

## AMF position – recommandation 2013-04

### AMF guidelines on the concept of third party introducer with regard to the fight against money laundering and terrorist financing

**Background regulations: Articles L.561-7 and R. 561-13- I of the Monetary and Financial Code and articles 315-55, 321-31, 321-48, 321-57, 325-12 of the AMF General Regulation**

The French anti-money laundering and counter terrorist financing system (AML/CTF) was recast with the transposition into French law of European Directive 2005/60/EC, known as the "Third Money Laundering Directive" and its Implementing Directive<sup>1</sup>.

The purpose of these guidelines is to make more explicit the requirements for implementing the legal and regulatory provisions governing the concept of third-party introducer with regard to anti-money laundering and counter terrorist financing, which must be complied with by the establishments referred to in paragraph 6° of Article L.561-2 of the Financial and Monetary Code and subject to the supervision of the *Autorité des Marchés Financiers* (hereinafter the professionals), namely:

- **asset management companies and management companies** as regards the investment services they provide or the marketing of units or shares in collective investment schemes for which they may or may not act as a manager<sup>2</sup>,
- **financial investment advisers,**
- **Central Security Depositories and securities settlement systems managers.**

These guidelines<sup>3</sup> shall be read in conjunction with the guidelines<sup>4</sup> already available on the AMF's website and, as regards financial investment advisers, with the guide drafted by the AMF and published on the aforementioned website. Naturally, these documents do not exempt the professionals concerned by the anti-money laundering and counter terrorist financing programme from referring to the applicable laws and regulations so as to determine how to ensure strict compliance with them.

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<sup>1</sup> Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing - Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis .

<sup>2</sup> Articles 315-57, 321-31, 321-48, 321-57 325-12 of the AMF General Regulation require that management companies, when they implement their investment policy, whether on their own account or on account of a third party, ensure assessment of the risk of money laundering and terrorist financing and define procedures for supervising the investments made by their agents.

<sup>3</sup> The AMF takes part in the advisory council "fight against money laundering" set up by the Autorité de Contrôle Prudentiel, which ensures homogeneity between the guidelines published by the ACP and those published by the AMF on the issue addressed. These guidelines have been the subject of prior consultation with the professional associations concerned and are intended to be updated in order to take into account the experience of the AMF and that of the professionals, and the upcoming legal or regulatory changes.

<sup>4</sup> "AMF Guidelines 2010-22 on combating money laundering and terrorist financing" and "AMF Guidelines 2010-23 on the obligation to report suspicious transactions to TRACFIN as part of the fight against money laundering and terrorist financing."

1. What are the texts governing the concept of third party introducer with regard to the fight against money laundering and terrorist financing? .....	2
2. What is a third party introducer with regard to the fight against money laundering and terrorist financing? .....	3
3. Who are the potential third party introducers? .....	4
3.1. Capacity of the third party introducer located, or with its registered office, in France.....	4
3.2. Capacity of the third party introducer located within the European Union .....	4
3.3. Capacity of the third party introducer located in a third country imposing similar obligations in combating money laundering and terrorist financing .....	4
4. How to select a third party introducer? .....	5
5. What due diligence obligations may be entrusted to a third party introducer for implementation? .....	6
6. What information must the professional collect in order to comply with due diligence obligations as part of the third party introduction scheme? .....	6
7. What are the arrangements for the exchange of information between the third-party and the professional? .....	7
8. To whom may the information collected from the third party introducers be communicated? .....	7
9. What are the respective responsibilities of the professional and of the third party introducer? .....	8
9.1. As regards the professional using the services of a third party introducer .....	8
9.2. As regards the third party introducer .....	8
10. What control obligations arise from the use of a third party introducer? .....	8
11. Under which circumstances does using the services of a third party introducer require that the professional conduct a specific review in the light of the risks incurred? .....	9
12. How does third party introduction work within a group? .....	10
13. How does third party introduction work when it involves discretionary management by an asset management company? .....	11
14. Can there be a third-party when a management company distributes or sells units or shares in a CIS? .....	11

**1. What are the texts governing the concept of third party introducer with regard to the fight against money laundering and terrorist financing?**

