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AIFMD Transposition Questions

No	**Article** in Directive 2011/61/EC	Question	Commission's preliminary views
		Scope and exemptions	
1	Article 2(3)	Are the entities listed in Article 2 not in the scope of the AIFMD because they are exempted, or because they are not alternative investment funds? If they are AIFs, could it be possible to consider these entities as financial counterparties regarding other regulations (such as EMIR)?	The entities listed in Article 2(3), provided they fulfil the requirements laid down therein, are by law not considered to be AIFMs for the purposes of the AIFMD, which excludes them from its scope. It is for EMIR provisions and other regulation to decide whether they may be considered as financial counterparties for the purposes of those regulations.
2.	Article 2(3)(a) and 4(1)(o)	What is to be understood by "holding companies", (for example, clarification is desirable regarding the distinction with financial holding companies). The proper reading of Article 4(1)(o) and its relation to Recital 8 is sought. It is not clear to us, how the words “operating on its own account” in Article 4(1)(o)(i) should be understood. Article 4(1)(o)(ii) seems to address venture capital and private equity. However, venture capital and private equity are not explicitly mentioned unlike in Recital 8, 3rd sentence, which appears to imply that private equity should not be excluded from the scope. A clarification would be welcomed.	The definition of holding companies given in the AIFMD is not related to the definition of financial holding companies in other EU legal acts. It is not possible to introduce additional elements into the definition laid down in the Directive. Article 4(1)(o) has to be read as a whole and jointly with recital 8. Consequently private equity as such should not be deemed to be a 'holding company' in the sense of Article 4(1)(o). "Operating on its own account" should be interpreted also in the context of the requirement that the shares of

			such holding company are admitted to trading on a EU regulated market. Hence this means that the holding company is a separate legal entity that carries out the business of owning and holding equity shares of other companies without the intent to dispose of such shares. Such business is done on the own account of the holding company and not on behalf of a third party. It is inherent in the concept of a holding company that all other operations apart from those related to the ownership of shares and assets are done via its subsidiaries, associated companies or participations. The exclusion of a holding company in Art 2(3)(a) was meant to exclude from the AIFMD large coorporates such as Siemens or Shell. The criterion of being listed is not in itself sufficient.
3.	Article 2(3)(b), (e), recital 8	What is the intention of the Directive with respect to managers which manage AIFs wherein only pension funds invest, are they in or out of scope of the AIFMD? Adequate implementation requires clarification on the following points: • Regarding Article 2(3)(b): not clear is what is meant with the phrase 'in so far they do not manage AIFs'. An exception is only relevant when a manager is in scope of the AIFMD. But, in order to be in-scope of the AIFMD a manager has to manage AIFs. In a nutshell, the phrase 'in so far they do not manage AIFs' implies that the Article 2(3)(b) exception can never be used when relevant (i.e. when a manager is in-scope of the AIFMD). It is a necessity that it is clarified how 'in so far they	According to the wording of Article 3(3) the exclusion depends on whether an AIFM in addition to managing pension funds also manages AIFs. Thus "in so far as they do not manage AIFs" should be interpreted to mean that a pension fund manager would fall within the scope of the AIFMD if, apart from a pension fund it also manages at least an AIF. An AIFM can be exempted from the AIFMD only if it manages exclusively pension funds. An AIF does not become a pension fund, merely because pension funds invest into it. So managers

		do not manage AIFs' in this context should be interpreted. (Note: perhaps a logical interpretation of 'in so far they do not manage AIFs' seems to be: 'in so far they do not manage AIFs which (also) raise capital from parties other than pension funds'). • Regarding to Article 2(3)(e): it is unclear how the phrase 'institutions which manage funds supporting social security and pension systems' should be interpreted. Is this an one-to-one elaboration of the sentence 'this Directive should not apply to the management of pension funds' as included in recital 8? • Regarding to recital 8 ('this Directive should not apply to the management of pension funds'): it is unclear whether the management of pension funds should (also) be interpreted as the management of AIFs in which only pension funds invest.	managing such AIFs are covered by the AIFMD. Under the AIFMD the individual portfolio management of a pension fund by an AIFM can be done only under the conditions laid down in Article 6. In any case one has to consider the rationale for the exclusion of the management of pension funds: namely the fact that pension funds are subject to specific regulation. Also being an exemption, it has to be interpreted narrowly, and in no way provide managers of AIFs with possibilities for circumventing the AIFMD.
4.	Article 2(3)(f)	Can employee savings funds be considered as AIFs, as Article 6(4)(a) provides that Member States may authorize an external AIFM to provide management of portfolios of investments, including those owned by pension funds?	Employee savings funds may be considered as AIFs according to the definition of Article 4(1)(a). As there is no clear definition of employee participation schemes and employee savings schemes, but there is a large variety of such schemes in the Member States, we suggest that each form of such a scheme be assessed on its own merits in order to conclude whether it fulfills or not the elements of the definition of an AIF as laid down in Article 4(1)(a) of the AIFMD. Article 6(4)(a) is about individual portfolio management and therefore it is not relevant for the

			legal determination of an entity as being an AIF.
5.	Article 2(3)(g)	Need for guidance on securitisation and the use of SPEs On one's hand, the AIFMD defines "securitisation special purpose entities" with a cross-reference to Regulation (EC) No 24/2009 of the European Central Bank concerning statistics on this category of investment products. On the other hand, the AIFMD defines "investment in securitisation positions" with a cross-reference to the Directive 2006/48/EC concerning capital requirements. Hence, this lack of consistency regarding the definition of securitisation in the AIFMD might offer opportunities for managers willing to circumvent the directive and deciding to manage a hedge fund through a SPE issuing shares whose performance could be 100% correlated to the hedge fund's performance itself. In order to avoid this risk, a solution would consist in the introduction of an anti-circumvention provision describing the characteristics of all types of SPEs that could be used to circumvent the AIFMD.	The AIFMD has a definition of a securitization SPE in Article 4(1)(an) referring to the ECB Regulation 24/2009. The Commission cannot interpret this definition as referring to the CRD. However, it should be emphasized that the reference to a securitization SPE should be interpreted narrowly and should not be used in order to circumvent the application of the AIFMD. Given the potentially high risk of misuse of this exemption for circumventing the AIFMD, the Commission supports the idea of the development of guidelines by ESMA against circumvention of the AIFMD.
6.	Article 2(3) and recital 8	Please clarify the notion of 'joint ventures' (recital 8). Are joint ventures excluded and if so, under which conditions? One authority would like to clarify the notion of joint venture, and suggests using the criterion of who exercises control over the portfolio. Can the definition of a joint venture be based on the definition of an AIF in Article 4(1)(a), namely on the part referring to "raising capital"? The directive does not provide a definition of joint ventures. This term is commonly used to denote a number of contractual relations formed to carry out one project and generally define a business agreement in which parties agree to develop a new entity and new assets by contributing	Joint ventures are not listed as exemptions in Article 2(3). Therefore recital 8 is a 'floating' recital' which cannot alter or amend the list of exemptions given in the core legal text. A joint-venture could be excluded only if it falls under the exemptions listed in Article 2(3) or if the specific structure of that joint venture does not fall within the definition of an AIF in Article 4(1)(a), which is the core provision defining the features of an AIF. In any event, each situation should be assessed on its

