



CD/ SJ – n° 4061/Div.

ESMA
103 rue de Grenelle
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**AFG response to ESMA consultation
regarding Draft Regulatory Technical Standards on types of AIFMs**

The Association Française de la Gestion financière (AFG)¹ is grateful for the opportunity to respond to ESMA’s consultation regarding Draft Regulatory Technical Standards (RTS) on types of AIFMs. The issues at stake, including the articulation of the AIFMD and the UCITS Directive, are indeed significant for AFG members, as France is the 3rd domiciliation centre in Europe for AIFs, with 360 billion euros worth of AIFs domiciled in France, and the 2nd domiciliation centre in Europe for UCITS, with 1,100 billion euros worth of UCITS domiciled in France (EFAMA International Statistical Release, Q3 2012).

General comments

Please find below AFG general comments.

AFG members would like to raise ESMA’s attention on the articulation of the proposed RTS and other pieces of EU legislation, in particular the UCITS Directive. For instance, the UCITS Directive contains investment rules that distinguish open-ended and closed-ended funds. However, we believe that the application in the context of the UCITS Directive of any definition of these funds in the proposed RTS should and hence will be subject to an impact assessment, perhaps in the context of

¹ The Association Française de la Gestion financière (AFG) represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. 600 management companies are based in France. They are entrepreneurial or belong to banking or insurance groups. AFG members manage 2,600 billion euros in the field of investment management, making the Paris fund industry the leader in Europe for the financial management of collective investments (with 1,500 billion euros managed from France, i.e. 17% of all EU assets managed in the form of investment funds) wherever they are domiciled in the EU. In the field of collective investment, our industry includes – beside UCITS – the whole range of AIFs, such as: employee savings schemes, regulated hedge funds/funds of hedge funds, private equity funds, real estate funds and socially responsible investment funds. AFG is an active member of the European Fund and Asset Management Association (EFAMA) and of PensionsEurope. AFG is also an active member of the International Investment Funds Association (IIFA).

the current revision of the UCITS Directive (UCITS VI). As for now, we believe it should be made explicit that the definition of open-ended and closed-ended funds is relevant in the context of the AIFMD only.

We would also like to stress that Article 2 paragraph 2 letter a) of the AIFMD provides that whether the AIF belongs to the open-ended or closed-ended type is of no significance. Therefore, an AIFM may manage both open-ended and closed-ended AIFs. Therefore, we ask for the following amendment of Article 1 paragraph 1 of the proposed Regulation:

Proposed Regulation	AFG proposed amendment
<p><i>An AIFM may be either of the following:</i></p> <ul style="list-style-type: none"> - <i>an AIFM of open-ended AIF(s);</i> - <i>an AIFM of closed-ended AIF(s).</i> 	<p><i>An AIFM manages AIFs that may be:</i></p> <ul style="list-style-type: none"> - <i>open-ended AIF(s) and/or,</i> - <i>closed-ended AIF(s).</i>

Detailed comments

Please find below AFG detailed comments.

Q1: Do you agree with the approach suggested above on the topics which should be included in the draft regulatory technical standards? If not, please state the reasons for your answer and also suggest an alternative approach.

We strongly support the objective of allowing for a fully harmonised implementation of the AIFMD. As a consequence, we believe that some of the topics which were included in ESMA discussion paper, but which are covered neither in the present consultation nor in ESMA consultation on Guidelines on key concepts of the AIFMD, should be the object of Regulatory Technical Standards or Guidelines. This would ensure uniform conditions of application of the AIFMD and a level playing field among products/actors and among individual Member States. In other words, all products/actors should be subject to the same regulatory and compliance costs and conversely benefit from the same advantages, not depending on the Member State where they are located. This is also important for investors.

