THE VOICE OF PRIVATE CAPITAL
VENTURE CAPITAL
PRIVATE EQUITY
INFRASTRUCTURE
LONG TERM INVESTORS

On behalf of the Public Affairs Executive (PAE) of the EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

29 January 2021

Response to the European Commission's public consultation on the review of the Alternative Investment Fund Managers Directive (AIFMD)

Chapter I - Functioning of the AIFMD regulatory framework, scope and authorisation requirements

Question 1 - What is your overall experience with the functioning of the AIFMD legal framework?

Please choose between:

- **Very satisfied**
- **Satisfied**
- **Neutral**
- **Unsatisfied**
- **Very unsatisfied**
- **Don't know / no opinion / not relevant**

Answer:

Satisfied.

Question 2 - Do you believe that the effectiveness of the AIFMD is impaired by national legislation or existing market practices?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

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Answer:

Somewhat disagree.

Question 2.1 - Please explain your answer to Question 2, providing concrete examples and data to substantiate it. 5000 characters maximum including spaces and line breaks.

Answer:

As the double negative of question/answer pair may be misunderstood, we would like to clarify that "Somewhat disagree" is meant in a way that the private equity and venture capital industry believes that the effectiveness of the AIFMD is mostly **not impaired** by national legislation and market practices. The industry takes the view that certain technical considerations should/could be addressed at Level 2 or by ESMA's administrative practice (e.g. to address inconsistencies or deviations from the Level 1 Directive), but that those points are too granular to be included in the Level 1 discussion. The industry would be happy to discuss such points when the Commission deems appropriate.

In any case, as and when changes are to be considered, whether through ESMA commentary, at Level 2 or Level 1, it is important to recognise existing market practice, the diversity of AIFMs and the specific characteristics of the private equity and venture capital industry, such as the typical negotiated iterative marketing process for closed-ended funds.

For example, there is a lack of clarity and consistency – and sometimes conflicts - between regulators as to what is considered a "material change". Whilst we know that some Member States have expressly adopted the Article 106 AIFMR test[1] in their AIFMD marketing notification forms, we understand that not all Member State regulators are taking this approach. It would be helpful if all Member State regulators could adopt the same approach to assessing materiality and whether changes require notification. This would ensure that there is a level playing field across the EU. From a practical perspective, there is a risk of uncertainty for an AIFM if its home Member State and host Member State regulators adopt different approaches. One way to address this is through ESMA Q&A.

Question 3 - Please specify to what extent you agree with the statements below.

The AIFMD has been successful in achieving its objectives as follows:

[1] Whilst the term "material change" is used in the marketing context, it is defined only in the context of an AIF's annual report. In that context, Article 106(1) of the AIFMD Level 2 Regulation provides that, "*Any changes in information shall be deemed material within the meaning of [Article 22(2)(d) of the Level 1 Directive] if there is a substantial likelihood that a reasonable investor, becoming aware of such information, would reconsider its investment in the AIF, including because such information could impact an investor's ability to exercise its rights in relation to its investment, or otherwise prejudice the interests of one or more investors in the AIF*" (the "Article 106 test").

Answer:

	1 (fully disagree)	2 (somewhat disagree)	3 (neutral)	4 (somewhat agree)	5 (fully agree)	Don't know - No opinion - Not applicable
creating internal market for AIFs				X		
enabling monitoring risks to the financial stability				X		
providing high level investor protection				X		

Other statements:

Answer:

	1 (fully disagree)	2 (somewhat disagree)	3 (neutral)	4 (somewhat agree)	5 (fully agree)	Don't know - No opinion - Not applicable
The scope of the AIFM license is clear and appropriate					X	
The AIFMD costs and benefits are balanced (in particular regarding the regulatory and administrative burden)				X		
The different components of the AIFMD legal framework operate well together to achieve the AIFMD objectives					X	
The AIFMD objectives correspond to the needs and problems in EU asset management and financial markets				X		

The AIFMD has provided EU AIFs and AIFMs added value				X		

Question 3.1 - Please explain your answer to Question 3, providing quantitative and qualitative reasons to substantiate it. 5000 characters maximum including spaces and line breaks.

Answer:

The private equity and venture capital (PE/VC) industry does not believe the AIFMD should be re-opened at this time considering the overall satisfaction of the legal and regulatory AIFMD framework, as also recognised by the European Commission and in the KPMG report.

In addition, the AIF has developed into being a strong brand with high levels of trust from the investors' side both inside and outside the EU. It should be a priority that no damage is done to the strength of the AIF brand and that the specific business model of PE/VC managers and their important function in the EU capital markets (by providing capital to private companies) is duly taken into account, as is currently the case by appropriate exemptions or exclusions for PE/VC managers.

Question 4 - Is the coverage of the AIFM licence appropriate?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 4.1 - If no, what other functions would you suggest adding to the AIFM licence?

Please explain your choice also considering related safeguards and requirements, such as protecting against potential conflicts of interest, where appropriate, disadvantages and benefits of the proposed approach. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 5 - Should AIFMs be permitted to invest on own account?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 5.1 - If yes, what methods and limitations to this possibility should be imposed?

Please explain your proposition in terms of conflicts of interest, benefits and disadvantages as well as costs, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 5.1 - If No or Don't know, please explain your answer to Question 5. 5000 characters maximum, including spaces and line breaks.

Answer:

The current coverage of the AIFM licence is in our view established, appropriate and fit for purpose and does not necessitate amendments to the Directive. We call for the rules on own account under AIFMD to remain unchanged.

Question 6 - Are securitisation vehicles effectively excluded from the scope of the AIFMD?

Please choose between:

- **Yes**
- **No**

- **Don't know / no opinion / not relevant.**

Answer:

Yes.

Question 6.1 - If no, what elements would you suggest introducing into the AIFMD to exclude securitisation vehicles from the scope of the AIFMD more effectively and reducing regulatory arbitrage possibilities? Please explain. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 7 - Is the AIFMD provision providing that it does not apply to employee participation schemes or employee savings schemes effective?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 7.1 - If no, please explain your answer to Question 7. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 8 - Should the AIFM capital requirements be made more risk-sensitive and proportionate to the risk-profile of the managed AIFs?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 8.1 - If yes, please explain your answer to Question 8, presenting benefits and disadvantages of your approach as well as potential costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 9 - Are the own funds requirements of the AIFMD appropriate given the existing initial capital limit of EUR 10 million although not less than one quarter of the preceding year's fixed overheads?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant.**

Answer:

Yes.

Question 9.1 - If no, please explain your answer to Question 9, detailing any suggestion of an alternative policy option, and presenting benefits and disadvantages of the entertained options as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 10 - Would the AIFMD benefit from further clarification or harmonisation of the requirements concerning AIFM authorisation to provide ancillary services under Article 6 of the AIFMD?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

Answer:

Somewhat disagree.

Question 10.1 - Please explain your answer to Question 10, presenting benefits and disadvantages of the entertained options as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Market parties have not signalled issues with the authorisation to provide ancillary services. Any clarifications, *if* deemed appropriate, should not result in an amendment of Article 6 AIFMD, but rather should be provided in Level 2 measures or, if considered more appropriate, an ESMA document providing further guidance.

Question 11 - Should the capital requirements for AIFMs authorised to carry out ancillary services under Article 6 of the AIFMD be calculated in a more risk-sensitive manner?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 11.1 - If yes, please explain your answer to Question 11, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 12 - Should the capital requirements established for AIFMs carrying out ancillary services under Article 6 of the AIFMD correspond to the capital requirements applicable to the investment firms carrying out identical services?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 12.1 - Please explain your answer to Question 12, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

The capital requirements applying to AIFMs in relation to the provision of ancillary services should take into account the specificities of these market players, and in particular of managers of PE/VC funds, as compared to investment firms.

Indeed, there are fundamental differences between investment firms and AIFMs carrying out ancillary services, including in relation to risk exposure. AIFMs managing only closed-ended unleveraged funds are not exposed to investor redemptions, unlike managers of open-ended funds. Similarly, they are not exposed to the risk of fund insolvency due to inability to repay leverage, unlike leveraged funds.

Many AIFMs which provide ancillary services in addition to managing exclusively closed-ended unleveraged funds, have similar certainty of fee income over the medium term arising from their ancillary services. That is to say, the firms performing these ancillary services typically invest in private companies on a medium to long-term capital investment basis. The effect of this is that

the AIFM typically has certainty of investment management fees over a longer period than would be the case for the manager of frequently traded securities.

In addition, it should be noted that AIFMs are subject to rules of good conduct and covered by civil liability insurance, which should allow to limit their capital requirements.

Last, we would like to stress the need for regulatory stability. We believe that, overall, rules on capital requirements are sufficiently harmonised at EU level and do not need to be changed.

Question 13 - What are the changes to the AIFMD legal framework needed to ensure a level playing field between investment firms and AIFMs providing competing services?

Please present benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Given the fact that MiFID organisational requirements and conduct of business rules apply to these (ancillary) services, no changes are required. Additional capital requirements should not be introduced given the fact that AIFMs are sufficiently capitalised taking into consideration the services that they provide. The assets that an AIFM manages – either collectively (through an AIF) or individually (through separate accounts) - are segregated from the AIFM's own assets and liabilities. Any clarifications, if deemed appropriate, should not result in an amendment of Article 6 AIFMD and can be provided in Level 2 measures or, if needed, an ESMA document providing further guidance.

Question 14 - Would you see value in introducing in the AIFMD a Supervisory Review and Evaluation Process (SREP) similar to that applicable to the credit institutions?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 14.1 - Please explain your answer to Question 14, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Unlike credit institutions, AIFMs do not take deposits, do not hold money or securities belonging to their clients and do not place themselves in debt with those clients. Clients invest in AIFs and an AIF's assets are separated from the AIFM's own assets and liabilities. AIFMs are thus fundamentally different from credit institutions, which mandates a fundamentally different supervisory framework. Therefore, the introduction of a SREP for AIFMs is **not justified** in order to safeguard client interests nor is a SREP justified from a macro-prudential perspective.

Question 15 - Is a professional indemnity insurance option available under the AIFMD useful?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 15.1 - Please explain your answer to Question 15, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Invest Europe welcomed the original proposals to use professional indemnity insurance as an alternative to regulatory capital requirements. This insurance option provides flexibility to AIFMs and therefore should be kept in the AIFMD. In addition, we continue to believe that such insurance is a more appropriate measure than regulatory capital for investment managers' professional liability risk, which is reflected in the global approach to this issue.

However, such measures can only be effective if the detail of the measures provided for in legislation reflects the market for available insurance. Whilst we have not recently surveyed our members on this point, we are unaware of any cases of AIFMs using professional indemnity insurance as an alternative to regulatory capital.

If the Commission decides to revisit these rules, we propose that the Commission discuss any potential revision with members of the insurance industry prior to finalising the amendment to the legislation. Having said that, we do not see a strict need to revisit the rules as PE/VC managers have adjusted to the existing and appropriate capital requirements.

Question 16 - Are the assets under management thresholds laid down in Article 3 of the AIFMD appropriate?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 16.1 - If not, please suggest different thresholds and explain your choice, including benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 17 - Does the lack of an EU passport for the sub-threshold AIFMs impede capital raising in other Member States?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 17.1 - Please further detail your answer to Question 17, substantiating it, also with examples of the alleged barriers. 5000 characters maximum including spaces and line breaks.

Answer:

The lack of an EU passport can be an impediment to sub-threshold AIFMs. For such managers, marketing under the (varying) national private placement regimes (NPPRs) remains the only way to market in other jurisdictions. However, the PE/VC industry does **not** believe it is **necessary** to introduce an EU passport for sub-threshold AIFMs. We acknowledge that having a harmonised regulatory framework and an EU passport are two sides of a coin.

It is important that Member States continue to have the right to set (and do set) their own NPPRs, and thereby also permit their investors access to a potentially broader spectrum of funds, including those that do not benefit from a passport. We believe the current AIFMD (and EuVECA) passporting rules and existing NPPRs mostly represent a balanced approach to fund size, level of regulation, access to investors and investor protection.

Where sub-threshold managers are denied access to certain markets (for example, because the NPPR is abolished or imposes restrictions on cross-border marketing), it follows that investors are denied the ability to invest in such funds. It is essential to uphold possibilities of cross-border marketing for sub-threshold managers to enable managers and EU institutional investors to connect, to enhance investor choice and to foster competition amongst managers.

One particular area of concern is that some Member States permit marketing by sub-threshold AIFMs established in their own territory, but do not permit access to their territory for sub-threshold AIFMs from other Member States on equal terms.

While we do not believe changes need to be made to the AIFMD in respect of NPPRs (which are, by definition, a matter for Member States), we do urge Member States to consider their NPPRs and seek to provide access to sub-threshold managers that provide their investors with choice and competition and are fair, proportionate and non-discriminatory.

Question 18 - Is it necessary to provide an EU level passport for sub-threshold AIFMs?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 18.1 - If yes, should the regulation of the sub-threshold AIFMs differ from the regulation of the full-scope AIFMs under the AIFMD and in which way?

Please explain your proposition, including costs/benefits of the proposed approach. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 18.1 - If No or Don't know, please explain your answer to Question 18. 5000 characters maximum including spaces and line breaks.

Answer:

Please also see our answer to Question 17.

There is no absolute necessity to provide a passport for sub-threshold managers, and Invest Europe strongly supports the distinction between above and sub-threshold funds, which recognises that for fund managers with assets below €500 million (this is the applicable threshold for PE/VC fund managers) the costs associated with application of the AIFMD would simply not be sustainable. Please also see our separate paper, attached to this consultation response, on the importance of maintaining the *de minimis* threshold.

However, a passport as a **voluntary** option would/could certainly be helpful for many, and without posing systemic risk or endangering investor protection. Whereas the "opt-in" to full authorisation is not economically viable for many sub-threshold AIFMs which deem remaining registered only a preferred option even without the passport (and whereas a requirement of full authorisation for all would simply put smaller firms out of business), a voluntary pan-EU passport for sub-threshold fund managers, with **proportionate regulatory obligations** (e.g. comparable to established and proven EuVECA requirements), would be a solution.

Since development and growth finance are as important for the EU economy as start-up capital, a tailored and proportionate internal market passporting regime should/could be made available to these fund managers as well.

We would like to stress though that such a passport should **not** be pursued in the context of the AIFMD review, but rather as a separate, stand-alone initiative. Similarly to the well-functioning EuVECA regime, this could be established as a branding for a specific vehicle, rather than in an across-the-board regulatory context like AIFMD, which is focused on fund managers.

We would like to use this opportunity to point to some unintended effects of Article 3 of the AIFMD in connection with the EuVECA Regulation. Indeed, similar considerations to the above can

be made in relation to sub-threshold managers seeking registration under the EuVECA Regulation in those jurisdictions where sub-threshold managers are subject to an authorization requirement or to other rules supplementing the registration regime set forth in Article 3(3) of the AIFMD. This can result in EuVECA fund managers being required to abide by an additional layer of rules delaying their time to market and/or imposing regulatory burdens not contemplated by the EuVECA Regulation. It should be clarified that the "stricter rules" permitted by Article 3(3) of the AIFMD may not have the indirect and unintended effect of *de facto* gold plating the provisions of the EuVECA Regulation. Again, we would like to stress that this should not be pursued in the context of the AIFMD review, but rather as a separate initiative or as appropriate ESMA guidance concerning the correct relationship between the "stricter rules" that Member States are allowed to adopt under Article 3(3) of the AIFMD and the EuVECA Regulation.

