

AMF Position 2013-22

Frequently asked questions on the transposition of the AIFM Directive into French law

Reference texts: Article 33 of Order 2013-676 of 25 July 2013 amending the framework for asset management, Articles L. 214-24, L. 214-24-20, L. 532-9 and D. 214-32-7-1 of the Monetary and Financial Code and Article 311-1 A of the AMF General Regulation

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (the “AIFM Directive”) was transposed into the Monetary and Financial Code by Order 2013-676 of 25 July 2013, Decree 2013-687 of 25 July 2013 and the Order of 8 August 2013 authorising amendments to the AMF General Regulation.

In line with the guides published in the first half of 2013, the AMF is keen to continue to support market participants impacted by the transposition of the AIFM Directive into French law.

The purpose of this document is to set out answers to questions likely to be of interest to all participants involved in managing AIF. It draws, in part, on answers given in response to questions submitted by professionals via the AMF’s dedicated mailbox (aifm@amf-france.org).

This document will be updated regularly and is liable to evolve in line with future amendments to the AMF General Regulation (Book IV on products), as well as when new European documents are published (ESMA guidelines, etc.).

For the sake of clarity, readers should note the following:

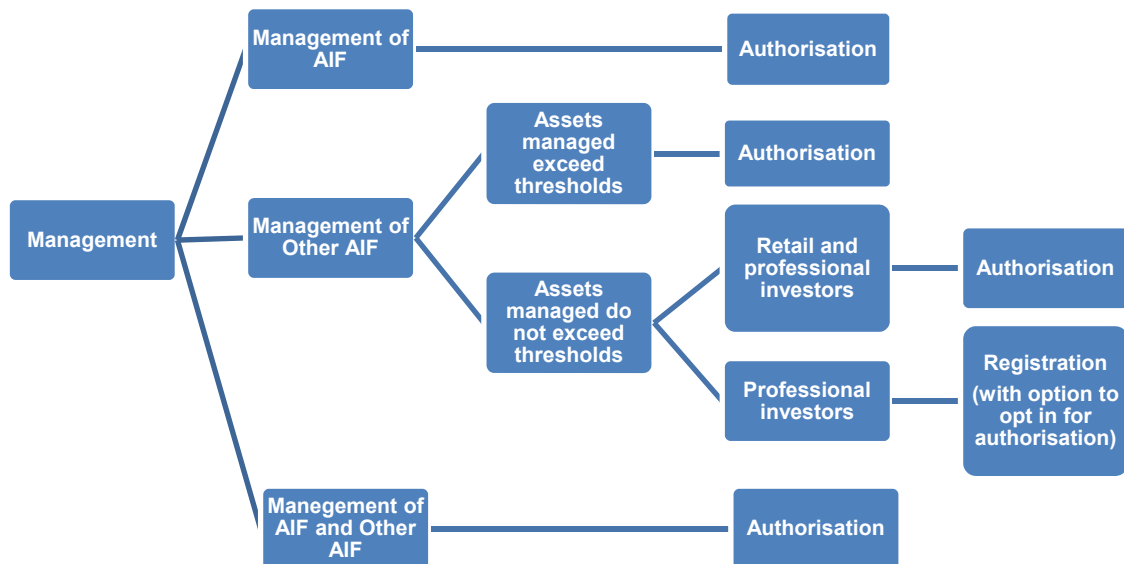
- Unless otherwise stated, the term “AIF” is used to denote both AIFs listed in the Monetary and Financial Code (general purpose investment funds, private equity funds, alternative funds of funds, real estate collective investment schemes, employee savings funds, real estate investment companies, forestry investment companies, closed-ended investment companies, specialised professional funds, professional private equity funds, professional real estate collective investment schemes and securitisation schemes) and Other AIFs (vehicles falling under the definition of AIF laid down in Article L. 214-24 but not listed in paragraph II of that same article).
- Reference is usually made to portfolio management companies; note, however, that an AIF may be self-managed, in which case the vehicle must meet the same criteria as, and be authorised in the same way as, a portfolio management company.

1. Authorisation and registration of market participants

1.1. Do legal entities managing AIFs need to be authorised by the AMF as portfolio management companies, or can they simply be registered with the AMF?

