

Chapter 16

Scope of the Alternative Investment Fund Managers Directive

16.6 Exclusions

G Question 6.1: What exclusions from the regulated activities specific to AIFs are there?

The following table lists the exclusions. Some exclusions are relevant to the definition of an *AIF*, some to the definition of an *AIFM* and some to both.

Table: Exclusions		
Entities that are not <i>AIFs</i>	<i>Persons</i> excluded from the definition of <i>managing an AIF</i>	Where further <i>Handbook</i> material can be found
An institution for occupational retirement provision which falls within the scope of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision	An institution for occupational retirement provision which falls within the scope of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in article 2.1 of that directive, or the investment managers appointed pursuant to article 19.1 of that directive, in so far as they do not manage <i>AIFs</i> A national, regional or local government or body or other institution which manages funds supporting social security and pension systems	Question 2.32
An employee participation scheme or employee savings scheme	An employee participation scheme or employee savings scheme	Question 2.34
A securitisation special purpose entity	A securitisation special purpose entity	Question 2.37
A holding company	A holding company <i>A small registered UK AIFM</i> , in respect of the	Questions 6.2 to 6.5 FUND 1

*AIFs managed by it by virtue of which it is entitled to be registered as a *small registered UK AIFM* (but not in respect of any other *AIFs* managed by it)*

An *AIFM* that manages a group *AIF* Question 6.6

A national central bank None

The European Central Bank, the European Investment Bank, the European Investment Fund, a bilateral development bank, the World Bank, the International Monetary Fund, any other supra-national institution or similar international organisation, or a European Development Finance Institution, in the event that such institution or organisation manages *AIFs* and in so far as those *AIFs* act in the public interest None

An *AIFM*, the registered office of which is not in an *EEA State* Question 8.3

Note 1: All references are to this chapter of *PERG* unless otherwise stated

Note 2: In general the meaning of *AIF* in the RAO is the one in the *AIFMD UK Regulation*. The exclusions from the *AIF* definition noted in this table come from the *AIFMD UK Regulation*. However, the RAO article dealing with *managing an AIF* says that any expression used in that article which is not defined in the *AIFMD UK Regulation* and is used in *AIFMD* has the same meaning as in that directive. This makes no difference as, in our view, the *AIFMD UK Regulation* implements *AIFMD*.

Question 6.2: Is a holding company subject to AIFMD?

No. There is a specific exclusion for a holding company.

For these purposes, a holding company means a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy(s) through its subsidiaries, associated companies or participations in order to contribute to their long-term value and which is either a company:

(1) operating on its own account and whose shares are admitted to trading on a regulated market in the European Union; or

(2) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents.

In our view, this exclusion is at least in part by way of clarification. In some circumstances, compliance with the conditions of the exclusion will mean that there is no *AIF* in the first place.

Question 6.3 How wide does the holding company exclusion go?

Broadly speaking, therefore, an undertaking will be able to use the holding company exclusion if:

- (1) it carries out a commercial business strategy through its participations by contributing to their long-term value; and
- (2) it does not generate its returns for its investors by means of divestment of its participations.

The question then is what else the exclusion covers.

Recital (8) of *AIFMD* says that managers of private equity funds or *AIFMs* managing *AIFs* whose shares are admitted to trading on a regulated market should not be excluded from its scope.

However, the exclusion envisages that an undertaking, whose main purpose is generating returns for its investors by means of divestment of its subsidiaries or associated companies, may still be excluded from *AIFMD* if its shares are listed.

The question then is how the recital and the exclusion are to be reconciled.

There is guidance on this on the *AIFMD* section of the European Commission's webpages "Questions on Single Market Legislation". The answer to Question ID 1146 says that the definition has to be read as a whole and jointly with recital (8). Consequently, private equity as such should not be deemed to be a holding company. The concept of "operating on its own account" should also be interpreted in the context of the requirement that the shares of such holding company are admitted to trading on an EU regulated market. Hence, says the guidance, this means that a holding company is a separate legal entity that carries out the business of owning and holding equity shares of other companies without the intent to dispose of such shares. Such business is done on the own account of the holding company and not on behalf of a third party. The answer says that the exemption is meant to cover "large corporates such as Siemens or Shell".

In theory, there is no distinction between a company whose returns are for itself and one whose returns are for its investors, as the returns of any company are generated for its investors as they change over time. However, in our view, this distinction is pointing towards the factors that distinguish a typical fund from a commercial company.

This does not completely explain the part of the exclusion that refers to shares being admitted to trading (see paragraph (1) of the answer to Question 6.2 (Is a holding company subject to *AIFMD*?)). In our view, this part of the exclusion is limited to internally managed *undertakings*. Therefore, this part of the exclusion applies to a business if:

- (3) it carries out a commercial business strategy through its participations by contributing to their long-term value;
- (4) the *AIF* is self-managed;

(5) it is not clearly acting as a fund taking into account the factors in the answers to Question 2.20 (Are there any other factors to take into account?) and Question 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund); and

(6) the AIF's shares are admitted to trading on a regulated market in the European Union.

Paragraphs (3) to (6) do not apply to an undertaking that meets the criteria in paragraphs (1) and (2).

Question 6.4: Is the holding company exclusion always available where the fund holds controlling stakes in the businesses in which it invests so that the businesses are its subsidiaries?

No. It is important to remember that the exclusion is only available if the company carries out a business strategy(s) through its subsidiaries. The company should act in the same way that a conventional holding company of an industrial group would act. This means that the holding company must be responsible (with the subsidiaries) for the overall strategy of the subsidiaries. So, if the manager's subsidiaries are manufacturers, the manager must be responsible, with the subsidiaries themselves, for the manufacturing strategy of the subsidiaries.

The European Commission's Q&A about *AIFMD* say (Question ID 1146) that it is inherent in the concept of a holding company that all operations apart from those related to the ownership of shares and assets are done via its subsidiaries, associated companies or participations. In our view, the exemption is available only to the extent that the undertaking is acting as a holding company. It does not matter if the undertaking carries out other activities but any such activities will not get the benefit of the holding company exclusion. Those activities should be entirely ancillary to its role as a holding company or otherwise outside *AIFMD*. Thus, for example, a holding company may also provide services to other members of the group such as raising capital through the capital markets, treasury functions and human resources services.

If a holding company manages an *AIF* as well as acting as a holding company, its activities in managing that *AIF* are not excluded. The exclusion applies only in so far as it acts as a holding company. For example, if a holding company manages a conventional unit trust scheme it would not be excluded for that activity.

Question 6.5: What does company mean in the holding company exclusion?

As explained in the answer to Question 2.25 (What is the justification for the approach in the answers to Questions 2.15 to 2.23?), the basic distinction in *AIFMD* is between investment activities and commercial/industrial activities. The holding company exclusion is an illustration of this basic approach. For that reason, we believe that the term 'company' should be broadly interpreted to cover any undertaking such as, for example, a *limited liability partnership*.

Question 6.6: What does the group AIF exclusion involve?

An *AIFM* in so far as it manages one or more *AIFs* whose only investors are:

(1) the *AIFM*; or

(2) the *parent undertakings* of the *AIFM*; or

(3) the *subsidiary undertakings* of the *AIFM*; or

(4) other *subsidiary undertakings* of those *parent undertakings*;

is excluded from the *regulated activity of managing an AIF* provided that none of the investors is an *AIF*.