More precisely, we are of the opinion that the treatment of UCITS management companies and the treatment of MiFID firms and Credit Institutions should be further clarified by ESMA:

- Treatment of UCITS management companies

Indeed, we strongly believe that the articulation of the AIFMD and the UCITS Directive should be clarified (please refer to page 7 of our response to ESMA discussion paper):

- RTO

AFG members do support ESMA's view that AIFMs which are also UCITS management companies should be able to carry out the receipt and transmission of orders under their AIFMD authorisation, provided conflicts of interest are taken into account.

- Provision of information to authorities for authorisation purposes

Regarding the provision of information to authorities for authorisation purposes, we believe that there would be no use for regulators in management companies that already are authorised by their competent authorities – for example as UCITS management companies – to provide them again with all the information relating to the AIFM authorisation process. Rather, we think that it would be more efficient, for both management companies and regulators, to provide only the additional information required by the new legislation and if relevant any update of the information already provided. This is indeed the approach taken by the Directive with respect to asset management companies that already are authorised as UCITS management companies.

- Treatment of MiFID firms and Credit Institutions

As explained in our response to ESMA discussion paper (please refer to page 8 of our response), AFG believes that AIFMs should be allowed to provide certain MiFID services, namely management of portfolios of investment in accordance with mandates, investment advice, safekeeping and administration and RTO with regards to financial instruments. We strongly believe that AIFMs should be able to perform and benefit from a passport for these activities. Furthermore, we believe that MiFID licensed firms (e.g. banks, brokers) should be forbidden to perform the activities specific to AIFMs or UCITS management companies. Indeed, it is crucial that the specialisation of activities should be maintained and the exclusivity of collective investment management for fund management companies should be preserved for the sake of preventing conflicts of interests which might very easily arise from extending banks' and brokers' scope of activities to collective investment management.

In addition to clarifications on the treatment of UCITS management companies and MiFID firms and Credit Institutions, we would welcome some clarification on entities that are exempted from the provisions of the AIFMD, e.g. family offices, insurance contracts, joint ventures, holding companies. However we are aware that these would be very difficult to bring, if possible at all, and might go beyond the context of the AIFMD. On this point, please refer to our response to ESMA discussion paper.

We do not see any strong need for further clarifying to what extent an AIFM may delegate to third parties the functions it must carry out or the notion of significant leverage. Indeed, in our opinion, the Regulation published by the Commission on 19 December 2012 provides enough detail on these matters.

Q2: Do you agree with the proposed definition of AIFMs managing AIFs of the open-ended/closed-ended type? If not, do you have any alternative proposal, in particular as regards the relevant frequency of redemptions for the open-ended funds?

We would also like to stress that Article 2 paragraph 2 letter a) of the AIFMD provides that whether the AIF belongs to the open-ended or closed-ended type is of no significance. An AIFM may

manage both open-ended and closed-ended AIFs. Therefore, we ask the amendment of Article 1 paragraph 1 of the proposed Regulation as described in our general comments.

We do not have any objection as regards the proposed frequency of redemptions used for the definition of open-ended AIFs.

Furthermore, we support that any special arrangements arising from the illiquid nature of the AIF's assets provided for in the rules or instrument of incorporation of the AIF or any prospectus should be taken into account when applying the definition of open-ended AIFs.

Indeed, we believe that the use of certain liquidity management tools should not prevent open-ended funds to be defined as such. Please refer to our response to ESMA discussion paper (response to question 6 page 11):

“some AFG members foresee the use of gates in their liquidity management toolkit described in the prospectus of the AIFs they manage. In our members' view, these tools, provided that they are disclosed in the prospectus, should not be considered as special arrangements nor automatically characterise a fund as closed-ended”.

Q3: Please provide qualitative and quantitative data on the costs and benefits that the proposed definition of AIFMs managing AIFs of the open-ended/closed-ended type would imply.

We believe that we could cope with the proposed definition of AIFs of the open-ended/closed-ended type.

