

In-scope v. out-of-scope :A practical checklist

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- Is the structure an investment undertaking?
- Does the structure raise capital?
- From a number of investors?
- Does the structure have a defined investment policy?
- Is the structure a UCITS or exempt?

Elements to check	Yes/No?
Is the structure an investment undertaking? Test 1: No commercial or industrial purpose	

- You need to make sure that the structure does not have
 - an « industrial » purpose
 - a « commercial » purpose
- « Commercial » : purchase/sale/exchange of goods or commodities and/or the supply of non-financial services
- « Industrial » : production of goods or construction of properties

Elements to check	Yes/No?
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What is the legal nature and binding effect of the ESMA Guidelines of May 2013?

In-scope v. out-of-scope

Elements to check	Yes/No?
Is the structure an investment undertaking? Test 1: No commercial or industrial purpose	

- You need to make sure that the structure does not have
 - an « industrial » purpose
 - a « commercial » purpose

- « Commercial » : purchase/sale/exchange of goods and/or commodities and/or the supply of non-financial services

- « Industrial » : production of goods or construction of immovable properties

What is the legal nature and binding effect of the articles of association?

What if the articles of association refer to both a commercial and « fund » purpose?

Elements to check	Yes/No?
Is the structure an investment undertaking? Test 1: No commercial or industrial purpose Test 2: Pooling to generate a pooled return	YES

- Does the structure « pool together » capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors?

- Pooled return is defined as
 - the return generated by the pooled risk (...)
 - arising from acquiring, holding or selling investment assets (...)
 - including the activities to optimize or increase the value of these assets

In-scope v. out-of-scope

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What if a PE fund provides for different returns per investor class?

In-scope v. out-of-scope

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What if a PE fund provides for different returns for

What about virtual pooling arrangements?

Elements to check	Yes/No?
Is the structure an investment undertaking?	
Test 1: No commercial or industrial purpose?	YES
Test 2: Pooling to generate a pooled return?	YES
Test 3: Shareholders no day-to-day discretion/control?	

- « One or more » v. « all » of the shareholders
- « Day-to-day discretion or control » defined as
 - a form of direct and on-going power of decision (...)
 - whether exercised or not (...)
 - over operational matters relating to the daily management of the undertakings' assets (...)
 - which extends substantially further than the ordinary exercise of decision or control

In-scope v. out-of-scope

Elements to check	Yes/No?
Is the structure an investment undertaking?	
Test 1: No commercial or industrial purpose?	YES
Test 2: Pooling to generate a pooled return?	YES
Test 3: Shareholders no day-to-day discretion/control?	

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What about voting at shareholder meetings on mergers or liquidation?

In-scope v. out-of-scope

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Is the structure an investment undertaking?	
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What about voting at shareholder meetings on reserved matters?

What about « reserved matters » in a joint venture agreement?

In-scope v. out-of-scope

Elements to check	Yes/No?
Is the structure an investment undertaking?	
Test 1: No commercial or industrial purpose?	YES
Test 2: Pooling to generate a pooled return?	YES
Test 3: Shareholders no day-to-day discretion/control?	

« Joint venture » exemption

- Recital 8 is a « floating » recital « which cannot alter or amend the list of exemptions given in the core legal text » (European Commission, Q&A)
- A joint-venture could be excluded only if it does not fall within the definition of an AIF or if it falls under the exemptions
- « Substance should prevail over the formal denomination »

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Elements to check	Yes/No?
Is the structure an investment undertaking?	YES
Does the structure raise capital? Test 1: Procure transfer/commitment of capital?	

- Does the structure (or a person acting on its behalf)
 - enter into the commercial activity of taking direct or indirect steps (...)
 - to procure the transfer or commitment of capital by one or more investors to the undertaking (...)
 - for the purpose of investing it in accordance with a defined investment policy?

In-scope v. out-of-scope

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What if there is only one capital raising during the lifetime of the entity?

In-scope v. out-of-scope

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Difference between contributions in cash and in kind?

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 raising
 e
 of the

In-scope v. out-of-scope

Elements to check	Yes/No?
Is the structure an investment undertaking?	YES
Does the structure raise capital? Test 1: Procure transfer/commitment of capital? Test 2: Not from « members of a pre-existing group »?	YES

« Family office » exemption

- Is capital invested in the structure by a member of a preexisting group, for the investment of whose private wealth the undertaking has been exclusively established?
- Defined list of « family members » (e.g. spouse, « committed intimate relationship », relatives in direct line, siblings, uncles, aunts, first cousins and the dependants of an individual)

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What about succession planning schemes?

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- From a number of investors?
- Does the structure have a defined investment policy?
- Is the structure a UCITS or exempt?

Elements to check	Yes/No?
Is the structure an investment undertaking?	YES
Does the structure raise capital?	YES
From a number of investors? Test 1: No prevention? (OR)	

- Is the structure not prevented from raising capital from more than one investor
 - by its national law (...)
 - the articles of incorporation (...)
 - or any other arrangement of binding legal effect

Elements to check	Yes/No?
Is the structure an investment undertaking?	YES
Does the structure raise capital?	YES
From a number of investors? Test 1: No prevention? (OR)	

- Is the structure not prevented from raising capital from more than one investor
 - by its national law (...)
 - the articles of incorporation (...)
 - or any other arrangement of binding legal effect

Is the actual number of shareholders relevant? Quid if only one shareholder?

Elements to check	Yes/No?
Is the structure an investment undertaking?	YES
Does the structure raise capital?	YES
From a number of investors? Test 1: No prevention? (OR) Test 2: Sole investor structure?	YES

- If the structure cannot raise capital from more than one investor, does its sole investor
 - invest capital which it has raised from more than one person with a view to investing it for the benefit of those persons; and
 - consist of an arrangement which in total has more than one investor for the purposes of the AIFMD?

