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ESMA
103 rue de Grenelle
75007 Paris

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AFG response to ESMA consultation regarding Guidelines on key concepts of the AIFMD

The Association Française de la Gestion financière (AFG)¹ is grateful for the opportunity to respond to ESMA’s consultation regarding Guidelines on key concepts of the AIFMD. 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 strongly support the purpose of the guidelines “to ensure common, uniform and consistent application of the concepts in the definition of AIF”. However, as currently proposed by ESMA in its consultation, the discretion left to competent authorities and market participants to consider as an AIF an entity which does not fulfil the proposed criteria does not seem consistent with such a harmonised implementation of the AIFMD across the EU. Indeed, it creates room for

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).

legal uncertainty as it is not possible to ascertain solely on the basis of these criteria whether an undertaking is an AIF i.e. an undertaking can be considered as an AIF even though it may not fulfil these criteria.

We are quite concerned by this issue, especially as it will be possible to “passport” undertakings defined as AIFs throughout the whole of Europe, including in Member States where local authorities might not consider such undertakings as AIFs under their own rules – thus creating an unlevel playing field between local AIFs and AIFs imported from elsewhere – to the detriment of local funds and to the protection of investors. 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.

We support the approach proposed by ESMA that the criteria to define an AIF should be looked at jointly: it is not because only one of them is fulfilled that the structure under consideration can necessarily be defined as an AIF.

AFG members understand that the guidelines will apply to both competent authorities and AIFMs. However, we would like to stress that, in case a competent authority does not comply with the guidelines, it may prove difficult for AIFMs regulated by that authority to themselves comply with the guidelines, as the guidelines might not be incorporated in their local regulation or as compliance with the guidelines might imply that they contravene their local regulation. In other words, AIFMs should be expected to comply with the guidelines only if their competent authority does so.

Finally, we would like to raise ESMA’s attention on the assessment made of the impact of the guidelines on funds. Indeed, we are afraid that the data shown in table 2 page 16 of the consultation might not be accurate.

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 guidelines on key concepts of the AIFMD? If not, please state the reasons for your answer and also specify which topics should be re-moved/included from the content of the guidelines.

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 Draft Regulatory Technical Standards on types of AIFMs, should be the object of Regulatory Technical Standards or Guidelines in order to ensure uniform conditions of applications of the AIFMD and a level playing field among products/actors and among individual Member States, as those subject to the obligations of the AIFMD will incur higher regulatory and compliance costs.

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: What are your views on/readings of the concepts used in the definition of AIF in the AIFMD? Do you agree with the orientations set out above on these concepts? Do you have any alternative/additional suggestions on the clarifications to be provided for these concepts?

AFG members would like to raise ESMA's attention on the articulation of the guidelines and other pieces of EU legislation. We believe that the application in other contexts of any definition set out in the guidelines should be subject to an impact assessment. As for now, we believe that these definitions should be relevant in the context of the AIFMD only.

ESMA decided to propose draft guidelines to further clarify these concepts, with the only exception of the concept of 'ownership of underlying assets' which ESMA did not consider as a key element in defining an AIF. We would like the guidelines to cover this concept: in our response to ESMA discussion paper (questions 9 & 10 page 5), we were in agreement with the analysis on the ownership of the underlying assets in an AIF proposed by ESMA. We further agreed with the analysis on the absence of any investor discretion or control of the underlying assets in an AIF – as far as the AIF governance ensures that the interests of the AIFM are in line with those of investors.

Q3: What are your views on the notion of 'raising capital'? Do you agree with the proposal set out above? If not, please provide explanations and possibly an alternative solution. Q4: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance on the notion of 'raising capital' would imply.

We generally agree with ESMA's proposal on the notion of "raising capital".

However, in order to clarify that some undertakings should not be considered as AIFs and to ensure a harmonised implementation of the AIFMD, we suggest amending paragraph 13 page 52 as follows:

Without prejudice to paragraph 14 and to recital 7 of Directive 2011/61/EU 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, when capital is invested in an undertaking by a natural or legal person or body of persons who is one of the following [...].

Q5: Do you agree with the proposed guidance for identifying a 'collective investment undertaking' for the purposes of the definition of AIF? If not, please explain why. Q6: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for identifying a 'collective investment undertaking' would imply.

We generally agree with ESMA's proposed guidance for identifying a "collective investment undertaking".

