

Guidelines

Guidelines on key concepts of the AIFMD

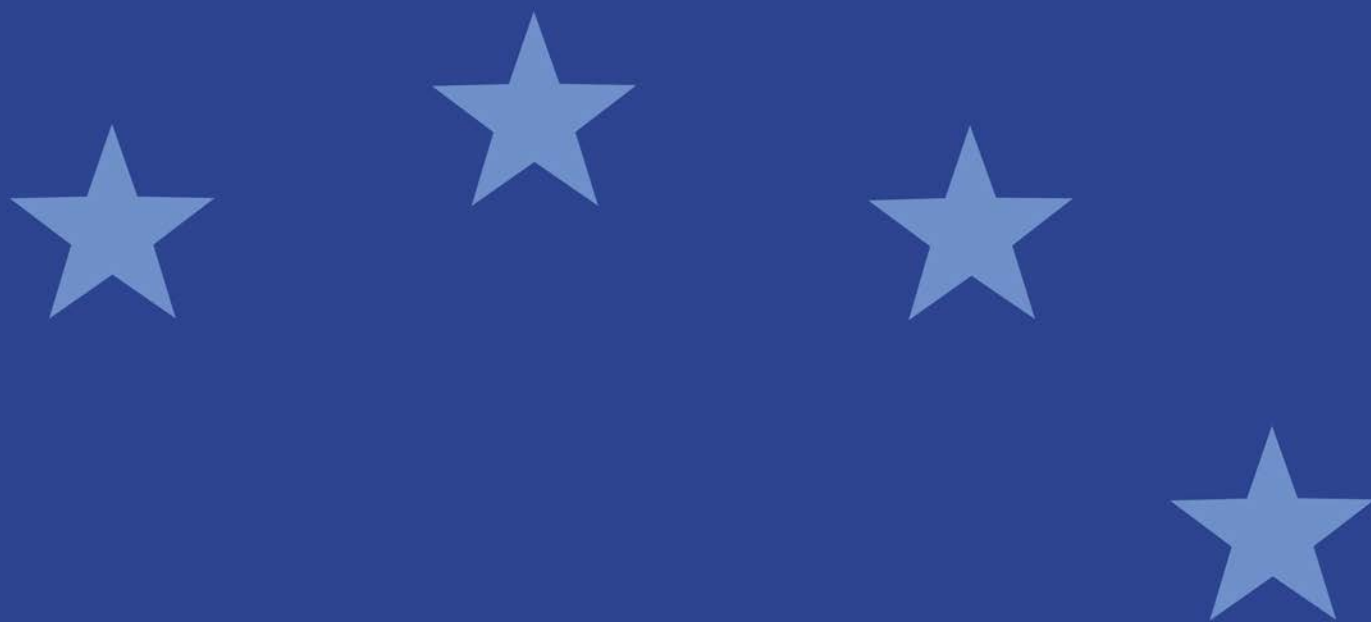


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I. Scope

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 1095/2010¹ (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 supervision², have the same meaning in these guidelines. In addition, the following definitions apply for the purposes of these guidelines:

general commercial or industrial purpose the purpose of pursuing a business strategy which includes characteristics such as running predominantly

- i) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services, or
- ii) an industrial activity, involving the production of goods or construction of properties, or
- iii) a combination thereof.

pooled return 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.

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

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:2013:083:0001:0095:EN:PDF>.

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 Regulation³. 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.

³ 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.