- **At international level**, the issue of “Third party introducer” is addressed in the Recommendation 17 of the FATF<sup>5</sup> called “RELIANCE ON THIRD PARTIES” and in its interpretive note, available on the FATF’s website.
- **At European level**, Section 4 ‘Performance by third parties’ of European Directive 2005/60/EC deals with the concept of third party in its Articles 14 to 19.
- **National Law** establishes a regulatory framework governing the use of third party introducers through provisions in the Monetary and Financial Code and in the AMF General Regulation, which require that the management company or investment services provider lay down written internal procedures for having third party introducers implement their due diligence obligations pursuant to Article L. 561-7 of the aforementioned Code<sup>6</sup>.  
These provisions of the Monetary and Financial Code are available on Legifrance’s website and the concerned provisions of the AMF General Regulation are available on the AMF’s website.

<sup>5</sup>The Financial Action Task Force is an intergovernmental body established in 1989 at the initiative of France and whose purpose is the development and promotion of national and international policies aimed at combating money laundering and terrorist financing both at national and international levels. The FATF elaborated 40 recommendations on anti-money laundering and terrorist financing, which were reviewed in February 2012.

<sup>6</sup> Pursuant to b) of 2° of Article 315-55 of the AMF General Regulation for asset management companies; pursuant to Articles 321-31, 321-48 and 321-57 for the other management companies; pursuant to Article 325-12 for financial investment advisers.

## 2. What is a third party introducer with regard to the fight against money laundering and terrorist financing?

For the professional, **the concept of third party introduction consists of using the services of a third party introducer meeting certain requirements** and called “third party introducer” (see: Question 3 “Who are the potential third party introducers?”) when it comes to implementing its customer due diligence obligations provided for in Articles L.561-5 and L.561-6 of the Monetary and Financial Code<sup>7</sup>.

Thus, the professional relies on the third party introducer who commits to conduct due diligence as part of the fight against money laundering and terrorist financing, and which may consist exclusively of:

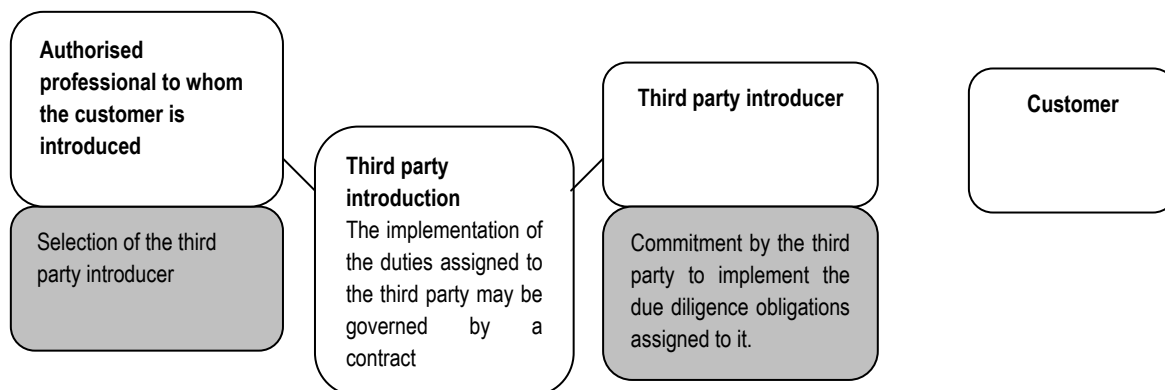
- Identifying the customer and verifying its identity before entering into a business relationship<sup>8</sup>
- Where appropriate, identifying the beneficial owner and verifying its identity<sup>9</sup>
- Obtaining information on the purpose and intended nature of the business relationship and any relevant information on the customer.

### **Position**

**The concept of third party introduction is a relationship that links a professional with a third party introducer under which the professional entrusts the third party introducer with the duty to implement effectively its own customer due diligence obligation.**

**Cascades of third party introducers are not allowed and the professional must ensure that the third party introducer does not in turn delegate the duties it was entrusted with.**

Third party introduction is a mechanism that is subject to a strict legal framework explained hereinafter and which may be diagrammed as follows. The customer of the third party introducer, introduced by the latter to the authorised professional, is not involved in the third party introduction relationship.



