



European Securities and
Markets Authority

Final report

Guidelines on key concepts of the AIFMD

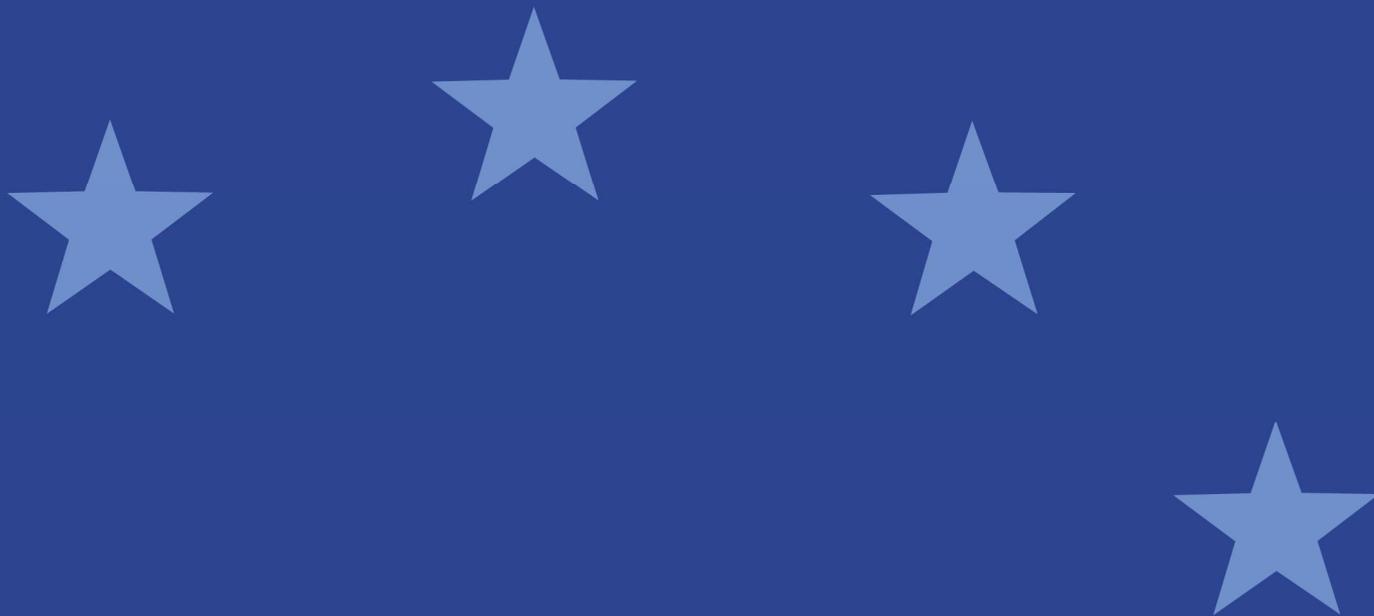


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Acronyms used

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	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 ¹
ESMA	European Securities and Markets Authority
UCITS Directive	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) ²

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:EN:PDF>

I. Executive Summary

Reasons for publication

On 23 February 2012, ESMA published a discussion paper (DP) on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM (ESMA/2012/117), which was followed on 19 December 2012 by the publication of a consultation paper (CP) on guidelines on key concepts of the AIFMD (ESMA/2012/845). The CP set out formal proposals for guidelines ensuring common, uniform and consistent application of the concepts in the definition of ‘AIF’ in Article 4(1)(a) of the AIFMD by providing clarification on each of these concepts. This final report sets out the final text of the guidelines on key concepts of the AIFMD.

Contents

Section II sets out the feedback statement to the CP (ESMA/2012/845) previously published by ESMA.

Annex I provides for the cost-benefit analysis related to the guidelines.

Annex II includes the opinion of the Securities and Markets Stakeholder Group (SMSG) on the DP. The SMSG did not provide a formal response to the CP.

Annex III contains the full text of the final guidelines.

Next steps

The guidelines in Annex III will be translated into the official languages of the EU, and the final texts will be published on the ESMA website. The deadline for reporting requirements will be two months after the publication of the translations and the guidelines will apply from such date.

II. Feedback Statement

1. ESMA received 37 responses to the consultation paper (CP) on draft guidelines on key concepts of the AIFMD. Responses were received from asset managers (and their associations), banks (and their associations), an association of investors, law firms and a lawyers' association, a private equity fund administrator and public authorities.

I. General comments

2. Some respondents expressed concerns relating to the discretion left to competent authorities and market participants to consider as an AIF an entity which does not fulfil the proposed criteria. Two respondents mentioned that it will be possible to passport undertakings defined as AIFs throughout Europe, including in Member States where national authorities might not consider such undertakings as AIFs under their own rules. An asset managers' association was of the view that it should be possible for ESMA to ensure more legal certainty for "core AIFs" by stating that the AIF quality should be at least assumed for vehicles which cumulatively fulfil the criteria for each relevant AIF concept as specified in Sections VI to IX of the draft guidelines.
3. Furthermore, three respondents argued that AIFMs should be expected to comply with the guidelines only if their competent authority does so.
4. A respondent asked for clarification on the responsibility of the valuation function (internal and external) under Article 19(10) of the AIFMD.

ESMA's response: The aim of the guidelines is to ensure a harmonised approach by competent authorities in determining whether or not an entity is to be considered an AIF under the definition set out in Article 4(1)(a) of the AIFMD. However, since ESMA guidelines cannot alter the provisions of the AIFMD, ESMA considered it important to clarify that competent authorities and market participants should consider an undertaking to be an 'AIF' if the presence of all the concepts in the definition under Article 4(1)(a) of the AIFMD is established based on the application of the Level 1 text alone (i.e. even if the undertaking shows characteristics that are not described in the guidelines or does not show any of the characteristics described in the guidelines). Once the existence of an AIF is established by a competent authority, such AIF should benefit from full passporting rights in the Member States as per the relevant provisions of the AIFMD.

As for the request for clarification on the responsibility of the valuation function under the AIFMD, ESMA considers that that issue goes beyond the scope of this work stream.

Definitions

Pre-existing group

5. The following comments were made:
 - i) the reference to "a pre-existing group" should not hinder the addition of new members to the group for family offices, for example by birth or marriage;
 - ii) the investors in a family investment vehicle may be individual members of a family, or they may be family trusts, the ultimate beneficiaries of which are members of the family;

- iii) some family investment vehicles may also include charitable trusts among their beneficiaries and this should not lead the vehicle to be treated as an AIF.
- iv) some reference to the familial context should be added (e.g. “family group” if the term “family office” is not to be used);
- v) the definition excludes investment by directors, partners, members, managers, trustees and employees of the pre-existing group; and
- vi) the use of the term “close familial relationship” is too restrictive and not sufficiently precise and the nature of such relationships will change over time and generations.

ESMA’s response: The definition of “pre-existing group” has been clarified in the final guidelines. The definition now includes a new notion of “family members” and provides a defined and clear list of people included in the family relationship (this also includes new members joining the family after the undertaking has been established). ESMA also saw merit in clarifying that a pre-existing group may be established irrespective of the type of legal structure that may be put in place by the family members to invest in an undertaking and provided that the sole ultimate beneficiaries of such legal structure are family members.