In principle, all legal entities managing AIFs¹ or Other AIFs² must be **authorised** as portfolio management companies³.

Notwithstanding this principle, legal entities exclusively managing Other AIFs whose total asset value⁴ falls below the €100 million or €500 million thresholds⁵ and where all the unitholders or shareholders are professional investors must **register** with the AMF⁶. They may, however, apply to be authorised as portfolio management companies, for example if they wish to benefit from the opportunities offered by the AIFM Directive.



1.2. Practical example: what impact does the transposition of the AIFM Directive into French law have on venture capital firms (société de capital risque, SCR)?

The guide to modernisation measures applied to French collective investments (in French only) published on the AMF website states as follows:

¹ AIF listed in Article L. 214-24 of the Monetary and Financial Code (general purpose investment funds, private equity funds, alternative funds of funds, real estate collective investment schemes, employee savings funds, real estate investment companies, forestry investment companies, closed-ended investment companies, specialised professional funds, professional private equity funds, professional real estate collective investment schemes and securitisation schemes). In accordance with paragraph VI, Article 33 of Order 2013-676 of 25 July 2013, companies managing real estate investment companies and forestry investment companies must apply to be authorised as portfolio management companies by 22 July 2014.

² As defined in paragraph III of Article L. 214-24 of the aforementioned code – i.e. vehicles falling under the definition of AIF laid down in paragraph I of Article L. 214-24 but not listed in paragraph II of that same article.

³ Pursuant to paragraphs II and III of Article L. 214-24 and Article L. 532-9 of the Monetary and Financial Code.

⁴ Calculated in accordance with Article 2 of Commission Delegated Regulation (EU) No. 231/2013 of 19 December 2012.

⁵ Under the conditions laid down in Article R. 532-12-1 of the Monetary and Financial Code:

- €100 million, including assets acquired using leverage; or
- €500 million where those legal entities do not use leverage and cannot redeem units or shares for a period of five years with effect from the date of their initial investment in each AIF.

⁶ Point 3, paragraph III, Article L. 214-24 of the Monetary and Financial Code.

“The purpose of a venture capital firm (SCR) that raises funds from a number of third party investors (whether or not professional) is to invest its capital in line with a predefined strategy. Although the nature of such a venture capital firm (SCR) up to now excluded it from the scope of regulated CIS, as listed in Article L. 214-1 of the Monetary and Financial Code, by virtue of its purpose such a firm now constitutes an AIF.”

In other words, if a venture capital firm (SCR) meets all the criteria set out in the definition of an AIF⁷, the vehicle constitutes an AIF; more specifically, under French law, it constitutes an Other AIF as defined in paragraph III of Article L. 214-24 of the aforementioned code.

Classification as an Other AIF has a number of consequences.

If the total asset value of one or more AIFs (including Other AIFs) managed by a given legal entity, calculated in accordance with Article 2 of Commission Delegated Regulation (EU) 231/2013 of 19 December 2012, exceeds the aforementioned thresholds of €100 million or €500 million, the AIFM Directive applies in full; this means, in particular, that the AIF or AIFs in question must be managed by a portfolio management company authorised under the AIFM Directive and a depositary must be appointed for the AIF.

If the total asset value of one or more AIFs (including Other AIFs) managed by a given legal entity, calculated in accordance with Article 2 of Commission Delegated Regulation (EU) 231/2013 of 19 December 2012, does not exceed the €100 million or €500 million thresholds:

- The legal entity managing the AIF or AIFs in question must apply to be authorised as a portfolio management company (or, where it has its own in-house manager, a self-managed vehicle), with the possibility of opting to apply the AIFM Directive in full, and a depositary must in any event be appointed for the AIF.
- Notwithstanding this principle, where the unitholders or shareholders in Other AIFs consist exclusively of professional investors, there is no need to apply for authorisation for the legal entity managing those AIFs and, in this case, the Other AIFs will not need a depositary. The aforementioned legal entity will, however, have to register with the AMF⁸ and comply with a number of reporting requirements. It may apply to be authorised as portfolio management company (or self-managed vehicle), for example if it wishes to benefit from the opportunities offered by the AIFM Directive.

1.3. When a financial investment adviser advises a venture capital firm (SCR) that qualifies as an AIF, does that financial investment adviser need to apply for authorisation as a portfolio management company?

