



OPINION

Draft regulatory technical standards on types of AIFMs under Article 4(4) of Directive 2011/61/EU

I. Legal basis

1. Article 4(4) of Directive 2011/61/EU (the 'AIFMD' or 'Directive') provides that ESMA shall develop draft regulatory technical standards (RTS) to determine types of AIFMs, where relevant in the application of the AIFMD, and to ensure uniform conditions of application of the AIFMD.
2. On 2 April 2013, ESMA submitted its Final report on draft regulatory technical standards on types of AIFMs (ESMA/2013/413)¹ to the Commission for endorsement of the draft RTS pursuant to Article 10(1) of Regulation (EU) No 1095/2010 (the 'ESMA Regulation').
3. On 8 July 2013, ESMA received a letter from DG MARKT (the 'Letter')² explaining that the Commission's analysis of the draft RTS indicated that "*Article 1(2)(a) of the RTS risks not be fully compatible with the AIFMD*" and inviting ESMA to submit new draft RTS to the Commission reflecting the orientations given in the Letter.
4. Pursuant to Article 10(1) of the ESMA Regulation, within a period of six weeks from the receipt of the Letter ESMA may amend its draft RTS on types of AIFMs and resubmit them to the Commission in the form of a formal opinion.
5. ESMA's competence to deliver an opinion is based on Article 10(1) of the ESMA Regulation. In accordance with Article 44(1) of the ESMA Regulation the Board of Supervisors has adopted this opinion.

II. Background

6. Article 4 of the AIFMD includes definitions of some of the terms used in the Directive. The draft RTS under Article 4(4) of the AIFMD should be aimed at determining the different types of AIFMs covered by the AIFMD, thereby allowing appropriate differentiation of the requirements according to the nature of the entity.
7. ESMA initially identified a number of ways in which AIFMs could be differentiated for the purposes of Article 4(4).³ These included whether the fund is externally or internally managed, employs leverage or is substantially leveraged. After a first public consultation on this approach, ESMA came to the

¹ Available at: http://www.esma.europa.eu/system/files/2013-413_0.pdf.

² Available at: <http://www.esma.europa.eu/content/European-Commission-letter-ESMA-re-draft-Regulatory-Technical-Standards-types-AIFMD-Article->

³ See the Discussion paper on Key concepts of the Alternative Investment Fund Managers Directive and types of AIFM (ESMA/2012/117), available at: <http://www.esma.europa.eu/system/files/2012-117.pdf>.

conclusion that of the possible differentiations initially identified, only the notion of open-ended/closed-ended funds should be selected and covered by the draft RTS under Article 4(4) of the AIFMD at this stage.⁴

8. ESMA considered that the characteristics of AIFs that make it possible to distinguish whether an AIFM is managing an AIF of the open-ended or closed-ended type should be defined in order to ensure that the rules on liquidity management, the valuation procedures and the transitional provisions of the AIFMD are applied to AIFMs in a uniform manner.

III. ESMA opinion

9. The present opinion is intended to (1) present the arguments supporting the original approach followed by ESMA in Article 1(2)(a) of the draft RTS submitted on 2 April 2013 to the Commission, including on the compatibility of that approach with the AIFMD (Level 1 and 2 provisions) and (2) submit an amended version of the draft RTS for the Commission's consideration.

1) Arguments supporting the approach followed in the original draft RTS

a) Reasoning behind ESMA's approach

10. The approach proposed by ESMA to identify closed-ended and open-ended AIFs was based on the frequency of redemptions. An annual frequency was identified for the purpose of considering a fund open-ended, with the consequence that funds offering redemptions less frequently than annually were considered closed-ended.
11. The one-year threshold related to a choice made by ESMA in accordance with the empowerment under Article 4(4) of the AIFMD and it was made on the basis that it seemed a reasonable threshold to distinguish between funds which offer frequent redemption opportunities (and that are, therefore, to be considered open-ended) and funds that only provide such opportunities on a relatively infrequent and exceptional basis (and that are, therefore, to be considered closed-ended).
12. In particular, ESMA considered that it would not be proportionate to require managers of AIFs with relatively infrequent redemption opportunities to apply the full set of liquidity management obligations set out in Article 16(1). Similarly, ESMA was of the view that its proposed approach was entirely consistent with the provisions on valuation in Article 19(3) of the AIFMD; since the valuation of the assets and the calculation of the net asset value must be carried out at least once per year, it seemed reasonable to treat funds that offer redemption opportunities less than once per year as closed-ended (i.e. not to require a more frequent valuation). ESMA consulted twice on this approach and the feedback received from a broad range of stakeholders, including consumer representatives, was broadly positive. In addition, in our more recent discussions with stakeholders following receipt of the Letter, the concern has been raised that consumers would expect redemptions to be possible at least once a year when the term "open-ended" is used to describe a fund.
13. ESMA was comforted in its conclusions by the fact that the approach of setting a yearly threshold for the frequency of redemptions in an open-ended AIF should have limited consequences in terms of in-