Both the professional that uses the services of third party introducer and the third party introducer itself may act in the capacity of a third party introducer.

The professionals falling within the jurisdiction of the AMF may entrust third party introducers with their due diligence obligations for combating money laundering and terrorist financing within the legal framework for third party introduction legally based on Article L.561-7 of the Monetary and Financial Code.

<sup>7</sup>These guidelines deal with the concept of introduction by a third party, the legal basis of which is Article L.561-7 of the Monetary and Financial Code. It is specified that outsourcing with a services provider referred to in Article 313-72 of the AMF General Regulation cannot be transposed as such when it comes to the fight against money laundering and terrorist financing and, in any case, is not expressly provided for in the aforementioned Code when it comes to combating money laundering and terrorist financing. To this day, the AMF have not spotted any cases of outsourcing.

<sup>8</sup> A business relationship shall be created when an authorised professional enters into a professional or commercial relationship which is intended, at the time when the contact is established, to be of a certain duration. (Article 561-2-1 of the Monetary and Financial Code)

<sup>9</sup> See: “AMF Guidelines on the concept of beneficial owner”.

### **3. Who are the potential third party introducers?**

Pursuant to a) of I of Article L.561-7 of the Monetary and Financial Code, the third party introducer must meet certain requirements and it is the duty of the professional to ensure that the third party introducer comply with them. More specifically, depending on the country in which the third party introducer is established, it is necessary to determine the capacity of the said third party introducer on the basis of predetermined specific criteria.

Three cases are to be distinguished:

#### **3.1. Capacity of the third party introducer located, or with its registered office, in France**

A third party introducer may act as such where, in addition to being located in France, it meets the following requirement:

- The third party introducer is necessarily a person referred to in 1° to 6°, 12° and 13° of Article L.561-2 of the Monetary and Financial Code.

It should be noted that professionals falling within the jurisdiction of the AMF may use a third party introducer and themselves act as third party introducers. For asset management companies acting as third party introducers, one may refer to the question 13 (How does third party introduction operate when it involves discretionary management by an asset management company?). As regards investment services providers, they act as third party introducers when they are responsible for conducting the identity verification process on behalf of a financial products developer.

#### **3.2. Capacity of the third party introducer located within the European Union**

A third party introducer may act as such where, in addition to being located within the European Union, it meets the following two cumulative requirements:

- The third party introducer is registered in a category equivalent to the one referred to in 1° to 6°<sup>10</sup>, 12° or 13° of Article L.561-2 of the Monetary and Financial Code under foreign law;
- The third party introducer is governed by the anti money laundering and counter terrorist financing regulation applicable in the EU Member State and it is subject to the supervision of the domestic competent authority.

#### **3.3. Capacity of the third party introducer located in a third country imposing similar obligations in combating money laundering and terrorist financing**

In such cases, the third party introducer is located in a third country (outside the UE) included in the list<sup>11</sup> of the countries imposing similar obligations in combating money laundering and terrorist financing.

A third party introducer may act as such where, in addition to being located in a third country, it meets the following two cumulative requirements:

- The third party introducer is necessarily a person registered in a category equivalent to the one referred to 1° to 6°, 12° or 13° of Article L.561-2 of the Monetary and Financial Code under foreign law;
- The third party introducer is governed by the anti money laundering and counter terrorist financing regulation applicable in the third country and it is subject to the supervision of the domestic competent authority.

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<sup>10</sup>See previous note, excluding the persons referred to in 1° bis of the same Article which provide mainly the service referred to in 6° of II of Article L.314-1 of the Monetary and Financial Code, i.e. the payment services.

<sup>11</sup> Order of 27 July 2011 on the list of third countries imposing similar requirements on combating money laundering and terrorist financing referred to in II of Article L.561-9 of the Monetary and Financial Code.