		equity. The parties exercise control over the enterprise and consequently share revenues, expenses and assets. The term "Club deals" generally refers to a LBO or other private equity investment that involves several different private equity investment firms. This group of firms pools its assets together and makes the acquisition collectively. Unlike JVs, Club deals do not provide all investors with control over the management of the assets. The control over the management and strategic decisions is one of the criteria that could be taken into account to consider whether JVs and Club deals should be qualified as AIFs. Inrev also supported this approach in their response to the discussion paper on AIFMD key concepts: they suggested distinguishing joint ventures where all shareholders exercise full control over the strategic decision (veto power) from club deals where some investors may have a say on the strategic orientations but do not have a veto power. Further to this criterion pointing out the difference between JVs and club deals, there is a need for clarifications regarding the definition of all types of joint ventures that provide investors with different levels of control over the management of assets.	own merits in order to determine whether the criteria listed in Article 4(1)(a) are fulfilled or not, whereby substance should prevail over the formal denomination of the specific structure. As a general rule, where there is no definition or common understanding at EU level, national definitions should be used for further specification. A common understanding of the detailed features of an AIF is also currently being discussed by ESMA.
7.	Article 2	Please clarify the scope of the Directive with regard to listed real estate investment companies. We've been contacted by stakeholders that it is unclear whether these companies fall inside or outside the scope. The European listed property companies sector is wide and includes a variety of entities such as European listed property companies, REITs' (market brand present in 7 EU countries), SIICs, G-REITs, FBIs, structured within different legal structures, under different regulations and	The question whether or not a listed real estate investment company is excluded from the scope of the AIFMD depends on whether or not it falls under the definition of an 'AIF' in Article 4(1)(a). Real estate companies cannot be excluded as such a priori, each situation needs to be valued on its own merits, based on substance, not on form.

		characterized by diverse business models.	
8.	Article 3(3) and (4)	AIFMs below the threshold are, subject to national law, required to comply only with Articles 3(3) and 3(4). Can such AIFMs retain an existing MiFID authorization? Is it possible for a MiFID firm to manage portfolios of AIFs whose AUM in total do not exceed the thresholds?	Sub-threshold AIFMs are not hindered to retain an existing MiFID authorization according to the AIFMD provisions. It is mainly national law that applies to sub-threshold AIFMs.
9.	Article 3(3)	AIFMD rules do not apply to AIFMs whose assets under management are less than € 100 mln (if leveraged) or € 500 mln (if unleveraged). For these AIFMs the regime of registration is provided for. Is it possible granting to all AIFMs the authorization and avoiding the regime of registration?	According to Article 3(3) second subparagraph, Member States may adopt stricter rules with respect to the sub-threshold AIFMs. Hence, it seems to be possible to replace the registration regime by an authorization regime, because this is stricter than the registration regime. However, should Member States decide to apply a regime which is stricter than the registration but lighter than the AIFMD authorization regime the entities will not benefit from the rights granted under the AIFMD. The future interaction with the VC and EuSEF regulations may be taken into account by Member States when deciding to impose stricter rules on the sub-threshold AIFMs. However the minimum registration regime laid down in Articles 3(3) and (4) of the AIFMD and also Article 46 cannot be departed from.
10.	Articles 3, 5	According to Article 5 par.1 of the 2011/61 (AIFMD) all AIFs falling into the scope of the AIFMD shall designate an alternative investment fund manager (AIFM). Taking into account that the AIFMD (except for par. 3	Only Articles 46, 3(3) and (4) apply to AIFMs below the thresholds. Therefore it is for the Member States to decide in their national laws and in accordance with

		and 4 of Article 3) does not apply to AIFMs managing portfolios of AIFs whose assets are below certain AUM thresholds (small AIFMs), is it possible that an investment firm, a credit institution or a UCITS management company acts as an AIFM for the said AIFs?	the relevant EU sectoral legislation, i.e. MiFID rules, UCITS rules and CRD rules, if an investment firm, a credit institution or a UCITS manager may be the AIFM of a sub-threshold fund.
11.	Article 3(3), (4)	Shall an internally managed AIF whose portfolio includes assets below the thresholds referred to in Article 3 par. 2 of AIFMD be considered as AIFM for the application of Article 3 par. 3 and 4 of AIFMD?	Yes, for the purposes of Article 3(2) it is not relevant whether a fund is managed internally or externally. Internally managed AIFs should also be considered.
12.		The AIFMD constantly refers to "units or shares." In order to cover AIF's issuing securities other than units, would it not be more appropriate to use the general term "securities" in some specific articles of the AIFMD (e.g. in articles (i)regarding the marketing of units or shares of AIF's or(ii) concerning the supervisory tasks of the depositary)?	As a matter of principle, the Commission considers the term "units and shares" to be generic and inclusive of other forms of equity of the fund, i.e. a stock or any other security representing an ownership interest in the fund.
Definition of an AIF			
13.	Article 4(1)(a)	The Directive seems unclear whether and in what circumstances a set of arrangements between several legal or natural persons should be considered to be a single AIF or multiple AIF. According to the Directive a criteria of an AIF is that it must be an “undertaking”: even if this term is not defined in Community law, it is likely to encompass certain pooled investment vehicles, but mere parallel investment arrangements and ordinary corporate and joint venture arrangements should not be caught by the definition, even if one of the participants is a fund. For instance, in a private equity fund where there are several “parallel” limited partnerships having a common general partner and a common AIFM, each undertaking	The definition of an AIF has been intentionally drafted broadly by the legislators in order to capture the variety of fund structures in all Member States (hence the broad formulation "collective investment undertakings"). The intention behind such wording was to include investment funds in one of the two categories: AIFs or UCITS and to avoid any gaps. Whether a structure falls within this definition can be determined only on a case-by-case basis, taking into account its specific features. ESMA is currently

		(limited partnership) should be properly regarded as a separate and distinct AIF. Also a private equity AIF structured as a limited partnership may have amongst its limited partners another limited partnership and these limited partnerships may have a common AIFM: if the second limited partnership has the features of an AIF, then there will be two separate AIFs, one a feeder fund into the other, whereas if it is not the case, there will be one AIF, which is the main fund limited partnership.	discussing these aspects in more detail.
14.	Article 4(1)(a)	Does the definition of AIF in Article 4(1)(a) include REITs or real estate companies?	The question whether or not a REIT or real estate company is excluded from the scope of the AIFMD depends on whether or not it falls under the definition of an 'AIF' in Article 4(1)(a). Each structure should be considered on its own merits based on substance, not on form.
15.	Article 4(1)(a)	It would be worth considering an alternative definition to the one proposed in the ESMA discussion paper on technical standards. In this sense, an open ended fund should be the one with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets (as stated in the UCITS Directive), regardless of the frequency of redemption intervals. In this sense the liquidity management (art 16) should be in line with that frequency. For instance a hedge fund with a three-year lock up period should be considered an open ended fund and its NAV calculation should be carried out at least on an annual basis and in any case according to the redemption facilities.	The question relates to the definition of open-ended funds as discussed by ESMA. Such debate should continue within the framework of the discussions led by ESMA concerning draft regulatory technical standards according to Article 4(4).
Own funds			