Question 19 - What are the reasons for EuVECA managers to opt in the AIFMD regime instead of accessing investors across the EU with the EuVECA label?

Please explain your answer. 5000 characters maximum including spaces and line breaks.

Answer:

In our view, a EuVECA manager would not "opt-in" to the AIFMD regime as a means to access investors across the EU instead of using the EuVECA label. The EuVECA label remains a useful means to access professional and high-net worth individual investors in the EU.

We believe that the ability of managers that are authorised as full-scope AIFMs to use the EuVECA designation when marketing qualifying venture capital funds (and comply with the conditions to market qualifying venture capital funds) should be retained. It broadens the use of the EuVECA designation and does not present any corresponding risks to investors.

However, in particular with respect to growth capital funds or separated AIFs financing only follow-on investments in portfolio companies in which the flagship EuVECA of an EuVECA manager has originally invested, the EuVECA requirements relating to qualifying portfolio companies are sometimes too narrow forcing the EuVECA manager to establish such schemes as "ordinary" AIFs instead of EuVECAs.

Question 20 - Can the AIFM passport be improved to enhance cross-border marketing and investor access?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 20.1 - If so, what specific measures would you suggest?

Please explain your suggestions, presenting benefits and disadvantages as well as potential costs thereof, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 20.1 - If No or Don't know, please explain your answer to Question 20. 5000 characters maximum including spaces and line breaks.

Answer:

We think the rules governing the AIFM passport are appropriate and work well. Also, the Cross-Border Distribution of Investment Funds ("CBDF") package (Regulation (EU) 2019/1156 and Directive (EU) 2019/1160) already improves the performance of the cross-border marketing passport in a number of important ways. No additional amendments to the AIFMD are needed to further improve the passport to enhance cross-border marketing and investor access.

However, several impediments to the efficient working of the passport remain, in particular regarding national implementation, which could be addressed at Level 2 or during the future review of the CBDF legislation.

The CBDF legislation recognizes that competent authorities of host Member States may impose "regulatory fees or charges", on a one-off or ongoing basis, for the authorisation/notification and monitoring of non-domestic funds. Several Member States impose additional fees and charges on AIFMD-authorised EU AIFMs not based in their country, thereby reducing access to market in a significant part of Europe, including larger markets such as Germany, France, Spain and Italy. Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, Latvia, Luxembourg, Malta and Poland also charge host fees. The amount and the basis for calculating such fees varies between Member States, and include initial entry fees and/or ongoing annual fees.

Although the costs of such fees are relatively low compared to overall marketing costs, they can be substantial when a manager markets more than one fund (e.g. via a parallel structure) throughout the EU. The necessity to retain local advisors to understand and evaluate the costs of

marketing the fund in such particular jurisdiction and to provide advice on the fees adds to this bill. In practice, AIFMs (may) avoid some countries because of the (level of) fees charged, including larger countries, but also Member States where the anticipated investor demand is relatively low and/or the investor base is comparatively small (the additional regulatory costs would be deemed disproportionate to the perceived fundraising potential). The impact of such charges is particularly acute where annual fees are levied. It is also not always clear whether jurisdictions expect a fee to be paid: (a) only during each year that marketing takes place; or (b) after marketing has ceased but where there are still investors in the fund in that jurisdiction. Some Member State regulators have indicated that fees would cease to be due if the AIFM no longer exercises its marketing passport, but the position remains unclear and there are divergent approaches.

Where an AIFM has been granted a marketing passport by its home Member State regulator, we consider there to be no legal justification under the AIFMD for any additional restrictions and/or requirements to be imposed on the AIFM by the host Member State regulator. Not only are we concerned about the legality of such practice, but we are also concerned about the long-term and potentially significant adverse impacts that this may have on market participants' behaviour and the operation of the single market. Irrespective of whether (or not) a fee affects the marketing strategy of a fund manager, in a Capital Markets Union a fund manager that is fully compliant with the relevant EU law and that is in possession of a valid passport should be free to market across the EU without any further administrative requirements being imposed by the 'host' jurisdiction, including fees and charges. Such charges, even minimal, undermine the concept of a Capital Markets Union and remain an unwarranted barrier to the single market and to cross-border marketing, not only for their cost per se but also for the administrative burden they create. It should be made explicit, for example during the review of the CBDF, that there are no circumstances under which national competent authorities retain the right to impose additional obligations.

Separately, we are aware that certain Member States also impose other obligations, such as full translations of certain notification/registration materials or local agents or representatives. In terms of costs, this can easily add up to tens of thousands of euros. A large majority of investors into PE/VC funds consider that either English or their national language is sufficient.

Also, it should be clarified in Level 2 measures or guidance from ESMA that the home regulator has sole jurisdiction to regulate the AIFM. Certain host regulators comment on the documents provided to them for information only, whereas it should be clear for the AIFM that only its national regulator has authority of it. Differences between regulators should be dealt with at ESMA level.

In relation to enhancing investor access under the AIFMD passport by allowing marketing to sophisticated individual investors, we give our views on improving access to such investors in Questions 21 and 22.

Chapter II - Investor protection

a) Investor classification and investor access

Question 21 - Do you agree that the AIFMD should cross-refer to the client categories as defined in the MiFID II (Article 4(1)(ag) of the AIFMD)?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 21.1 - If no, how could the investor classification under the AIFMD be improved? Please give examples where possible and present benefits and disadvantages of your suggested approach as well as potential costs of the change.

Answer:

Annex II of MiFID, which determines what is a professional investor under AIFMD by virtue of the cross-reference made in Article 4(1)(ag), does not at all, from our perspective, reflect the actual degree of knowledge of investors in private equity and may limit the ability of certain types of long-term investors to commit capital indirectly to unlisted businesses.

Three types of investors commit capital to the portfolio companies private equity funds support:

1. **Institutional investors** (pension funds, banks, insurers, fund-of-funds, sovereign wealth funds, …) representing the majority of the investment made in the asset class.

2. **"Sophisticated" investors** ((ultra) high net worth individuals, family offices, entrepreneurs, academic endowments, executives, directors or employees of the AIFM that are involved in the management of an AIF, …) – investing usually very large sums of capital into the fund, they make up for more than a quarter of the investment in some funds.

3. **"Mass-affluent" and other retail investors** – while most private equity managers will not market to these individuals, some may decide to do so under specific conditions (see our response to Question 22 on these investors).

We believe that the treatment of Category 2 investors, which are often treated as retail despite having an expertise and experience of the industry that is equivalent to institutional investors, should be reconsidered.

Given their level of knowledge of the investment, "sophisticated investors" should be included **within the professional investor category, preferably through a change to the MiFID Annex II**. Arguably, these long-term fund investors indeed have similar levels of knowledge of the private equity market as professional investors and should not be treated differently. This would confirm the logic already introduced in the EuVECA Regulation to allow marketing to investors committing more than €100,000 or employees of the AIFM as these are "knowledgeable enough to participate in investments".

To apprehend the inadequacy of the current MiFID categorisation, and of the "professional upon request" test, it is vital to understand that a (generally large) investment in a ten-year closed-ended fund with no redemption rights, often made after a negotiation with the fund manager on the terms of the investment, cannot easily be compared to a liquid daily trading activity.

Changes to the investor categorisation are all the more necessary since these investors cannot always be considered as "professional clients upon request" under Section II.1 of Annex II due to the inane bias of this category's criteria. Here is why:

- **Frequency criterion**: this test, calibrated for participants trading in liquid markets, such as those for exchange-traded equities, is inherently discriminatory in a private equity context due to the long-term and illiquid nature of private equity funds.

  Not even the most seasoned institutional investors make as many as 10 commitments per quarter to private equity funds. With an equal level of sophistication, this puts any long-term investor at an important disadvantage.

- **Experience criterion:** for investments made in funds investing into unlisted businesses (as opposed to financial products), working in the "financial sector" is not necessarily a helpful measure.

  The onus should be put on the ability of the investor to understand the risk. While expertise may be derived from experience, it can also be the result of academic and professional qualifications or from an understanding of the sector where the investment is made. Expertise in investing should therefore be seen as sufficient to be deemed sophisticated. In the case of private equity, many sophisticated investors also have extensive industry or sector experience (for example, in an operational role or as an entrepreneur) that provides them with a sophisticated understanding of the specific investment into a private equity or a venture capital fund that they are intending to make.

- **Requirement for the assessment to be made by an investment firm**: to our knowledge, only investment firms are authorised to certify that a client can be professional "upon request" (and investment firms do not necessarily have incentives to certify products that they are not selling).

Would the Commission not share our view that "sophisticated" investors should in the future be deemed professional, we call on the Commission to introduce significant changes to this section in MiFID II or to ensure its cross-reference in AIFMD is tailored to the nature of the long-term, closed-ended asset management universe.

Question 22 - How can AIFM access to retail investors be improved?

Please give examples where possible and present benefits and disadvantages of your suggested approach as well as potential costs of the change. 5000 characters maximum including spaces and line breaks.

Answer:

As mentioned in our response to Question 21, we do not believe that "sophisticated investors", i.e. investors such as family offices or high net worth individuals committing more than €100,000 into closed-ended funds, should be considered retail for the purpose of EU rules.

This response therefore only covers investors, such as "mass-affluent" ones, to which some private equity managers generally market through intermediaries. It is worth pointing out that such investors are rare, if only because the features of the PE/VC asset class (ten-year funds with no redemption rights, regular calls for commitments) make it difficult for such investors to access it.

We do not believe there is a need to improve access to retail investors under the AIFMD and think that there is a significant risk such access will be accompanied by measures that are not suited to the specificities of the private equity market. The ELTIF regime, which is currently under review, is seen by private equity managers interested in retail clients as the most appropriate marketing vehicle. Any improvement should therefore be introduced as part of the ELTIF regime and we invite the Commission to look at our response to the ELTIF consultation for more details.

Question 23 - Is there a need to structure an AIF under the EU law that could be marketed to retail investors with a passport?

Please choose between:

- **Yes**

- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 23.1 - If yes, what are the requirements that should be imposed on such AIFs?

Please give examples where possible and present benefits and disadvantages of your suggested approach as well as potential costs of the change. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 23.1 - If No or Don't know, please explain your answer to Question 23. 5000 characters maximum including spaces and line breaks.

Answer:

We do not see the added value of such a regime compared to the ELTIF. From a private equity perspective, the main interest of the ELTIF is precisely the ability to market to retail investors.

b) Depositary regime

Question 24 - What difficulties, if any, do the depositaries face in exercising their functions in accordance with the AIFMD?

Please provide your answer by giving concrete examples identifying any barriers and associated costs. 5000 characters maximum including spaces and line breaks.

Answer:

As a starting point, it is important to recollect that the depositary requirement which was introduced into the AIFMD, was born out of the pre-existing UCITS legislation which has been in place since 1985 with the stated aim of protecting investor interests. In a UCITS context, a depositary is essential. UCITS funds target retail investors and invest the majority of their capital in transferrable securities (i.e. liquid assets). It is essential that any manager and fund has a third-party depositary appointed in order to ensure that the manager is running the fund properly in accordance with its pre-set investment and risk limits, that title to assets is properly safeguarded through the custody system and that NAV which is used to set (sometimes daily) trading prices is properly calculated.

Because of the differing risk profile attaching to private equity funds, the requirement for professional investor backed private equity funds to appoint a depositary remains questionable to a certain extent. That said, private equity funds have generally found means to deal with the depositary requirements and their services may also prove a competitive advantage for AIFMs, for instance vis-à-vis non-European investors. Hence, we are not seeking changes to the Level 1 rules.

However, in our view, it would be helpful to clarify a point in relation to the verification of ownership function (Article 21(8)(b)), for example by changes to Level 2. Concretely, various aspects of the verification of ownership function are practically difficult to implement in a private equity context. In practice, a private equity fund will ensure that it acquires title to assets with the benefit of external legal advice. Different practices exist in regard to the point at which a depositary performs its verification of ownership checks. In line with the requirements for the depositary's general oversight duties (Article 92 of Level 2), it should be sufficient and proportionate in the case of a closed-ended unleveraged fund for the depositary to perform these checks, including reconciliation against counterparty records, on an ex-post basis.

Question 25 - Is it necessary and appropriate to explicitly define in the AIFMD tri-party collateral management services?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 25.1 - Please explain your answer to Question 25. 5000 characters maximum including spaces and line breaks.

Answer:

A tri-party collateral management service is just one of a range of services which a fund and/or its manager may choose to use to manage collateral. There is no reason why this particular service should be defined. Any attempt to define this service would limit the nature of tri-party collateral management services used by funds/managers by requiring such services to fall within a definition imposed by regulation, and therefore would limit the ability of funds/managers to agree the services best suited to their requirements.

Question 26 - Should there be more specific rules for the delegation process, where the assets are in the custody of tri-party collateral managers?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 26.1 - Please explain your answer to Question 26, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

To put this in context, the ability to delegate certain safekeeping functions has always been necessary and is appropriate for private equity depositaries[2] who lack the operational systems to hold custody assets without delegation. However, the fact that all fund financial instruments must be held by the depositary or its delegate means that in tri-party collateral management arrangements (or other structures, such as prime brokerage), the entity holding fund securities as part of the services provided by it to the fund must hold such securities as delegate of the depositary. This creates additional complexity, which increases cost and investor risk.

Moreover, the use of delegates is onerous because AIFMD Article 21(12) imposes a high level of liability for financial instruments held by delegates. Although under Article 21(13), liability can be passed to a delegate, in reality this rarely happens as custody banks are not open commercially to accepting liability over and above their existing negligence-based standard. This leads to a disconnect between the party that ultimately remains responsible for the assets (the private equity depositary) and the party that in reality holds them in custody (the sub-custodian). This disconnect becomes magnified in circumstances where the asset is held through a custody chain and whilst most custody banks are willing to underwrite the risks associated with in-group sub-custodians, they are less willing to do so where the asset is ultimately held by a non-group entity in their wider custody network. Aside from this risk-based issue, the appointment of a sub-custodian also carries cost and there is a relatively limited pool of organisations who are willing to simply provide custody services for low volume listed assets.

As a result, given the already onerous requirement regarding delegation, more specific rules in relation to the use of tri-party collateral managers is neither necessary nor useful.

More generally, the imposition of additional regulatory requirements where AIFMs use tri-party collateral managers services is not necessary or useful since this would create additional complexity and costs, and would risk reducing the services available to the fund/AIFM by narrowing the scope for commercial agreement between the relevant parties.

Question 27 - Where AIFMs use tri-party collateral managers' services, which of the aspects should be explicitly regulated by the AIFMD?

Please select as many answers as you like.

Answer:

	Yes / No
the obligation for the asset manager to provide the depositary with the contract it has concluded with the tri-party collateral manager	No
the flow of information between the tri-party collateral manager and the depositary	No

[2] Private equity depositaries are specialised depositaries operating under the 'private equity exemption' authorised pursuant to the final paragraph of Article 21(3) of the AIFMD.

the frequency at which the tri-party collateral manager should transmit the positions on a fund-by-fund basis to the depositary in order to enable it to record the movements in the financial instruments accounts opened in its books	No
no additional rules are necessary, the current regulation is appropriate	Yes
other	No

If yes, please explain why you think the obligation for the asset manager to provide the depositary with the contract it has concluded with the tri-party collateral manager should be explicitly regulated by the AIFMD.