Pooled return

- 6. A private equity and venture capital association suggested deleting the words “acting for its own account” from the definition on the basis that it is not clear that an entity with such characteristics is inconsistent with the concept of pooling. This respondent argued that any company or other entity which has legal personality acts for its own account and not as an agent for the shareholders who have invested in it. On the contrary, two real estate asset managers’ associations mentioned that the distinction between AIFs and businesses that manage the underlying assets, as well as the reference to an entity acting for its own account, are helpful in identifying ‘ordinary’ companies that are not intended to be within scope.
- 7. A respondent suggested further clarifying that the guidelines do not catch entities where investors do not benefit from (i.e. returns are not directly linked to) income or profits generated by the sale or management of the AIF’s assets such as (i) undertakings issuing products with a pre-defined investment return or (ii) undertakings acquiring assets for the purpose of custody/to hold such assets in a convenient form (as opposed to for investment). This respondent also asked ESMA to state that the pooled return should be managed to generate a pooled return for the benefit of investors.
- 8. An asset managers’ association suggested including a specific reference to “side pockets” in the definition. The same respondent also requested confirmation that “virtual pooling arrangements” (where a number of funds, managed accounts and/or other investors have a common investment strategy, investment manager and administrator) do not constitute AIFs.
- 9. A real estate asset managers’ association mentioned that it remained unclear what the concept of pooled returns is precisely trying to cover, and why a ‘pooled return’ is different from a total ‘return’ that any company would seek to deliver.

ESMA’s response: The words “acting for its own account” were deleted and the definition streamlined in order to clarify that a pooled return is the return generated by the pooled risk arising from ac-

quiring, holding or selling investment assets, including the activities to optimise or increase the value of these assets.

Paragraph 4 of the draft guidelines

10. A private equity and venture capital association suggested adding in paragraph 4 of the draft guidelines the following sentence from paragraph 9 of the CP: “*It is only when all the elements included in the definition of AIFs under Article 4(1)(a) of the AIFMD are present that an entity should be considered an AIF*”.

ESMA’s response: ESMA saw merit in this suggestion and clarified that an entity should not be considered an AIF unless all the elements included in the definition of ‘AIFs’ under Article 4(1)(a) of the AIFMD are present.

II. Background

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 removed/included from the content of the guidelines.

11. A large number of respondents agreed with the approach.
12. Some respondents regretted the fact that some topics included in the DP were not included in the CP. In particular, some of these respondents mentioned specifically the sections relating to the vehicles which are not AIFMs or AIFs or are exempted from the provisions of the AIFMD, the treatment of UCITS management companies and the treatment of MiFID firms and credit institutions. Two asset managers’ associations asked for clarification on the questions raised in relation to these topics in the DP and reiterated the comments made in their feedback on the DP. Two other asset managers’ associations asked for clarification on the appointment of the AIFM, the delegation of tasks and the exempted vehicles.
13. An asset managers’ association asked for the development of guidelines on the delegation rules under Article 82 of the Level 2 Regulation.
14. Another asset managers’ association asked for further consideration of the extent to which private equity funds are considered to be collective investment schemes.
15. Two respondents sought clarification on the application of the AIFMD to structured products. One of these respondents sought confirmation that structured issues fall outside the scope of the AIFMD. This respondent argued that (i) structured issues have a pre-defined payout profile and capital is not raised with a view to investing it in accordance with a defined investment policy and (ii) assets are acquired for hedging the payment profile, not as a pooled investment. Similarly, another respondent mentioned that in dealing with structured financial instruments (such as exchange-traded notes or exchange-traded commodities) it should be taken into account that an AIF must involve some form of “investment management”.
16. A respondent also asked ESMA to confirm that the Regulation ECB/2008/30 of December 2008 (concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions and giving guidance as to the meaning of “financial vehicle corporation” and “securitisa-

tion”) is not applicable to the interpretation of the definition “securitisation” as used in the exclusion of securitisation special purpose entities under Article 2(3)(g) of the AIFMD.

17. A private equity and venture capital association considered that carried interest structures should be explicitly addressed in the guidelines and should be excluded from the definition of AIF since, although they may share the same legal structure as an AIF, they are not AIFs as they do not raise external money.
18. Two real estate asset managers’ associations asked ESMA to provide further guidance in order to make clear that joint venture structures are not caught in the definition of collective investment undertaking. However, a third asset managers’ association considered that being a joint venture is not a deterministic factor in assessing whether an entity is, or is not, an AIF – this association was of the view that some joint ventures are clearly AIFs and operate as such, while other are clearly not AIFs.
19. A real estate asset managers’ association raised concerns linked to the fact that the guidelines as proposed still leave a significant grey area in the identification of ordinary companies with “general commercial purpose”.
20. Another real estate asset managers’ association suggested that it could be beneficial to include the additional concept of “valuation approach” in the key concepts. AIFs are most often valued by investors using metrics that look mainly at the assets under the funds’ control, such as the NAV; by contrast, corporate and other businesses undertakings are often valued by using a combination of cash flow analysis, assets-to-liabilities ratios and growth in earnings or dividends.
21. A respondent mentioned the need to specify a narrow definition of holding companies to be excluded from the AIFMD and strongly supported the aim stated in the DP of not allowing the exclusion of holding companies to lead to circumvention of the provisions of the AIFMD.

ESMA’s response: Given the support received on the topics to be covered in the guidelines, ESMA confirmed its proposed approach. As for the requests to provide additional guidance on the topics covered in the DP that were not addressed in the CP (nor in the separate consultation paper on draft regulatory technical standards on types of AIFMs (ESMA/2012/844)), ESMA considered that at this stage additional guidance was not needed since the content of the AIFMD Level 2 provisions (Commission Delegated Regulation (EU) No 231/2013³) and the list of questions and answers (Q&A) related to the AIFMD published by the European Commission⁴ already provide sufficient harmonisation on a good number of these topics. In particular, joint ventures are explicitly addressed in the European Commission’s Q&A.

The judgement set out above in relation to the need for additional guidance is without prejudice to the possibility to develop further guidelines and recommendations or other convergence tools (e.g. Q&A) in the future, in particular based on the application of the Directive by the competent authorities in the Member States after the AIFMD transposition deadline.

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:0095:EN:PDF>.

⁴ <http://ec.europa.eu/yqol/index.cfm?fuseaction=legislation.show&lexId=9>.

III. Concepts extracted from the definition of AIF

22. Some respondents mentioned that any definition developed within the guidelines should be relevant in the context of the AIFMD only and not for other pieces of EU legislation.
23. Two respondents mentioned that the language in Article 4(1)(a) of the AIFMD is not clear on the treatment of entities established with a number of compartments, and in particular whether it is the entity as a whole that is an AIF or each individual compartment is an AIF. One of these respondents suggested that the determination as to whether the undertaking constitutes an AIF or falls within one of the exclusions to the AIFMD should be made at the level of each compartment or contractually ring-fenced obligation only and without regard to other investment compartments or contractually ring-fenced obligations. The second respondent asked for clarification in this respect also considering that this could raise issues in the notification process should Member States take different views.

ESMA's response: ESMA saw merit in clarifying that the additional details provided by the guidelines should be relevant for the purposes of the AIFMD only and are not intended to affect the meaning of any similar concepts used in any other European legislation. Furthermore, a new Section V was introduced in the guidelines on the treatment of investment compartments of an undertaking in order to clarify that where an investment compartment of an undertaking exhibits all the elements in the definition of 'AIF' in Article 4(1)(a) of the AIFMD, this should be sufficient to determine that the undertaking as a whole is an 'AIF' under Article 4(1)(a) of the AIFMD.

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?