#### 4. How to select a third party introducer?

##### **Position**

In all cases, choosing a third party introducer must be based on a risk-based approach conducted by the authorised professional. This approach must arise from an in-depth analysis consisting particularly of the professional:

- Analysing the risks potentially posed by the third party introducer (nature of the business operated by the third party introducer, nature and purpose of the business relationship likely to be entered into with the customer). This analysis must be subject to written procedures (analysis criteria...).
- Reviewing the potential risks with regard to its risk classification.
- Verifying the information available with the national and international bodies engaged in the fight against money laundering and terrorist financing<sup>12</sup> as regards the quality of the anti money laundering and counter terrorist financing regulations applicable in the country of the third party.
- consulting, where appropriate, its subsidiaries, branches or group entities located in the country of the third party introducer in order to check the reputation of the latter and ensure that there are no obstacles to implementing the group's AML/CTF procedures within the entity that may act as a third party introducer for him/her.
- Looking for potential public sanctions, including criminal ones, imposed on the third party introducer and which would contain one AML/CTF complaint<sup>13</sup>.

Lastly, as part of the risk-based approach, the professional must ensure that the third party introducer (either French or foreign) is able to implement, personally and on an ongoing basis, the French obligations pertaining to AMF/CTF provided for in Paragraph 1 of Articles L.561-5 and L.561-6 of the Monetary and Financial Code (See: question 6: What information must the professional collect in order to comply with due diligence requirements with regard to the third party introducer?).

##### **Position**

As part the third party introducer selection process, the professional shall make sure to:

- Collect sufficient information on the third party acting as such,
- Fully understand the nature of its business and check its reputation and the quality of its AML/CTF due diligence regime on the basis of information available to the public
- Ensure that the third party introducer is able to provide the information requested without delay
- Have a decision made at high hierarchical level<sup>14</sup>.

<sup>12</sup> In particular the FATF mutual evaluation reports available on the FATF's website.

<sup>13</sup> In particular the sanctions issued by the AMF and the ACP or by their counterparts for third parties located outside France.

<sup>14</sup> The regulations do not make any provision on the issue. It is the AMF's interpretation on how it applies Article 315-55-f of its General Regulation, which provides for written procedures as regards the arrangements for implementing the due diligence obligations through third parties pursuant to Article L.561-7 of the Monetary and Financial Code. According to the AMF, the procedures should particularly indicate the person responsible for selecting the third party.

**5. What due diligence obligations may be entrusted to a third party introducer for implementation?**

The following are customer due diligence obligations established before or during the business relationship<sup>15</sup>:

- in paragraph 1 of Article L. 561-5 of the Monetary and Financial Code, the need to identify the customer and verify its identity and, where appropriate, that of the beneficial owner of the business relationship,
- and
- in paragraph 1 of Article L. 561-6 of the Monetary and Financial Code, the necessity to collect the information relating to the purpose and nature of the relationship and any other relevant information.

However, one cannot use the services of third party introducer to implement the obligations laid out in paragraph 2 of Article L. 561-6 of the Monetary and Financial Code, i.e. applying ongoing due diligence to the business relationship and carrying out a thorough examination of the transactions executed while ensuring on an ongoing basis that they are consistent with updated customer information.

**6. What information must the professional collect in order to comply with due diligence obligations as part of the third party introduction scheme?**

In order to ensure compliance with the first paragraph of both Articles L. 561-5 and L. 561-6 of the Monetary and Financial Code, the professional who uses the services of third party must dispose of the identifiers of the customer and verify these identifiers (and those of the beneficial owner, where appropriate<sup>16</sup>) as well as the information relating to the nature and purpose of the business relationship.

Two cases are to be distinguished:

a) Where the third party introducer is governed by French Law, the professional who uses its services must be able to have access to the information collected by the third party introducer before entering into the business relationship<sup>17</sup> pursuant to Articles R. 561-5 and R. 561-12<sup>18</sup> of the Monetary and Financial Code, since the third party introducer is subject to the same obligations as the professional.

b) Where the third party introducer is located outside France, it is not necessarily on the basis of the aforementioned elements that verifying the customer's identity (and/or that of the beneficial owner where appropriate) and gathering information on the business relationship may be carried out.

Indeed, pursuant to the law applicable to the third party introducer, the information and documents collected by the foreign third party introducer when entering into the business relationship with the customer<sup>19</sup> do not necessarily comply with the French legislative requirements for entering into a business relationship.