Please present benefits and disadvantages of this approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the flow of information between the tri-party collateral manager and the depositary should be explicitly regulated by the AIFMD.

Please present benefits and disadvantages of this approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the frequency at which the tri-party collateral manager should transmit the positions on a fund-by-fund basis to the depositary in order to enable it to record the movements in the financial instruments accounts opened in its books should be explicitly regulated by the AIFMD.

Please present benefits and disadvantages of this approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please specify what are the other aspect(s) that should be explicitly regulated by the AIFMD.

Please present benefits and disadvantages of this/these approach(es) as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 28 - Are the AIFMD rules on the prime brokers clear?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 28.1 - If not, please explain your answer to Question 28, providing concrete examples of ambiguities and where available suggesting improvements. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 29 - Where applicable, are there any difficulties faced by depositaries in obtaining the required reporting from prime brokers?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 29.1 - If yes, please explain your answer to Question 29, providing concrete examples and suggesting improvements to the current rules and presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 30 - What additional measures are necessary at EU level to address the difficulties identified in the response to the preceding question?

Please explain your answer providing concrete examples. 5000 characters maximum including spaces and line breaks.

Answer:

No comment (as per our responses to Questions 28 and 29).

Question 31 - Does the lack of the depositary passport inhibit efficient functioning of the EU AIF market?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 31.1 - Please explain your answer to Question 31. 5000 characters maximum including spaces and line breaks.

Answer:

The European Commission's Report to the European Parliament and the Council assessing the scope and application of the AIFMD notes that the lack of a depositary passport is "at odds with the spirit of the single market" and the limited choice of service providers poses concentration risks, given that a single depositary could hold the assets of all AIFs established in a given Member State. We are of the view that the lack of a depositary passport reduces competition in some Member States. Smaller AIFs can also find it difficult to engage a depositary for where the scope of the depositary's tasks is limited.

In our view, the depositary passport will be helpful for the industry, but should **not** be pursued in the context or as part of the review of AIFMD Level 1, but rather as a separate initiative. Such passport would be made available to depositaries of the type identified in AIFMD Level 1 Article 21(3) final sub-paragraph. Such depositaries are relevant only to AIFs, EuVECA, EuSEF and ELTIF (as opposed to, for example, UCITS). Nevertheless, we do not believe that AIFMD would be the appropriate legal vehicle to make provision for a depositary passport. This is because any such measure would necessarily need to specify the minimum prudential, conduct of business and other obligations applicable to such passport; and the technical operation of it. It may have features in common with the Investment Firms Directive and Regulation, for example. It would therefore be a measure regulating the depositaries as service providers, which would be misplaced in AIFMD (a Directive concerning their clients). It would also be a horizontal measure across AIFMD, EuVECA, EuSEF and ELTIF.

We outline below some reasons why the depositary passport is helpful for the industry.

A number of problems have arisen in connection with the existing AIFMD depositary arrangements:

- **Cost**: Cost issues are apparent at two levels. For the specialist private equity depositaries, the regulatory capital costs can quickly multiply in cases where multiple entities are established in multiple jurisdictions. Although some service providers have chosen to keep their depositary and administration businesses under a single regulated entity, others have established segregated entities meaning that not only do they have to put aside regulatory capital in multiple jurisdictions, but in single jurisdictions in certain cases, regulatory capital requirements can be increased too.

  In addition to this, general business costs are multiplied when multiple locations are used, with property expenses, insurance, payroll, audit, regulatory costs/fees etc. duplicated for each regulated business in a private equity depositary's group.

  As the cost of doing business increases, this is passed back to the AIF and therefore affects the returns that investors receive.

- **Physical presence**: Under the current definition of establishment, a physical presence is required in each jurisdiction in which the AIF is based. From a commercial standpoint, private equity depositaries will only consider providing services in markets where: (i) the

costs of staff, premises etc. are reasonable; and (ii) there will be a good demand for their services. As jurisdictional market viability and the cost base in connection with employment differs across the EU, this can have a substantial impact on the ability of private equity depositaries to operate and as a result, on the ability of AIFMs to engage the most suitable service providers.

As with the wider costs point made above, the increased cost of providing this service is inevitably passed on to the AIF and therefore to investors. To the extent that a sensible fees position cannot be negotiated, private equity depositaries will not be in a position to provide the services and this can lead to a lack of competition in the market, which again can drive costs up.

- **Competition**: As things currently stand, forcing private equity depositaries to establish in multiple jurisdictions does create issues and is not appropriate for the private equity market. Whilst this approach may well have worked with Bank Depositaries[3] in a UCITS context (which generally have large pre-existing pan-European footprints), private equity depositaries engaged to provide services to private equity funds under the 'private equity exemption' do not generally have significant pan-European footprints and instead are limited to a handful of jurisdictions. Continuing to require local physical presence therefore restricts competition and in certain cases may force AIFMs to appoint locally based Bank Depositaries. These institutions are likely to have less knowledge of the industry and its related risks; thus, exposing investors in AIFs to additional risk, which the appointment of a specialist private equity depositary was meant to overcome.

Question 32 - What would be the potential benefits and risks associated with the introduction of the depositary passport?

Please explain your position, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

We support the establishment of a private equity depositary passporting regime to allow for the passporting of depositary services to private equity funds.

In the depositary space there is already precedent for the provision of services under a single umbrella authorisation as AIFMD already allows for the establishment of branches from which depositaries authorised in one Member State can provide services in another with the consent of their home regulator and notification to the regulator of the other Member State. This pre-existing ability to provide services on a cross-border basis could be extended through the

[3] Full scope depositaries (credit institutions/investment firms and so on) authorised under Article 21(3)(a) – (c) of AIFMD.

creation of full passporting rights for private equity depositaries under a separate, stand-alone initiative.

There are some clear and compelling reasons to legislate for a depositary passport. Principally:

(a) **Supervision**: Allowing depositaries to obtain authorisation in a single jurisdiction and then passport services into other jurisdictions would reduce regulatory burdens for many regulators. It is likely that the majority of private equity depositaries are already authorised in key fund structuring jurisdictions, all of which are well versed in AIFMD and the associated depositary requirements.

(b) **Costs**: As a result of not having to deal with multiple business establishments along with a reduction in the regulatory capital requirements associated with multiple business establishments, the costs associated with running a depositary business would be reduced. In addition, the centralisation of employment in a single entity would lead to economies of scale and operational efficiencies. Given the level of competitiveness in the market this would undoubtedly lead to cost savings that would be passed on to AIF clients (ultimately institutional investors who typically are investing on behalf of the general public).

(c) **Specialisation**: By allowing for the centralisation of staff, it would be possible for 'centres of excellence' to develop leading to an increase in service quality and consistency; in turn ensuring even greater security of cash and assets. In addition, depositary passporting is predicated on the basis that the depositary requirements are harmonised across Member States and by providing for this passport, more focus could be placed on this which would be in line with the principles of the proper functioning of the single market.

(d) **Competition**: The introduction of a depositary passport would reduce artificial jurisdictional barriers which needlessly hinder the proper functioning of the single market. As a result of this, with a single authorisation in any Member State a specialist private equity depositary would be able to access business in any EU jurisdiction which would boost competition and level the playing field when competing against Bank Depositaries with pre-existing jurisdictional presence. It would also ensure that depositary services are made available in the smaller markets; markets that would not otherwise be financially viable for a 'stand-alone' depositary business.

Practical implementation

AIFMD established a sensible procedure for EU AIFMs to manage EU AIFs on a cross-border basis and we would suggest that this forms the basis of any private equity depositary passporting procedure to be put in place in connection with depositary services.

Concretely, we would support a process under which:

(a) the depositary notifies the competent authority of its home Member State of the fact that it intends to provide services on a cross-border basis;

(b) the depositary also sets out details of which services it plans to provide on a cross-border basis;

(c) the depositary notifies which AIF the services will be provided to; and

(d) the competent authority of the home Member State then notifies the competent authority of the host Member State (where the AIF is located) of the fact that the depositary services will be provided under passporting arrangements.

In these circumstances we would anticipate the competent authorities of the home Member State of the depositary providing appropriate regulatory oversight.

Finally, we would like to underline that, in order for the depositary passport to be fully efficient, the related rules will have to be harmonised and implemented in an appropriate manner by the different national competent authorities across the EU.

Question 33 - What barriers are precluding introducing the depositary passport?

Please explain your position providing concrete examples and evidence, where available, of the existing impediments. 5000 characters maximum including spaces and line breaks.

Answer:

The advantages and disadvantages of depositary passporting have previously been considered by the European Commission as part of their 2012 Consultation on UCITS Product Rules, Liquidity Management, Depositary, Money Market Funds, Long-term Investments.

In the region of 100 responses were received in connection with this consultation and mixed views were expressed in connection with the establishment of a depositary passport for UCITS funds. The key issues that respondents listed as acting as potential blockers to the introduction of a depositary passport were as follows:

(a) **Harmonisation**: Respondents highlighted a lack of harmonisation in the application of UCITS depositary requirements (including custody, insolvency and securities laws) as reason for delaying the introduction of the passport.

(b) **Supervision**: Respondents also listed potential difficulties with cross-border supervision in situations where the ManCo, depositary and fund were established in different jurisdictions and were potentially all subject to different regulatory supervision.

(c) **Tax**: Tax implications arising from removal of substance from the fund jurisdiction were also cited by many as a reason not to press ahead with a passport-based solution.

(d) **ManCo passport**: At the time of the consultation, management company passports were relatively new in a UCITS context (introduced in 2004 under the Management Company Directive) and AIFMD management company passports had not been introduced so there was uncertainty expressed concerning the potential uptake of a passport-based solution. In addition and in a UCITS context, the introduction of a ManCo passport was also considered more complex due to the fact that the fund itself was always regulated.

(e) **Local laws**: Concern was also expressed in connection with the ability of depositaries to deal with local legal issues on a cross-border basis.

Although from a UCITS perspective the industry may not have been ready for a passport, there are some important distinctions to be drawn between the UCITS regime and its service providers, and the AIFMD regime.

In this context, the issues that were raised in connection with the corresponding UCITS consultation can arguably be seen to be less important in the AIFMD sphere:

(a) **Harmonisation**: AIFMD has only been in force for a number of years so the development of cross-border differences in the application of the Article 21 AIFMD requirements are in their infancy and most jurisdictions operate to a harmonised standard. There is a small amount of jurisdictional arbitrage, but this is currently negligible. In addition to this, as private equity depositaries are only able to act for private equity funds which generally invest in illiquid assets, the cross-border application of securities legislation is of less relevance.

(b) **Supervision**: As AIFMD only regulates the AIFM, there are only two counterparties which fall to be supervised under AIFMD in connection with in-scope structures so there would be less of an issue arising in connection with supervision to the extent that a passport was introduced saving cost and effort to European regulators. It is also worth noting that under current arrangements the AIFM and the depositary can be supervised by separate regulators as a result of the introduction of the management passport under Article 33 of AIFMD, so conflicts positions can already arise.

(c) **Tax**: Remains an issue, but to the extent that using a passported depositary prejudiced the substance arrangements of the AIFM/AIF, a locally based provider could be chosen.

(d) **ManCo passport**: This has been operating successfully under AIFMD for a number of years now and there has been good take-up in the AIFMD space.

(e) **Local laws**: Ultimately, the depositary requirement for private equity funds is driven by AIFMD which has been largely copied out in each EU jurisdiction. Local legal frameworks are therefore much less relevant in the private equity depositary space. In addition to this, private equity funds are essentially a form of contractual co-investment and the way in which a fund operates is largely determined by the main constitutive documents

(which tend to embed any national legal requirements). To put this in context, a number of private equity depositaries are already providing services from within and outside of the EU in connection with Article 42 AIFMD marketing into some Member States. In these circumstances, the depositary requirements are contained entirely in national law.

Question 34 - Are there other options that could address the lack of supply of depositary services in smaller markets?

Please explain your position presenting benefits and disadvantages of your suggested approach as well as potential costs of the change. 5000 characters maximum including spaces and line breaks.

Answer:

Ideally (and in a well-functioning Capital Markets Union), there should not be an obligation to appoint a depositary that is located in the same Member State as the fund; managers should be able to benefit from the efficiencies and other benefits that would flow from being able to choose freely from amongst depositaries located across the EU. In smaller Member States with few managers and/or funds the inefficiencies are particularly acute.

Question 35 - Should the investor CSDs be treated as delegates of the depositary?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 35.1 - Please explain your answer to Question 35, providing concrete examples and suggesting improvements to the current rules and presenting benefits and disadvantages as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

No CSDs, whether investor CSDs or issuer CSDs, should be treated as delegates of the depositary for the following reasons:

- CSDs are market infrastructure systems; to require depositaries to bear the risk of market infrastructure systems by regarding such systems as delegates would create a dangerous concentration of risk.
- As market infrastructure systems, CSDs cannot agree to the detailed obligations, including access and inspection, required from delegates.
- CSDs are regulated under CSDR, therefore treating CSDs as delegates would create unnecessary complexity but no real benefit.
- Standard terms must apply to all CSD participants under the CSDR requirement for fair and open access for participants, therefore CSDs cannot agree different terms with depositaries.
- CSDs must necessarily limit their liability to manage systemic risk, therefore were CSDs regarded as delegates, depositaries would not have the same option of transferring liability or imposing liability similar to that imposed on depositaries, as for other delegates.

As a practical point, the distinction of investor CSD and issuer CSD is relevant under CSDR but not AIFMD. An investor CSD holds securities through another CSD, but an issuer CSD does not necessarily hold securities directly since it may hold securities through its depositary or nominee; distinguishing between the two types of CSD is purely arbitrary. Also, the same CSD will provide the same services in relation to securities held for its participants, whether such securities are held by the CSD through another CSD or not; the participants cannot impose different terms on the CSD depending what manner of delegation the CSD uses, and may have no means of discovering the nature of delegation arrangements.

c) Transparency and conflicts of interest

Question 36 - Are the mandatory disclosures under the AIFMD sufficient for investors to make informed investment decisions?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 36.1 - If not, what elements of the mandatory disclosures under the AIFMD could be amended?

Please explain your position presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 37 - What elements of mandatory disclosure requirements, if any, should differ depending on the type of investor?

Please explain your position, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

We believe the existing mandatory disclosures under AIFMD to be largely sufficient for investors of all categories to make informed investment decisions. Mandatory disclosure requirements should not differ depending on the type of investor.

One problem with having different mandatory disclosures for different types of investors would be that the manager may not be certain at the outset of the fundraise (when they are preparing

their Article 23 disclosures) which types of investors they may attract, which might mean drafting for all possible types of investors.

Question 38 - Are there any additional disclosures that AIFMs could be obliged to make on an interim basis to the investors other than those required in the annual report?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 38.1 - If yes, please explain your answer to Question 38, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 39 - Are the AIFMD rules on conflicts of interest appropriate and proportionate?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 39.1 - If not, how could the AIFMD rules on conflicts of interest be amended?

Please provide your suggestions, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

d) Valuation rules

Question 40 - Are the AIFMD rules on valuation appropriate?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 40.1 - If not, please explain your answer to Question 40, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 41 - Should the AIFMD legal framework be improved further given the experience with asset valuation during the recent pandemic?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 41.1 - If yes, please explain your answer to Question 41, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 42 - Are the AIFMD rules on valuation clear?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 42.1 - If not, please explain your answer to Question 42. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 43 - Are the AIFMD rules on valuation sufficient?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 43.1 - If not, please explain your answer to Question 43, explaining what rules on valuation are desirable to be included in the AIFMD legal framework. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 44 - Do you consider that it should be possible in the asset valuation process to combine input from internal and external valuers?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 44.1 - Please substantiate your answer to Question 44, also in terms of benefits, disadvantages and costs. 5000 characters maximum including spaces and line breaks.