⁴ See the Consultation paper on Draft regulatory technical standards on types of AIFMs (ESMA/2012/844), available at: <http://www.esma.europa.eu/system/files/2012-844.pdf>. In particular, for the reasons why ESMA came to the above mentioned conclusion, see paragraphs 15 to 20 of the main body of the paper and the cost-benefit analysis in its Annex III.

vestor protection. Indeed, several requirements on liquidity management and valuation rules also apply to closed-ended AIFs, as per the provisions of the AIFMD (Level 1 and 2).

14. First, as far as the liquidity management requirements are concerned, these will fully apply not only to managers of open-ended AIFs, but also to managers of all those closed-ended AIFs which are leveraged. As for managers of unleveraged closed-ended AIFs, a certain amount of liquidity requirements will also apply to them as per the Level 1 and Level 2 provisions. Indeed, even managers of unleveraged closed-ended AIFs will be required not only to ensure an alignment of the investment strategy, liquidity profile and redemption policy of the fund (i.e. they are subject to art. 16(2) of the Directive and art. 49 of the Commission Delegated Regulation (EU) No 231/2013 (the ‘Regulation’)), but also to put in place appropriate liquidity management limits and stress tests in accordance with the provisions of art. 16(1), second sub-paragraph of the Directive and art. 48 of the Regulation. It is clear from the wording of art. 48 of the Regulation that stress test requirements apply to managers of all kinds of AIF (“AIFMs shall, where appropriate, considering the nature, scale and complexity of each AIF they manage [...]” – emphasis added).
15. As for the valuation rules, the only requirement specifically applying to managers of open-ended AIFs only is the one on the frequency of valuations under art. 19(3), third sub-paragraph, of the Directive and art. 74 of the Regulation. All the other Level 1 and 2 valuation requirements apply to managers of both open-ended and closed-ended AIFs, and there are also some specific requirements on the frequency of valuations for managers of closed-ended AIFs (art. 19(3), fourth sub-paragraph of the Directive).
16. Therefore, as mentioned above, ESMA considered that the proposed definition of AIFMs of open-ended/closed-ended AIFs does not have an undue impact on the obligations incumbent on AIFs and their managers.
17. Furthermore, ESMA is of the view that the approach submitted to the Commission in April was appropriate taking into account the transitional provisions of the Directive. Indeed, it is only when an AIFM exclusively manages closed-ended AIFs falling under the provisions of Article 61(3) and (4) of the Directive that it is exempted from the obligation to be authorised or registered under the AIFMD. Whenever an AIFM also manages at least one open-ended AIF, it is subject to the AIFMD regime (in terms of authorisation or registration).
18. Notwithstanding the above, in the Letter DG MARKT expressed doubts on whether the frequency of redemptions is a criterion that can be employed to distinguish an open-ended AIF from a closed-ended one. These doubts were based on the wording of Articles 19(3) and 16(1) of the AIFMD. DG MARKT was ultimately of the view that closed-ended AIFs are those AIFs that do not offer any redemptions before their winding-up.

b) Compatibility of ESMA approach with Articles 19(3) and 16(1) of the AIFMD

19. DG MARKT argues in the Letter that the assumption underlying the wording in Article 19(3), third and fourth subparagraphs of the AIFMD is that an open-ended AIF is a type of AIF that issues and redeems shares and units. On the contrary, a closed-ended AIF is a type of AIF that does not and its valuation and calculation frequency is therefore linked solely to increases or decreases of its capital.
20. ESMA considers that the reference to the increase or decrease of capital in the fourth subparagraph of Article 19(3) of the AIFMD does not mean that a closed-ended AIF may not allow subscriptions

and/or redemptions. Otherwise, a contrario the DG MARKT interpretation of the third and fourth subparagraphs of the said Article would imply that an open-ended AIF may not increase or decrease its capital, which does not seem logical.