19.	Article 9(3)	Article 9 provides that the additional amount of own funds shall be equal to 0.02% of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million. Which are the portfolios to be taken into account? Does that include the portfolios under individual management (mandate)? If the AIFM also acts as a management company for UCITS the mandates are already taken into account, but what if the management company only acts as an AIFM?	No, portfolios under individual/discretionary management should not be included when calculating the additional own funds. Article 9(2) refers to value of portfolios of AIFs managed by AIFMs. Hence, individually managed portfolios are excluded.
20.	Article 9(3)-(6)	To what extent should the own fund requirements in Article 9 (3) - (6) of the Directive be applied to internally managed AIFMs? The applicability of point (1) to internally managed AIFs and of point (2) to externally managed AIFs is clearly indicated whereas this is not the case for the following points (3) to (6) of Article 9.	The definition of an AIFM includes both internally managed AIFs and external AIFMs. Whenever the AIFMD uses the term AIFM without making any differentiation between the two categories, it comprises both categories. When it intends to only cover one category, the AIFMD is explicit in mentioning the target category only. In consequence, the neutral term 'AIFM' in Article 9(3) comprises both categories. The definition of an AIFM is independent of the dichotomy that exists between management companies and investment companies in UCITS. UCITS investment companies are not considered as UCITS management companies within the scope of Article 2(1)(b) UCITS but follow a distinct set of rules set out in Chapter IV UCITS. The differences between UCITS investment companies and UCITS management companies are therefore more fundamental than those between internally managed AIFs and external AIFMs.
21.	Article 9(7)	Article 9 (7) requires additional own funds to cover professional liability risks resulting from “activities AIFMs may carry out pursuant to this	No, for the purpose of determining additional own funds to cover professional liability risks the

		Directive". Permitted activities include the management of UCITS – although this is subject to authorization under the UCITS Directive. However, should the management of UCITS activity be covered by the additional funds or professional indemnity insurance specified in Article 9(7)?	management of UCITS is excluded because Article 9(7) refers to activities that AIFMs may carry out pursuant to the AIFMD. The draft level 2 Regulation, in line with the ESMA advice, specifies that only the assets of AIFs managed have to be taken into account when calculating own funds.
22.	Article 9(7)	An AIFM which is also authorized under the UCITS Directive is permitted under both Directives to carry out management of portfolios of investments (individual portfolio management). Could an AIFM with dual authorization as a UCITS management company indicate that the individual portfolio management activity was carried out under the UCTS authorization and accordingly not subject to Article 9(7)?	There should be no free riding, it has to be always clear from the beginning under which license an activity is performed.
23.	Articles 3 and 9	AIFMD Article 3(3) stipulates that AIFM under the threshold are subject to registration with the competent authorities of their home MS but are not required to comply with requirements set out in Article 9. AIFMD is the minimum harmonization Directive and it is our understanding that setting the initial capital and own funds for registered AIFM is fully up to the MS. Could you please confirm that?	Indeed, it is for Member States to determine the capital requirements for sub-threshold AIFMs. The AIFMD does not contain such requirements
24.	Article 9(8)	Article 9 (8) requires that own funds of AIFM, including any additional own funds, shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions. This is a new requirement, which also applies to UCITS management companies. We would appreciate the clarification of this paragraph. What kinds of assets shall be treated as liquid assets or assets readily convertible to cash in the short term and without including speculative positions?	The provision in Article 9(8) is designed to apply in the interest of investors. Compliance with it shall be assured by the AIFM on a continuous basis and throughout the life of an AIF. Consequently, it is not possible to indicate a limitative list of specific types of assets that shall be treated as liquid, as the "liquidity" of a specific asset may change over time. The emphasis should be not on types of

			assets but on specific features that warrant the liquid nature of assets. Member States may develop principle based criteria to specify what should be considered as liquid or readily convertible to cash. To achieve a common approach ESMA is encouraged to fuel convergence between Member States' positions on this issue
Remuneration			
25.	Article 13	The AIFMD does not specify the threshold from which the remuneration committee must be established. The AIFMD only states that the creation of a remuneration committee is compulsory for AIFM's that are significant in terms of their size or the size of the AIF's they manage, their internal organisation, and the nature, the scope and the complexity of their activities (cf Annex II, § 3). How does the Commission interpret this provision?	ESMA is currently developing guidelines on remuneration, a consultation paper was published that proposed an approach to the determining what should be considered as "significant in size".
Valuation			
26.	Article 19	According to Article 19(5)(c) the AIFM shall demonstrate that the appointment of the external valuer complies with the requirements of Article 20(1) and 20(2). According to Article 20(1)(e) the AIFM must be able to demonstrate, inter alia, that the AIFM is in a position to give at any time further instructions to the delegate [i.e. external valuer]. Is the understanding correct that the instructions of the AIFM may not refer to	Yes, the understanding is correct.

		the valuation results? Otherwise, Article 20(1)(e) would contradict the requirement of an independent external valuer.	
Delegation			
27.	Article 20	According to ESMA's Discussion Paper on technical standards on the one hand i) in order to be appointed as the AIFM for an AIF, it is not necessary for the AIFM to perform the additional functions set out in Annex I, and on the other hand ii) if the AIFM may choose not to perform itself the additional functions set out in Annex I of the AIFMD, ESMA believes that in such a case these functions should be considered as having been delegated by the AIFM to a third party (retaining the responsibility). One authority is of the opinion that to delegate any function, first, it has to be provided by the AIFM. For instance to delegate the administration (an addition function according to Annex I) the AIFM has to provide this function because one cannot delegate a function for which it has not been authorised. In this sense, in the case of an AIF that lacks legal personality, a single AIFM has to be appointed to perform the functions of portfolio management, risk management, administration and marketing (even if some function are further delegated). In the case of an AIF with legal personality, it would be possible to appoint an AIFM to perform the portfolio management and risk management (even if one of these is delegated) and also to appoint other entities to carry out the remaining functions (such as the administration).	There is no clear cut answer. The fund structure appears to be mostly relevant when considering which functions have been attributed to the AIFM and therefore can be also subject to delegation by the AIFM. In any case, the AIFM is responsible for ensuring compliance with the AIFMD, even if it is the AIF or another entity on its behalf that is responsible for performing that activity (see Article 5, recital 11).
28.	Article	What are the views on whether an AIFM retains responsibility for	It depends on the fund structure – see answer above.