No. Since the financial investment adviser cannot under any circumstances decide on the AIF's management strategy, and cannot therefore take part in its investment decisions, the financial investment adviser does not need to apply for authorisation as a portfolio management company.

Where the AIF is self-managed, it must apply for authorisation as a self-managed AIF and thus meet the same criteria as a portfolio management company. Conversely, where the AIF is managed by a separate legal entity under an overall management delegation agreement, that legal entity must apply for authorisation as a portfolio management company.

It is important to remember that the AIF (or, where a management delegation agreement is in place, the portfolio management company) may decide to follow (or not to follow) the advice provided by the financial investment adviser to the extent that it remains independent and responsible for its management.

⁷ Laid down in Article L. 214-24 of the Monetary and Financial Code and clarified by AMF Position 2013-16 – Essential concepts found in the Directive on Alternative Investment Fund Managers.

⁸ Point 3, paragraph III, Article L. 214-24 of the Monetary and Financial Code.

1.4. At what point do entities managing AIFs or Other AIFs need to obtain authorisation, where applicable, as portfolio management companies?

Entities managing AIFs or Other AIFs as at the publication date of the Order (27 July 2013) and falling within the scope of entities requiring authorisation as portfolio management companies may apply for such authorisation at any time during a transitional period extending until 22 July 2014⁹. Note that the requirements arising from the transposition of the AIFM Directive will apply in full to the market participants concerned with effect from 22 July 2014. However, portfolio management companies will only be able to claim the benefit of the provisions on management and marketing passports with effect from their actual authorisation under the AIFM Directive¹⁰.

Entities not managing AIFs or Other AIFs as at 27 July 2013 and considering doing so must apply in advance for authorisation as portfolio management companies (unless their circumstances are such that they are only required to register).

1.5. Where a portfolio management company was initially authorised to invest the portfolios it manages in “ARIA” CIS (henceforth known as general purpose professional funds), box C2 (French UCITS, European UCITS compliant with Directive 2009/65/EC and CIS authorised for marketing in France) on the old authorisation form was checked. Which box is checked on the new authorisation form?

Given the distinction that is now drawn between UCITS and AIF, the portfolio management company authorisation form has been amended. In the case in point, box B3 on the new authorisation form (European AIFs intended for professional clients and third country AIFs) will from now on be checked if the portfolio management company’s authorisation and programme of activity allow instruments falling within the scope of that box to be held as assets within the portfolios it manages (even in cases where box C3 on the old authorisation form – whose scope was not the same – was not checked).

However, this does not mean that the scope of instruments authorised for the portfolio management company is extended; the scope of authorisation remains unchanged when the change from the old to the new authorisation form is made. The authorisation form should be read in light of the portfolio management company’s programme of activity.

For example, where a portfolio management company’s authorisation allows it to invest the portfolios it manages in “ARIA” CIS, henceforth known as general purpose professional funds:

- On the old authorisation form, box C2 (French UCITS, European UCITS compliant with Directive 2009/65/EC and CIS authorised for marketing in France) is checked.
- On the new authorisation form, since the general purpose professional fund is an AIF intended for professional clients, box B3 is checked.

⁹ Paragraph I of Article 33 of Order 2013-676 of 25 July 2013 amending the framework applicable to asset management.

¹⁰ See also question ID 1180. Transitional provisions, available via the European Commission website: <http://ec.europa.eu/yqol/index.cfm?fuseaction=question.show&questionId=1180>.

Old authorisation form

C – Authorised instruments	
1 - Instruments traded on a regulated or organised market (exchange-traded financial instruments, negotiable debt securities, etc.)	<input type="checkbox"/>
2 - French UCITS, European UCITS compliant with Directive 2009/65/EC and CIS authorised for marketing in France	<input type="checkbox"/>
3 - Foreign investment funds not authorised for marketing in France (whether or not using alternative investment strategies)	<input type="checkbox"/>
4 - Financial instruments not traded on a regulated or organised market	<input type="checkbox"/>
5 - Real estate assets, as defined in Article L. 214-92 of the Monetary and Financial Code	<input type="checkbox"/>
6 – Loans	<input type="checkbox"/>
7 – Simple financial contracts (also known as “derivatives”) (including securities with embedded simple derivatives)	<input type="checkbox"/>
8 - Complex financial contracts (also known as “derivatives”) traded over the counter (including securities with embedded complex derivatives)	<input type="checkbox"/>
9 - Other (specify):	<input type="checkbox"/>