**Position**

**Where the third party introducer is located outside France, the professional must make sure that the information collected by the third party introducer allows it to comply with the French legislative requirements<sup>20</sup>.**

<sup>15</sup> Only where the professional considers that the risk is low and under certain conditions laid down by decree.

<sup>16</sup> See the « AMF guidelines on the concept of beneficial owner ».

<sup>17</sup> The third party introducer is often already engaged in a business relationship with the client for which it acts as an introducer for similar activities or not.

<sup>18</sup> The information related to the knowledge of the client and of the business relationship likely to be collected for the purpose of assessing the risks of money laundering and terrorist financing is listed in Order of 2 September 2009 adopted pursuant to Article R. 561-12 of the Monetary and Financial Code.

<sup>19</sup> In this case, it is often a client established in the country of the third party introducer whose identity must be verified by means of other supporting documents than those referred to in 1° and 2° of Article R. 561 of the Monetary and Financial Code.

In all cases, where the professional has good reasons to believe that the identity of the customer and the identifiers previously collected are no longer accurate or relevant, it must carry out a new identification of the customer, pursuant to the provisions of Article R. 561-11 of the Monetary and Financial Code<sup>21</sup>.

## **7. What are the arrangements for the exchange of information between the third-party and the professional?**

Article R. 561-13 I of the Monetary and Financial Code provides that the third party introducer shall promptly make available to the professional using its services the information referred to in paragraph 1 of Article . 561-13 I of the Monetary and Financial Code (information related to the identity of the customer – and, where appropriate, that of the beneficial owner – and to the purpose and nature of the business relationship). Furthermore, the third party introducer is required to provide a copy of all the documents referred to in paragraph 2 of the aforementioned Article upon the professional's request in order to make the latter able to conduct due diligence.

### **Recommendation**

**The third party introducer and the professional may enter into an agreement in order to specify the procedures for transmitting the information collected by the third party introducer to the professional. Where it is not provided for in the Monetary and Financial Code<sup>22</sup>, such an agreement seems to useful or is recommended, in particular when the third party introducer is located outside France and that the legislative requirements applicable to it, although of an equivalent nature, are different from those applicable in France<sup>23</sup>.**

**Such an agreement, which must be established before entering into a relationship with the customer, allows the professional to organise the relationship with the third party introducer and, in particular, to establish in advance a framework for the practical arrangements which allow it to have access to the information held by the third party introducer, pursuant to the provisions set forth in I of Article R. 561-13. For instance, such an agreement may stipulate the means for transmitting the information, the arrangements for recording and keeping them, the privileged interlocutors within each party...**

In any case, the professional which uses the services of third party introducer must be able to justify at any time to the AMF that it has access to the information collected by the third party introducer and that it is provided with a copy of the documents requested upon first request (Article R.561-13 of the Monetary and Financial Code) and that these documents comply with AML/CTF requirements provided for in the Monetary and Financial Code.

## **8. To whom may the information collected from the third party introducers be communicated?**

Pursuant to II of Article L.561-7 of the Monetary and Financial Code, the professional is allowed to communicate the information<sup>24</sup> collected from a third party introducer:

- To the entities referred to in paragraphs 1 to 6 of Article L. 561-2 of the Monetary and Financial Code, located, or having its registered office, in France<sup>25</sup>
- to institutions proposing financial activities equivalent to those carried out by the entities referred to in paragraphs 1 to 6 of Article L. 561-2 of the aforementioned Article under the following cumulative conditions:

<sup>20</sup> Pursuant to b) of I of Article L.561-7 of the Monetary and Financial Code.

<sup>21</sup> It is the duty of the professional to carry out this new identification.

<sup>22</sup> Article R.561-13 of the Monetary and Financial Code.

<sup>23</sup> In particular if French regulations are more stringent than European laws.

<sup>24</sup> Information collected pursuant to Paragraph 1 of Articles L.561-5 and L.561-6 of the Monetary and Financial Code.

<sup>25</sup> See note 10, excluding the persons referred to in 1bis (providing mainly payment services).