Answer:

It is currently common practice for AIFMs to supplement their internal valuation functions with third party valuers and combine their input in the asset valuation process. The valuation analysis provided by the third party valuation advisor will supplement the AIFM's / External Valuer's (as defined under the Directive) own work in the External Valuer's (as defined under the Directive) assessment of value. This seems appropriate and allows for flexibility to meet the requirements of different AIFMs from a cost, expertise and timing perspective.

In the case of PE/VC funds, AIFMs will have a better understanding of the companies in the funds' portfolio whilst a third party valuer can bring market insight as well as technical rigour. We would like to stress the need for flexibility for AIFMs to perform the valuation function by themselves would they deem so appropriate and determine when they need to bring in third party expertise to supplement their own functions and processes, as they are currently permitted to do so.

Question 45 - In your experience, which specific aspect(s) trigger liability of a valuer?

Please provide concrete examples, presenting costs linked to the described occurrence. 5000 characters maximum including spaces and line breaks.

Answer:

The AIFM is responsible for the valuation of the AIF assets, the calculation and the publication of the net asset value. Under AIFMD Article 19(10), an external valuer liability is triggered as a result of the external valuer's negligence or intentional failure to perform its tasks which results in losses suffered by the AIFM.

Question 46 - In your experience, what measures are taken to mitigate/offset the liability of valuers in the jurisdiction of your choice?

Please provide concrete examples, presenting benefits and disadvantages as well as costs of the described approach. 5000 characters maximum including spaces and line breaks.

Answer:

The AIFM is responsible for the valuation of the AIF assets as well as the publication of the net asset value. The AIFM may contract another specialist in valuation process that the AIFM may look to assist with the valuation process, however the AIFM is still the External Valuer. While the role and the liability of the External Valuer is defined in the Directive, the contractual arrangements between the other specialist and the AIFM are subject to negotiated terms between these two parties. This allows the other specialist valuer to carry out the valuation assessment with their liability being to the AIFM because of the External Valuer's negligence or intentional failure to perform the tasks.

Chapter III - International relations

Question 47 - Which elements of the AIFMD regulatory framework support the competitiveness of the EU AIF industry?

Please explain providing concrete examples and referring to data where available. 5000 characters maximum including spaces and line breaks.

Answer:

The robustness of the regulatory system created by the AIFMD (e.g. its transparency requirements and the oversight provided by a third party depositary) does lead some investors to prefer to invest in EU fund structures, which are subject fully to the AIFMD regime, in preference to non-EU structures and therefore does lead to some fund structures being structured as EU funds where a choice of alternative jurisdictions would be available. On the other hand, the associated costs of compliance with the EU regime, and the consequent drag on investor returns, along with the compliance burden on managers, can also lead to a decision to structure funds outside the EU - and not to market those funds widely within the EU - where a choice of other jurisdictions is available. The balance between maintaining a robust and effective regulatory regime, while avoiding the introduction of a level of cost which creates too great a drag on investor returns and a disproportionate compliance burden on managers, is therefore a key balance to be struck in ensuring that EU investors are given access to funds which are able to be structured and offered outside the EU (and so to a fully diversified range of investment strategies, geographies and managers) and also that EU funds are attractive to foreign capital.

The ability to efficiently market funds in the EU on a cross-border basis using the passport has, of course, many benefits for investors: in particular, being able to access cross-border funds provides EU investors with additional investment opportunities outside their immediate jurisdictions, fostering competition within the EU; and being able to efficiently consolidate capital from investors from multiple jurisdictions within single fund structures spreads fund costs across a larger investor base, which should minimise the drag of fund costs on investor returns.

Delegation is equally fundamental to how the EU AIF industry operates. Delegation arrangements, whether to EU or non-EU jurisdictions, are critical for the private equity industry and its operations. In particular, private equity funds by nature almost always operate on a cross-border basis: investments are usually made all over Europe; teams are very often located in different countries; and investors will also be dispersed across Europe and the wider world. As regulatory requirements increase and teams are required to separate functions, more sophisticated and larger teams are required to support the fund industry. Delegation arrangements are deployed to be able to access the skills and expertise needed in the most efficient manner, wherever they are based. The ability for a number of funds to delegate to an entity with a particular expertise also allows the funds to benefit from economies of scale and operational efficiencies and therefore reduced costs for the funds and, ultimately, investors.

For more information on delegation, please see the separate paper attached to this consultation response.

Question 48 - Which elements of the AIFMD regulatory framework could be altered to enhance competitiveness of the EU AIF industry?

Please explain providing concrete examples and referring to data where available. 5000 characters maximum including spaces and line breaks.

Answer:

Invest Europe does not consider there to be a need to alter any elements of the AIFMD regulatory framework to enhance the competitiveness of the EU AIF industry.

The global nature of the investment management industry has to be properly considered when looking at the European asset management industry. There are three angles under which the global nature of the industry has to be looked at. It is only when these three bases are covered that the competitiveness of the European framework remains assured.

European AIFs must be able to raise money internationally. The space of the European Union is simply not large enough for fundraising purposes. Funds require a broad and diversified investor base. Relying upon funds to be raised from EEA investors only would defeat that purpose. International investors will be considering multiple factors in an investment management process. With investor protection features being very important, the cost of operation will play an important role as will the ability to select competent investment management teams and firms within and outside the EU.

The competitiveness of the European AIFM framework is thus characterised by:

- its open architecture permitting European managers to raise money with the EU marketing passport as well as outside the EU on a country-by-country approach; the EU market alone is too small for many European managers, who typically raise money from a wide international investor base (in particular from North America and Asia) to meet fundraising targets. This is particularly true for more niche strategies and for larger strategies requiring significant pools of capital to make their target investments while maintaining diversification; hence the EU regime must remain open to non-EU investors who must continue to consider the robustness of the EU framework as well as its breadth and depth;

- the same open architecture will permit EU managers to retain asset management expertise where it is located based on delegation arrangements; the European asset management industry must be in a position to offer strategies that go beyond the EU's borders, be it for risk diversification or operational diversification; it is therefore essential that delegation

arrangements remain in place permitting EU managers to develop their operations from within Europe and not outside the EU; and

- this architecture must remain cost efficient for globally active managers as well as for local or regional managers that aim to expand over time. The entry level threshold must remain accessible – as with any industry the EU asset management industry requires that new teams be able to start up regularly permitting new teams and ideas to develop. Hence the asset management ecosystem has to permit these start-up situations be they located within or outside of the EU to develop.

Question 49 - Do you believe that national private placement regimes create an uneven playing field between EU and non-EU AIFMs?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 49.1 - If yes, i.e. if you believe there is an uneven playing field between EU and non-EU AIFMs, which action would you suggest to address the issue?

Please explain your choice, presenting benefits and disadvantages of the potential changes to the AIFMD as well as potential costs associated with your preferred option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 50 - Are the delegation rules sufficiently clear to prevent creation of letter-box entities in the EU?

Please choose between:

- **Yes**
- **No**

- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 50.1 - If not, please explain your answer to Question 50. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 51 - Are the delegation rules under the AIFMD/AIFMR appropriate to ensure effective risk management?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 51.1 - If not, please explain your answer to Question 51, presenting benefits and disadvantages of the current rules and where available providing concrete examples substantiating your answer. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 52 - Should the AIFMD/AIFMR delegation rules, and in particular Article 82 of the Commission Delegated Regulation (EU) No 231/2013, be complemented?

Please choose between:

- **Yes**

- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 52.1 – If yes, should the delegation rules be complemented with?

Please select as many answers as you like.

Answer:

	Yes/No
quantitative criteria	N/A
a list of core or critical functions that would always be performed internally and may not be delegated to third parties	N/A
other requirements	N/A

If yes, please explain why you think the AIFMD/AIFMR delegation rules should be complemented with quantitative criteria, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the AIFMD/AIFMR delegation rules should be complemented with a list of core or critical functions, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain with what other requirements the AIFMD/AIFMR delegation rules should be complemented, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 53 - Should the AIFMD standards apply regardless of the location of a third party, to which the AIFM has delegated the collective portfolio management functions, in order to ensure investor protection and to prevent regulatory arbitrage?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 53.1 - Please explain your answer to Question 53. 5000 characters maximum including spaces and line breaks.

Answer:

We consider the current AIFMD delegation rules to be appropriate and sufficient to ensure investor protection. Firms rely extensively on the ability to delegate portfolio management to non-EU entities. In our experience, this is not with a view to regulatory arbitrage, but simply reflects the global nature of the asset management industry and the fact that the relevant expertise for many investment strategies may exist outside the EU. For example, an EU AIFM may – for obvious reasons – want to delegate portfolio management in relation to U.S. or Asian investments to local teams with particular experience and expertise. We do not believe this is to the detriment of investors, quite the opposite. Very often, it is a firm's long-standing track record (built up over many years) of utilising local teams, with local knowledge and expertise, to source and execute transactions across multiple geographies that attracts investors to their funds. Access to such strategies and expertise is significantly to the benefit of EU investors.

We do not believe that such delegation should result in the AIFMD standards being extended, as a matter of law, to non-EU delegates of an EU AIFM. Article 20 of AIFMD already includes extensive safeguards, including a requirement that portfolio management or risk management can be delegated only to appropriately regulated entities or with the specific prior approval of the AIFM's regulator. Article 20(3) makes clear that the AIFM's liability towards investors is not affected by any delegation. The AIFMD standards are applied to the AIFM itself and it is for the AIFM to determine, as a matter of contract, what additional commitments and undertakings it

requires from any delegate in order for the AIFM to be able to fulfil its own regulatory obligations.

Direct application of AIFMD to delegates is likely to be challenging from a supervisory perspective and also risks some non-EU delegates 'opting out' and ceasing to be willing to provide services to EU AIFMs. If that were to be the case, it would materially reduce investor choice and would also potentially result in institutional investors turning instead to non-EU products that do not benefit from regulation under AIFMD in order to access the best managers for non-EU investment strategies.

Question 54 - Do you consider that a consistent enforcement of the delegation rules throughout the EU should be improved?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 54.1 - If yes, please explain your answer to Question 54, presenting benefits and disadvantages of the current rules and where available providing concrete examples substantiating your answer. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 55 - Which elements of the AIFMR delegation rules could be applied to UCITS?

Please explain your position, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

As the PE/VC industry is not directly affected by UCITS, we do not feel we are in a position to make concrete recommendations.

That said, we would like to note that although there is some similarity in the requirements under UCITS and AIFMD, these are separate regulatory regimes with distinct differences (for example, the investment restrictions for UCITS funds) which cover different market areas. The UCITS regime is designed to facilitate fund investment by retail investors, whereas this is not the case for the AIF regime. To combine the regulatory frameworks in one rulebook is neither necessary nor advisable, since it would risk causing confusion regarding application and compliance.

Chapter IV - Financial stability

a) Macroprudential tools

Question 56 - Should the AIFMD framework be further enhanced for more effectively addressing macroprudential concerns?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 56.1 - If No or Don't know, please explain your answer to Question 56. 5000 characters maximum including spaces and line breaks.

Answer:

The principal means by which the AIFMD framework contributes to the management of macro-prudential risks is through reporting and supervisory monitoring. The existing AIFMD Annex IV reporting regime already requires AIFMs to report extensive data to competent authorities.

We agree with the KPMG view that "it is essential that the intended sharing and aggregation of data be fully implemented". We believe this, rather than a change to the regime, is what is warranted at this stage. Indeed, there were considerable delays between the beginning of Annex IV reporting by AIFMs when the AIFMD was transposed in national law; the transmission of data from NCAs to ESMA; the systematic use by ESMA of such data; and its onward reporting to – and use by – the European Systemic Risk Board (ESRB). NCAs, ESMA and the ESRB should employ – and report publicly on - the data so gathered for a longer period before changes are made to the reporting framework.

Beyond supervisory monitoring, the key macro-prudential concerns in the funds sector that have been repeatedly identified by the ESRB, FSB and IOSCO are: (a) liquidity mismatch; and (b) leverage. We agree that these are the core areas to look at.

From that angle, it is worth reiterating that private equity funds are invariably closed-ended. Investors in private equity have no right to redeem their commitments or investments. These funds therefore give rise to no liquidity mismatch risk, and there is therefore no need for private

equity AIFMs to employ liquidity risk management tools. On cost-benefit grounds, any changes which are proposed should be sensitive to the fact that many AIFs are closed-ended. For example, recommendations concerning AIFM best practice in liquidity management should not be addressed to them. In relation to this sector and asset class, therefore, the existing guidelines (including the ESMA guidelines on liquidity stress testing) are adequate, if only because they are not relevant for these funds.

It is not our place to comment on other sectors and asset classes with different features, but we note generally that Section 4 of AIFMR makes detailed and extensive provision for liquidity risk management. There may be scope for further coordination of best practice between NCAs in relation to the supervision of AIFMs' compliance with such provisions.

Private equity funds typically do not employ leverage (as defined in AIFMD) at fund level. In exceptional cases where they do (for example when they have put in place so-called "NAV-based" finance facilities), such leverage is modest. The existing reporting framework should be adequate to monitor such activity. It is odd that, where an AIFM manages an AIF which employs leverage, additional rules relating to liquidity risk management must be complied with, even though the fund may be closed-ended (Article 47(4) AIFMR). Supervisory discretion should be exercised in these circumstances.

To the extent that macro-prudential concerns relate to companies which may be invested in by private equity funds (for example, concerns about the level of borrowing by certain companies), any measures should be developed separately from AIFMD. This is because such companies may be equity-financed by a wide range of actors not subject to AIFMD, including sovereign wealth funds, pension schemes and non-EU AIFs not marketed into the EU.

Question 56.1 - If yes, which of the following amendments to the AIFMD legal framework would you suggest?

Please select as many answers as you like.

Answer:

	Yes/No
improving supervisory reporting requirements	N/A
harmonising availability of liquidity risk management tools for AIFMs across the EU	N/A
further detailing cooperation of the NCAs in case of activating liquidity risk management tools, in particular in situations with cross-border implications	N/A
further clarifying grounds for supervisory intervention when applying macroprudential tools	N/A
defining an inherently liquid/illiquid asset	N/A
granting ESMA strong and binding coordination powers in market stress situations	N/A
other	N/A

Please explain why you would suggest improving supervisory reporting requirements.

Please present benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you would suggest harmonising availability of liquidity risk management tools for AIFMs across the EU.

Please present benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you would suggest further detailing cooperation of the NCAs in case of activating liquidity risk management tools, in particular in situations with cross-border implications.

Please present benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you would suggest further clarifying grounds for supervisory intervention when applying macroprudential tools.

Please present benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you would suggest defining an inherently liquid/illiquid asset.

Please present benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you would suggest granting ESMA strong and binding coordination powers in market stress situations.

Please present benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain what other amendments to the AIFMD legal framework you would suggest.

Please present benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 57 - Is there a need to clarify in the AIFMD that the NCAs' right to require the suspension of the issue, repurchase or redemption of units in the public interest includes financial stability reasons?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 57.1 - Please explain your answer to Question 57, presenting benefits and disadvantages of the potential changes to the existing rules and processes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

We see no need to clarify this matter. Article 46(2)(j) grants an expansive power to NCAs to require the suspension of the issue, repurchase or redemption of units, not only where this is in the interests of unit-holders, but also where it is in the interests of the public, which we submit must include doing so on financial stability grounds.