21. ESMA considers that the references in Article 19(3) to the issuance and redemption frequency for open-ended AIFs and to the increase or decrease of capital for closed-ended AIFs only mean that these two elements are taken as time references for the additional valuation procedures and NAV calculations foreseen in the said Article for open-ended and closed-ended AIFs.
22. DG MARKT further argues in the Letter that the structure of Article 16(1) suggests that all open-ended AIFs need to manage their liquidity, while this requirement only applies to those closed-ended AIFs that are leveraged. According to DG MARKT, *“the main distinction between open and closed-ended AIF rests on the fact that open-ended AIF are confronted with “underlying obligations” beyond those resulting from leverage, i.e., to redeem investors”*.
23. ESMA sees a reasonable case for taking a different view, to the extent that the provisions of Article 16(1) clearly require also leveraged closed-ended AIFs to adopt procedures which enable them *“to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations”*. It may be inferred from this provision that the co-legislator implicitly recognised the possibility for at least certain types of closed-ended AIFs (i.e. the ones which are leveraged) to have certain “underlying obligations”. The DG MARKT view is that those “underlying obligations” can only relate to the leverage employed by the AIF, while ESMA considers that they can also relate to redemptions given that no distinction is made in the Article between the obligations relating to the leverage and those arising from redemptions.
24. More importantly, whereas the provisions of Article 16(1), first sub-paragraph of the AIFMD only apply to open-ended AIFs and leveraged closed-ended AIFs, the provisions of Article 16(2) (and the related Level 2 measures, i.e. Article 49 of the Regulation) apply to both open-ended and closed-ended funds: indeed, Article 16(2) explicitly provides that the requirements foreseen therein apply to AIFMs *“for each AIF that they manage”*. Article 16(2) further provides that for these AIFs (open-ended and closed-ended) the AIFM shall ensure that, inter alia, the redemption policy is consistent. Therefore, this means that also a closed-ended fund may have a redemption policy and, as a consequence, permit redemptions.

c) Additional indicators of the compatibility of ESMA’s approach with several Level 1 and 2 provisions

25. ESMA considers that there are also other provisions in the Level 1 and 2 texts from which it may be inferred that the approach followed under Article 1(2)(a) of the draft RTS submitted on 2 April 2013 to the Commission is appropriate and consistent with the Level 1 text. These provisions are listed below in order of relevance.

i) *Article 72 of the Regulation*

26. Article 72 of the Regulation explicitly states the following (emphasis added): *“An AIFM shall ensure that for each AIF it manages the net asset value per unit or share is calculated on the occasion of each issue or subscription or redemption or cancellation of units or shares, but at least once a year”*. These rules clearly apply to all AIFs (whether they are closed-ended or open-ended). Therefore, the

reference to the redemption of units or shares may be seen as an implicit reference to the fact that the co-legislator admitted the possibility of allowing redemptions also in a closed-ended AIF.

ii) *Various provisions referring to redemptions without distinguishing between closed-ended and open-ended AIFs*

27. There are some provisions in the AIFMD text relating to the depositary's duties⁵ and the disclosure⁶ and remuneration⁷ requirements that concern the redemption of the units or shares of the AIF. Other relevant provisions are also included in the Level 2 text, as follows:

- Article 1(5) of the Regulation on the definition of “special arrangement” impacting the redemption rights of the investors;
- Article 3 of the Regulation on the ongoing monitoring of assets under management, which refers to the redemption activity for each AIF;
- Article 57(5) of the Regulation on the disclosure of redemption policies to investors;
- Article 83(1)(j) of the Regulation on the contract for the appointment of the depositary which shall include, inter alia, the necessary information related to the redemption of units or shares of the AIF.