New authorisation form:

B – Authorised instruments within the confines of the programme of activity	
1 - Instruments traded on a regulated or organised market (exchange-traded financial instruments, negotiable debt securities, etc.)	<input type="checkbox"/>
2 - European UCITS and AIFs open to retail clients	<input type="checkbox"/>
3 - European AIFs intended for professional clients and third country AIFs	<input type="checkbox"/>
4 - Financial instruments not traded on a regulated or organised market	<input type="checkbox"/>
5 - Real estate assets, as defined in Article L. 214-36 of the Monetary and Financial Code	<input type="checkbox"/>
6 – Loans	<input type="checkbox"/>
7 - Simple derivatives (financial contracts)	<input type="checkbox"/>
8 - Complex derivatives (financial contracts) (including securities with embedded complex derivatives)	<input type="checkbox"/>
9 - Other (specify):	<input type="checkbox"/>

1.6. Must employee savings funds continue to be managed by portfolio management companies?

Employee savings funds do indeed constitute AIF¹¹, and their managers are not exempt from the requirement to be authorised as portfolio management companies, as was also the case under the previous rules. Furthermore, the manager may need to be authorised under the AIFM Directive, depending on the volume of assets under management¹².

1.7. Are entities referred to in paragraph V of Article L. 532-9 of the Monetary and Financial Code required to register with the AMF?

Paragraph V of Article L. 532-9 of the Monetary and Financial Code lists entities which “are not subject to authorisation or to the legislative and regulatory provisions governing portfolio management companies”¹³.

¹¹Article L. 214-24 of the Monetary and Financial Code.

¹² The thresholds are laid down in Article R. 532-12-1 of the Monetary and Financial Code.

¹³ Examples include employee profit-sharing schemes and employee savings schemes, holding companies as defined in the same article, national central banks, etc.

These entities are completely outside the scope of the legislative and regulatory provisions arising from the transposition of the AIFM Directive into French law. As such, they do not need to be authorised as portfolio management companies or registered with the AMF.

1.8. Does the exemption from authorisation as a portfolio management company for legal entities managing closed-ended AIFs before July 2013 and not making any further investments after that date mean that such legal entities are also from the requirement to comply with other provisions applicable to AIFs (covering depositaries, reporting, etc.)?

According to paragraph III, Article 33 of Order 2013-676, managers managing closed-ended AIFs (within the meaning of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011) prior to the date of publication of that Order and not making any further investments after that date may continue to manage such funds without applying for authorisation as portfolio management companies.

This constitutes total exemption from all provisions of the AIFM Directive applicable to AIFs.

1.9. Is a portfolio management company that manages AIFs exclusively on a delegated basis required to apply for authorisation under the AIFM Directive?

When assessing whether or not authorisation under the AIFM Directive is mandatory, the amount of an AIF's assets under management is assessed at the level of the legal manager of the AIF, whether or not that manager has delegated management of the AIF to a third party.

As such, where a portfolio management company manages AIFs solely on a delegated basis on behalf of another French portfolio management company, a management company authorised in another European Union Member State or a third country manager, including where the total value of assets managed on a delegated basis exceeds the thresholds of €100 million or €500 million, it does not need to apply for authorisation under the AIFM Directive¹⁴.

1.10. Has a list of entities authorised under the AIFM Directive been published?

For all portfolio management companies authorised by the AMF, the AMF website provides information as to whether they are authorised under the AIFM Directive (<http://www.amf-france.org/Recherche-avancee.html?formId=GECO>).

1.11. Can a legal entity managing Other AIFs that include retail clients who have opted to be treated as professional investors be eligible for the registration procedure?

Under the conditions set out in the answers to questions 1.1 and 1.2, a legal entity exclusively managing Other AIFs may simply register with the AMF rather than applying for authorisation as a portfolio management company. One of the conditions is that all investors in the Other AIFs in question must be professional investors.