However, since private equity funds are invariably closed-ended (and typically unleveraged), with "issue" of fund interests taking place on a handful of occasions on inception of the fund, and since they do not repurchase or redeem units, this tool is of little impact on our business.

Question 58 - Which data fields should be included in a template for NCAs to report relevant and timely data to ESMA during the period of the stressed market conditions?

Please provide your suggestions, presenting benefits and disadvantages of the potential changes as well as costs. 5000 characters maximum including spaces and line breaks.

Answer:

We understand that this question is directed mainly at open-ended funds, which may experience difficulty in disposing of assets (whether at book value or with a limited discount) during stressed market conditions. As explained previously, private equity funds:

a) are invariably closed-ended;
b) typically have a ten-year life;
c) invariably provide for the life of the fund to be extended by agreement between a pre-determined threshold of investors and the manager; and
d) ultimately, almost always feature a right for the manager to distribute assets *in specie* to investors.

Private equity funds therefore do not experience runs, and are not forced sellers during times of stressed market conditions. Nor would other types of closed-end AIFs, such as closed-end listed bodies corporate, experience such pressures. For those reasons, any additional reporting obligations should not apply to AIFMs in respect of closed-ended AIFs **whether or not such AIFs employ leverage**.

We have heard it suggested by some NCAs that closed-ended AIFs which employ leverage (for example, by entering into derivatives) ought to conduct stress tests. We assume that the concern may be the ability of such AIFs to meet their liabilities as they fall due, for example in relation

to a margin call under a derivative contract. This should not be relevant to private equity funds which only use derivatives, if at all, for modest foreign exchange hedging purposes. Otherwise, private equity AIFs assets are fully funded when they are acquired. We suggest that further stress testing or reporting would be disproportionate in these circumstances. That could at some point be further clarified by ESMA in Level 3 Guidance.

Question 59 - Should AIFMs be required to report to the relevant supervisory authorities when they activate liquidity risk management tools?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 59.1 - If not, please explain your answer to Question 59, providing costs, benefits and disadvantages of the advocated approach. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 60 - Should the AIFMD rules on remuneration be adjusted to provide for the de minimis thresholds?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 60.1 - If yes, please explain your answer to Question 60, suggesting thresholds and justification thereof, if applicable. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

b) Supervisory reporting requirements

Question 61 - Are the supervisory reporting requirements as provided in the AIFMD and AIFMR's Annex IV appropriate?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

Answer:

Somewhat agree.

Question 61.1 - If you agree, are neutral or don't know, please explain your answer to Question 61. 5000 characters maximum including spaces and line breaks.

Answer:

Even though we recognise that the supervisory reporting requirements in the AIFMD and AIFMR (in particular, the reporting templates in Annex IV AIFMR) lack tailoring to private equity and venture capital and are not always suited to the specificities of the asset class, it is important to re-iterate that considerable time has been invested by the industry in understanding and complying with the current requirements.

Even minor changes to the regime – while they could be of some benefit - would require firms to incur significant time and expense in adapting their existing reporting systems to a new, revised regime or format. We do not believe that the benefit of any changes is likely to outweigh those costs.

Indeed, any amendments to the AIFMD reporting requirements should take into account the significant sunk costs in implementing the reporting systems, for AIFMs, NCAs and ESMA, and the additional costs that would be incurred in making changes, especially if those changes are made in a piecemeal fashion.

Imposing such an additional and unnecessary compliance burden on fund managers would also imply that fund managers are diverted from the core business (i.e. investment into the real economy), with no obvious benefit to financial stability or investor protection.

Question 61.1 - If you disagree that the supervisory reporting requirements as provided in the AIFMD and AIFMR's Annex IV are appropriate, it is because of:

Please select as many answers as you like.

Answer:

	Yes/No
overlaps with other EU laws	N/A
the reporting coverage is insufficient	N/A
the reporting coverage is superfluous	N/A
other	N/A

If yes, please detail as much as possible your answer providing examples of the overlaps.

Where possible, please provide concrete examples and where relevant information on costs and benefits in changing the currently applicable reporting requirements. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please detail as much as possible your answer providing examples of the insufficient reporting coverage.

Where possible, please provide concrete examples and where relevant information on costs and benefits in changing the currently applicable reporting requirements. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please detail as much as possible your answer providing examples of the superfluous reporting coverage.

Where possible, please provide concrete examples and where relevant information on costs and benefits in changing the currently applicable reporting requirements. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please specify for what other reason the supervisory reporting requirements as provided in the AIFMD and AIFMR's Annex IV are not appropriate.

Where possible, please provide concrete examples and where relevant information on costs and benefits in changing the currently applicable reporting requirements. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 62 - Should the AIFMR supervisory reporting template provide a more comprehensive portfolio breakdown?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 62.1 - If yes, the more detailed portfolio reporting should be achieved by:

Please select as many answers as you like.

Answer:

	Yes/No
a full portfolio reporting by relevant identifier as provided for statistical purposes	N/A
a more granular geographical breakdown of exposures (e.g. at country level) by asset classes, investors, counterparties, and sponsorship arrangements	N/A
requiring more details on leverage	N/A
requiring more details on liquidity	N/A
requiring more details on sustainability-related information, e.g. risk exposure and/or impacts	N/A

other	N/A

If yes, please explain why you think the more detailed portfolio reporting should be achieved by a full portfolio reporting by relevant identifier as provided for statistical purposes.

Please include concrete examples and, where possible, provide information on the benefits, disadvantages and costs of implementing this proposition. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the more detailed portfolio reporting should be achieved by more granular geographical breakdown of exposures by asset classes, investors, counterparties, and sponsorship arrangements.

Please include concrete examples and, where possible, provide information on the benefits, disadvantages and costs of implementing this proposition. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the more detailed portfolio reporting should be achieved by requiring more details on leverage.

Please include concrete examples and, where possible, provide information on the benefits, disadvantages and costs of implementing this proposition. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the more detailed portfolio reporting should be achieved by requiring more details on liquidity.

Please include concrete examples and, where possible, provide information on the benefits, disadvantages and costs of implementing this proposition. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the more detailed portfolio reporting should be achieved by requiring more details on sustainability-related information.

Please include concrete examples and, where possible, provide information on the benefits, disadvantages and costs of implementing this proposition. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain by what other ways you think the more detailed portfolio reporting should be achieved.

Please include concrete examples and, where possible, provide information on the benefits, disadvantages and costs of implementing this proposition. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 63 - Should the identification of an AIF with a LEI identifier be mandatory?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 63.1 - Please explain your answer to Question 63, presenting benefits and disadvantages as well as costs associated with introducing such a requirement. 5000 characters maximum including spaces and line breaks.

Answer:

The Legal Entity Identifier numbers are required for certain transactions on listed capital markets and derivative transactions.

Invest Europe, which represents PE/VC market participants managing AIFs which main purpose is to carry out transactions on financial instruments that **are not** listed on a financial market, is not in favour of making the obtention of a LEI mandatory for AIFs.

Only those AIFs that actually carry out transactions that require the identification of the AIF by a LEI should be required to obtain one.

We would strongly advocate for an approach on an "as needed" basis, rather than imposing the requirement of a LEI to AIFs that have no practical use for such identifier.

Question 64 - Should the identification of an AIFM with a LEI identifier be mandatory?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 64.1 - Please explain your answer to Question 64, presenting benefits and disadvantages as well as costs associated with introducing such a requirement. 5000 characters maximum including spaces and line breaks.

Answer:

The Legal Entity Identifier numbers are required for certain transactions on listed capital markets and derivative transactions.

Invest Europe, which represents PE/VC market participants managing AIFs which main purpose is to carry out transactions on financial instruments that **are not** listed on a financial market, is not in favour of making the obtention of a LEI mandatory for AIFMs.

First, a LEI should be obtained by the entities that are actually carrying out the relevant transactions (not their manager). Second, only those AIFs that actually carry out transactions that require the identification of the AIF by a LEI should be required to obtain one.

We would strongly advocate for an approach on an "as needed" basis, rather than imposing the requirement of a LEI to AIFMs or AIFs that have no practical use for such identifier.

Question 65 - Should the use of a LEI identifier for the purposes of identifying the counterparties and issuers of securities in an AIF's portfolio be mandatory for the Annex IV reporting of AIFMR?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 65.1 - Please explain your answer to Question 65, presenting benefits and disadvantages as well as costs associated with introducing such a requirement. 5000 characters maximum including spaces and line breaks.

Answer:

This should not be mandatory. The AIF's portfolio reporting may include a LEI identifier for the purposes of identifying the counterparties and issuers of securities that already have one.

Including such a requirement may have the adverse consequence of limiting the capacity of AIFs to invest or trade only with issuers or counterparties that have a LEI, which is not the purpose of such identifier nor of the AIFMD.

Question 66 - Does the reporting data adequately cover activities of loan originating AIFs?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 66.1 - If Yes or Don't know, please explain your answer to Question 66. 5000 characters maximum including spaces and line breaks.

Answer:

This is not relevant to Invest Europe, which represents equity and quasi equity investors in the private equity and venture capital sectors.

Question 66.1 - If not, what data fields should be added to the supervisory reporting template?

Please select as many answers as you like.

Answer:

	Yes/No
loans originated by AIFs	N/A
leveraged loans originated by AIFs	N/A
other	N/A

If yes, please explain why you think loans originated by AIFs should be added as a data field to the supervisory reporting template, providing information on the benefits, disadvantages and costs of implementation. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think leveraged loans originated by AIFs should be added as a data field to the supervisory reporting template, providing information on the benefits,

disadvantages and costs of implementation. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain what other data field(s) should be added to the supervisory reporting template, providing information on the benefits, disadvantages and costs of implementation. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 67 - Should the supervisory reporting by AIFMs be submitted to a single central authority?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 67.1 - If No or Don't know, please explain your answer to Question 67. 5000 characters maximum including spaces and line breaks.

Answer:

There are pros and cons to either approach (reporting to the national competent authorities or to a single central authority). Invest Europe believes this is a matter to be discussed and agreed between the relevant supervisory stakeholders.

That said, as and when such a discussion takes place, we believe there are a number of important elements to be taken into account:

- As regards supervisory responsibilities, it is crucial to make a distinction between the collation and provision of data ("reporting") on the one hand and authorisation and supervision on the other.
- Invest Europe strongly believes that the NCAs should continue to have direct supervisory responsibility over AIFMs; that should remain a national responsibility. ESMA should not take over this role from the NCAs.
- AIFMs should not be required to multiply their reporting submissions.
- Any envisaged changes (e.g. to facilitate a central reporting hub) should be subject to a public consultation to ensure the industry and other relevant stakeholders can feed in comments at that stage.

Question 67.1 - If yes, which one?

Answer:

	Yes/No
ESMA	N/A
other options	N/A

Please explain your choice, particularly substantiating 'other options', and provide information, where available, on the benefits, disadvantages and costs of implementing each proposition. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 68 - Should access to the AIFMD supervisory reporting data be granted to other relevant national and/or EU institutions with responsibilities in the area of financial stability?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 68.1 - If No or Don't know, please explain your answer to Question 68. 5000 characters maximum including spaces and line breaks.

Answer:

We would not oppose such data being shared (by ESMA or the NCAs) with other relevant EU institutions. However, we would strongly oppose such sharing being the responsibility of anyone other than ESMA or the NCAs.

There is no need to duplicate the amount of data being provided so it is crucial that such access does not lead to additional requirements being imposed on AIFMs.

Question 68.1 - If yes, please specify which one.

***Note*: Only one option possible.**

Answer:

	Yes/No
ESRB	N/A
ECB	N/A
NCBs	N/A
National macro-prudential authorities	N/A
Other	N/A

Question 68.2 - If one of the first four options, please explain your answer to Question 68.1. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If Other, please specify to which other relevant national and/or EU institutions the access to the AIFMD supervisory reporting data should be granted. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 69 - Does the AIFMR template effectively capture links between financial institutions?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 69.1 - If not, what additional reporting should be required to better capture inter-linkages between AIFMs and other financial intermediaries?

Please provide your suggestion(s) providing information on the costs, benefits and disadvantages of each additional reporting. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 69.1 - If Yes or Don't know, please explain your answer to Question 69. 5000 characters maximum including spaces and line breaks.

Answer:

We draw your attention to the fact that a large number of AIFs involved in private equity or venture capital do not have any link with other financial institutions.

Private equity funds, which make direct investment into businesses, have very limited financial exposures to other participants in the financial system. They do not engage in a significant amount of borrowing or trading in derivatives at the fund level and thus have limited counterparty exposure.

Furthermore, private equity funds – even where they are managed by the same fund manager - are not exposed to each other as they neither pledge their assets as security nor guarantee each other's obligations. Any portfolio company group into which a fund has invested is managed independently and has its own specific holding company, protecting both other portfolio companies and other funds from the implications of those investments being unsuccessful. Even

if a private equity fund is unsuccessful in its investment strategy, it should not pose contagion risk or have systemic risk implications in the same way as an entity which is strongly inter-connected might.

Question 70 - Should the fund classification under the AIFMR supervisory reporting template be improved to better identify the type of AIF?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 70.1 - If No or Don't know, please explain your answer to Question 70. 5000 characters maximum including spaces and line breaks.

Answer:

The current categories in the Annex IV AIFMR forms under private equity fund types are:

Venture Capital
Growth Capital
Mezzanine Capital
Multi-strategy private equity fund
Other private equity fund strategy

In our view, these adequately cover all the different private equity strategies, so we do not consider there to be a need to make any changes.

Question 70.1 - If yes, the AIF classification could be improved by:

Please select as many answers as you like.

Answer:

	Yes/No
permitting multiple choice of investment strategies in the AIFMR template	N/A

adding additional investment strategies	N/A
other	N/A
it cannot be improved, however, if a portfolio breakdown is provided to the supervisors this can be inferred	N/A

If yes, please explain why you think the AIF classification could be improved by permitting multiple choice of investment strategies in the AIFMR template, providing information, where available, on the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the AIF classification could be improved by adding additional investment strategies, providing information, where available, on the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain by what other ways the AIF classification could be improved, providing information, where available, on the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why you think the AIF classification cannot be improved unless a portfolio breakdown is provided to the supervisors. Please provide information, where available, on the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 71 - What additional data fields should be added to the AIFMR supervisory reporting template to improve capturing risks to financial stability?

Please select as many answers as you like.

Answer:

	Yes/No
value at Risk (VaR)	No
additional details used for calculating leverage	No
additional details on the liquidity profile of the fund's portfolio	No
details on initial margin and variation margin	No
the geographical focus expressed in monetary values	No
the extent of hedging through long/short positions by an AIFM/AIF expressed as a percentage	No
liquidity risk management tools that are available to AIFMs	No
data on non-EU master AIFs that are not marketed into the EU, but which have an EU feeder AIF or a non-EU feeder marketed into the EU if managed by the same AIFM	No
the role of external credit ratings in investment mandates	No
LEIs of all counterparties to provide detail on exposures	No
sustainability-related data, in particular on exposure to climate and environmental risks, including physical and transition risks (e.g. shares of assets for which sustainability risks are assessed; types and magnitudes of risks; forward-looking, scenario-based data)	No
other	No

If yes, please explain why value at Risk (VaR) should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why additional details used for calculating leverage should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why additional details on the liquidity profile of the fund's portfolio should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why details on initial margin and variation margin should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why the geographical focus expressed in monetary values should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why the extent of hedging through long/short positions by an AIFM/AIF expressed as a percentage should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why data on non-EU master AIFs that are not marketed into the EU, but which have an EU feeder AIF or a non-EU feeder marketed into the EU if managed by the same AIFM should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why the role of external credit ratings in investment mandates should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why LEIs of all counterparties to provide detail on exposures should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain why sustainability-related data, in particular on exposure to climate and environmental risks, including physical and transition risks should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If yes, please explain what other data fields should be added to the AIFMR supervisory reporting template, providing as much detail as possible and relevant examples as well as the

costs, benefits and disadvantages of this option. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 72 - What additional data fields should be added to the AIFMR supervisory reporting template to better capture AIF's exposure to leveraged loans and CLO market?