AFG members strongly support the purpose of the guidelines "to ensure common, uniform and consistent application of the concepts in the definition of AIF". However, the discretion left to competent authorities and market participants to consider as an AIF an entity which does not fulfil

the proposed criteria does not seem consistent with a harmonised implementation of the AIFMD across the EU. Indeed, ESMA's proposed approach does not allow to ascertain solely on the basis of these criteria whether an undertaking is an AIF i.e. an undertaking can be considered as an AIF even though it may not fulfil these criteria. Such an approach would entail potential distortions among players and national market places even though a pan-EU passport is in place.

For this reason we are not in favour of the provision set out in paragraph 10 page 51:

The determination of the above characteristics showing that an undertaking is a collective investment undertaking should be without prejudice to the fact that competent authorities and market participants should not consider that the absence of all or any one of them conclusively demonstrates that the undertaking is not a collective investment undertaking.

Q7: Do you agree with the analysis on the absence of any day-to-day investor discretion or control of the underlying assets in an AIF? If not, please explain why.

Yes. In our response to ESMA discussion paper (question 10 page 5), we were in agreement with the analysis on the ownership of the underlying assets in an AIF proposed by ESMA. We further agreed with the analysis on the absence of any investor discretion or control of the underlying assets in an AIF – as far as the AIF governance ensures that the interests of the AIFM are in line with those of investors.

Q8: Do you agree that an ordinary company with general commercial purpose should not be considered a collective investment undertaking? If not, please explain why. Q9: Which are in your view the key characteristics defining an ordinary company with general commercial purpose?

Yes, AFG members agree that an ordinary company with general commercial purpose should not be considered a collective investment undertaking. Indeed, if such companies were captured in the scope of AIFMs, they would be too many and would have nothing to do with collective investment.

Q10: Do you agree with the proposed guidance for determining whether a ‘number of investors’ exists for the purposes of the definition of AIF? If not, please explain why. Q11: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for determining whether a ‘number of investors’ exists would imply.

We generally agree with ESMA's proposed guidance for determining whether a “number of investors” exists.

As explained in our response to ESMA discussion paper (question 8 page 5), we consider that co-investment by the manager or by individuals or other entities closely connected with the manager should be ignored when determining whether an entity raises capital from a number of investors.

Moreover, we believe that ancillary investors – only required to set up the structure – should not be taken into account when determining whether or not an entity raises capital from a number of investors.

Q12: Do you agree with the proposed indicative criteria for determining whether a ‘defined investment policy’ exists for the purposes of the definition of AIF? If not, please explain why.
Q13: Please provide qualitative and quantitative data on the costs and benefits that the proposed indicative criteria for determining whether a ‘defined investment policy’ exists would imply.

We generally agree with ESMA’s proposed criteria for determining whether a “defined investment policy” exists.

However, in order to define more precisely what an investment policy is and to ensure that the criteria that define such a policy are cumulative where relevant to the type of AIF concerned, we suggest replacing “or” by “and” in paragraph 16 page 53 as follows :

The investment policy specifies investment guidelines, with reference to criteria including the following:

- (i) to invest in certain categories of asset, or conform to restrictions on asset allocation;*
- (ii) to pursue certain strategies;*
- (iii) to invest in particular geographical regions;*
- (iv) to conform to restrictions on leverage;*
- (v) to conform to minimum holding periods of the units/shares; ~~or~~ and*
- (vi) to **where relevant** conform to other restrictions designed to provide risk diversification.*

AFG members strongly support the purpose of the guidelines “to ensure common, uniform and consistent application of the concepts in the definition of AIF”. However, the discretion left to competent authorities and market participants to consider as an AIF an entity which does not fulfil the proposed criteria does not seem consistent with a harmonised implementation of the AIFMD across the EU. Indeed, ESMA’s proposed approach does not allow to ascertain solely on the basis of these criteria whether an undertaking is an AIF i.e. an undertaking can be considered as an AIF even though it may not fulfil these criteria. Such an approach would entail potential distortions among players and national market places even though a supposedly pan-EU passport is in place.

For this reason we are not in favour of the provision set out in paragraph 18 page 53:

The determination of factors tending to indicate the existence of a defined investment policy should be without prejudice to the fact that competent authorities and market participants should not consider that the absence of all or any one of them conclusively demonstrates that no such policy exists.

Q14: Do you consider appropriate to add in Section IX, paragraph 16(b) of the draft guidelines (see Annex V) a reference to the national legislation among the places where (in addition to the rules or instruments of incorporation of the undertaking) the investment policy of an undertaking is referenced to?

Yes, for the sake of clarification, we consider appropriate to add in Section IX, paragraph 16(b) of the draft guidelines (see Annex V) a reference to the national legislation among the places where (in addition to the rules or instruments of incorporation of the undertaking) the investment policy of an undertaking is referenced to.

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