24. A large number of respondents supported the clarifications with respect to the concepts of the AIF definition.
25. On the concept of "ownership of underlying assets", some asset managers' associations were of the view that it should not be considered a key element in defining an AIF, while other asset managers' associations would have preferred the guidelines to cover this concept.
26. A private equity and venture capital association mentioned that the statements in the following paragraphs were unclear:
- i) paragraph 10 of the CP: the elements of the definition set out in Article 4(1)(a) should not be construed in accordance with other EU law, and
 - ii) paragraph 11 of the CP: the guidance should not be used to facilitate circumvention.
27. A respondent was of the view that there could be some further guidance on the words "with a view to investing [the capital raised]" in the definition of AIF in Article 4(1)(a)(i) of the AIFMD and argued that an AIF must involve some form of investment management.
28. A bank mentioned that it should be made clear that special purpose vehicles in a multi-tier structure where at least one of the ultimate parent entities is an AIF (and the other parent entity may be, for instance, an industrial or publicly-held enterprise) should not qualify as AIFs.

29. An employee and consumer representative body advocated a wide definition of AIF to avoid circumventions of the provisions of the AIFMD, as mentioned in paragraph 11 of the CP. This respondent pointed out that if the elements defining an AIF have to be fulfilled simultaneously together, the definition of each single element has to be interpreted rather broadly.

ESMA's response: Given the support received, ESMA did not change its approach on the concepts it identified in the definition of AIF in the AIFMD. See also the ESMA's responses under paragraphs 10 and 23 above.

1. Raising Capital

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.

30. A large number of respondents agreed with the approach suggested by ESMA with regard to the notion of "raising capital".

31. Some respondents mentioned the following additional elements to be taken into consideration:

- i) there should be an express link between capital raising and the defined investment policy (i.e. in order to be a fund, an entity needs to raise capital with a view to investing it in accordance with a defined investment policy);
- ii) typically an AIF will raise capital through a "sponsor" that plans (itself or through a group member) to make a profit out of the management of the capital raised from third party/external sources;
- iii) generally, only corporate entities (or securitisation special purpose entities) issue unsecured debt securities into public markets;
- iv) those cases of open-ended funds, which start their activity by using the capital of a single investor (usually the manager) should be taken into account;

32. Two real estate asset managers' associations suggested distinguishing the type of capital raising undertaken by normal, publicly-quoted commercial businesses versus that of a fund.

33. An asset managers' association was of the opinion that the requirement for there to be commercial communication between the investor and the undertaking seeking capital, or the person acting on its behalf, may have the unintended consequence of capturing transactions which are not capital raisings.

34. Another asset managers' association asked ESMA to elaborate further on the concept of "taking active steps" by way of business to procure the commitment of third party capital set out in paragraph 13 of the CP.

Paragraph 11(a) and (b) of the draft guidelines

35. A private equity and venture capital association claimed that the characteristics mentioned under items (a) and (b) should both be present if an undertaking is to be taken to raise capital. In particular, this respondent asked ESMA to make "commercial communication" a necessary condition for capital raising.

Similarly, the same respondent asked ESMA to clarify that the intention to generate a “pooled return” is a key condition for setting up a fund i.e. engaging in capital raising; this respondent argued that if there is a commercial communication between an entity seeking capital and a prospective investor, this would still not create an AIF if there is no intention to generate a pooled return (as is the case, for example, in a managed account). Finally, this respondent mentioned that the only new criterion added by item (a) is the element “with a view to generating a pooled return” which is not an element of “raising capital” but rather an element of “collective investment vehicle”.

Paragraph 11(a) of the draft guidelines

36. A public authority asked ESMA to clarify whether the word “procure” would also include accepting unsolicited or voluntary capital from investors.

Paragraph 11(b) of the draft guidelines

37. Some asset managers’ associations asked for further clarification of the notion of “commercial communication”. A respondent suggested that the “commercial communication” should imply some kind of active communication (not merely of a technical nature) aimed at the raising of capital, either by the AIF itself or by any person acting on behalf of the AIF.

Paragraph 13 of the draft guidelines

38. An asset managers’ association asked ESMA to clarify that the paragraph should be without prejudice to recital (7) of the AIFMD.

39. A respondent suggested including at the end of this paragraph the content of paragraph 16 of the CP.

Paragraph 13(a) and (b) of the draft guidelines

40. A private equity and venture capital association mentioned that paragraph 13(a) and (b) had drawn the test for a non-AIF co-investment arrangement too narrowly since it is typical for participants in co-investment undertakings to comprise not only members of the governing body and risk takers, but also other professional staff and frequently also the management entity itself or a related company.

41. This respondent also mentioned that investment by a management entity together with its related companies, possibly accompanied by co-investment and/or carried interest arrangements, would not normally involve raising capital: indeed, in the respondent’s view there is no means for a commercial communication or other steps to “procure” investment by the management entity since it decides on its investment as part of its overall structuring of the fund, rather than being solicited for investment.

Paragraph 13(a) of the draft guidelines

42. Several respondents mentioned that the proposed treatment of the “legal person managing the undertaking” (AIFM or an external manager) is not very clear: according to paragraph 15 of the CP capital provided by such a person shall not be considered for the purpose of “raising capital”, whereas paragraph 16 suggests that it should be relevant in this respect. Some of these respondents suggested applying the exception under paragraph 13(a) of the draft guidelines only to members of the governing body of the undertaking managing an AIF, while another respondent mentioned that capital provided by an external person involved in the operational management of the undertaking should not be considered

relevant and such persons should be considered comparable to the manager of the undertaking itself or to a member of the legal person managing the undertaking.

43. An asset managers' association asked ESMA to clarify that even if the investor of an AIF is an affiliate of the AIFM, the AIF remains an AIF and, therefore, to include in the guidelines the text in the first three sentences of paragraph 16 of the CP.

44. A private equity and venture capital association suggested that reference should be made not only to managing "the undertaking", but also to managing "its investments", since it is also the management team of the underlying portfolio company which will be asked to invest in the company to align the interests.

Paragraph 13(c) of the draft guidelines

45. A respondent mentioned that family vehicles should be exempt only if they lack any formal legal structure, apart from being owned by particular persons.

46. Two asset managers' associations mentioned that the reference in paragraph 13(c) of the draft guidelines to investments made by "a pre-existing group" as likely to be out of scope implies that there is no need of a family relationship to be a family office. Therefore, one of these associations asked for a modification of the statement in paragraph 14 of the CP.

47. Another asset managers' association mentioned that the scenario described in paragraph 14 of the CP should not be considered as the only situation where it may be held that there is no raising of external capital since recital (7) of the AIFMD does not impose a condition of exclusivity or of a familial relationship which pre-dates the establishment of the undertaking.

Paragraph 14 of the draft guidelines

48. A private equity and venture capital association argued that when there is only an external investor, coupled with co-investment and/or carried interest arrangements, this may not result in an AIF where capital is only raised from the external investor. Two other asset managers' associations argued that in this scenario only one investor should be counted.

49. A hedge fund association mentioned that co-investment vehicles should not be treated as AIFs unless the manager/affiliate has raised capital from the investor and suggested adding the following wording at the end of paragraph 14 of the draft guidelines: "[...] if the person in paragraph 13 carried out the activity in paragraph 11 with regard to that investor".

50. A respondent pointed out that the approach in paragraph 14 of the guidelines may have the effect of bringing joint ventures or managed accounts within the scope of the AIFMD.

51. A private equity and venture capital association noted that there appeared to be a potential mismatch between paragraph 14 of the draft guidelines, according AIFMD rights to external investors, and paragraph 17 of the CP, which accords such rights to the management personnel listed. On this point, another asset managers' association mentioned that all investors should enjoy full rights under the AIFMD. Similarly, a third respondent was of the opinion that if persons listed in paragraph 13 of the draft guidelines invest in an AIF alongside other "external" investors, they should be conferred the same rights and enjoy the same legal status as other AIF unitholders.

