



*European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken*



European Association of Co-operative Banks comments on

Discussion Paper

Key concepts of the Alternative Investment Fund Managers Directive and types of AIFM

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The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.000 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 181 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 51 million members and 750.000 employees and have a total average market share of about 20%.

The voice of 4.000 local and retail banks, 51 million members, 181 million customers

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The Members of the European Association of Co-operative Banks (EACB) are pleased to comment on ESMA's *Discussion Paper on Key concepts of the Alternative Investment Fund Managers Directive and types of AIFM*.

Detailed Remarks

IV. DEFINITION OF AIF

Q1: Do you see merit in clarifying further the notion of family office vehicles? If yes, please clarify what you believe the notion of 'investing the private wealth of investors without raising external capital' should cover.

Yes, we are in favour of further clarification of the notion of family offices. We believe that family offices should be defined as an undertaking (regardless of their legal nature) that manages large amounts of private wealth without the reliance on banks.

Q2: Do you see merit in clarifying the terms 'insurance contracts' and 'joint ventures'? If yes, please provide suggestions.

Yes, we would see merit in clarifying the terms "insurance contracts" and "joint ventures". Firstly, the term "joint ventures" is not legally defined on EU level and therefore needs further clarification. Secondly, the term "insurance contracts" needs further explanation in view of hybrid products which include both qualities of insurance and investment products.

Q3: Do you see merit in elaborating further on the characteristics of holding companies, based on the definition provided by Article 4(1)(o) of the AIFMD? If yes, please provide suggestions.

Some members see further value in elaborating the characteristics of holding companies, as not all holding companies have their shares admitted to trading on a regulated market in the EU.

Q4: Do you see merit in clarifying further the notion of any of the other exclusions and exemptions mentioned above in this section? If yes, please explain which other exclusions and exemptions should be further clarified and provide suggestions.

We would appreciate further elaboration on the "in part" delegation of portfolio management or risk management in paragraph 8 in order to avoid different future interpretations.



Furthermore, we would welcome further clarification of the term "securitisation special purpose entities" in paragraph 17, as some Member States lack a definition of this term that would open the door to regulatory arbitrage.

Q5: Do you agree with the orientations set out above on the content of the criteria extracted from the definition of AIF?

Even though we can generally agree with the orientations as set out by ESMA, we would like to receive general clarification whether all criteria have to be met simultaneously or if only the majority of criteria have to be met. Furthermore we would like to highlight the following points:

- Paragraph 6: We would like to question whether it is the intention to allow the delegation to an entity which is located in a 3rd country that is neither authorised nor registered, as this could lead to regulatory arbitrage.
- Paragraphs 7 and 8: We are of the opinion that delegation of major activities has to be limited and it must not be possible to delegate both portfolio management and risk management functions in order to avoid absolutely the registration of letter box AIFM. Such an assessment has to be clearly stated and the present ambiguities which may remain in the Level-1 text around this issue have to be avoided. As regard to the function of liquidity management stipulated in Article 16 AIFMD we consider that it is one of the most central functions within risk management. Please also refer to our answer to Q14.
- Paragraph 10: We consider that an AIFM should in any case be responsible for all functions performed for the AIF, including additional functions as listed in Annex I of the AIFMD. The reasoning is that all these functions are of the responsibility of the AIFM and that the fact that they can be delegated under certain conditions does not alter its liability. If any function of the AIFM is delegated to another AIFM, it is very important to identify clearly which of both is the responsible AIFM for each AIF.

Furthermore, our Finnish Members bring up a good real-life example why the criteria need further fine-tuning: Jointly owned forest would now fall within the scope of AIF according to the criteria. These are leftover structures from jointly owned real estates and represent a way of owning forests in Finland. Similar structures appear elsewhere and should therefore not be treated as AIF.

Q6: Do you have any alternative/additional suggestions on the content of these criteria?

Regarding the defined investment policy we do not see the necessity that the policy becomes part of the constitutional documents of the entity, if the AIFM is the external manager of an AIF. It should be clarified that the linkage between the investment policy and the constitutional document should only be required, if the AIFM is internal manager of an AIF.

Lastly, with regards to paragraph 29 we would require further information on the term "number of investors". What is the minimum number of investors?



Q7: Do you agree with the details provided above on the notion of raising capital? If not, please provide explanations and an alternative solution.

Yes, we agree with the notion of raising capital provided.

Q8: Do you consider that any co-investment of the manager should be taken into account when determining whether or not an entity raises capital from a number of investors?

We considered that co-investments of the manager should not be taken into account for determining the capital that was raised from a number of investors. Furthermore, please refer to our answer in Q6 referring to the number of investors.

Q9: Do you agree with the analysis on the ownership of the underlying assets in an AIF? Do other ownership structures exist in your jurisdiction?

We agree with the analysis on the ownership of the underlying assets in an AIF.

Q10: Do you agree with the analysis on the absence of any investor discretion or control of the underlying assets in an AIF? If not, please explain why.

We understand that, in general, any direct instructions the AIFM receives from the investors concerning the AIFM's investment decisions should not be binding. As far as this does not restrict other possibilities for investors to take certain investment decisions (i.e. through investment advisory committees, individual arrangements between investors and AIFM) we agree with paragraph 34.

Q11: Do you agree with the proposed definition of open-ended funds in paragraph 41? In particular, do you agree that funds offering the ability to repurchase or redeem their units at less than an annual frequency should be considered as closed-ended?

We disagree with the proposed definition of "open-ended funds" in paragraph 41. The interpretation differs from other EU legislations. We would like to point out the already existing definition of an open-ended fund under the UCITS Directive.

Q12: Do you see merit in clarifying further the other concepts mentioned in paragraph 37 above? If so, please provide suggestions.

Yes, further clarification is necessary. According to the cipher 2(a) Box 111 of the ESMA Final report on implementing measures of the Alternative Investment Funds Managers Directive (ESMA/2011/379) the AIFM shall also consider in its assessment whether an AIF uses leverage on a substantial basis according to the type of AIF under management. As there is no further advice on the question how the type of AIF may influence the outcome of the assessment we recommend further clarifications on the topic, especially the concepts used in in paragraph 37.



VI. TREATMENT OF UCITS MANAGEMENT COMPANIES

Q13: Do you agree with the above analysis? If not, please provide explanations.

Yes, we agree with the above analysis.

VII. TREATMENT OF MIFID FIRMS AND CREDIT INSTITUTIONS

Q14: Do you agree with the above analysis? If not, please provide explanations.

Yes, we agree with the analysis, but we would like give you our remarks on paragraph 53. It suggests that such depositary services could also be provided by the AIFM. Some Member States require investment and custodial services to be provided by different entities in order to ensure a proper safeguarding of the client' assets and to provide proper controls over the asset manager by the depositary bank. We therefore would ask for the strict separation of services provided by the AIFM and depositary bank.

Contact

The EACB trusts that its comments will be taken into consideration. Should there be any need for further information any questions on this paper, please contact:

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