Please explain your answer providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages. 5000 characters maximum including spaces and line breaks.

Answer:

It is difficult to answer this question from a private equity perspective as private equity funds will not be exposed to leveraged loans and CLO markets as they make investments in unlisted businesses. While some of the businesses may themselves be using debt, it is absolutely vital that AIFMD continues to make clear, as it does in Recital 78 and in the last sentence of Article 6(3) of the Delegated Regulations, that any borrowing at the level of the portfolio company does not have any bearing on the leverage of the fund as long as there is a clear separation between the fund, and the holding company (HoldCo) and operating company (OpCo).

In private equity, the holding company, including any acquisition SPVs, are invariably part of the portfolio company group structure and not of the fund structure. It is more than a simple feature of the private equity model – it corresponds to the very essence of its diversification model that for each acquisition by private equity fund managers, the debt held by each of its individual portfolio companies will typically be structurally and systematically siloed (i.e. ring-fenced), both from any debt of the fund itself and from the debt of any other portfolio company controlled by the fund.

This structure protects against contagion risk and systemic risk to the financial system as it ensures that even the possible failure of a portfolio company does not impact either other companies owned by the manager or the fund itself.

The current AIFMD framework recognises that only exposure at the level of the fund can constitute leverage for these purposes and under the conditions set in Article 6(3) of the Delegated Regulations. They should therefore not be part of the AIFMD reporting and certainly not be confused with an exposure of the fund.

Finally, and as mentioned in more details in our response to Question 83, it is our view that AIFMD is, and should remain, a legislation concerned with the activities of the fund manager – as opposed to activities undertaken by the companies owned by the funds. Accordingly, AIFMD is

not the appropriate vehicle to regulate loan markets and doing so could lead to a situation where the regulator only has a partial overview of such markets.

Question 73 - Should any data fields be deleted from the AIFMR supervisory reporting template?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 73.1 - If yes, please explain your answer to Question 73, presenting the costs, benefits and disadvantages of each data field suggested for deletion. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 74 - Is the reporting frequency of the data required under Annex IV of the AIFMR appropriate?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 74.1 - If not, please explain your answer to Question 74, presenting the costs, benefits and disadvantages for a suggested change, if any. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 75 - Which data fields should be included in a template requiring AIFMs to provide ad hoc information in accordance with Article 24(5) of the AIFMD during the period of the stressed market in a harmonised and proportionate way?

Please explain your answer presenting the costs, benefits and disadvantages of implementing the suggestions. 5000 characters maximum including spaces and line breaks.

Answer:

This is not relevant from a private equity and venture capital perspective.

Question 76 - Should supervisory reporting for UCITS funds be introduced?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 76.1 - Please explain your answer to Question 76, also in terms of costs, benefits and disadvantages. 5000 characters maximum including spaces and line breaks.

Answer:

Members of Invest Europe do not manage UCITS funds.

Question 77 - Should the supervisory reporting requirements for UCITS and AIFs be harmonised?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 77.1 - Please explain your answer to Question 77, also in terms of costs, benefits and disadvantages. 5000 characters maximum including spaces and line breaks.

Answer:

While it may be useful to ensure a minimum level of consistency between different EU reporting frameworks (e.g. in terms of definitions), it would **not** be appropriate to move towards full coherence or harmonisation, bearing in mind that the respective target audiences of the different EU supervisory reporting frameworks are not the same and will have their own characteristics, perspectives, strategies, beneficiaries and business models. Any (further) moves towards coherence should be tailored taking into account the specific profiles of affected practitioners and should not adversely affect existing supervisory reporting requirements for AIFs and AIFMs.

Even within one and the same reporting framework, a distinction needs to be made between the different market participants and asset classes covered. In the case of AIFMD, it is important to recognise and to tailor for the different asset classes and types of alternative investment fund manager affected by the Directive.

Set out below are two examples demonstrating the fundamental differences between the AIFMD and UCITS universes, and within the AIFMD universe, and hence we are not in favour of harmonisation. The industry has adapted and learned to comply with the requirements, so these examples are **not** in any way intended as a request to address these issues during the AIFMD review.

Example 1 - Filings for fundraising

The AIFMD introduced several formal steps which must be followed by the AIFM in order to raise a new fund, requiring numerous filings to be made with (usually) the home Member State competent authority. Being modelled on the UCITS Directives (which concern retail funds), the AIFMD requirements are not proportionate for funds which will be marketed principally (in most cases exclusively) to institutional investors.

In particular, the formalities do not reflect the iterative process of raising closed-end funds in the private equity market, which has traditionally involved early-stage discussions with

prospective investors to gauge their appetite. Over the many months in which fundraising then takes place the terms are subject to negotiation between potential investors and the fund manager prior to the final closing of the fund taking place. Often the final terms are not agreed until just before the final close. This is in marked contrast to the typical process for raising a retail fund (such as a UCITS fund), which involves the UCITS management company manufacturing the product for distribution to investors on non-negotiable terms.

In many respects, the AIFMD assumes that an institutional private equity or venture capital fund is a 'pre-baked' product (like a UCITS fund) and fails to recognise that for the private equity and venture capital industry marketing is a negotiated, iterative process. The formalities front-load the effort required to raise a fund (and also front-load costs, when there may be no guarantee that the fundraise will be successful) and generally complicate and disrupt the process.

Example 2 - Reporting timeframe

The requirement to report to competent authorities within 30 days (as per Article 110 of the AIFMD Delegated Regulation) is impractical for private equity fund managers and is not well-tailored to the illiquid nature of private equity investments and to the practices of the private equity industry. Concretely:

- Private equity is an illiquid asset class, investing in the real economy. The underlying assets of the fund are unquoted, operating companies with their own directors, i.e. there is no ready-made price (as with financial instruments such as publicly quoted equities) nor a standard formula for calculating prices (as with OTC derivatives). Such a short timeframe leads to unnecessary costs being incurred and also the use of estimates and/or old data and further requirement to file amended reports when numbers are later finalised.
- Private equity AIFs typically do not calculate or report data on a monthly basis.
- Private equity funds and fund-of-funds typically report quarterly financials to their investors 90 and 120 days after the period has ended, respectively.

In fact, other regulators around the world have taken the approach that private equity funds' systemic risk is minimal enough to justify reporting once on an annual basis with a more relaxed submission timeline.

A relaxation of the 30-day timing requirement to 3-4 months would align supervisors with existing industry practice and the reporting schedule used with investors.

Question 78 - Should the formats and definitions be harmonised with other reporting regimes (e.g. for derivates and repos, that the AIF could report using a straightforward transformation of the data that they already have to report under EMIR or SFTR)?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 78.1 - If yes, please explain your response indicating the benefits and disadvantages of a harmonisation of the format and definitions with other reporting regimes. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

c) Leverage

Question 79 - Are the leverage calculation methods - gross and commitment - as provided in AIFMR appropriate?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

Answer:

Somewhat agree.

Question 79.1 - Please explain your answer to Question 79 in terms of the costs, benefits and disadvantages. 5000 characters maximum including spaces and line breaks.

Answer:

There is no need to modify the AIFMD with respect to the notion of leverage, the methods of leverage or the manner in which it is to be calculated.

Leverage calculation methods are largely appropriate. While there are some caveats with the current approach, which we detail below, we do not believe any of those warrant a review of the framework. These observations should be taken into account by NCAs, ESMA and the ESRB when using the data.

The gross method: As it expresses a ratio between the total absolute value of all long and short positions held by the fund and the fund's NAV, the gross method can be a useful measure to give an idea of the "fund's footprint" but, as was recognised in many occasions, it can also be a misleading tool.

In a private equity context, the gross method fails to account that investments made by a closed-ended fund will be backed by uncalled commitments. Since private equity funds invest in only a relatively small number of positions (i.e. the equity of typically private companies), for which opportunities arise only infrequently, the AIFM does not call for institutional investors to invest their cash immediately when the fund is raised. Rather, institutional investors make contractual, binding commitments to the fund, which are drawn down when required. The

commitment period is tied to the life-span of the fund and is therefore made for several years. In practice in the market, the manager of an institutional closed-end fund will typically only accept commitments from institutional investors with whose covenant it is entirely satisfied, i.e. the manager will be confident that the investor will be able to meet commitments to the fund on an almost "on demand" basis (typically on ten business days' notice) even in adverse market conditions. (In addition, as part of any temporary borrowing facility being entered into by the fund – as contemplated by recital 14 and Article 6(4) AIFMR, it is usual for the lender independently to check the creditworthiness of the investors that have made commitments to the fund.) Under the constitutional documents of the fund, such commitments are legally enforceable (and default would bring serious adverse consequences for the investor). As a result, the historic experience is that there is no material risk of default on commitments by institutional investors.

Under applicable accounting frameworks, such commitments are not typically reflected in the NAV of the fund. Therefore, any measure of leverage (such as the gross method) which measures the ratio of exposures to NAV will give the misleading impression that the fund is leveraged irrespective of the actual financial stability risk this poses.

In addition, the gross method does not allow the effects of hedging or netting to be recognised as a means of reducing a fund's exposure, potentially leading to the perverse result that two positions could perfectly offset each other and reduce a fund's net economic exposure to zero and yet the value of both positions would need to be included when determining the fund's exposure value. This will have the unintended consequence of discouraging funds from entering into the important risk management tool that are hedging arrangements.

The commitment method: while better tailored to the actual risk posed by private equity fund managers, this method contains flaws because it does not specifically exclude cash from the calculation of the exposure, to the contrary of the gross method. Given cash or cash-equivalents do not pose market risk, our opinion is that these should not be included in the definition of the exposure and that the current approach of AIFMR, where the treatment of cash is different in the gross and commitment methods, may be a drafting oversight. Including cash in the definition of exposure under the commitment method would give rise to a misleading result because cash which was available to settle a liability would have the effect of both increasing the NAV and increasing the exposure. As a result, the fund would have a leverage ratio above 1:1 despite it having more than enough cash to cover a liability appearing on its balance sheet of an equivalent amount. In our view, this cannot be the intended result.

Appropriately analysing data on leverage is crucial because its absence is the only characteristic in AIFMD that allows a distinction to be drawn between private equity funds and other types of AIFs, with often very different features, hence ensuring they are subject to a regulatory treatment that is appropriate to the risk they pose. As a reminder, the fund's (absence of) leverage impacts:

- the *de minimis* threshold for authorisation (Article 3 AIFMD);
- the frequency of Annex IV reporting (Article 110(3) AIFMR); and

- the maintenance of liquidity management systems and procedures (Article 47(4) AIFMR), even for closed-ended funds that do not pose any liquidity risk.

Question 80 - Should the leverage calculation methods for UCITS and AIFs be harmonised?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 80.1 - If yes, what leverage calculation methods should be chosen to be applied for both UCITS and AIFs?

Please explain your proposal, indicating the difficulties, costs and benefits of applying such methodology(ies) to both UCITS and AIFs. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 80.1 - If No or Don't know, please explain your answer to Question 80. 5000 characters maximum including spaces and line breaks.

Answer:

We strongly advise against harmonising between the UCITS and AIFMD frameworks due to the differences between these fund types, in respect of their structure, purpose and investor base. UCITS is (appropriately) a scheme of product regulation for a particular type of (mainly retail-focussed) investment, whereas AIFMD is legislation governing the management of a heterogenous population of funds targeted typically at professional investors.

Under UCITS, there are mandatory limits on cash borrowing (see in particular Article 83(1) UCITS Directive) and the total global exposure arising from the use of derivative instruments (see in particular Article 51(3) UCITS Directive). Whilst many private equity AIFs are in practice also subject to limits on cash borrowing arrived at by negotiation with well-informed, sophisticated

institutional investors, such limits are flexible depending on circumstances and are typically expressed by reference to investor commitments (as opposed to assets, as in UCITS), which reflects the legal structure of most private equity funds as limited partnerships.

A private equity fund will typically also feature bespoke restrictions on the use of derivatives, intended (subject to our observations above about the risk of creating technical "leverage") to permit, for example, currency hedging or staged investments into growing companies, but to prohibit synthetic borrowing.

Question 81 - What is your assessment of the two-step approach as suggested by International Organisation of Securities Commissions ('IOSCO') in the Framework Assessing Leverage in Investment Funds published in December 2019 to collect data on the asset by asset class to assess leverage in AIFs?

Please provide it, presenting costs, benefits and disadvantages of implementing the IOSCO approach. 5000 characters maximum including spaces and line breaks.

Answer:

There is no need to modify the Level 1 text of AIFMD to integrate the IOSCO approach into EU law, as the IOSCO framework has largely – and rightly - been based on the AIFMD experience.

Eventual adaptations to the AIFMD model could be done as part of technical standards and guidelines and reflected in supervisory practice of NCAs, ESMA and the ESRB instead.

Regulators are well aware that any regulatory change comes with significant costs of adaptation and compliance and that it took our industry some time and effort to understand the implications of the current AIFMD rules on leverage. The costs of introducing changes to the framework would far outweigh the benefits, given the flexibility that is already given by the current framework.

ESMA Guidelines on leverage limits (on which approach we comment below) are a good example of how the principles set in IOSCO guidance can be integrated into EU law without modifying the Directive. They ensure that, for the purposes of systemic risk monitoring, Member States follow the IOSCO's two-step approach: first, eliminating those funds unlikely to pose risks to the financial system, and second, performing a risk-based analysis on those funds that remain.

We have argued to ESMA that the recently published Guidelines do not, in our opinion, follow the spirit of the IOSCO approach which was to ensure no time is wasted looking at funds that clearly pose no concern from a financial stability perspective.

We would prefer to exclude at Step 1 any closed-end fund whose exposures are fully backed by contractual commitments from investors, provided the manager has determined that it believes

such commitments would be met by investors including in adverse market conditions. The total of such commitments and NAV would for these purposes constitute "Adjusted NAV". We are also opposed to the suggestion by ESMA that any fund of a certain type that deviates from the median or average value of leverage of funds of the same type should automatically be considered as using "unusually high leverage". In a private equity context, this will lead to situations where funds that have no substantial leverage and no deep interconnections with other market participants to be considered as potentially systematically risky despite having no such characteristics.

Question 82 - Should the leverage calculation metrics be harmonised at EU level?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 82.1 - Please explain your answer to Question 82, presenting the costs, benefits and disadvantages of your chosen approach. 5000 characters maximum including spaces and line breaks.

Answer:

Some of our members report experience of NCAs in different Member States approaching differently the calculation of leverage under AIFMD. Such instances of divergence should be eliminated through supervisory convergence.