ESMA’s response: Considering that there was a certain overlap between paragraph 11(a) and (b) of the draft guidelines, ESMA decided to merge items (a) and (b) into paragraph 13 of the final guidelines. When merging the two items ESMA decided to delete the notion of “commercial communication” and replace it with a reference to a “commercial activity”. ESMA also saw merit in the suggestion to enhance the link between capital raising and the defined investment policy and reflected this in the revised guidance. Furthermore, ESMA clarified that for the purpose of the notion of raising capital, it should be immaterial whether the transfer or commitment of capital takes the form of subscriptions in cash or in kind.

As for the exemption in paragraph 13(a) and (b) of the draft guidelines (i.e. the exemption relating to (i) the members of the governing body of the undertaking or the legal person managing that undertaking and (ii) certain employees), ESMA considered it appropriate to remove the relevant wording from the text of the final guidelines. Indeed, ESMA is of the view that the exemption would have been against the Level 1 provisions, since the relationship of the investor with an undertaking should not define the existence of a fund.

Finally, ESMA agreed to clarify the language in paragraph 14 of the draft guidelines (paragraph 16 of the final guidelines) to make clear that if a member of a pre-existing group invests in an AIF alongside other investors not being members of a pre-existing group, all the investors should enjoy full rights under the AIFMD.

Q4: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance on the notion of ‘raising capital’ would imply.

52. An asset managers’ association mentioned that co-investment, insofar as it permits alignment, is a benefit and should not serve to bring structures that would otherwise be excluded within the scope of the AIFMD.
53. Another asset managers’ association did not expect any change to the established business concepts in the AIF management and, therefore, no specific costs or benefits resulting from the proposed guidance on “raising capital”.

2. Collective Investment Undertaking

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.

54. A large number of respondents agreed with the proposed guidance for identifying a ‘collective investment undertaking’.
55. Two asset managers’ associations recommended a clarification of the boundary between an AIF(M) and a holding company.
56. A respondent asked for clarification on the reference in paragraph 20 of the CP to “*an entity whose purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity*”; in particular, this respondent asked ESMA to clarify the difference between this concept and an ordinary company with general commercial purpose to which ESMA further refers.

Paragraph 9(a) of the draft guidelines

57. Two respondents suggested amending the reference in paragraph 9(a) to an “ordinary commercial company” since the same principle applies whatever the legal form of the undertaking. One of these respondents proposed that the guidelines refer instead to an “ordinary commercial undertaking”, while the other respondent suggested using the words “ordinary business”.
58. A real estate asset managers’ association argued that all corporate commercial businesses essentially ‘invest’ shareholder’s capital in the same way and this is very different to a fund whose purpose is essentially to provide returns to investors that match the investment into the underlying asset.

Paragraph 10 of the draft guidelines

59. Some respondents raised concerns on the discretion left to consider that an entity is an AIF even in the absence of all or any of the characteristics.

ESMA’s response: ESMA decided to replace the reference to an “ordinary company” with a reference to an undertaking not having a “general commercial or industrial purpose” under paragraph 12(a) of the final guidelines and to define such a new concept to ensure an appropriate harmonisation of the national supervisory practices (for more details on this new definition, see also ESMA’s response under paragraph 73 below). On the discretion left to competent authorities and market participants to consider that an entity is a collective investment undertaking even in the absence of any or all of the characteristics, see ESMA’s response under paragraph 4 above.

Q6: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for identifying a ‘collective investment undertaking’ would imply.

60. A respondent mentioned that no specific costs or benefits resulting from the proposed guidance on “collective investment undertaking” were expected.

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.

Paragraph 9(c) of the draft guidelines

61. The majority of respondents agreed with the analysis on the absence of any day-to-day investor discretion or control of the underlying assets in an AIF.
62. An asset managers’ association asked ESMA to clarify whether it is the actual day-to-day control or the power to exercise day-to-day control which is being referred to.
63. A real estate asset managers’ association mentioned that this paragraph could inadvertently capture joint venture arrangements, which it considered to be exempted from the scope of the Directive on the basis of recital (8). This respondent argued that where joint venture partners do not participate in the day-to-day management of the joint venture properties, but do have daily control over the key decisions affecting the joint venture (often referred to as “reserved matters”), this should not lead the undertaking to be classified as an AIF.

64. Another real estate asset managers' association mentioned that the concept of the absence of day-to-day discretion or control is not particularly helpful in the context of "ordinary companies with general commercial purposes": shareholders in quoted companies are not engaged in day-to-day control over the underlying assets, but they do exercise control through voting at shareholder meetings or ultimately through their actions for buying or selling the shares. On a similar note, another respondent mentioned that a normal business undertaking will typically seek shareholder approval for matters when it is required to do so by law (e.g. voting on major issues such as mergers or liquidation, the election of shareholder representatives, the re-election of directors, approval of annual accounts), whereas, in the case of a fund, investor consent issues usually are a matter for negotiation between the AIFM and the investor at the time that the AIF is launched, or the investment is made and an investment agreement or investment mandate is agreed by the two parties.

65. A respondent argued that there are circumstances where there is no day-to-day investor discretion or control and yet the relevant arrangements should not be considered to be a collective investment undertaking (e.g. shareholders in an ordinary company will not have day-to-day control over the assets of the company or the participants of a joint venture may not have day-to-day control over its assets, notwithstanding that they will usually have control over certain strategic matters).

66. A private equity and venture capital association noted the following:

- i) not every undertaking will require daily decisions to be made by investors; it should be sufficient that the investors exercise discretion or control when the need arises;
- ii) if one investor and not others has day-to-day discretion or control, that should not lead to a conclusion that the undertaking is not an AIF (if other characteristics of an AIF are present); the day-to-day discretion or control should, for an undertaking not to be considered as an AIF, be exercised by the investors collectively, and all of them should in such case have day-to-day discretion or control to the extent of their respective interests in the undertaking.

67. A respondent suggested defining the day-to-day discretion of the investors as a discretion which includes at least the authority of the investors to make decisions about the annual budget for the management of the assets, repairs and renovation concerning the assets and entering into contracts with service providers.

ESMA's response: ESMA considered it appropriate to keep the absence of a "day-to-day discretion or control" by all the unitholders or shareholders of an undertaking as a relevant factor in assessing whether an undertaking is a collective investment undertaking. However, ESMA saw merit in further clarifying the notion of "day-to-day discretion or control" and added an ad hoc definition for this purpose. The definition clarifies the nature of the power of decision – whether exercised or not – to be granted to the unitholders or shareholders in order not to be in the presence of a collective investment undertaking. Moreover, ESMA clarified that in order for an undertaking not to be considered a collective investment undertaking, the day-to-day discretion or control should be granted to all the unitholders or shareholders of the undertaking and the fact that one or more of them are granted such a discretion or control should be of no relevance for this purpose.

For the treatment of joint ventures, see ESMA's response under paragraph 21 above.

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.

68. The majority of respondents agreed that an ordinary company with general commercial purpose should not be considered a collective investment undertaking.

69. A real estate asset managers' association noted the importance of having a clear understanding of why and how "ordinary" companies (and any other type of business activity) that are not funds are outside of the definition. Another asset managers' association mentioned that the notion of an ordinary company with general commercial purpose is too vague to give any real guidance.

ESMA's response: see EMSA's response under paragraph 59 above.