	20(3)	administrative functions? This responsibility is clearly stipulated in Article 19 of level 1 for the valuation tasks, but much less clearly in the case of a delegation of administrative tasks for example under Article 20 (3) of level 1.	In any case the AIFM is responsible for ensuring compliance with the Directive, even if it is the AIF or another entity on its behalf that performs an activity (see Article 5, recital 11).
29.	Article 20	Should the requirements set out in Article 20 of the AIFMD and Articles 76 to 83 of the draft Commission regulation apply to all functions referred to in Annex I of the AIFMD?	Yes; the provisions apply to any delegation by an AIFM, within the limits described in the Level 2 Regulation.
30.	Article 20 and Level 2 regulation	One MS remains concerned about the article on the letter-box entity in Level II, which results in serious difficulties for the sector and cannot be complied with by most AIFM at this time. It is common for portfolio management or risk management to be delegated to a specialist MiFID-authorised entity. We are concerned this article remains overly burdensome. In our opinion delegation of portfolio and risk management within the group should be possible without resulting in a letterbox entity.	This is a matter of application of Level 2 where we listed the criteria for determining whether an entity is a letter box.
		Depositary	
31.	Article 21	The new classification of assets to be held in custody by the depositary according to article 21 (8) can result in major restructurings in certain member states depending on the outcome on further level 2 provisions on article 21 (8). In order to prepare for the new requirements there is a need for transitional provisions also in this respect.	No specific transitional requirements are foreseen for the requirements related to the depositary, except for the ones in Article 61(5). The basic rules and policy choices are already contained in Level 1, the Level 2 only specifies them.
32.	Article 21(5) and	From article 21(5) jointly read with article 4(1)(j) it follows that an appointed depositary should have its 'registered office or branch' in the	For depositaries which are a credit institution or a MiFID firm the definition of a branch is provided in

	4(1)(j)	member state of the AIF. However, article 4 does not define the notion of 'branch' in the context of the depositary. Please provide some more detail on which substance requirements these branches have to fulfil?	the CRD and MiFID respectively. With respect to another category of depositary as foreseen by Article 21 (3)(c) it is for the national law to define, considering the common understanding.
Reporting requirements			
33.	Articles 22-24	There is a need for a transition period for the implementation of the reporting requirements. This is important so that the AIFMs targeted could have reasonable time to prepare for such extensive reporting requirements. This would also impact on the quality of the reporting in the long run, if it can be properly planned and executed from the beginning. It should be taken into account that the detailed reporting requirements, that are crucial to the preparatory work on reporting, on level 2 have not yet been published.	No specific transitional requirements are foreseen for reporting obligations. Furthermore, certain of the reporting obligations i.e. annual report, have a later date for compliance than the entry into force of the AIFMD (annual report should be provided no later than 6 months following the financial year). In addition, some of the AIFMs may be subject to reporting obligations under the Transparency Directive in which case the burden will not be so important.
34.	Articles 22-24	When will existing AIFMs be expected to commence reporting? Will reporting commence as and when each AIFM is approved or, for consistency of reporting, will they all start at the same time? Do AIFMs under the respective threshold have to report as of July 2012?	Existing AIFMs will be expected to start reporting as of the date of the application of the AIFMD. New AIFMs will have to report as of their authorisation. Sub-threshold AIFMs also have to start reporting as of July 2012. The frequency of reporting is harmonised, whereas the starting date might be different. We therefore encourage ESMA to issue guidance concerning the alignment of the dates of delivery of information if

			deemed necessary.
36.	Article 43	What happens after July 2013 to the cross-border marketing of AIFs that could be subject also to Directive 2003/71/EC (Prospectus Directive)? Which regime prevails?	If the possibility for derogation provided for in Article 43 is used by Member States, it seems that there is a possible overlap between the AIFMD and the Prospectus Directive. For this purpose, Article 43 starts with the wording "Without prejudice to other instruments of Union law…". It follows that in such cases the rules of the Prospectus Directive will also apply. Therefore both regimes apply.
Transitional provisions			
37.	Article 61(1)	Article 61(1) provides that AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorization within 1 year of that date. Does this mean that existing AIFMs have one year to comply in full with national law and to submit an application for authorization?	During the one year transitional period, AIFMs are expected to comply, on a best efforts basis, with the requirements of the national law transposing the AIFMD. The AIFM's obligation to seek an authorization (Chapter II and Chapters VI, VII) is legally binding, but only needs to be complied with within a year of the entry into force of the Directive. In respect of other requirements contained in the AIFMD (such as the general principles, operating conditions, organizational requirements, conflicts of interests, remuneration, risk management, liquidity management rules, securitization rules, valuation, delegation, depositary rules and reporting

			requirements), an AIFM that exists at the date of entry into force of the AIFMD, shall – already during the transitional period -- take all necessary measures (i.e., expend its best efforts) to comply with the AIFMD in respect of all relevant activities undertaken subsequent to the entry into force of the AIFMD (22 July 2013). After the transitional period, all of the obligations arising under the AIFMD are legally binding. According to Article 5, paragraph 1, Member States shall ensure that each AIF has a single AIFM which shall be responsible for ensuring compliance with the AIFMD. Art 5 applies as of 22 July 2013. Transposition of this provision into national law should enable Member States to monitor compliance of the not-yet authorized single AIFMs. Member States may choose the means of how to achieve the above mentioned goal. The issue of enforcing compliance against unauthorized AIFMs is, however, a more general issue: even after expiry of the transitional period, the risk that certain AIFMs continue operations without seeking an authorization and without complying with the AIFMD persists.
38.	Article 61(1)	If read verbatim, Article 61(1) seems to require that necessary measures shall be taken earlier than an authorization is granted. However, it has become clear that e.g. reporting requirements and depositary arrangements would be difficult to meet before an authorization	Compliance with the Directive has to be ensured on a best efforts basis as of the date of transposition into national law. In general, existing AIFs will be expected to start reporting as of the date of the application of the

		is granted. We would welcome a clarification.	AIFMD in accordance with the reporting frequencies foreseen in Level 1 and Level 2 rules. Also, compliance with e.g. reporting obligation or other obligations does not depend on having obtained an authorization with the competent authorities.
39.	Article 61(3), (4)	Article 61(3) provides that AIFM that manage closed-ended AIF, that fulfil certain criteria, can continue to manage such AIF without authorisation under this Directive. Article 61(4) provides that AIFM that manage closed-ended AIF, that fulfil certain (other) criteria, can continue to manage such AIF without needing to comply with this Directive except for some Articles or to submit an application for authorisation under this Directive. Do Article 61(3) and 61(4) have the same legal consequence, i.e. that the AIFMD does not apply to these AIFM, or is there a difference? If yes, which one?	Article 61(3) aims to avoid a regulatory burden for AIFMs that manage closed-end funds and who neither receive new money from investors nor make additional investments. AIFMs of such closed-end funds should not be subject to authorization or material compliance. However, it is very important that the concept of "additional investments" is interpreted in a way that does not create opportunities for circumvention of the AIFMD.
40.	Article 61(3), (4)	Do Article 61(3) and 61(4) also exclude the requirement for a registration pursuant to Article 3?	In light of the aim of Articles 61(3) and (4), as described above, managers described in Articles 61(3) and (4) who are exempt from authorization and from compliance with the AIFMD (except for certain provisions) are also exempt from registration. Articles 3(2) and (3) do not apply to such managers either. Applying the requirements of Articles 3(2) and (3) AIFMD would lead to the consequence that AIFMs below the thresholds are subject to requirements which do not apply to AIFMs which are above the threshold. This result is not intended by the sub-threshold provisions in the AIFMD.