However, if this question relates to the differences between the notions of "leverage" under AIFMD and of "leverage" within the meaning of, for example CRR2, these measures serve very different purposes, for example to measure the ratio of a credit institution between Tier 1 capital and debt exposures. We would therefore argue against such harmonisation.

Were such harmonisation to be undertaken, we would argue for: (a) very careful use of the resulting notions for the purposes only of systemic risk monitoring, as opposed to the tailoring of prudential, governance and conduct of business rules (in other words, ceasing to use the notion of an "unleveraged, closed-ended" fund as a proxy for a private equity fund; (b) incorporating the notion of "Adjusted NAV" for closed-ended funds in order to reflect the significance of uncalled commitments.

As to the idea of harmonisation between AIFMD and UCITS, please refer to our answer to Question 80.

Question 83 - What additional measures may be required given the reported increase in CLO and leveraged loans in the financial system and the risks those may present to macro-prudential stability?

Please provide your suggestion(s) including information, where available, on the costs and benefits, advantages and disadvantages of the proposed measures. 5000 characters maximum including spaces and line breaks.

Answer:

We understand this question refers to loans to companies with already significant borrowings, with some loan receivables securitised in collateralised loan obligations (we suggest caution around the term "leveraged loan", which is not scientific and ultimately a tautology).

AIFMD should remain a framework aimed at the activities of the fund manager/fund – as opposed to the activities of investee companies. Accordingly, AIFMD is not the right regime to regulate loan markets and doing so could leave regulators with only a partial overview of such markets. For example, a CLO is not itself an AIF (being a securitisation). Also, although debt funds (which Invest Europe does not represent) are increasingly common, they are not always subject to AIFMD (e.g. where they are established outside the EU and not marketed to EU investors).

Like activity should be subject to like regulation. Whether a borrower has received equity investment from a PE/VC AIF (which may or may not itself be subject to AIFMD) is irrelevant to the macro-prudential and systemic risk oversight of that company. While some private equity strategies (e.g. "leveraged buyouts"), involve the use of borrowing, this is always at the portfolio company level.

In these strategies, any borrowing by the portfolio company has no bearing on the leverage of the fund. This is true in a PE/VC context, because there is a clear separation between the fund, and the holding company (HoldCo) and operating company (OpCo). The holding company structure, including any acquisition SPVs, is part of the portfolio company group structure, not the fund structure. Indeed, for each acquisition by a PE/VC fund, the debt held by each of its individual portfolio companies will typically be structurally and systematically ring-fenced, both from any debt of the fund itself and from the debt of any other portfolio company controlled by the fund.

This protects against contagion risk and systemic risk to the financial system as it ensures that even any failure of a portfolio company does not impact either other companies owned by the

manager or the fund itself. This is why AIFMD recognises that only exposure at fund level can constitute leverage for these purposes and under Article 6(3) of AIFMR.

For these reasons, measurement of "leverage" as defined for the purposes of AIFMD in relation to a PE/VC AIF gives no indication of the prevalence of "leveraged loans" to companies in which that fund has invested equity.

The only transmission mechanism for risk to the financial sector in a PE/VC context is therefore through the lenders which, in most cases, will be credit institutions. As banks are subject to counterparty credit risk capital requirements under the Basel framework, debt capital provided to PE/VC backed companies is already covered by robust regulation on the supply side. The EBA Guidance on leveraged transactions, which seeks to impose limits on the financing of leveraged companies, is a good example of how this problem is already tackled – and should continue to be tackled - from the supply side.

We note from that perspective that, even considered from the supply side, the absolute leverage level of a borrower will not necessarily be proportional to the risk the loan poses to the bank's balance sheet. Lenders already take into account in risk assessments the borrower's credit worthiness, including cash flows and assets, its ability to de-lever over time and market conditions when taking an investment decision that will affect its exposure - i.e. all elements that indicate the borrower's credit worthiness - rather than simply using an arbitrary debt/EBITDA ratio (the current ECB metric).

Often, the refinancing risk and the borrower's ability to deleverage over time will matter much more to the bank than the amount of leverage. This is why banks tailor each borrower's leverage to the perceived credit risk. This again could not necessarily be assessed by measures set in the AIFMD. As for companies that are financed by infrastructure funds, the acceptable refinancing risk at maturity of a loan is generally low, as the continuing high predictability of cash flows over the long term ensures that the debt can be fully repaid over an acceptable period of time. For some industries characterised by high cyclicality (e.g. fashion retail), a leverage level of 4.0x may already present too great a credit risk, whilst for other businesses (e.g. infrastructure), 4.0x would be more than comfortable.

Provided a company has predictable, stable earnings and underlying growth potential, and thus a strong cash-generative capacity, a credit institution will decide that these transactions, though leveraged, can support high valuation multiples better than other types of company with lower leverage ratios. If a leverage ratio limit should be quantified at all, it should be based on facts and circumstances rather than an arbitrary fixed level.

Question 84 - Are the current AIFMD rules permitting NCAs to cap the use of leverage appropriate?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Yes.

Question 84.1 - If not, please explain your answer to Question 86, in terms of the costs, benefits and disadvantages. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 85 - Should the requirements for loan originating AIFs be harmonised at EU level?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 85.1 - If No or Don't know, please explain your answer to Question 85. 5000 characters maximum including spaces and line breaks.

Answer:

This is not relevant to Invest Europe, which represents equity and quasi equity investors in the private equity and venture capital sectors.

Question 85.1 - If yes, which of the following options would support this harmonisation?

Please select as many answers as you like.

Answer:

	Yes/No
limit interconnectedness with other financial intermediaries	N/A
impose leverage limits	N/A
impose additional organisational requirements for AIFMs	N/A
allow only closed-ended AIFs to originate loans	N/A
provide for certain safeguards to borrowers	N/A
permit marketing only to professional investors	N/A
impose diversification requirements	N/A
impose concentration requirements	N/A
other	N/A

Please explain why you think limiting interconnectedness with other financial intermediaries would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you think imposing leverage limits would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you think imposing additional organisational requirements for AIFMs would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you think allowing only closed-ended AIFs to originate loans would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you think providing for certain safeguards to borrowers would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you think permitting marketing only to professional investors would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you think imposing diversification requirements would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain why you think imposing concentration requirements would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Please explain what other option would support this harmonisation.

Please provide information, where available, on the costs and benefits, advantages and disadvantages of this option. Concrete examples are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Chapter V - Investing in private companies

Question 86 - Are the rules provided in Section 2 of Chapter 5 of the AIFMD laying down the obligations for AIFMs managing AIFs, which acquire control of non-listed companies and issuers, adequate, proportionate and effective in enhancing transparency regarding the employees of the portfolio company and the AIF investors?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

Answer:

Fully agree.

Question 86.1 - Please explain your answer to Question 86, providing concrete examples and data, where available. 5000 characters maximum including spaces and line breaks.

Answer:

In the vast majority of cases, the acquisition of control of an unlisted company is a collaborative process between the proposed controller and the company and its senior managers.

Indeed, in practice (and even without the AIFMD) the vast majority of control acquisitions of unlisted companies would involve discussions between the proposed controller and the company (management team) *prior to* the acquisition, including about the proposed controller's plans for the company.

While the AIFMD may have formalised this information flow and given it a new legal foundation, considerable information was already provided and would continue to be provided if there were no such requirements in the AIFMD. We would expect such information to be passed to employees by the management and to investors by the fund manager as part of their regular reporting.

We also re-iterate that, as already acknowledged in the AIFMD, there is no direct link between the shareholders of a company and its employees and any communication must be done in the

appropriate manner according to local company and employment laws. We think that the AIFMD already facilitates that.

In light of the above, we do **not** consider there to be a need or policy reason to change or to add to the provisions of the AIFMD.

Question 87 - Are the AIFMD rules provided in Section 2 of Chapter 5 of the AIFMD whereby the AIFM of an AIF, which acquires control over a non-listed company, is required to provide the NCA of its home Member State with information on the financing of the acquisition necessary, adequate and proportionate?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

Answer:

Somewhat agree.

Question 87.1 - Please explain your answer to Question 87, providing concrete examples and data, where available. 5000 characters maximum including spaces and line breaks.

Answer:

We are not sure whether the NCAs use this information and, therefore, whether the requirement is needed. That said, the requirement has not proved overly burdensome for managers and we would therefore not propose any changes if the NCAs find the information helpful.

Question 88 - Are the AIFMD provisions against asset stripping in the case of an acquired control over a non-listed company or an issuer necessary, effective and proportionate?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**

- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

Answer:

Somewhat agree.

Question 88.1 - Please explain your answer to Question 88, providing concrete examples and data, where available. 5000 characters maximum including spaces and line breaks.

Answer:

The principal investment objective of PE/VC fund managers, and their underlying investors, is building sustainable businesses and preserving and adding value to them over the longer term. Right across the EU, PE/VC fund managers have a well-documented track record in helping companies to grow and become internationally competitive, creating high quality employment in the process. The vast majority of PE/VC firms do not, therefore, engage in activities that could be described as "asset stripping". Given that context, the AIFMD provisions against asset stripping have only limited utility, as we do not believe that "asset stripping" is, or ever has been, widespread in Europe.

We believe the current provisions are broadly effective to address the mischief at which they are aimed (which we would stress again we believe to be very limited in the first place). We do not believe that changes are needed; indeed, considerable time has been invested by the industry in understanding the current requirements and even minor changes to the regime would require firms to incur significant time and expense in refreshing legal advice across multiple jurisdictions.

Question 89 - How can the AIFMD provisions against asset stripping in the case of an acquired control over a non-listed company or an issuer be improved?

Please provide your suggestion(s) including information, where available, on the costs and benefits, advantages and disadvantages of the proposed measures. 5000 characters maximum including spaces and line breaks.

Answer:

As noted in our response to Question 88 above, we do not think any change to these provisions is necessary or desirable. The current regime is sufficient to achieve the desired regulatory objectives and we do not believe there is any residual mischief that is not effectively addressed by the current provisions. Whilst minor changes could be of some benefit, they would result in

very significant compliance costs for the industry as it would be necessary for firms to refresh legal advice across multiple jurisdictions, re-educate deal professionals and advisers and re-test their approach to deal structuring for compliance with the revised requirements. We do not believe that the benefit of any changes is likely to outweigh those costs.

We have previously identified our concern that these provisions create an unlevel playing field between AIFs and other acquirers (financial and non-financial), but that is not an issue that could be resolved in a review of AIFMD. Nevertheless, we want to re-iterate that any further provisions would make that position worse.

Chapter VI - Sustainability/ESG

Question 90 - The disclosure regulation 2019/2088 defines sustainability risks, and allows their disclosures either in quantitative or qualitative terms.

Should AIFMs only quantify such risks?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 90.1 - Please substantiate your answer to Question 90, also in terms of benefits, disadvantages and costs as well as in terms of available data. 5000 characters maximum including spaces and line breaks.

Answer:

Invest Europe's members believe that consideration of sustainability risks is a vital part of the assessment of any prospective portfolio company and plays a key role in the stewardship of that investment during the private equity or venture capital fund's holding period.

However, it is important to stress that quantification of the many different sustainability risks that are faced by an investment fund can be very complex and subjective, or not possible at all, and has to be considered on a product-by-product basis. The choice and assessment of the relative importance of various ESG factors will vary from one investment to another. What is relevant for a certain investment may not necessarily be important for another. Not all factors will likely have the same impact for the concerned stakeholders. Materiality may differ depending on the ESG issue in question, the timeframe, the investment practice and strategy, market, country, and company.

In any case, it should be noted that PE/VC funds mainly invest in non-listed SMEs, i.e. enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. That is to say that most companies in the portfolio of PE/VC funds are not subject to many EU provisions on non-financial reporting and disclosure and do not publish detailed non-financial information. Also, some of the most innovative sectors may not even have a NACE code. As a consequence, there are often no processes to collect the data required to perform a reliable *quantitative* analysis of

sustainability risk. A requirement to quantify a risk when appropriate data is not available is likely to mislead investors.

Further, in the private equity industry (sustainability-related) data is held directly by portfolio companies and may be confidential. This data is private and not publicly available, but it will be compared to indicators built on public data sources (i.e. listed companies). Public data relates to companies whose size and geographical scope of impact are far removed from unlisted SMEs and mid-caps. Therefore, the use of indicators built on this public data to quantify sustainability risks for unlisted SMEs and mid-caps may lead to unreliable information for investors.

Question 91 - Should investment decision processes of any AIFM integrate the assessment of non-financial materiality, i.e. potential principal adverse sustainability impacts?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 91.1 - Please substantiate your answer to Question 91, also in terms of benefits, disadvantages and costs. Please make a distinction between adverse impacts and principal adverse impacts and consider those types of adverse impacts for which data and methodologies are available as well as those where the competence is nascent or evolving. 5000 characters maximum including spaces and line breaks.

Answer:

Invest Europe believes that asset managers should, and will, take account of "principal adverse impacts" because many such impacts will, or could, also have a material impact on investment return or risk. In addition, the end-investors in PE/VC funds may require all or some "principal adverse impacts", whether or not financially material, to be taken into account in decision-making and/or reported to investors.

As regards financially material adverse impacts, the fund manager will typically have a fiduciary duty to take these into account. In addition, consideration of such matters will be required by the Sustainable Finance Disclosure Regulation (Regulation (EU) 2019/2088) and by proposed amendments to the AIFMD Delegated Regulation (Amendments to EU 231/2013 as regards the sustainability risks and sustainability factors to be taken into account by Alternative Investment

Fund Managers). These latter changes will require sustainability risks to be considered as part of due diligence and built into organisational and risk management processes. Invest Europe fully supports that approach. We also note that it does not seem appropriate, given that there are other EU Regulations specifically covering these matters, to include additional obligations in a specific sectoral Directive, which could create confusion and/or expose alternative investment fund managers to different and more extensive rules than would apply to other asset managers.

As regards non-financially material "principal adverse impacts", many end-investors already require that the fund manager should take these into account and/or report on them and we expect such investor focus on sustainability to increase in the coming years, in part as a result of other EU-driven sustainability reforms. Invest Europe believes that is a positive development and works with its member firms to meet growing investor expectations in this regard.

However, we have answered "No" to Question 91 because we do not believe that it would be appropriate for there to be a *regulatory requirement* for AIFMs to consider non-financially material principal adverse sustainability impacts (i.e. that do not fall within the category of sustainability risk) as part of their investment decision-making processes. As explained above, our members embrace sustainability and are enthusiastic advocates for it. Our view, however, is that this is a matter to be agreed between investors and AIFMs and is not a matter that is amenable to one-size-fits-all regulation, and its universal application for all AIFMs and for all funds and products would result in disproportionate cost to AIFMs without corresponding benefit to investors.

To elaborate: Invest Europe believes it is appropriate for governments and regulators to require fund managers to pursue the best interests of their investors, which does require ESG factors to be taken into account where those are material to the manager's view of risk or return or when investors have required that as a condition of investment. However, in our opinion, it would be inappropriate for regulators to interfere in investment decision-making by asking fund managers to balance the interests of investors and society at large. If investors' interests, and the contractual commitments made to them, are no longer paramount, it will leave fund managers in a very invidious position with no apparent accountability for the decisions they make (which will necessarily involve value judgements) and could weaken the contractual certainty which many investors require or rely on (particularly funds-of-funds and certain institutional investors that are themselves subject to obligations in respect of their investments).