- The recipient is located in another Member State of the European Union or in a third country which imposes similar obligations in combating money laundering and terrorist financing, the list of which is set out in 2° of Article L. 561-9 of the Monetary and Financial Code<sup>26</sup>.
- The recipient must ensure an adequate level of protection with regard to the private life and the fundamental freedoms and rights of persons when dealing with information of a personal nature, pursuant to Articles 68 and 69 of Act No. 78-17 of 6 January 1978 on data processing, files and individual liberties<sup>27</sup>.

## **9. What are the respective responsibilities of the professional and of the third party introducer?**

### **9.1. As regards the professional using the services of a third party introducer**

Article L. 561-7 of the Monetary and Financial Code provides that *“Where the entity concerned relies on the steps taken by a third party, it shall remain liable for meeting its obligations.”* Thus, lawmakers made it clear that when a professional uses the services of a third party introducer, it remains fully liable for complying with all the AML/CTF obligations assigned to the third party introducer, including with regard to the AMF.

This responsibility requires that the professional itself conduct ongoing due diligence, pursuant to paragraph 2 of Article L. 561-6 of the Monetary and Financial Code. To do this, Article L. 561-7 of the aforementioned Code provides that the *professional “shall have access to the information gathered by the third party”*. Due diligence includes, where appropriate, the filing of a suspicious transaction report with TRACFIN, pursuant to Article L. 561-15 of the Monetary and Financial Code (see: “Joint AMF and TRACFIN Guidelines”).

### **9.2. As regards the third party introducer**

The third party introducer, in its capacity of authorised professional, remains responsible to the competent authority for implementing due diligence measures aimed at combating money laundering and terrorist financing<sup>28</sup>.

#### **Position**

**Should the third party introducer and the professional using the services of the third party introducer enter into an agreement providing for the contractual liability of each party, this would not release them from their respective obligations in combating money laundering and terrorist financing in respect of the legislation applicable to them. They must provide evidence to their respective supervisory authority that they meet their obligations.**

**Contractual reliance on a third party introducer does not exempt the professional from its legal responsibility towards the Autorité des Marchés Financiers.**

## **10. What control obligations arise from the use of a third party introducer?**

Since the professional which uses the services of a third party introducer remains responsible for implementing its obligations for combating money laundering and terrorist financing<sup>29</sup>, it shall provide for formalising appropriate procedures in its internal control system and for implementing relevant controls so as to make sure that it complies at all times with the statutory and regulatory provisions of Articles L. 561-5 and L. 561-6 of the Monetary and Financial Code.

<sup>26</sup> Order of 27 July 2011 on the list of third countries imposing similar requirements on combating money laundering and terrorist financing referred to in II of Article L.561-9 of the Monetary and Financial Code.

<sup>27</sup> The countries of the European Economic Area (EEA) are considered as providing an equivalent level of protection of personal data. In these countries, the processing of personal data is governed by Directive 95/46/EC. The European Commission also recognised the adequacy of the protection of personal data in certain third countries, which are listed on the European Commission’s website (Topic: Review of the data protection legal framework).

<sup>28</sup> The third party introducer remains liable for all the obligations provided for in Directive 2005-60/EC, insofar as it has entered into a relationship with the client that is covered by said Directive, including the obligation to report suspicious transactions and maintain records.

<sup>29</sup> Article L.561-7-1 of the Monetary and Financial Code.



**Recommendation**

In this context, the AMF recommends that the internal control function of the professional verify that:

- The risks inherent in the third party introducer are taken into account in the risk classification of the professional and that the latter is able to demonstrate to the AMF at all times the relevance of taking these risks into account
- Its AML/CTF risk assessment and management system provided for in Article L.561-32 of the Monetary and Financial Code does include the customers whose identification and verification have been carried out by the third party introducers.
- It has been provided with the identification papers and other mandatory documents when entering into the business relationship with the introduced customer.
- The quality of the documents transmitted by the third party introducer allows the professional to meet its customer due diligence obligations.
- The requests for documents are traceable and that the related copies are provided upon first request, pursuant to Article R.561-13 I of the Monetary and Financial Code.

The AMF recommends that an agreement between the professional and the third party introducer establish a framework for the control procedures implemented by the third party introducer on behalf of the professional.

In any cases, it is the duty of the professional to justify to the AMF that it has implemented control procedures in order to ensure that it has a firm grasp in using the services of third party introducer.