41.	Article 61(3), (4)	When calculating the total assets under management, do also the AUM of the portfolios of article 61(3) and 61(4) have to be taken into account (in case of an AIFM which manages both regular AIFs and AIFs falling under article 61(3) and 61(4))?	Given the fact that the management of the funds described in Articles 61(3) and 61(4) is subject to grandfathering under the AIFMD, it can be inferred that the portfolios of such funds should not be counted for the purpose of calculating the assets under management of an AIFM managing also other types of AIFs.
42.	Article 61(3)	Article 61(3): What does “which do not make any additional investments” mean? For example does it include or exclude: • After 22 July 2013 target fund calls in capital (closing) that fund of funds has committed to before 22 July 2013. • Fund commits to buy asset before 22 July 2013, but closing is after 22 July 2013. • Investments in bank deposit • Additional financing of portfolio companies that fund acquired before 22 July 2013 • Investments in acquired assets (e.g. refurbishment, reconstruction, renovation) • Capital increases required for financial restructuring • Fund of funds acquired target fund before 22 July 2013, target funds makes additional investments after 22 July 2013.	The interpretation of "additional investment" has to take place in the context of the specific investment strategy and in the context of the legal provisions which aim to exempt AIFMs that manage end-of-life AIFs from the application of provisions of the AIFMD Therefore 'additional investments' should be interpreted widely. We generally understand "make additional investments" as implying a new contract, involving investment of capital for the purpose of obtaining a gain. However, the management of the portfolio falling under the provision in Article 61(3) for the sole purpose of maintaining the value of the portfolio should be possible. Hence limited amounts of financial injection should be possible provided they are arising out of existing commitments, they represent a negligible percentage of the AIF's portfolio and they aim only to maintain the value of the portfolio.

Transposition			
43.	Article 66	• According to Article 66(1) of the AIFMD, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive by 22 July 2013. They shall communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive. According to Article 66(2), Member States shall apply these laws, regulations and administrative provisions from 22 July 2013. However, according to Article 66(3) Member States shall apply the laws, regulations and administrative provisions necessary to comply with Article 35 and Articles 37 to 41 in accordance with the delegated act adopted by the Commission pursuant to Article 67(6) and from the date specified therein. – Should Member States adopt and publish the laws, regulations and administrative provisions necessary to comply with Articles 35, 37 to 41 of the AIFMD by 22 July 2013 even if the Member States shall apply these laws, regulations and administrative provisions from a later date which will be specified in a delegated act adopted by the Commission in 2015?	Yes, Article 66(1) requires that Member States adopt and publish their national measures by 22 July 2013. Only application is deferred for later according to Article 66(3) and (4). Transposition should be communicated by the Member States together with a transposition table. In case a Member State does not transpose all provisions of the AIFMD, it will have to signal partial transposition.
Passport issues			
44.	Articles 33(1), 31(6), 32(9), 35(17), 39(11),	According to Article 33 (1) AIFMD, Member States shall ensure that an authorised EU AIFM may manage EU AIFs established in another Member State provided that the AIFM is authorised to manage that type of AIF. Pursuant to Article 31 (6) , 32 (9), 35 (17), 39 (11) und 40 (17)	The AIFMD does not regulate the establishment of retail funds which is a matter of national law. The AIFMD permits the marketing of AIFs by AIFMs to retail investors only under the conditions foreseen in

	40(17), 43(1)	AIFMD, Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors. According to the second subparagraph of Article 43 (1) AIFMD, Member States may impose stricter requirements applicable to the AIFs marketed to retail investors in their territory. Taking this into account, the national law of the Member States may provide for a specially regulated type of retail fund which may not be managed by an AIFM established in another Member State.	Article 43 which include also non-discrimination provisions. (see also recital 71). Article 43 allows Member States to impose stricter requirements than those applicable to the marketing of AIFs to professional investors. This means that in no case can an AIFM bypass the requirements for marketing to professional investors foreseen in the AIFMD by marketing to retail investors.
45.		Assumed that Member State A provides for the same rules applicable to the marketing of AIF to professional investors on the one hand and on the other hand to so called semi-professional investors (cf. Article 6 of EuVeCa Regulation) in Member State A: Can Member State A also provide that an EU-AIFM from Member State B holding an EU pass for the marketing to professional investors is allowed to market its EU-AIF also to semi-professional investors in Member State A. Or does the AIFMD require a notification with the competent authority of Member State A for such a cross-border marketing to semi-professional investors?	Marketing of AIFs cross-border to professional investors has to be done under the passport and via notification. It is Member States' national law that applies to the marketing of AIFs to non-professional investors, including cross-border marketing to non-professional investors. Article 43 foresees only that no stricter or additional requirements on EU AIFs than those applicable to AIFs marketed domestically should be applied. Hence, Member State A may allow an EU-AIFM from Member State B to market its EU-AIFs also to semi-professional investors in Member State A. This would not mean that such AIFM would be allowed to market to semi-professional in Member State B if this is not allowed in Member State B. Furthermore, to be able to check compliance with its own rules, Member State A needs to be informed of the EU-AIFs that are marketed in its territory, irrespective where they are established. Requirements on AIF's or AIFM's might be stricter under national law, therefore the notification procedure would not be automatically applicable. Member States

			could decide if they want to rely on the notification procedure or if they want to put in place specific national rules how to be informed.
46.		Shall it be possible for an AIFM to transfer the management of an AIF to an AIFM in another Member State? – If so, is this regardless of the AIF is subject to a fund legislation, e.g. a Special Funds Act, in its home Member State or subject only to the AIFMD (and applicable national corporate law)? – If so, is this regardless of the AIF is a fund that is established before 22 July 2013 or a fund established that date or later?	Under the AIFMD the transfer, understood as appointment of a new AIFM for an AIF should be possible, provided that the new AIFM is AIFMD compliant. The new appointment is not dependent on national fund law and/or corporate law since *"[t]he fact that a Member State may impose requirements additional to those applicable in other Member States on AIFs established in its territory should not prevent the exercise of rights of AIFMs authorised in accordance with this Directive in other Member States*" (Recital 10). Whether the fund is being managed by an AIFM before or after 22 July 2013 is relevant only for the purposes of the transitional provisions in Article 61 that should be interpreted as indicated above.
47.	Articles 36, 42	The interaction between (a) articles 42 and 36, and (b) article 3 – and whether the sub-threshold regime can be applied to non-EU AIFMs and EU AIFMs managing and / or marketing non-EU AIFs. We're getting questions around the apparent anomaly that sub-threshold third country managers operating under private placement regimes are subject to higher transparency requirements than domestic registration-only managers	The Directive has a limited applicability as regards sub-threshold AIFMs; therefore it is up to Member States how to apply the national private placement regimes to non-EU AIFMs that would qualify as sub-threshold AIFMs. Article 3 only requires registration, but does not