Q9: Which are in your view the key characteristics defining an ordinary company with general commercial purpose?

70. A private equity and venture capital association considered that developing a list of the characteristics of an ordinary undertaking with general commercial purpose is too difficult and suggested that the concept would more usefully be applied by business people and competent authorities on a case-by-case basis. Two other respondents were also of the opinion that no further definition is necessary. However, one of these respondents mentioned the idea of having non-exhaustive indicators which may assist in determining whether a company is an ordinary company with general commercial purpose. These indicators could include the number and type of staff, the type of customers and the goods and services which are provided.

71. A respondent mentioned the possibility for ESMA to give examples of ordinary companies which would not be considered AIFs even if these ordinary companies invest shareholders' money into assets. Another respondent mentioned that the main feature that distinguishes "ordinary companies with general commercial purpose" from "AIFs" is the lack of a defined investment policy.

72. A number of respondents mentioned several different characteristics that could be useful in identifying ordinary companies with general commercial purposes. Examples of the characteristics mentioned by (one or more of) these respondents are set out below:

- i) the notion of commercial purpose meaning that an ordinary company has a "business purpose" while an AIF has a defined investment policy;
- ii) an ordinary company makes profits out of production, services or trading, but not (at least not primarily) from the investment of capital;
- iii) an ordinary company has a perpetual and continuously evolving business model, as opposed to seeking new investors on the basis of a defined investment policy for each fund that has a separate, finite life;
- iv) an ordinary company generates returns for its own account which may be reserved, re-invested or distributed to shareholders at the absolute discretion of the company (subject only to shareholder vote);
- v) an ordinary company organises the production, logistic or design process in a manner which goes beyond giving directions to managers in companies owned by the entity.

73. Two asset managers' associations also mentioned Article 9 of the Council Directive 2006/112/EC which contains a definition of "economic activity" and states that: "*Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity*").

ESMA's response: As mentioned above, ESMA decided to replace the reference to an "ordinary company" with a reference to an undertaking not having a "general commercial or industrial purpose". The definition of this new concept was developed by ESMA on the basis of the analysis of the different proposals made by the respondents for the "ordinary company" notion. In order to draw a line between collective investment undertakings and other undertakings, ESMA decided to describe the general commercial or industrial purpose as a purpose of pursuing a business strategy which includes characteristics such as running predominantly a commercial and/or industrial activity. Details on the content of each of these activities (i.e. commercial and industrial) were also included in the guidance. However, in line with the general approach followed in the guidelines, ESMA recalls that the examples of activities that may be performed by an undertaking which is not a collective investment undertaking are only indicative.

3. Number of Investors

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.

Paragraph 15(a) of the draft guidelines

74. A large number of respondents agreed with the proposed guidance for determining whether a 'number of investors' exists for the purposes of the definition of AIF.
75. An asset managers' association was of the opinion 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.
76. Some respondents mentioned 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.
77. A few respondents disagreed with the proposed approach.
78. A private equity and venture capital association argued that the Level 1 provision on a number of investors is simply a factual analysis of the number of investors in the AIF and more than one investor is necessary for there to be a pooled return. This respondent mentioned that whether the constitutional documentation makes any positive statement about the number of possible investors (or is silent on this) is irrelevant.
79. Three respondents added that the Level 1 provisions refer to an undertaking which "raises" capital from a number of investors and not to an undertaking which is "capable of raising" capital from a number of investors. One of these respondents also mentioned that there are many jurisdictions where a mini-

mum of two shareholders or partners is required to incorporate a company or form a limited partnership which is a collective investment undertaking; this respondent asked ESMA to clarify that where an AIF is structured as an entity which requires a minimum of two shareholders or partners, then the presence of the general partner or the second de minimis shareholder should not disqualify the vehicle from being able to rely on the single investor fund carve-out.

80. Similarly, a respondent considered that the AIFMD Level 1 provisions do not impose the requirement for a legally binding prohibition on having more than one investor and that, as such, where a person does not attempt to raise capital from more than one investor, the undertaking should not be regarded as an AIF just because there is no legally binding requirement prohibiting further investors.

Paragraph 15(b) of the draft guidelines

81. A respondent was in favour of including in the definition of AIF entities where single investors such as pension funds, insurance companies or other intermediaries represent bigger group of investors.
82. An asset managers' association mentioned that the proposed guidance implies that a look-through approach will automatically have to be applied to all nominee and fund arrangements where there is more than one underlying beneficial owner and the underlying investors counted regardless of the nature of those investors. This respondent argued that such an approach would be against the statement in recital (8) of the AIFMD according to which the Directive should not apply to certain entities and, therefore, these should not be considered "a number of investors" for the purpose of Article 4(1)(a)(i) of the AIFMD.
83. A private equity and venture capital association was concerned by the reference to "feeder structures or fund of fund structures": in its view, these structures are likely to be AIFs in their own right and it is odd to imply that an undertaking to which a feeder AIF or fund of fund AIF commits capital is an AIF if the feeder AIF or the fund of fund AIF is the sole investor in the underlying undertaking.
84. An asset managers' association suggested clarifying the drafting in order to ensure that genuine single investors are not inadvertently caught by paragraph 15(b) of the draft guidelines and asked ESMA to include definitive statements that (i) a pension fund or a pension fund trustee is a single investor and (ii) an insurance company or bank may be a single investor in a vehicle, where it is both the legal and beneficial owner.

ESMA's response: Given the support received from the respondents, ESMA decided not to change its approach as regards the notion of "number of investors". As for the consideration to be given to the fact that the plurality of investors may cease to exist over time, ESMA still considers that in order to ensure certainty and consistency in the application of the AIFMD, the element to be taken into consideration is the existence of a restriction to raise capital from a single investor.

As for the comment according to which the approach proposed under paragraph 15(b) of the draft guidelines (paragraphs 18 and 19 of the final guidelines) would be against the provisions of recital (8) of the AIFMD, ESMA recalls that this recital sets out a list of entities not to be considered AIFMs for the purpose of the AIFMD; however, such entities could be considered AIFs if they fulfil the criteria in the definition in Article 4(1)(a) of the AIFMD.

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.

85. An asset managers’ association did not expect any specific costs or benefits resulting from the proposed guidance for AIFMs.

4. Defined Investment Policy

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.

86. The large majority of respondents agreed with the proposed indicative criteria for determining whether a “defined investment policy” exists.

87. However, a real estate asset managers’ association added that it should be clearer that the defined investment policy should be more restrictive than what would usually be found in a normal company bylaw, or communicated by a public company undertaking, for example, a rights issue. The same respondent suggested reintroducing the references to a clearly disclosed investment policy and the requirement for consent to changes in the investment policy. This respondent also mentioned that the existence of a defined investment policy should neither be inferred based only on the corporate purpose of a company nor on tax requirements driving the business strategy of that company.

88. A respondent was of the opinion that the requirement for an AIF to have a defined investment policy does not provide sufficient distinction between a joint venture and a collective investment undertaking.

89. A stakeholder mentioned that the identified criteria are quite broad and could suggest the existence of an investment policy even though there is an absence of any management of the capital. This respondent added that the investment policy has to reflect how the collective investment undertakings’ pooled capital will be managed to generate a pooled return.

Paragraph 16 of the draft guidelines

90. A respondent mentioned that the proposed criteria should be viewed in aggregate and requested that the words “singly or cumulatively” be deleted.

Paragraph 16(d) of the draft guidelines

91. An asset managers’ association asked that the words “singly or cumulatively” be included after the word “reference”, in order to clarify that (i) the reference to “investment policy” is not the same as “investment objective” as commonly understood and (ii) not all of the criteria need to apply.