**11. Under which circumstances does using the services of a third party introducer require that the professional conduct a specific review in the light of the risks incurred?**

Using a third party introducer can prove problematic under certain circumstances and the attention of the professionals should be drawn to the following cases, which all pose high risks in terms of controlling the third party introducer:

- **The third party introducer reduces or enhances the intensity of its customer due diligence measures**, either because of its own assessment of the risk or because of the domestic law applicable to it. In this case, the professional which uses the services of a third party introducer is required to verify the level of risk posed by the client with regard to French laws and verify its own risk classification so as to determine whether the due diligence measures implemented by the third party are sufficient.

**Recommendation**

The AMF recommends that the professional contractually provides for the third party introducer to inform it about plans to relax and reinforce the measures provided for in Articles L.561-5 and L. 561-6 of the Monetary and Financial Code implemented.

- **The third party introducer introduces a customer that is considered a “politically exposed person” according to its own legislation.**

**Position**

**The professional must verify whether or not the status of “politically exposed person” is applicable in France too and, where appropriate, authorise entering into a business relationship with the “politically exposed person” pursuant to 2° of III of Article R.561-20 of the Monetary and Financial Code, regardless of the due diligence conducted by the third party introducer.**

Indeed, conducting customer identification and verification due diligence is distinct from the decision to enter into a business relationship, which may be made only by a member of the executive body of the professional with whom the “politically exposed person” is introduced (or by any other accredited person by the executive body for this purpose)<sup>30</sup>.

- **The third party introducer is responsible for ensuring the application of Article L.561-10 of the Monetary and Financial Code** on additional due diligence measures with regard to the customer, certain products or transactions:

Indeed, the cases provided for in the aforementioned Article require that the professional implement a risk-based approach in order to ensure that the third party introducer:

- Applies additional due diligence measures provided for in the aforementioned Article or equivalent measures on the basis of its national legislation.
- Is able to provide without delay relevant and quality information on the client, product or transaction, even where this information is different from that required in the country of the third party introducer.

- **Even where it uses the services of third party introducer, the professional remains responsible for ensuring the application of Article L.561-10-2 of the Monetary and Financial Code** on increasing the intensity of the due diligence measures where:

- The risk of money laundering posed by a customer, a product or a transaction appears to be high
- The operation is highly complex or unusually large, or where it has no apparent economic or visible lawful purpose.

**Position**

**In all cases, except for the aforementioned cases, where the expected third party introducer is considered to be posing a substantial risk in light of the contemplated relationship, whether using the services of this third party is appropriate or not should be examined in depth. It bears recalling that using a third party does not exempt the professional using its services from its obligations provided for in the Monetary and Financial Code<sup>31</sup>.**

**12. How does third party introduction work within a group?**

Professionals belonging to a group which uses the services of a third party introducer belonging to the same group, located in France, in a Member State of the European Union or in an third country imposing similar obligations in combating money laundering and terrorist financing, may consider that the third party complies with the requirements provided for in Articles L.561-7 and in I of Article R.561-13 of the Monetary and Financial Code where the following three cumulative conditions are met:

- A group of belonging is a group within the meaning of Article L. 511-20 of the Monetary and Financial Code.
- At group level, implementing the due diligence measures and AML/CTF risk assessment and management systems is subject to the supervision of the AMF or another Authority and it is part of

<sup>30</sup> Article R.561-20- III-2° of the Monetary and Financial Code.

<sup>31</sup> Last paragraph of Article L.561—I of the Monetary and Financial Code.

the exchange of information scheme provided for in Article L.632-1 of the Monetary and Financial Code<sup>32</sup>.

- The procedures of the group supervised by an Authority, which are in the hands of the professional wishing to use the services of a third party introducer belonging to its group, specify clearly that they cover the use of third party introduction (obligations and controls shall be implemented for the purpose).

### **13. How does third party introduction work when it involves discretionary management by an asset management company?**

Pursuant to Article L.533-21 of the Monetary and Financial Code<sup>33</sup>, asset management companies cannot hold the assets of their clients. The assets (financial instruments and cash) of their clients (hereinafter clients) are entrusted by the said clients (who open an account) to an authorised provider called “custody account-keeper”<sup>34</sup>. The asset management company only has the power to act in the name and on behalf of the client of the portfolio under discretionary management and the custody account-keeper must be aware of the existence of such an agreement.