We would, therefore, like to stress the importance of freedom of contract between fund managers and investors. In the private fund world, fiduciary duties are matters to be discussed and agreed between fund managers and investors, for example in the Limited Partnership Agreement. By agreement with investors these may, and often will, require managers to consider sustainability factors in ways that are clearly specified in the investment mandate. This would be the case, for example, in an impact fund, or one with an ESG-based exclusion policy.

Invest Europe and its manager and investor members value the flexibility currently afforded to managers and investors to agree the integration of ESG factors in investment strategies as

between themselves. We believe that legislators and regulators should facilitate investor-determined adoption and integration of ESG negative externalities in managers' investment decision processes by improving the standardisation of, and access to, high quality data.

Question 92 - Should the adverse impacts on sustainability factors be integrated in the quantification of sustainability risks (see the example in the introduction)?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

Answer:

Somewhat disagree.

Question 92.1 - If you agree, please explain how and at which level the adverse impacts on sustainability factors should be integrated in the quantification of sustainability risks (AIFM or financial product level etc.).

Please explain your answer including concrete proposals, if any, and costs, advantages and disadvantages associated therewith. Please make a distinction between adverse impacts and principal adverse impacts and consider those types of adverse impacts for which data and methodologies are available as well as those where the competence is nascent or evolving. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 92.1 - If you disagree, are neutral or don't know, please explain your answer to Question 92. 5000 characters maximum including spaces and line breaks.

Answer:

As explained previously, in our opinion, it is only appropriate for regulators to *require* that ESG factors which may have a material adverse impact on the value of investments *must* be taken

into account in the decision-making process of AIFMs, and this will be required under the proposed amendments to the Delegated Regulation EU 231/2013, which Invest Europe supports. Consequently, we do not agree that non-financially material adverse impacts on sustainability factors should be *required* to be integrated in the quantification of sustainability risks, although of course they may be by agreement with investors.

Furthermore, even if certain sustainability issues could have a material impact on the value of the investment, quantification of such impact may be very complex or not possible at all and has to be assessed on a product-by-product and investment-by-investment basis. The choice and assessment of the importance of ESG factors will vary from one investment to another. What is relevant for a certain investment may not necessarily be important for another. Not all factors will likely have the same impact for the concerned stakeholders. Materiality may differ depending on the ESG issue in question, the timeframe, the investment practice and strategy, market, country, and company.

In addition, as explained previously, the magnitude of the adverse impacts of SMEs and mid-caps will not compare to that of large (multinational) companies. In other words, materiality and proportionality should be key in identifying the factors to integrate in AIFMs' investment decision processes.

In any case, as explained in our response to Question 90, AIFMs should retain the option to disclose sustainability risks either in quantitative or qualitative terms.

We also note that the Sustainable Finance Disclosure Regulation and the Taxonomy Regulation will apply to AIFMs and we do not believe that there is a need to amend Level 1 of the AIFMD in order to add additional requirements that go beyond those specified in those Regulations.

Question 93 - Should AIFMs, when considering investment decisions, be required to take account of sustainability-related impacts beyond what is currently required by the EU law (such as environmental pollution and degradation, climate change, social impacts, human rights violations) alongside the interests and preferences of investors?

Please choose between:

- **Yes**
- **No**
- **No, ESMA's current competences and powers are sufficient**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 93.1 - If Yes, how should AIFMs be required to take account of the long-term sustainability and social impacts of their investment decisions?

Please explain. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 93.1 - If No or Don't know, please explain your answer to Question 93. 5000 characters maximum including spaces and line breaks.

Answer:

As explained previously, in our opinion, factors which may have a material impact on the value of investments should be required by regulators to be taken into account in the decision-making process of AIFMs (and that will be the case under proposed amendments to Delegated Regulation 231/2013), while others may be required by agreement with investors. However, in our view, AIFMs should **not** be required by regulators to take account of non-financially material sustainability-related impacts beyond what is currently required by EU law. We believe that regulators and AIFMs should focus on effective implementation of the existing EU requirements, which will require a lot of time and effort.

In addition, introducing such a requirement would create an unlevel playing field for AIFMs vis-a-vis other market players.

From a general standpoint, we would like to stress the need for a smooth articulation among the Disclosure, Taxonomy and AIFM (as well as ELTIF, EuVECA and EuSEF) regulations and the need for a level playing field for all market players.

Question 94 - The EU Taxonomy Regulation 2020/852 provides a framework for identifying economic activities that are in fact sustainable in order to establish a common understanding for market participants and prevent green-washing. To qualify as sustainable, an activity needs to make a substantial contribution to one of six environmental objectives, do no significant harm to any of the other five, and meet certain social minimum standards. In your view, should the EU Taxonomy play a role when AIFMs are making investment decisions, in particular regarding sustainability factors?

Please choose between:

- **Yes**

- **No**
- **Don't know / no opinion / not relevant**

Answer:

Don't know / no opinion / not relevant.

Question 94.1 - Please explain your answer to Question 94. 5000 characters maximum including spaces and line breaks.

Answer:

Invest Europe believes that the EU Taxonomy is an excellent initiative. It will help the EU to achieve its sustainability-related policy goals by encouraging European companies to adopt more sustainable practices, reduce the scope for "greenwashing" and increase consistency of sustainability reporting.

However, we believe that it is only appropriate for regulators to *require* that the Taxonomy be used as a basis for investment decisions when the product in question is marketed to investors as environmentally sustainable, in which case we believe that the right approach is to require fund managers to report on their Taxonomy compliance in order to enhance transparency for investors and to limit and expose "greenwashing". Such a requirement is already included in the Sustainable Finance Disclosure Regulation (as amended by the Taxonomy Regulation) and we do not believe that any amendments are required to the AIFMD in order to give effect to that requirement.

For other products (i.e. those that have not been marketed on the basis that they are environmentally sustainable), investors may require asset managers to report on their level of Taxonomy compliance, but we do not believe that this requirement (which could cause disproportionate costs to AIFMs and be very burdensome for AIFMs investing in SMEs or non-EU companies) should be mandated by regulators as a universal obligation including for products that are not marketed as environmentally sustainable, and for that latter category of products should be left to investors and managers to agree among themselves. Indeed, investors may go beyond requiring a manager to report on its level of Taxonomy compliance and may require that the manager only invests in Taxonomy-compliant activities, but again we believe that this is a matter for investors and managers to agree as part of their agreement on the manager's investment mandate.

Question 95 - Should other sustainability-related requirements or international principles beyond those laid down in Regulation (EU) 2020/852 be considered by AIFMs when making investment decisions?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 95.1 - Please explain your answer to Question 95, describing sustainability-related requirements or international principles that you would propose to consider.

Please indicate, where possible, costs, advantages and disadvantages associated therewith. 5000 characters maximum including spaces and line breaks.

Answer:

Many AIFMs already subscribe to and comply with a variety of sustainability-related international principles, and want to preserve this option. It should be a decision for the individual AIFM in discussion with their investors to decide whether to sign up and comply with any other sustainability-related requirements or international principles based on its own investment objectives and investors. There is a proliferation of standards and it will be for the investors and the AIFM to agree which, if any, standards are most appropriate for their particular investment mandate.

Chapter VII - Miscellaneous

Question 96 - Should ESMA be granted additional competences and powers beyond those already granted to them under the AIFMD?

Please select as many answers as you like.

Answer:

	Yes/No
entrusting ESMA with authorisation and supervision of all AIFMs	No
entrusting ESMA with authorisation and supervision of non-EU AIFMs and AIFs	No
enhancing ESMA's powers in taking action against individual AIFMs and AIFs where their activities threaten integrity of the EU financial market or stability of the financial system	No
enhance ESMA's powers in getting information about national supervisory practices, including in relation to individual AIFMs and AIFs	No
no, there is no need to change competences and powers of ESMA	Yes
other	No

If Yes, please explain why you think ESMA should be entrusted with authorisation and supervision of all AIFMs.

Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If Yes, please explain why you think ESMA should be entrusted with authorisation and supervision of non-EU AIFMs and AIFs.

Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If Yes, please explain why you think ESMA's powers should be enhanced in taking action against individual AIFMs and AIFs where their activities threaten integrity of the EU financial market or stability of the financial system.

Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If Yes, please explain why you think ESMA's powers should be enhanced in getting information about national supervisory practices, including in relation to individual AIFMs and AIFs.

Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

If Yes, please explain with what other additional competences and powers ESMA should be granted.

Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 97 - Should NCAs be granted additional powers and competences beyond those already granted to them under the AIFMD?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 97.1 - If so, please explain your answer to Question 97, providing information, where available, on the costs and benefits, advantages and disadvantages of implementing your suggestion. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 98 - Are the AIFMD provisions for the supervision of intra-EU cross-border entities effective?

Please choose between:

- **Fully agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Fully disagree**
- **Don't know / no opinion / not relevant**

Answer:

Fully agree.

Question 98.1 - Please explain your answer to Question 98, providing concrete examples. 5000 characters maximum including spaces and line breaks.

Answer:

NCAs are effectively carrying out their missions and functions. In a cross-border context NCAs have the option to defer certain queries to the other NCAs in the context of the ESMA working groups or in a bilateral context. NCAs also collectively work on Q&As at ESMA level and provide

relevant guidance. The supervision by NCAs is generally working effectively. Only the NCAs are in a position to effectively and efficiently monitor AIFMs authorised by them.

Question 99 - What improvements to intra-EU cross-border supervisory cooperation would you suggest?

Please provide your answer presenting costs, advantages and disadvantages associated with the suggestions. 5000 characters maximum including spaces and line breaks.

Answer:

Intra-EU cross-border supervisory cooperation is an integral part of the Directive's effectiveness. A visible part of the EU's supervisory coordination may be found in the ESMA Q&As that are released on a regular basis. While these Q&As provide valuable guidance, the process lacks transparency as to how these Q&As are approved and does not permit industry input to be provided in a transparent manner.

We would propose that ESMA strives to improve its dialogue with industry stakeholders, particularly in the context of producing such Q&As. Even though ESMA Q&As are not legally binding, they are often determining factors for national authorities' application of EU law and have sometimes had a significant impact on how private equity firms have been required to conduct their business.

While we support the role of Q&A in increasing supervisory convergence, we would call for these to be subject to the same better regulation principles as guidelines and recommendations and to allow for a transition period enabling AIFMs to make any necessary adjustments and avoiding legal uncertainty. An opportunity for stakeholders to offer input prior to the publication of revised Q&A documents should be guaranteed, whether under the form of a web-based tool or any other option which could offer stakeholders the opportunity to provide feedback – solicited or unsolicited - on issues they may have a specific interest in.

Regulatory practice and regulatory convergence need to be approached bearing in mind that while the legal framework is in principle the same across all the Member States, there remain a number of variables when it comes to e.g. the product, language (which carries the risk of significant differences in interpretation outside the local context), and service providers (administrators, depositaries, valuation agents, distributors, etc.).

The enhancement of powers of ESMA in this context may simply wipe out or ignore some of these local distinctions, which are entirely in line with applicable laws and regulations and regulatory practice.

Question 100 - Should the sanctioning regime under the AIFMD be changed?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 100.1 - If so, please explain your answer to Question 100, substantiating your answer in terms of costs/benefits/advantages, if possible. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 101 - Should the UCITS and AIFM regulatory frameworks be merged into a single EU rulebook?

Please choose between:

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

Answer:

No.

Question 101.1 - If so, please explain your answer to Question 101, in terms of costs, benefits and disadvantages. 5000 characters maximum including spaces and line breaks.

Answer:

Not applicable.

Question 102 - Are there other regulatory issues related to the proportionality, efficiency and effectiveness of the AIFMD legal framework?

Please detail your answer, substantiating your answer in terms of costs/benefits/advantages, where possible. 5000 characters maximum including spaces and line breaks.

Answer:

Recognition of diversity / differentiation

We would like to re-iterate that there are fundamental differences between the AIFMD and UCITS frameworks (regarding target audience, business models, investment strategies and intended type of investor), and to highlight the diversity within the AIF/AIFM world. It is critical that legislators take this into account when reviewing the AIFMD.

As AIFMD was created using the UCITS framework as a starting point, various rules designed for UCITS were copied into AIFMD. However, AIFs constitute a diverse category of funds used for a variety of purposes, with a very different market context and investor focus to UCITS. As a result, applying the same regulatory regime to UCITS and AIFs is not appropriate and results in unnecessary cost and complexity, since it seeks to impose a level of investor protection proportionate for UCITS funds aimed at retail investors but disproportionate in the AIF context. In particular, the following should be noted:

- UCITS funds target retail investors and invest most of their capital in transferrable securities (i.e. liquid assets).
- PE/VC funds are mostly aimed at professional / sophisticated investors, which do not need the same type of protections as retail investors. These investors complete extensive due diligence before investing in a PE/VC fund.
- Unlike UCITS funds, PE/VC funds invest long term mostly in illiquid assets held for several years, investors have no redemption rights and transfers of investor interests typically require the consent of the AIFM (and the secondary market is limited). Little or no cash is held in fund accounts and NAV calculations (to the extent possible in a non-unitised fund) are largely irrelevant until underlying assets or investor interests are disposed of. At those points, assets are generally valued externally by both buyer and seller during a comparatively lengthy disposal process.

Maintaining the NPPRs

- The PE/VC industry is global: investor capital from one jurisdiction is invested by a fund manager in companies in another. EU companies want to receive significant third country fund investment; and EU investors want to invest in third country funds (both for the returns and risk diversification). It is therefore critical EU investors have access to non-EU AIFMs' funds to provide them with the choice they need to make informed investment decisions.

- EU pension funds and insurance companies need to diversify their portfolios (by asset class and geography) for prudent risk management, and to achieve returns to deliver to EU citizens the pensions and savings growth they expect. To meet these expectations, institutional investors need access to fund managers, markets and opportunities across the world.

- Access to third country investment opportunities also helps reduce systemic risk in the EU by spreading investment more widely.

A well-functioning private placement framework is central to Europe's financial regulatory architecture and necessary to the global capital flows at the heart of the PE/VC industry. Even though there are regulatory, administrative and fee inconsistencies across NPPRs in Member States, creating unnecessary burdens for non-EU AIFMs, the NPPRs have proven a key channel for EU investors to access global funds and allowed non-EU managers to access the EU market in a way that many have come to find manageable.

The NPPRs are particularly important to enable third country fund managers who only wish to approach a select number of EEA investors (many managers only have clusters of investors in 3-4 jurisdictions, so an EU AIFM is not cost effective or proportionate) to continue to be able to provide opportunities for EU investors.

This is an important characteristic of the NPPRs that must be taken into account. They do *not* grant access to the EU single market *in one go*, but only to national investors on a country-by-country basis. The situation of EU AIFMs being able to passport and market their funds in all of the EU is not comparable with non-EU AIFMs being allowed by a single Member State's NCA to distribute only to the (professional) investors in that Member State. In addition to being regulated and authorised in their home country, non-EU AIFMs must still comply with certain AIFMD requirements (e.g. Article 42), including in relation to reporting and notifications.

The benefits of retaining the NPPRs for the European economy are significant and the concerns of lower regulatory standards (for non-EU AIFMs) have not been borne out since AIFMD was implemented (there have been no systemic exposure / failings caused by the current NPPR framework). Most market participants have embedded the regulatory requirements and are managing these effectively. We believe changing these would cause significant disruption particularly at a time (post-pandemic) where the economy is fragile and which will see a critical need for PE/VC to invest in EU companies.

Contact

For further information, please contact Martin Bresson (martin.bresson@investeurope.eu) at Invest Europe.

About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.
For more information please visit www.investeurope.eu.