In-scope v. out-of-scope

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Is the structure an investment undertaking?	YES
Does the structure raise capital?	YES
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 - invest capital which it has raised from more than one person with a view to investing it for the benefit of those persons; and
 - consist of an arrangement which in total has more than one investor for the purposes of the AIFMD?

Examples:

- Fund of funds is the sole investor
- Sole investor is a nominee
- Master/feeder

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Elements to check	Yes/No?
Is the structure an investment undertaking?	YES
Does the structure raise capital?	YES
From a number of investors?	YES
Does the structure have a defined investment policy?	

- Does the structure have a policy about how the pooled capital is to be managed to generate a pooled return for the investors?
- Factors that, singly or cumulatively, tend to indicate the existence of a defined investment policy

Indicative criteria

- Is the investment policy determined and fixed?
- Is the investment policy set out in a document which becomes part of or is referenced in the articles of incorporation?
- Does the structure or its manager have a legal obligation to follow the investment policy?
- Does the investment policy specify investment guidelines
 - To invest in certain categories of assets
 - To invest in accordance with restrictions on asset allocation
 - To pursue certain strategies
 - To invest in particular geographical regions?
 - To conform to restrictions on leverage?
 - To conform to minimum holding periods?
 - To conform to other restrictions designed to provide risk diversification?

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Elements to check	Yes/No?
Is the structure an investment undertaking?	YES
Does the structure raise capital?	YES
From a number of investors?	YES
Does the structure have a defined investment policy?	YES
The structure is not a UCITS or otherwise exempt? Test 1: The structure is not a UCITS?	

- Criteria of Directive 2009/65/EC

In-scope v. out-of-scope

Holding

check

Yes/No?

Institution for occupational retirement provision

Investment undertaking?

YES

From a

own capital?

YES

Supranational

From a

YES

Does t

defined investment policy?

YES

Central Bank

Is the structure

YES

Test 1: The str

Test 2: The structure is

Government (social security and pensions)

Employee participation

SPV

Parent

In-scope v. out-of-scope

Holding

check

Yes/No?

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YES

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YES

Central Bank

The structure

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YES

Test 1: The str

Test 2: The structure is

Government (social security and pensions)

Employee participation

SPV

Parent

Holding

A company:

- with shareholdings in one or more other companies (...)
- the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations (...)
- in order to contribute to their long-term value (...)
- which is either a company:
 - operating on its own account and whose shares are admitted to trading on a regulated market in the Union; or
 - 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-scope v. out-of-scope

Holding

A company:

- with shareholdings in one or more other companies (
- the commercial purpose of which is to carry out a business strategies through its subsidiaries, associated companies
- in order to contribute to their long-term value (...)
- which is either a company:
 - operating on its own account and whose shares are listed on a regulated market in the Union; or
 - 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

This means that the holding company is a separate legal entity that carries out the business of owning and holding equity shares of other companies without the intent to dispose of such shares

In-scope v. out-of-scope

Holding

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- the commercial purpose of which is to carry out a business strategies through its subsidiaries, associated companies
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 - operating on its own account and a regulated market in the Union; or
 - 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

This means that the holding company is a separate legal entity that carries out the business of holding shares of companies with the intent to control such

« [...] was meant to exclude from the AIFMD large corporates such as Siemens or Shell »

Securitization SPV

- Entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EC) No 24/2009
- « Securitisation » means a transaction or scheme whereby
 - An asset or pool of assets is transferred to an entity that is:
 - Separate from the originator; and
 - Created for or serves the purpose of the securitisation and/or
 - The credit risk of an asset or pool of assets, or part thereof, is transferred to the investors in the securities, securitisation fund units, other debt instruments and/or financial derivatives issued by an entity that is:
 - Separate from the originator; and
 - Created for or serves the purpose of the securitisation, and:
 - the transfer is achieved (a) by the economic transfer of the assets being securitised to an entity separate from the originator (e.g. via transfer of ownership, or (b) by the use of credit derivatives, guarantees or any similar mechanism

In-scope v. out-of-scope

Securitization SPV

- Entities whose sole purpose is to carry on a securitisation within the meaning of Article 1(2) of Regulation (EC) N
- « Securitisation » means a transaction or scheme which:
 - An asset or pool of assets is transferred to an entity:
 - Separate from the originator; and
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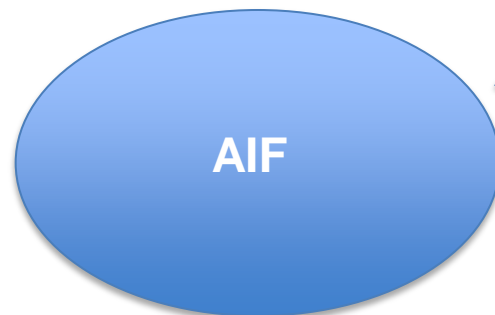
«[I]t should be emphasized that the reference to a securitization SPE should be

integrated and should be used

What about
«ICB's in
schuldvorderingen»
/ « OPC en
créances » ?

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of the

A PRACTICAL CHECKLIST	Yes/No?
Is the structure an investment undertaking?	YES
Does the structure raise capital?	YES
From a number of investors?	YES
Does the structure have a defined investment policy?	YES
The structure is not a UCITS or otherwise exempt?	YES



What can Liedekerke Banking mean for you?

**Know-how:
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**Advice:
Documents and procedures**

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**Litigation:
Winning your case**

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