			differentiate between EU and non-EU managers, being both within the scope of the Directive under article 2.1.
Responsibility of Member States' competent authorities			
48.	Articles 33, 41	Articles 33(6) provide for a written notice by the AIFM to the competent authorities of its home Member State in the event of a change to any of the information communicated in accordance with Article 33(2), and, where relevant, Article 33(3). If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with the AIFMD, or the compliance by the AIFM with the AIFMD otherwise, the competent authorities of the home Member State of the AIFM shall, without undue delay, inform the competent authorities of the host Member States of the AIFM of those changes. As Article 33(6) only refers to changes to any information communicated in accordance with Article 33 paragraph 2 or 3, there is actually no obligation to inform the competent authorities of the host Member States of the AIFM of any change in the scope of the authorisation granted to the AIFMD. As under the UCITS regime any change in the scope of the authorisation has to be communicated to the competent authorities of the host member State, and in order to achieve a level playing field, such an obligation should be discussed with respect to the transposition of Article 33 AIFMD. The same applies to Article 41(6) AIFMD.	The second subparagraph of Article 33(4) requires the home Member State competent authorities to submit to the competent authorities of the host Member State a statement to the effect that the AIFM concerned is authorised by them. We interpret this as meaning that a change to the authorisation in the sense of article 10 of the Directive would require a new statement by the home country competent authorities. This would also be the consequence, under article 50.4, if the information is required for the purposes of carrying out the duties of the host MS' competent authority.
49.		The AIFMD is based on the supervision on the AIFM and not on the AIFs, however in several countries funds are also specifically regulated by law and other secondary provisions which state the working mechanism of	It is the Member States who remain responsible for fund regulation. Hence national law regulating funds in a certain country applies to AIFs established in that

		alternative funds (including general limits to their total borrowings, reporting obligation, valuation of assets, annual accounts and disclosure to investors, crisis resolution measures, etc.). We are wondering – in case of institution of a fund in a country other than the home country of the AIFM – what are the instruments available to the host country Authorities for checking compliance with the host applicable rules concerning the AIF and to request to the AIF for statistical information.	country, irrespective whether they are managed by a domestic AIFM or by an EU_AIFM managing that AIF with or without a passport, and insofar national law does not prevent the exercise of rights of AIFMs authorised in accordance with this Directive in other Member States. Cooperation between national authorities should be done on the basis of articles 45 and 50. Additionally, Article 45(3) explicitly allows the competent authorities of the host Member State of the AIFM to require the AIFM to provide them with information necessary for the supervision of compliance with applicable rules for which the host country is responsible.
50.	Articles 24 and 42	Article 42 states that, where a non-EU AIFM markets AIF in the EU, the competent authority of the member state where the AIF is marketed will receive the reports with regard to Article 24. According to Article 24 para. 2 and para. 4 subpara. 3, those reports must be provided by the non-EU AIFM for each of the managed EU-AIFs and each AIF marketed in the EU. Does that imply that the competent authority of member state A (were the non-EU AIFM markets some AIF) also receives reports on AIF marketed solely in member state B? Or does it in that case just refer to AIFs managed or marketed in its jurisdiction?	Reporting obligations apply in respect of each AIF marketed, whereby the competent authority is deemed to be the authority of the Member States where the AIF is marketed without a passport. Hence Member State A will receive reporting for AIFs marketed in A, Member State B for those marketed in B.
Cooperation between Member States' competent authorities			

51.	Articles, 31(4) 32 (7), 35 (10), 39 (9) und 40 (10)	According to Article 32 (7), 35 (10), 39 (9) und 40 (10) AIFMD, the competent authorities of the home Member State of an AIFM should inform, without delay, the competent authorities of the host Member State of the AIFM of the changes described therein. It seems not entirely clear who is meant by "host Member State". Pursuant to letter r in Article 4 (1) AIFMD, host Member States are all Member States other than the home Member State where an AIFM manages or dis-tributes AIFs. Consequently, not only the Member States where the AIF is distributed but also the Member States where the AIF is domiciled would have to be informed. However, Article 31 (4) AIFMD and the second subparagraph of Article 32 (4) AIFMD contradict such reading. Article 31 (4) AIFMD does not provide for any information duty vis-à-vis the Member States where the AIF is domiciled. And pursuant to Article 32 (4) AIFMD, the competent authorities of the AIF shall be informed that the AIFM may start marketing the units or shares of the AIF in the host Member State of the AIFM.	It should be assessed on a case-by-case basis how the rules of Article 4(1)(r) apply i.e. in each of the above mentioned articles an assessment should be done on the basis of the subject matter of these articles in order to identify which is the host Member State.
52.	Article 45	Article 45 AIFMD provides for a division of responsibilities and for rules of cooperation between the competent authorities of the host Member State and the home Member State of an AIFM. According to Article 4 (1)(r) AIFMD, the host Member State of an AIFM is a Member State in which the AIFM distributes or manages shares or units of an AIF. Consequently, the question arises whether Article 45 AIFMD also applies if such distribution in another Member State is made on the basis of facultative national rules based on Article 36, 42 and 43 AIFMD. And if so, to which extent Article 45 AIFMD applies in such cases.	Article 45 specifies the responsibilities of competent authorities and their interaction. Article 45(1) foresees the general competence for the prudential supervision of the AIFM for the home country authorities of that AIFM, safe where the AIFMD recognises the responsibility for supervision for the host Member State. This exception includes not only the explicit competence of the host authority for supervision of compliance with Articles 12 and 14 foreseen in Article 45(2), but also other instances. For example the AIFMD recognises the competences of a competent

			authority of an EU AIF, as defined in Article 4(1)(h), to supervise the compliance with the applicable rules for which that competent authority is responsible Article 45(3). To allow a host Member State to exercise its supervisory duties without however impinging on the competences of the home Member State and without introducing obstacles to the cross-border marketing or management of AIFs, Articles 45(3)-(8) introduce provisions for the cooperation between Member States. Hence, the provisions laid down in Article 45 are intended to apply also for supervising compliance with the stricter national rules adopted by Member States on the basis of Articles 36, 42 and 43.
Issues related to master AIFs and feeder AIFs			
53.	Articles 31 (1), 32 (1), 35 (1), 36 (1), Annex III and Annex IV	The AIFMD mentions feeder AIF and master AIF in Article 31 (1), 32 (1), 35 (1), 36 (1), Annex III and Annex IV. • Article 35 (1) AIFMD referring to EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31 (1) AIFMD only makes sense if the requirements of Article 35 (2) AIFMD apply also on the non-EU master AIF and/or its non-EU AIFM. In this	The proposed interpretation to the first questions seems reasonable in order to ensure that all necessary information is made available. The proposed interpretation of the second question appears to be reasonable in order to avoid circumventions of the AIFMD