These professional investors may be:

- professional clients who meet the criteria laid down in Article D. 533-11 of the Monetary and Financial Code; and
- retail clients who have opted to be treated as professional investors¹⁵.

¹⁴ Note that a portfolio management company authorised under the AIFM Directive and considering delegating the management of an AIF to a third party must comply, in particular, with the conditions laid down in Article 318-58 of the AMF General Regulation. In particular, that article specifies the entities to which the management of an AIF's finances or risk may be delegated.

¹⁵ Article L. 533-16 of the Monetary and Financial Code.

The conditions and procedures under which persons other than professional clients meeting the criteria laid down in Article D. 533-11 of the Monetary and Financial Code may, at their request, be treated as professional clients are laid down in the AMF General Regulation¹⁶. These provisions call for an appropriate assessment procedure carried out by an investment services provider. Consequently, a legal entity that manages Other AIFs and is not an investment services provider cannot itself categorise clients as retail clients wishing to be treated as professional clients. Such an entity may, however, call on an investment services provider, for example within the framework of an investment advice service, to undertake such categorisation.

2. Requirements for portfolio management companies

2.1. Where management of an AIF is delegated, is the delegatee subject to AMF reporting requirements?

Reporting requirements¹⁷ only apply to portfolio management companies that are the designated managers of AIFs.

For example, where an investment services provider manages an AIF on a delegated basis¹⁸, only the portfolio management company that is the AIF's designated manager (in this case, the delegator) is required to report to the AMF.

2.2. Are portfolio management companies managing AIFs whose total asset value falls below the €100 million or €500 million thresholds required to notify major shareholdings and changes of control?

The requirement to report major shareholdings and changes of control, referred to in Articles D. 214-32-6 and D. 214-32-7-4 of the Monetary and Financial Code respectively¹⁹, only applies to portfolio management companies authorised under the AIFM Directive.

In other words, a portfolio management company managing AIFs whose total asset value falls below the €100 million or €500 million thresholds and which has not opted to apply the AIFM Directive in full is not required to submit these reports.

A distinction must be drawn between the requirement to report major shareholdings and changes of control and the reporting requirement laid down in paragraph V of Article 311-1 A of the AMF General Regulation, which applies to portfolio management companies that manage AIFs and are not authorised under the AIFM Directive.

2.3. Unlike the major shareholding thresholds, which must be reported whenever they are crossed, whether upwards or downwards, changes of control and additional information need only be notified when the associated thresholds are exceeded. Is this correct?

Yes. In particular, the provisions of Articles D. 214-32-7-1 et seq. of the Monetary and Financial Code provide for a notification mechanism when control over an entity is gained²⁰, and list the information that

¹⁶ Articles 314-6 and 314-7 of the AMF General Regulation.

¹⁷ Laid down in Article 311-1-A of the AMF General Regulation and Article L. 214-24-20 of the Monetary and Financial Code.

¹⁸ As defined in Article 318-58 of the AMF General Regulation.

¹⁹ These are not the same as the major shareholding notifications laid down in the Commercial Code.

²⁰ The entities concerned are set out in Article L. 214-24-23 of the Monetary and Financial Code:

- a company whose registered office is in a European Union Member State and whose shares are not admitted to trading on a regulated market in a European Union Member State

must be provided to the company concerned, the company's shareholders and the AMF. Conversely, no notification is required when the AIF loses individual or joint control of the entity.

2.4. For a portfolio management company that is subject to both the AIFM Directive and the UCITS Directive (Directive 2009/65/EC), do the requirements arising from the AIFM Directive extend to the management of UCITS? For example, must the remuneration policy defined in the AIFM Directive be applied to all of the portfolio management company's activities?

The provisions of the AIFM Directive do not apply to the management of UCITS authorised in accordance with Directive 2009/65/EC. For example, the provisions on remuneration policy (Article L. 533-22 of the Monetary and Financial Code) apply to portfolio management companies authorised under the AIFM Directive only in relation to their AIF management activities.

It should, however, be noted that the draft UCITS V Directive includes provisions on remuneration.

-
- an issuer as defined in point d, paragraph 1, Article 2 of Directive 2004/109 of 15 December 2004, whose registered office is in a European Union Member State and whose shares are admitted to trading on a regulated market in a European Union Member State