28. All these provisions refer to the “AIF” without making any distinction between closed-ended and open-ended AIFs. Based on these provisions an interpretation consistent by analogy with the one given by the Commission in its AIFMD Q&A could be given. Indeed, in its answer relating to the interpretation of Article 9(3 to 6) of the AIFMD on the own funds requirements⁸, the Commission considers that *“The definition of an AIFM includes both internally managed AIFs and external AIFMs. Whenever the AIFMD uses the term AIFM without making any differentiation between the two categories, it comprises both categories. When it intends to only cover one category, the AIFMD is explicit in mentioning the target category only. In consequence, the neutral term 'AIFM' in Article 9(3) comprises both categories”*. ESMA considers that the same reasoning could be applied to the references to “AIF” for the purpose of the distinction between open-ended and closed-ended AIFs. This would mean that the use of the word “AIF” when referring to some obligations linked to the redemption of the units or shares of an AIF means that also a closed-ended AIF may permit redemptions to its investors.

29. In particular, the following points should be taken into account in relation to certain of the Level 2 provisions mentioned above under paragraph 36:

- With respect to Article 3 of the Regulation on the ongoing monitoring of assets under management, it can be argued that the idea of “monitoring” is not compatible with a redemption taking place only at the moment of winding-up. Consequently, this would imply that there may be redemptions for closed-ended AIFs before winding-up. Furthermore, the expression *“where applicable”* is used in the Article only as regards capital draw downs and capital dis-

⁵ Article 21(9)(a) of the Directive, implemented by Article 93 of the Regulation.

⁶ Article 23(1)(h) of the Directive.

⁷ Annex II, par. 1(h) and (n) of the Directive.

⁸ Available at: <http://ec.europa.eu/yqol/index.cfm?fuseaction=question.show&questionId=1149>.

tributions. One would have expected a similar expression in the reference to redemption activity if closed-ended AIFs were not supposed to have such an activity.

- With respect to Article 83(1) of the Regulation on the contract for the appointment of the depositary, it can be argued that this Article contains several provisions where a distinction is made (i.e. “*as the case may be*” under Article 83(1) (b),(o),(q) and (r) and “*if applicable*” under Article 83(1) (d)) and, if one followed DG MARKT’s interpretation, it would then be surprising that no such distinction is made when referring to the term redemption (so as to exclude closed-ended AIFs).

iii) *Article 47(1)(c) and (4) of the Regulation*

30. Article 47(4) of the Regulation provides that leveraged closed-ended AIFs are exempt from the requirements of paragraph (1)(e) of the same Article. However, leveraged closed-ended AIFs are subject to the other requirements set out in Article 47 and some of them explicitly refer to redemptions (Article 47(1)(b)) and to the AIF’s underlying obligations (Article 47(1)(a)). This does not seem to be consistent with an interpretation according to which redemptions are not possible in a closed-ended fund.

iv) *Recital 34 of the AIFMD*

31. Recital 34 of the Directive provides the following (emphasis added): “*For AIFs that have no redemption rights exercisable during the period of 5 years from the date of the initial investments and that, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with this Directive or generally invest in issuers or non-listed companies in order potentially to acquire control over such companies in accordance with this Directive, such as private equity, venture capital funds and real estate funds, Member States should be able to allow a notary, a lawyer, a registrar or another entity to be appointed to carry out depositary functions. [...] This takes account of current practice for certain types of closed-ended funds. [...]*”.
32. The introduction of a time period as part of the distinction between unleveraged closed-ended funds is contemplated by the AIFMD and, as such, ESMA considers that a distinction between AIFMs based on the redemption frequency of the AIF does not represent an interference with the scope of the Level 1 text. Indeed, the above recital takes into account the current practice for certain types of closed-ended funds and applies it to AIFs not allowing redemptions for a limited period of time (i.e. 5 years). This may be a further indicator that the intention of the co-legislator was to allow closed-ended AIFs to permit redemptions.

2) Revised draft RTS

33. For the detailed reasons indicated above, ESMA does not consider that the solution proposed by DG MARKT in the Letter is the only reasonable way of interpreting the AIFMD provisions. In this respect, ESMA would like to stress that draft RTS submitted by ESMA should be made subject to amendments by the Commission only in very restricted and extraordinary circumstances.⁹

⁹ See recital 23 of the ESMA Regulation: “*The Commission should endorse those draft regulatory technical standards by means of delegated acts under Article 290 TFEU in order to give them binding legal effect. They should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily*

34. However, in order to ensure a timely implementation of the AIFMD provisions and move the process forward with the Commission, ESMA decided to submit an amended version of the draft RTS for the Commission's consideration.
35. ESMA believes that these revised RTS fully address the concerns expressed in the Letter, while retaining some more flexibility to take account of existing market practice. Indeed, the key element for the identification of an open-ended AIF on the basis of the revised RTS is the existence of repurchases or redemptions of the AIF's shares or units prior to the commencement of its liquidation phase or wind-down, provided that the repurchases or redemptions happen at the investors' request. At the same time, the revised draft clarifies that certain decreases in the capital of the AIF do not qualify as repurchases or redemptions for the purpose of the definition.
36. Revised draft RTS on types of AIFMs, redrafted on the basis of the Letter, are enclosed at Annex I.

functioning of financial markets. Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation. [...]" (emphasis added).