Q4: Do you consider that any possibility to redeem the AIF's units/shares on the secondary market and not directly from the AIF should be taken into consideration when assessing whether an AIF is open-ended or closed-ended? Or do you consider that, as within the UCITS framework, only any action taken by an AIFM to ensure that the stock exchange value of the units of the AIF it manages does not significantly vary from their net asset value should be regarded as equivalent to granting to unitholders/shareholders the right to redeem their units or shares out of the assets of this AIF?

First of all, in our view, redemptions are not relevant in the context of secondary markets. Indeed, securities are exchanged - not redeemed - on secondary markets.

In response to ESMA's question, AFG is of the opinion that there is no reason to take into consideration any possibility to exchange the AIF's units/shares on the secondary market and not directly from the AIF when assessing whether an AIF is open-ended or closed-ended. The main criterion to determine whether an AIF is of the open- or closed-ended type is the possibility to redeem the AIF's units/shares directly from the AIF.

Q5: Do you agree with the proposed approach as regards the treatment of hybrid structures? If not, please explain why and, if possible, provide alternative proposals.

We support the approach proposed by ESMA as regards the treatment of structures whose nature changes from open to closed-ended - or vice versa - as it makes good sense.

Q6: Do you see merit in clarifying further the notion of contracts with prime brokers and/or the notion of internally or externally managed? If so, please provide suggestions. In particular, if your answer is yes for the notion of internally or externally managed, please indicate which of the criteria already in recital (20) of the AIFMD need additional clarifications.

We do not feel the need for further clarifying the notion of contracts with prime brokers. Indeed, we believe that article 14 paragraph 3 of the AIFMD provides enough detail on conflicts of interest in situations whereby the AIFM uses the services of a prime broker.

Regarding the definition of the notion of internally or externally managed AIFs, we suggest integrating recital 20 of the AIFMD (please see below) in the proposed Regulation in order to increase its legal certainty.

AIFs should be deemed internally managed when the management functions are performed by the governing body or any other internal resource of the AIF. Where the legal form of the AIF permits internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF is also AIFM and should therefore comply with all requirements for AIFMs under this Directive and be authorised as such. An AIFM which is an internally managed AIF should however not be authorised as the external manager of other AIFs. An AIF should be deemed externally managed when an external legal person has been appointed as manager by or on behalf of the AIF, which through such appointment is responsible for managing the AIF. Where an external AIFM has been appointed to manage a particular AIF, that AIFM should not be deemed to be providing the investment service of portfolio management as defined in point (9) of Article 4(1) of Directive 2004/39/EC, but, rather, collective portfolio management in accordance with this Directive.

Q7: Do you consider that there is a need to develop further typologies of AIFMs where relevant in the application of the AIFMD? If yes, please provide details on the additional typologies sought.

We cannot see any need for developing typologies of AIFMs. In any case, we believe that the types of AIFMs should definitely not be based on criteria relating to the nature of the assets or the types of funds they manage.

However, we would like to stress here that the principle of proportionality should apply to some AIFMs depending on their size etc. in particular in the application of the reporting and stress test obligations.

As previously explained, we generally support the definition of AIFs of the open-ended/closed-ended type. However, we would also like to stress that Article 2 paragraph 2 letter a) of the AIFMD provides that whether the AIF belongs to the open-ended or closed-ended type is of no significance. An AIFM may manage both open-ended and closed-ended AIFs. Therefore, we ask the amendment of Article 1 paragraph 1 of the proposed Regulation as described in our general comments.

Would you require further information, please feel free to contact our Head of International Affairs Division, Stéphane Janin, at +33 1 44 94 94 04 (s.janin@afg.asso.fr), our Deputy Head of International Affairs Division, Carine Delfrayssi, at + 33 1 44 94 96 58 (c.delfrayssi@afg.asso.fr) or myself at +33 1 44 94 94 29 (p.bollon@afg.asso.fr).

Sincerely yours,

(Signed)

Pierre Bollon