92. Another asset managers’ association asked ESMA to clarify that the criteria that define the investment policy are cumulative.

93. An asset manager disagreed with the suggestion that a fund manager should conform to minimum holding periods as its talent is to buy and sell when appropriate to the best interests of the holders of shares or units of the collective investment undertaking it manages.

Paragraph 17 of the draft guidelines

94. A private equity and venture capital association asked for the deletion of this paragraph since there are examples of investment criteria (not being the business strategy followed by an ordinary undertaking with general commercial purposes) which are clearly not “investment guidelines” within the meaning of paragraph 16(d) of the draft guidelines (e.g. a joint venture agreement may well set out certain investment criteria or other restrictions, in order to make clear the intended scope of the venture and narrow the field of potential investment opportunities to be considered by investors).

Paragraph 18 of the draft guidelines

95. Some respondents voiced concerns regarding the discretion left to competent authorities and market participants to conclude that an investment policy exists even if the mentioned factors are absent.

ESMA’s response: Given the broad support received from respondents, ESMA did not change its approach on the notion of ‘defined investment policy’. However, ESMA saw merit in clarifying that the criteria under paragraph 16(d) of the draft guidelines (paragraph 20(d) of the final guidelines), against which it may be determined whether a defined investment policy specifies investment guidelines, are not cumulative.

On the discretion left to competent authorities and market participants to conclude that a defined investment policy exists even in the absence of the factors mentioned in the guidelines, see ESMA’s response under paragraph 4 above.

Finally, ESMA decided to add an anti-circumvention provision in order to avoid a situation in which leaving full discretion to make investment decisions to the manager of an undertaking might be used as a means to circumvent the provisions of the AIFMD.

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.

96. An asset managers’ association did not expect any specific costs or benefits resulting from the proposed guidance for AIFMs.

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?

97. A few respondents considered it appropriate to add a reference to the national legislation while several other respondents did not consider appropriate/required to do so given that range of eligible assets and restrictions on asset allocation stipulated by national law are reflected in the individual fund rules or instruments of incorporation. However, even these respondents did not object to the inclusion of a reference to the national legislation in the final guidelines.

98. A private equity and venture capital association mentioned that, where national law prescribes an investment policy or restrictions for particular types of fund vehicle, one would ordinarily expect those vehicles to be treated as AIFs, even if those legal requirements are not duplicated in the fund’s constitutional documents.

99. A real estate asset managers' association expressed some concerns about the proposal arguing that it could potentially bring into play a wide range of national legislation that will not be helpful in encouraging a harmonised approach.

ESMA's response: Given the feedback received, ESMA decided not to introduce any additional reference to the national legislation.

Annex I – Cost-benefit analysis

1. Introduction

1. Pursuant to Article 16 of the Regulation establishing ESMA⁵, ESMA is empowered to issue guidelines and recommendations addressed to competent authorities or financial market participants with a view to establishing consistent, efficient and effective supervisory practices within the European System of Financial Supervision, and to ensuring the common, uniform and consistent application of Union law. The same article obliges ESMA to conduct open public consultations regarding the guidelines and recommendations and to analyse the related potential costs and benefits, where appropriate. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines or recommendations.

2. Procedural issues and consultation process

2. On 23 February 2012, ESMA published a discussion paper on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM (ESMA/2012/117) (DP) which covered a number of topics relevant for the development of the draft RTS under Article 4(4) of the AIFMD as well as other topics that may merit the development of further guidelines and recommendations or other convergence tools (e.g. Q&A). On 19 December 2012, ESMA published a consultation paper on guidelines on key concepts of the AIFMD (ESMA/2012/845) (CP) which represented the next stage in the development of draft guidelines for some of the topics for which ESMA previously announced the potential development of further guidelines and recommendations or other convergence tools (e.g. Q&A). The CP set out formal proposals for the content of guidelines on the application of the concepts in the definition of 'AIF' in Article 4(1)(a) of the AIFMD on which ESMA sought the views of external stakeholders.
3. ESMA considered that in order to achieve a consistent application of the AIFMD provisions across Europe, it is necessary to first have a clear understanding of which entity is the AIFM, which itself depends on a harmonised approach as to what constitutes an AIF.
4. For these reasons, ESMA considered it appropriate to develop the guidelines looking at the definition of AIF contained in the AIFMD and providing clarifications on the criteria which may be extracted from the definition of AIFs in Article 4(1)(a) of the AIFMD (i.e. 'raise capital', 'collective investment', 'number of investors' and 'defined investment policy').
5. In the light of the approach taken for the development of the guidelines, ESMA decided to carry out a preliminary screening of (i) the number of entities captured by the AIFMD as per its Level 1 text and (ii) the potential impact that the guidelines may have on this.
6. Relevant data on the population that may be captured by the AIFMD may be found in the European Commission's Impact Assessment accompanying the AIFMD proposal⁶ (Commission's IA), and in particular Section 1.1 of that document ("The investment fund universe"). More up-to-date data on the number and assets under management of non-UCITS funds currently domiciled in the EU are contained in Table 1 below.

⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010.

⁶ Available at:

http://ec.europa.eu/internal_market/investment/docs/alternative_investments/fund_managers_impact_assessment.pdf.

Table 1: Breakdown of Non-UCITS funds by category

Fund types	31/12/2012			31/12/2011	
	EUR bn	%chg ⁽²⁾	Number of Funds	EUR bn	Number of Funds
Special / Institutional	1,739	16.3%	8,852	1,495	8,490
German "Spezialfonds"	955	16.2%	3,809	822	3,762
British investment trusts	84	10.5%	288	76	307
French employees savings	95	9.7%	2,250	87	2,342
Luxembourg "other" funds	95	12.3%	877	85	938
Real-estate funds	258	- 0.4%	1,122	259	993
Other	378	17.8%	5,706	321	5,149
TOTAL	2,649	14.1%	19,095	2,322	18,219

⁽²⁾ end December 2012 compared to end December 2011.

Source: EFAMA.

7. Notwithstanding the data already available in the Commission's IA and in Table 1 above, in order to assess the costs and benefits of its guidelines, ESMA saw merit in carrying out a mapping exercise among the competent authorities of the Member States of the existing population of entities which will be captured by the AIFMD and of the potential impact on these figures of the rules set out in the present guidelines. The mapping of the population captured by the AIFMD was considered necessary to the extent that the definition of AIF in the final text of the Directive is not the same as the one in the European Commission's initial proposal (COM(2009) 207 final)⁷.
8. Indeed, according to Article 3(a) of the European Commission proposal, an AIF was defined as "*any collective investment undertaking, including investment compartments thereof whose object is the collective investment in assets and which does not require authorisation pursuant to Article 5 of Directive 2009/.../EC [the UCITS Directive];*", whereas Article 4(1)(a) of the AIFMD defines AIFs as being "*collective investment undertakings, including investment compartments thereof, which: (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC;*".
9. The mapping of the population impacted by the AIFMD was initially carried out in Q3 2012 and updated in Q2 2013 and showed the results disclosed in Table 2 below. For the purpose of the mapping, both AIFs whose assets under management are above the thresholds set out in Article 3(2)(a) and (b) of the AIFMD and AIFs whose assets under management are below such thresholds have been taken into account. Indeed, the definition of AIFs in Article 4(1)(a) of the AIFMD, as further clarified in the present guidelines, is relevant to both types of fund.

⁷ Available at: http://ec.europa.eu/internal_market/investment/docs/alternative_investments/fund_managers_proposal_en.pdf.