		case Annex 3 and Annex IV e must be read in a way that not only the information on where the master is established but also all other information must be given that is required to examine whether the requirements of Article 35 (2) AIFMD are met by the non-EU master AIF and/or its non-EU AIFM. • In order to avoid circumventions of the AIFMD, Article 39 AIFMD should only apply to EU feeder AIFs that fulfil the requirements referred to in the second subparagraph of Article 31 (1) AIFMD. For EU feeder AIFs that do not fulfil the requirements referred to in the second sub-paragraph of Article 31 (1) AIFMD, Article 40 AIFMD should apply.	A "feeder AIF" is defined in Article 4(1)(m) of the AIFMD.
54.	Article 36(1)	According to Article 36 (1) AIFMD, Member States may allow an authorised EU-AIFM to market to professional investors, in their territory only, units or shares of non EU AIFs it manages or EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31 (1) AIFMD provided that the (minimum) requirements listed in (a), (b) and (c) are met. Consequently, there is no obligation of the Member States to allow the marketing of such funds in their territories. In contradiction thereto, Article 31 (2) AIFMD provides only for a right of the Member States to impose stricter rules on the AIFM in respect to the marketing of units or shares of non-EU AIFs to investors in their territory. In any case, the requirements of Article 31 (1) AIFMD and the imposition of stricter rules pursuant to Article 36 (2) AIFMD should also apply to non-EU Master-AIFs and its non-EU AIFM.	Member States may impose stricter rules with regard to the marketing by virtue of Article 36. Such stricter rules may cover also master-feeder structures established for circumventing the provisions in Article 36 of the AIFMD.
Issues related to Article 37 AIFMD			

55.	Article 37(5) and (9)	Article 37(5) fourth subparagraph AIFMD as well as Article 37(9) third subparagraph AIFMD state that the term referred to in Article 8(5) shall be suspended during the ESMA review in accordance with the respective paragraph. It is unclear when exactly the suspension begins and ends.	The suspension starts from the moment of notification of ESMA and lasts until ESMA has issued its advice. .
56.		Is our understanding of the AIFMD correct, that in case the member state of reference changes, there is a new authorisation process by the competent authorities of their new Member State of reference?	~~Under Article 37(11) para. 5, competent authorities of the new MS of reference are competent for authorising and supervising the AIFM from the date of transmission of the authorisation and supervision file.~~ ~~Whether a change of the Member State of reference will imply a reassessment of the authorisation granted by the competent authority of the original MCember State of reference will depend on the extent to which the factual situation leading to the change of MS of reference might also be relevant as regards the grounds on which authorisation was granted by the original MS of reference~~A new authorisation is needed if the initial authorisation does not cover the new managing/marketing activity. As regards the existing authorisation a re-authorisation does not seem to be required, as the old Member State of reference has to transfer to the new Member State of reference all relevant documentation. ~~However, t~~The new Member State of reference should take over all tasks and duties incumbent as the competent authority for that AIFM, including those laid down in Article 11 of the AIFMD. ~~may withdraw such authorisation, upon examination of~~

			~~the documentation.~~
57.	Article 37(13)	According to Article 37 (13) second subparagraph AIFMD any disputes between the AIFM or the AIF and EU investors of the relevant AIF shall be settled in accordance with the law of and subject to the jurisdiction of a Member State. How should this provision be adapted by the member states?	Member States may determine the appropriate jurisdiction taking into account the relevant legal instruments of private international law which Member States might be part of. In principle Article 37(13) requires that the relevant applicable law and jurisdiction are of an EU Member State, not necessarily of the Member State of reference. *Per a contrario*, the Member States could not allow that the applicable law and jurisdictions be the one from a non-EU country.
Issues related to private equity			
58.	Articles 26-30	(1) Article 26(5) says that the percentage of voting requirements which determines whether control has been acquired of an issuer shall be determined in accordance with the Takeover Directive. Under the Takeover Directive, individual Member States may choose their own percentage for what constitutes control of an issuer. If an AIFM authorised by State A manages an AIF in state A which acquires an issuer in State B, the UK considers that the test for control should be the percentage adopted in State B. Otherwise an issuer in State B will have different tests of control applicable to it, one under the Takeover Directive (State B's test), and another under AIFMD (State A's test). We would welcome the Commission's views on this interpretation. (2) Article 26(6) states that "This Section shall apply subject to the	(1) Article 5(3) of Directive 2004/25/EC (Takeover Directive) states clearly that "the percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office." Hence AIFMD requests the application of the test of the Member State where the issuer has its registered office pursuant to that Directive. (2) The situations envisaged by Article 6 of Directive 2002/14/EC (Employee Consultation Directive) cannot be limited to the two instances described. The

		conditions and restrictions set out in Article 6 of the Employee Consultation Directive" (duty of employee to keep certain information confidential; employers entitlement to withhold information if disclosure would seriously harm or prejudice the company). Does this mean that: a. If employees or their representatives receive confidential information under AIFMD, they must keep the information confidential. b. The duty on the AIFM to ensure that the Board of Directors of an acquired company passes on certain information to employees does not apply if passing on the information would seriously harm or prejudice the company? (3) In Article 30, paragraph 1 refers to "distribution, capital reduction, share redemption and/or acquisition of own shares, as described in paragraph 2." However, paragraph 2 does not describe capital reduction or share redemption – paragraph 2 only describes distribution and acquisition of own shares. This raises the following questions: a. Should share redemption be treated the same as acquisition of own shares, on the basis that share redemption and acquisition of own shares are economically and commercially very similar? In that case, should share redemption be subject to conditions in Art 30.2.c? b. Should capital reduction be treated as subject to the conditions in: a. Art 30.2.a? b. Art 30.2.b? c. Or just Art 30.3.b? c. [Does Art 30.3.c mean a. **All** the provisions in points (b) to (h) of Article 20(1) of the Second Company Law Directive apply;	provision in Article 26(6) shall be understood in the sense that any information related to the application of Articles 26-30 of the AIFMD, which is susceptible of being considered as confidential should be subject to the requirements provided in Article 6 of the Employee Consultation Directive. (3) a. The reference to distribution in paragraph 2 of article 30 should be understood as generic and covering all operations listed in paragraph 1. b. As regards the capital reductions, Article 30(3)(b) should be read in combination with either Article 30(2)(a) or Article 30(2)(b) depending under which letter of paragraph (2) a specific capital reduction may be subsumed. c. The extent to which the acquisition of own shares is permitted is a matter for the company law of the Member State where that company is incorporated.