ANNEX I – Draft regulatory technical standards

COMMISSION DELEGATED REGULATION (EU) No .../..

supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers

of [...]

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 1095/2010¹⁰, and in particular Article 4(4) thereof,

Whereas:

- (1) [Subject-matter] It is important that regulatory technical standards determining types of AIFMs supplement the rules in Directive 2011/61/EU so that the new requirements are applied to AIFMs in a uniform manner.
- (2) [Article 1 – Types of AIFMs] It is desirable to distinguish whether an AIFM is managing AIFs of the open-ended or closed-ended type or both in order to apply correctly the rules on liquidity management and the valuation procedures of Directive 2011/61/EU to AIFMs.
- (3) [Article 1 – Types of AIFMs] The distinguishing factor in determining whether an AIFM is managing AIFs of the open-ended or closed-ended type should be the fact that an open-ended AIF repurchases or redeems its shares or units with its investors, at the request of any of its shareholders or unitholders, prior to the commencement of its liquidation phase or wind-down and does so according to the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents. A decrease in the capital of the AIF in connection with distributions according to the rules or instruments of incorporation of the AIF, its prospectus or offering documents, including one that has been authorised by a resolution of the shareholders or unitholders passed in accordance with those rules or instruments of incorporation, prospectus or offering documents of the AIF, should not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.
- (4) [Article 1 – Types of AIFMs] The repurchases or redemptions which should be relevant for determining whether an AIFM is managing AIFs of the open-ended or closed-ended type should only be the ones made out of the assets of the AIF. Therefore, whether an AIF's shares

¹⁰ OJ L 174, 1.7.2011, p. 1.

or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF should not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.

- (5) [Article 1 – Types of AIFMs] An AIFM managing one or more AIFs of the open-ended type and one or more AIFs of the closed-ended type at the same time should apply the rules relating to the relevant type of AIFs only to the AIF(s) of this type and the other rules to the AIF(s) of the other type.
- (6) [Article 1 – Types of AIFMs] Any change in the redemption policy of an AIF implying that the AIF may be considered no longer as being an AIF of the open-ended type or an AIF of the closed-ended type, should lead the AIFM to cease to apply the rules relating to the old redemption policy of the AIF it manages and to apply the rules relating to the new redemption policy of such AIF.
- (7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (8) ESMA has conducted open public consultations in relation to the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.

HAS ADOPTED THIS REGULATION:

Article 1- Types of AIFMs

1. An AIFM may be either or both of the following:
 - an AIFM of open-ended AIF(s);
 - an AIFM of closed-ended AIF(s).
2. An AIFM of an open-ended AIF shall be considered to be an AIFM which manages an AIF the shares or units of which are, at the request of any of its shareholders or unitholders, repurchased or redeemed prior to the commencement of its liquidation phase or wind-down, directly or indirectly, out of the assets of the AIF and in accordance with the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents.

A decrease in the capital of the AIF in connection with distributions according to the rules or instruments of incorporation of the AIF, its prospectus or offering documents, including one that has been authorised by a resolution of the shareholders or unitholders passed in accordance with those rules or instruments of incorporation, prospectus or offering documents, shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.

Whether an AIF's shares or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.

3. An AIFM of a closed-ended AIF shall be an AIFM which manages an AIF other than of the type described in paragraph 2.

4. Where a change in the redemption policy of the AIF has the effect of changing the type of AIF(s) an AIFM manages, the rules relevant to the new type of AIF shall be applied to such AIF by the AIFM.

Article 2 – Entry into force

This Regulation shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

For the purpose of Article 61(3) and (4) of Directive 2011/61/EU, the determination of whether an AIFM is managing a closed-ended AIF should be made in accordance with national law applicable at the moment of the creation of the AIF where the creation precedes the entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]