Custody account-keepers are governed by the legal provisions pertaining to AML/CTF provided for in the Monetary and Financial Code. However, as regards the AML/CTF provisions, they do not fall within the jurisdiction of the AMF but within the competence of the Autorité de Contrôle Prudentiel (ACP).

In such circumstances, where the obligations provided for in the first paragraph of Articles L.561-5 and L.561-6 of the Monetary and Financial Code are implemented by the third party introducer, which is the asset management company, the custody account-keeper remains responsible for ensuring compliance with the obligations provided for in these Articles throughout the entire business relationship.

The custody account-keeper must conduct due diligence on the asset management company and, to do so, it must collect information on the customer that is commensurate with the risk of money laundering and terrorist financing. It must conduct an in-depth review of the transactions executed and ensure that they are consistent with updated customer information.

### **14. Can there be a third-party when a management company distributes or sells units or shares in a CIS?**<sup>35</sup>

1) Article L. 561-2 of the Monetary and Financial Code require that management companies or asset management companies comply with the AML/CTF obligations when it comes to marketing units or shares in collective investment schemes (CIS) for which they may or may not act as a manager. The notion of marketing is explained in Article 315-50 of the AMF General Regulation, which stipulates that it relates to marketing conducted by the management company “by itself or through an agent”.

The agent may be located on the national territory or abroad.

Where it markets shares or units in a CIS through an agent, a situation which cannot be considered as third party introduction within the meaning of Article L.561-7 and R.561-13 of the Monetary and Financial Code, the asset management company is liable under the AML/CTF scheme.

This is particularly so for asset management companies governed by French law which entrust the implementation of their legislative and regulatory obligations (or some of them) for identifying and obtaining knowledge about the customer and the business relation to a direct seller located in France

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<sup>32</sup> For instance, a professional supervised by the AMF which uses the services of a third party introducer within a group that takes part in the AML/CTF scheme of the competent authority in another Member State of the European Union or in a third country imposing similar obligations in combatting money laundering and terrorist financing.

<sup>33</sup> Article L. 533-21: Portfolio management companies are prohibited from receiving funds, securities or gold from their clients.

<sup>34</sup> The client opens an account at the custody account-keeper and empowers the asset management company to operate the account. (Article 322-6 of the AMF General Regulation).

<sup>35</sup> See: AMF Guidelines clarifying certain provisions of its General Regulation.

under a discretionary management agreement, in its name and on its behalf, according to its instructions and under its supervision.

2) Apart from this situation, management companies or asset management companies go beyond the scope of the AML regulation as specified in Article L. 561-2 of the Monetary and Financial Code.

However, the depositary, which is subject to the AML/CTF scheme, imposes a specific obligation to the management company or asset management company operating in the situation referred to in Article R.561-9 of the Monetary and Financial Code<sup>36</sup>, i.e. a management company which markets units or shares in a CIS through a person referred to in 1° to 6° of Article L. 561-2 ( the distributor) which is not part of the AML/CTF scheme or equivalent in a third country (1° and 2° of Article R.561-8 of the Monetary and Financial Code).

In this case, lawmakers entrusted the depositary<sup>37</sup> of the CIS with the obligation to ensure that an agreement be signed between the CIS<sup>38</sup> (or the management company representing it) and the distributor. The management company must first verify the status of the distributor.

This agreement must provide that the distributor applies identification procedures similar to those of the EU Member States and that the asset management company has access to the identifiers of the beneficial owner.

It is the duty of the depositary to ensure the application of this agreement.

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<sup>36</sup> Real estate funds are currently not required to use the services of a depositary. However, the AIFM Directive, which applies to all non-UCITS (and thereby to real estate funds) provides for a depositary. Accordingly, as soon as it is incorporated into national Law, real estate funds will be required to use the services of a depositary.

<sup>37</sup> Depositaries fall within the jurisdiction of the ACP with regard to anti money laundering and counter terrorist financing.

<sup>38</sup> When the CIS has the legal personality.