		b. The provisions in points (b) to (h) of Article 20(1) apply, **only to the extent adopted in the Member State in which the acquired company has its registered office**? c**.** The restrictions in points (b) to (h) of Article 20(1) apply, **only to the extent adopted in the home Member State of the AIFM?]**	
New questions submitted after the workshop			
59.	Article3(4)	(1) Article 3(4) provides that sub-threshold AIFMs "shall not benefit from any of the rights granted under this Directive unless they chose to opt in under this Directive". It is therefore clear that such firms cannot benefit from the right to passport under AIFMD. However, as this regime is subject to Member State's discretion, it would appear that if permitted by the local law of the home Member State of the sub-threshold AIFM and the law of the Member State in which that AIFM wishes to market, such an AIFM would be able to market in another EEA State. This is consistent with the current pre-AIFMD position whereby AIFMs may market in other Member States subject to local law. It is also aligned with the position with respect to domestic marketing by sub-threshold AIFM, which are allowed to market in their home Member State without opting in to the Directive. (2) If the analysis in (1) is correct, we would welcome further clarification as to whether such sub-threshold AIFMs can market to retail investors. Article 43 provides that "Member States shall not impose stricter or additional requirements on EU AIFs established in another Member State and marketed on a cross-border basis *to retail investors+ than on AIFs marketed domestically". In our view the following interpretations are possible:	(1) Indeed sub-threshold AIFMs do not benefit from the AIFMD passport unless they opt-in. However, this does not prevent them from cross-border marketing provided that both the legislation of the AIFM's home Member State and of the host Member State allow this. (2) Indeed according to Article 3(2) sub-threshold AIFMs are subject only to Articles 46, 3(3) and 3(4). It is up to Member States to decide whether marketing to retail investors by such AIFMs should be allowed and under what conditions.

		a. where a Member State allows domestic AIFs to be marketed to retail investors it must also allow AIFs established in other Member States to be marketed to retail investors. Therefore if we allow UK sub-threshold AIFMs to market to retail investors in the UK we must also allow EU sub-threshold AIFMs to market to such investors; or b. article 43 is not applicable in the case of sub-threshold AIFM and the only relevant article is Article 3. We would therefore not be required by the Directive to allow retail marketing of EU AIFs managed by sub-threshold EU AIFMs if we allowed retail marketing of UK AIFs managed by sub-threshold UK AIFM. However, Member State national law would be allowed to permit such retail marketing of EU AIFs if so minded.	
60.	Article 4	An EU AIF is defined as one which has a registered office or head office in a Member State. What if an AIF has a registered office in Member State A, but its head office in Member State B? Will the competent authority of the AIF be the one in A or B? Must the AIF have a depositary in A or B?	In case an AIF is not authorised or registered in a Member State, it may still be considered an EU AIF if it has the registered office and/or the head office in a Member State. The Directive also defines the concept of "established", referring to the "registered office", and not to the "head office". Therefore, "head office" should only be used where no registered office exists.
61.	Article8 (1) d)	Article 8, § 1, d) of the directive provides that "*the shareholders or members of the AIFM that have qualifying holdings are suitable taking into account the need to ensure the sound and prudent management of the AIFM*". Although the directive does not mention this explicitly, this provision primarily seems to target external managers of AIF's. Could the Commissions confirm whether, in her opinion, this provision must also be	The requirement in Article 8(1)(d) refers to both external managers and internally managed AIFs. Where the AIFMD does not explicitly differentiate both are covered by the definition of an AIFM. a) Irrespective of the intention behind the acquisition of shares/units a qualifying holding gives certain powers. There is no reason to treat internally managed

		applied to internally managed AIF's? A positive answer would in our opinion need to take the following issues into account: (a) the shareholders or members of an internally managed AIF are in the majority of cases the investors of the fund, who bought an investment product without any intention to intervene in the management of the fund; (b) in the case of an AIF with variable capital, a particular investor can have a qualifying holding by accident, as a consequence of the redemption of the participation of another investors. How should such a case be treated? Forcing an investor to sell his participation could lead to serious legal difficulties. (c) it can also be that no investor will have a qualifying holding in an internally managed AIF (especially in the case of an AIF with variable capital which are being marketed to the public). In such a case, should e.g. this provision be applied to the promotor of the fund, even if his participation is not "qualified"?	AIFs different from the externally managed ones. b) The requirement in Article 8(1)(d) allows the competent authority to assess the suitability of qualifying shareholders in light of the need of ensuring sound and prudent management. As long as the requirements of Article 8 (1)(d) are fulfilled, i.e. the shareholders are considered as suitable taking into account the need to ensure the sound and prudent management of the AIFM, there is nothing in the AIFMD requesting an investor to sell his participations. c) To the extent the promoter is a shareholder or member having a qualified holding he has to be taken into account for the purposes of this provision.
62.	Article 31	What should happen if a competent authority does not decide an application for approval of marketing within 20 working days, as required by Article 31. Presumably the authority will be in breach of its obligations, but a failure to respond within 20 working days should not mean there is automatic approval for the marketing?	The AIFMD does not foresee the consequences of a failure by a competent authority to approve an application for marketing within 20 working days. According to Article 31 the AIFM may start marketing in case of a positive decision. This implies that an AIFM is not allowed to market without the competent authorities having taken a positive decision. . However, it depends on the national law how an AIFM could proceed against the competent authority that failed to issue a decision (e.g. administrative or judicial

			proceedings to failure to act).
63.	Article 42	Does the requirement that there must be a single AIFM for each AIF apply to Article 42 AIFMs? The requirement for a single AIFM is in Art 5, but Art 42 says that only the transparency provisions and private equity provisions apply to Article 42 AIFMs.	During the application of the national regime allowing the marketing without a passport of AIFs managed by a non-EU AIFM, the AIFMD requires the non-EU AIFM to comply only with the provisions listed in Article 42(1)(a). However, these are minimum requirements, and Member States national laws may impose additional requirements, including that an AIF should have a single AIFM. However, once the passport regime will be applicable, the parallel application of the national regimes should be without prejudice to the Articles 37, 39 and 40 of the AIFMD, which require a single AIFM.
64.	Article 43	If a Member States permits marketing to retail investors under Article 43, must the AIFMD procedures for marketing to professional investors be followed? Article 43 states that Member States may permit marketing of AIFs to retail investors, and may impose 'stricter requirements' on this marketing. Does this mean that if a Member State permits marketing to retail investors, it must comply with the procedural requirements that apply when marketing to professional investors? In other words, if Member State A allows retail marketing: a. must an AIFM established in State A go through the procedures in Article 31, in order to market to retail investors in State A? b. must an AIFM established in State B go through the procedures in Article 32, in order to market to retail investors in State A?	If cross-border marketing of AIFs to retail investors is permitted under the laws of the home and of the host State of the AIFM, than the procedures in Articles 31 and 32 or stricter procedures should apply. Article 43 states clearly that Member States may impose stricter rules than the ones for the marketing to professional investors. This should be interpreted as allowing a Member State to attach to marketing to retail investor stronger rules, whilst not permitting that Member State to adopt more lenient requirements in such case.
65.	Article 54	In the view of the Commission, does article 54 of the directive apply in the context of national measures taken in application of article 43 (knowing	Article 54 on cooperation in supervisory activities

		that article 54 § 1 only refers to the "powers pursuant to this Directive")?	should be possible to be relied on also in case of application of Article 43. It is the AIFMD that gives the power to Member States to allow the marketing of units or shares of AIFs to retail investors and that sets the broad limits for the exercise of such power.

Contact:
Larisa Dragomir, Telephone: +32 229-8 74 79, larisa.dragomir@ec.europa.eu; Christiane Grimm, Telephone +32 229-58048, christiane.grimm@ec.europa.eu