Table 2: Funds captured by the AIF definition and impact of the guidelines

	Estimates of entities captured by the definition of AIF in Article 4(1)(a) of the AIFMD	Impact of the guidelines on the estimate
Austria	About 970 funds	No material impact on the estimate
Belgium	About 120 funds	No substantial impact on the estimate
Czech Republic	About 160 funds	No impact expected on the estimate.
Finland	250-300 funds	50 additional funds might be captured
France	9,000-12,000 funds	Approximately 1600 additional funds might be captured
Germany	About 4,000 funds (+350 new closed-ended funds expected each year)	No material impact on the estimate
Greece	—	No material impact expected
Hungary	About 520 funds	No material impact on the estimate
Iceland	50-60 funds	No material impact on the estimate
Ireland	More than 2,100 funds	The overall impact on the estimate is not expected to be significant
Italy	About 660 funds	No more than 5% additional entities are estimated to be captured
Latvia	20-25 funds	No material impact on the estimate
Liechtenstein	About 400 funds	No impact expected on the estimate
Lithuania	Up to 20 funds	No material impact on the estimate
Luxembourg	At least 2,000 funds	No material impact on the estimate
Malta	Less than 500 funds	No material impact on the estimate
Netherlands	About 1,400 funds	The impact is expected to be of around 5-10% of funds additionally captured or excluded from the scope
Norway	At least 170 funds	No material impact on the estimate
Portugal	About 450 funds	Roughly 50 funds could be excluded from the scope
Slovak Republic	20-30 funds	No material impact on the estimate
Slovenia	About 10 funds	No material impact on the estimate
Spain	About 330 funds	No impact expected on the estimate
Sweden	500-750 funds	No impact expected on the estimate
UK	Approximately 2,000 funds	No material impact on the estimate
TOTAL	Between approximately 25,650 and 28,975 funds	

Source: Competent authorities of the EEA Member States.

3. Problem definition

- Given the uncertainties surrounding the entities which should be captured within the scope of the AIFMD, ESMA considered that guidelines on key concepts of the AIFMD would add most value if these were aimed at ensuring a common understanding of the different entities captured by the definition of AIF within the Directive (and, therefore, of which entities have to be considered as AIFMs).
- The baseline scenario for this cost-benefit analysis would be the application of the requirements in the Level 1 Directive (i.e. the provisions in Articles 4(1)(a) of the AIFMD) without any further specifica-

tion. This would leave discretion to AIFMs and national competent authorities to determine whether an entity has to be considered an AIF and whether the provisions of the AIFMD apply to it and its AIFM. This could lead to a lack of harmonisation in the application of the provisions of the Level 1 Directive across the alternative investment industry.

12. Indeed, uncertainty on the notions used to define AIFs may lead to regulatory arbitrage and to inconsistent supervisory practices. For instance, an entity could be considered as falling within the scope of the AIFMD by one competent authority whereas a competent authority in a different Member State could consider that the same entity falls outside the scope of the AIFMD. This would be particularly problematic in the context of the EU passport introduced in Article 32 of the AIFMD.

4. Objectives of the guidelines

13. The guidelines aim to promote the objectives of the Level 1 Directive as identified in the Commission's IA and they do so by clarifying the scope of application of certain of the AIFMD provisions. They should contribute to the creation of a level playing field across Member States, which will help ensure that the risks tackled by the AIFMD are done so in a harmonised way and there is reduced scope for regulatory arbitrage (e.g. an undertaking choosing to move its activities to a jurisdiction with a more flexible approach according to which it would not be considered an AIF/AIFM) which could hamper the key objectives of the Level 1 Directive such as the monitoring of systemic risks and strengthened investor protection.

5. Policy options

14. In order to address the problem and comply with the objectives identified above, ESMA not only considered the idea of providing clarifications on the criteria which may be extracted from the definition of AIFs in Article 4(1)(a) of the AIFMD, but also identified in the DP some additional topics for which additional guidance could be beneficial for the purposes of a harmonised application of the AIFMD. These topics are as follows:
 - (i) the clarifications on the appointment of a single AIFM and the range of functions that an AIFM must carry out and to what extent it may delegate these functions to third parties (sections III and V of the DP),
 - (ii) the vehicles which are not AIFMs or AIFs or are exempted from the provisions of the AIFMD (section IV.2 of the DP),
 - (iii) the treatment of UCITS management companies (section VI of the DP), and
 - (iv) the treatment of MiFID firms and Credit Institutions (section VII of the DP).
15. Without prejudice to the possibility to develop further guidelines and recommendations or other convergence tools (e.g. Q&A) in the future on the above topics, ESMA considers that at this stage additional guidance is not needed since the content of the AIFMD Level 2 provisions (Commission Delegated Regulation (EU) No 231/2013⁸) and the list of questions and answers related to the AIFMD published by the European Commission⁹ already provide sufficient harmonisation on most of the above

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:0095:EN:PDF>.

⁹ <http://ec.europa.eu/yqol/index.cfm?fuseaction=legislation.show&lexId=9>.

topics. However, ESMA does not rule out the possibility of providing further guidance on these topics based on the application of the Directive by the competent authorities in the Member States after the end of the AIFMD transposition deadline.

6. The likely economic impacts

16. On the basis of the mapping exercise conducted by ESMA (the results of which are detailed in Table 2 above), the impact of the draft guidelines should not be material in most of the Member States.

Costs

Direct costs

17. The guidelines are unlikely to lead to additional costs to the extent that they provide clarifications on the Level 1 provisions and do not impose additional obligations beyond those already set by the AIFMD on firms whose compliance has to be supervised.

Benefits

18. The expected benefits of the guidelines are as follows:
 - The proposed approach minimises the risk of inconsistencies in the application of the AIFMD and the burden on investment managers by facilitating their assessment on whether or not they are within the scope of the AIFMD.
 - There are likely to be benefits from the guidelines to the extent that they provide competent authorities with a clear framework against which to assess the scope and the application of certain specific provisions of the AIFMD. In the absence of the guidelines, competent authorities would need to clarify on their own the scope and application of such provisions. Indeed, it is likely that AIFMs themselves would seek such clarification from competent authorities. The guidelines should therefore help reduce the need for both one-off and ongoing requests for further guidance and clarification from external stakeholders.
 - There are potential adverse impacts of not having the guidance proposed in the guidelines. Indeed, the guidelines reduce the prospect of regulatory arbitrage which could jeopardise the key objectives of the AIFMD such as the monitoring of systemic risks and strengthened investor protection. By ensuring a harmonised understanding of the scope of the AIFMD, the guidelines will ensure that, for instance, no manager covered in the scope of the Level 1 provisions will escape from the reporting obligations under the AIFMD which are essential for the monitoring of systemic risk which may build-up through the use of leverage.
 - A clear definition of the scope of the AIFMD provisions would also ensure a smoother operation of the AIFMD passport for both EU and (subject to its introduction) non-EU managers: indeed, the guidelines will ensure a common understanding across Europe about which entities shall be considered AIFs/AIFMs.
 - The risk of entities not having the typical characteristics of an investment fund falling into the scope of the AIFMD would be minimised.

Annex II – Opinion of the Securities and Markets Stakeholder Group

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.

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 au-



tomatically 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

Chair

Annex III – Guidelines on key concepts of the AIFMD

I. Scope

Who?

1. These guidelines apply to AIFMs and competent authorities.

What?

2. These guidelines apply in relation to Article 4(1)(a) of the AIFMD.

When?

3. These guidelines apply from two months after the date of publication by ESMA.

II. Definitions

Unless otherwise specified, terms used in the 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 (AIFMD) and in the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision¹¹, have the same meaning in these guidelines. In addition, the following definitions apply for the purposes of these guidelines:

<i>general commercial or industrial purpose</i>	the purpose of pursuing a business strategy which includes characteristics such as running predominantly <ol style="list-style-type: none">i) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services, orii) an industrial activity, involving the production of goods or construction of properties, oriii) a combination thereof.
<i>pooled return</i>	the return generated by the pooled risk arising from acquiring, holding or selling investment assets – including the activities to optimise or increase the value of these assets – irrespective of whether different returns to investors, such as under a tailored dividend policy, are generated.

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>.

¹¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:0095:EN:PDF>.

day-to-day discretion or control

a form of direct and on-going power of decision – whether exercised or not – over operational matters relating to the daily management of the undertakings’ assets and which extends substantially further than the ordinary exercise of decision or control through voting at shareholder meetings on matters such as mergers or liquidation, the election of shareholder representatives, the appointment of directors or auditors or the approval of annual accounts.

pre-existing group

a group of family members, irrespective of the type of legal structure that may be put in place by them to invest in an undertaking and provided that the sole ultimate beneficiaries of such legal structure are family members, where the existence of the group pre-dates the establishment of the undertaking. This shall not prevent family members’ joining the group after the undertaking has been established. For the purpose of this definition, ‘family members’ means the spouse of an individual, the person who is living with an individual in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings, uncles, aunts, first cousins and the dependants of an individual.

III. Purpose

4. The purpose of these guidelines is to ensure common, uniform and consistent application of the concepts that comprise the definition of ‘AIF’ in Article 4(1)(a) of the AIFMD by clarifying each of these concepts. Appropriate consideration should be given to the interaction between the individual concepts of the definition of an AIF and an entity should not be considered an AIF unless all the elements included in the definition of ‘AIFs’ under Article 4(1)(a) of the AIFMD are present. By way of example, undertakings which do raise capital from a number of investors, but do not do so with a view to investing it in accordance with a defined investment policy, should not be considered AIFs for the purposes of the AIFMD.
5. Nevertheless, competent authorities and market participants should not consider that the absence of all or any one of the characteristics under each of the concepts in the definition of ‘AIF’ in Article 4(1)(a) of the AIFMD (i.e. ‘collective investment undertaking’, ‘raising capital’, ‘number of investors’ and ‘defined investment policy’), as set out in these guidelines, conclusively demonstrates that an undertaking does not fall under the relevant concept. Competent authorities and market participants should consider an undertaking to be an ‘AIF’ if the presence of all the concepts in the definition under Article 4(1)(a) of the AIFMD is otherwise established. For the avoidance of doubt, these guidelines illustrate and explain in more detail the characteristics likely to lead to an undertaking being considered an AIF, but they in no way alter the provisions of the AIFMD.
6. The additional details provided by these guidelines should be relevant for the purposes of the AIFMD only and are not intended to affect the meaning of any similar concepts used in any other European legislation, including Directive 2009/65/EC and Directive 2010/73/EU.

IV. Compliance and reporting obligations

Status of the guidelines

7. This document contains guidelines issued under Article 16 of the ESMA Regulation¹². In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.
8. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines within the document are directed primarily at financial market participants.

Reporting requirements

9. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.
10. AIFMs are not required to report whether they comply with these guidelines.

V. Guidelines on the treatment of investment compartments of an undertaking

11. Where an investment compartment of an undertaking exhibits all the elements in the definition of 'AIF' in Article 4(1)(a) of the AIFMD (i.e. 'collective investment undertaking', 'raising capital', 'number of investors' and 'defined investment policy') this should be sufficient to determine that the undertaking as a whole is an 'AIF' under Article 4(1)(a) of the AIFMD.

VI. Guidelines on 'collective investment undertaking'

12. The following characteristics, if all of them are exhibited by an undertaking, should show that the undertaking is a collective investment undertaking mentioned in Article 4(1)(a) of the AIFMD. The characteristics are that:
 - (a) the undertaking does not have a *general commercial or industrial purpose*;
 - (b) the undertaking pools together capital raised from its investors for the purpose of investment with a view to generating a *pooled return* for those investors; and
 - (c) the unitholders or shareholders of the undertaking – as a collective group – have no *day-to-day discretion or control*. The fact that one or more but not all of the aforementioned unitholders or shareholders are granted *day-to-day discretion or control* should not be taken to show that the undertaking is not a collective investment undertaking.

¹² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

VII. Guidelines on ‘raising capital’

13. The commercial activity of taking direct or indirect steps by an undertaking or a person or entity acting on its behalf (typically, the AIFM) to procure the transfer or commitment of capital by one or more investors to the undertaking for the purpose of investing it in accordance with a defined investment policy should amount to the activity of raising capital mentioned in Article 4(1)(a)(i) of the AIFMD.
14. For the purpose of the previous paragraph, it should be immaterial whether:
 - (a) the activity takes place only once, on several occasions or on an ongoing basis;
 - (b) the transfer or commitment of capital takes the form of subscriptions in cash or in kind.
15. Without prejudice to paragraph 16, when capital is invested in an undertaking by a member of a *pre-existing group*, for the investment of whose private wealth the undertaking has been exclusively established, this is not likely to be within the scope of raising capital.
16. The fact that a member of a *pre-existing group* invests alongside investors not being members of a *pre-existing group* should not have the consequence that the criterion ‘raising capital’ is not fulfilled. Whenever such a situation does arise, all the investors should enjoy full rights under the AIFMD.

VIII. Guidelines on ‘number of investors’

17. An undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD. This should be the case even if it has in fact only one investor.
18. An undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD if the sole investor:
 - (a) invests capital which it has raised from more than one legal or natural person with a view to investing it for the benefit of those persons; and
 - (b) consists of an arrangement or structure which in total has more than one investor for the purposes of the AIFMD.
19. Examples of arrangements or structures within paragraph 18 include master/feeder structures where a single feeder fund invests in a master undertaking, fund of funds structures where the fund of funds is the sole investor in the underlying undertaking, and arrangements where the sole investor is a nominee acting as agent for more than one investor and aggregating their interests for administrative purposes.

IX. Guidelines on ‘defined investment policy’

20. An undertaking which has a policy about how the pooled capital in the undertaking is to be managed to generate a *pooled return* for the investors from whom it has been raised should be considered to have a defined investment policy in accordance with Article 4(1)(a)(i) of the AIFMD. The factors that would, singly or cumulatively, tend to indicate the existence of such a policy are the following:
- (a) the investment policy is determined and fixed, at the latest by the time that investors’ commitments to the undertaking become binding on them;
 - (b) the investment policy is set out in a document which becomes part of or is referenced in the rules or instruments of incorporation of the undertaking;
 - (c) the undertaking or the legal person managing the undertaking has an obligation (however arising) to investors, which is legally enforceable by them, to follow the investment policy, including all changes to it;
 - (d) the investment policy specifies investment guidelines, with reference to criteria including any or all of the following:
 - (i) to invest in certain categories of assets, 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; or
 - (vi) to conform to other restrictions designed to provide risk diversification.
21. In paragraph 20(d), any guidelines given for the management of an undertaking that determine investment criteria other than those set out in the business strategy followed by an undertaking having a *general commercial or industrial purpose* should be regarded as ‘investment guidelines’.
22. Leaving full discretion to make investment decisions to the legal person managing an undertaking should not be used as a mean to circumvent the provisions of the AIFMD.