

AMF Position 2013-16 **Key concepts of the Alternative Investment Fund Managers Directive**

References: Article L. 214-24, I of the Monetary and Financial Code.

The AMF applies all the guidelines issued by ESMA¹ on the key concepts of the Alternative Investment Fund Managers Directive (ESMA/2013/611).

These guidelines seek to ensure common, uniform and consistent application of the criteria that define an alternative investment fund (AIF), within the meaning of Article 4(1)(a) of the Alternative Investment Fund Managers Directive².

Any entity displaying characteristics not mentioned in the guidelines or not displaying some or all of the characteristics mentioned in the guidelines may be considered to be an AIF by its relevant competent authority.

Scope

This position applies to alternative investment fund managers (AIFMs) (investment management companies, management companies and self-managed vehicles exceeding certain thresholds or under opt-ins).

Incorporation in AMF supervisory practices

The AMF states that the criteria defining an AIF within the meaning of Article 4(1)(a) of the AIFMD, as transposed by Article L. 214-24, I of the Monetary and Financial Code, should be understood in the light of the provisions set out in this position, which itself incorporates the ESMA 2013/611 guide

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¹ European Securities and Markets Authority (ESMA)

² Pursuant to Article 4(1)(a) of the AIFMD, transposed by Article L.214-24, I of the Monetary and Financial Code, AIFs are collective investment undertakings, including investment compartments thereof, which:

- raise capital from number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those, and
- are not subject to authorization under Article 5 of Directive 2009/65/EC (UCITS Directive).

1. Definitions

Unless otherwise specified, terms used in the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (AIFMD) and in the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision, have the same meaning in these guide-lines. In addition, the following definitions apply for the purposes of these guidelines:

<i>general commercial or industrial purpose</i>	<p>the purpose of pursuing a business strategy which includes characteristics such as running predominantly</p> <ul style="list-style-type: none"> i) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services, or ii) an industrial activity, involving the production of goods or construction of properties, or iii) a combination thereof.
<i>pooled return</i>	<p>the return generated by the pooled risk arising from acquiring, holding or selling investment assets – including the activities to optimise or increase the value of these assets – irrespective of whether different returns to investors, such as under a tailored dividend policy, are generated.</p>
<i>day-to-day discretion or control</i>	<p>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 and which extends substantially further than the ordinary exercise of decision or control through voting at shareholder meetings on matters such as mergers or liquidation, the election of shareholder representatives, the appointment of directors or auditors or the approval of annual accounts.</p>
<i>pre-existing group</i>	<p>a group of family members, irrespective of the type of legal structure that may be put in place by them to invest in an undertaking and provided that the sole ultimate beneficiaries of such legal structure are family members, where the existence of the group pre-dates the establishment of the undertaking. This shall not prevent family members' joining the group after the undertaking has been established. For the purpose of this definition, 'family members' means the spouse of an individual, the person who is living with an individual in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings, uncles, aunts, first cousins and the dependants of an individual.</p>

2. Guidelines on the treatment of investment compartments of an undertaking

8. Where an investment compartment of an undertaking exhibits all the elements in the definition of 'AIF' in Article 4(1)(a) of the AIFMD (i.e. 'collective investment undertaking', 'raising capital', 'number of investors' and 'defined investment policy') this should be sufficient to determine that the undertaking as a whole is an 'AIF' under Article 4(1)(a) of the AIFMD.

3. Guidelines on 'collective investment undertaking'

9. The following characteristics, if all of them are exhibited by an undertaking, should show that the undertaking is a collective investment undertaking mentioned in Article 4(1)(a) of the AIFMD. The characteristics are that:

- (a) the undertaking does not have a *general commercial or industrial purpose*;
- (b) the undertaking pools together capital raised from its investors for the purpose of investment with a view to generating a *pooled return* for those investors; and
- (c) the unitholders or shareholders of the undertaking – as a collective group – have no *day-to-day discretion or control*. The fact that one or more but not all of the aforementioned unitholders or shareholders are granted *day-to-day discretion or control* should not be taken to show that the undertaking is not a collective investment undertaking.

4. Guidelines on 'raising capital'

10. The commercial activity of taking direct or indirect steps by an undertaking or a person or entity acting on its behalf (typically, the AIFM) 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 should amount to the activity of raising capital mentioned in Article 4(1)(a)(i) of the AIFMD.

11. For the purpose of the previous paragraph, it should be immaterial whether:

- (a) the activity takes place only once, on several occasions or on an ongoing basis;
- (b) the transfer or commitment of capital takes the form of subscriptions in cash or in kind.

12. Without prejudice to paragraph 16, when capital is invested in an undertaking by a member of a pre-existing group, for the investment of whose private wealth the undertaking has been exclusively established, this is not likely to be within the scope of raising capital.

13. The fact that a member of a pre-existing group invests alongside investors not being members of a pre-existing group should not have the consequence that the criterion 'raising capital' is not fulfilled. Whenever such a situation does arise, all the investors should enjoy full rights under the AIFMD.

5. Guidelines on 'number of investors'

14. An undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD. This should be the case even if it has in fact only one investor.

15. An undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD if the sole investor:

- (a) invests capital which it has raised from more than one legal or natural person with a view to investing it for the benefit of those persons; and
- (b) consists of an arrangement or structure which in total has more than one investor for the purposes of the AIFMD.

16. Examples of arrangements or structures within paragraph 18 include master/feeder structures where a single feeder fund invests in a master undertaking, fund of funds structures where the fund of funds is the sole investor in the underlying undertaking, and arrangements where the sole investor is a nominee acting as agent for more than one investor and aggregating their interests for administrative purposes.

6. Guidelines on ‘defined investment policy’

17. An undertaking which has a policy about how the pooled capital in the undertaking is to be managed to generate a pooled return for the investors from whom it has been raised should be considered to have a defined investment policy in accordance with Article 4(1)(a)(i) of the AIFMD. The factors that would, singly or cumulatively, tend to indicate the existence of such a policy are the following:

- (a) the investment policy is determined and fixed, at the latest by the time that investors’ commitments to the undertaking become binding on them;
- (b) the investment policy is set out in a document which becomes part of or is referenced in the rules or instruments of incorporation of the undertaking;
- (c) the undertaking or the legal person managing the undertaking has an obligation (however arising) to investors, which is legally enforceable by them, to follow the investment policy, including all changes to it;
- (d) the investment policy specifies investment guidelines, with reference to criteria including any or all of the following:
 - (i) to invest in certain categories of assets, or conform to restrictions on asset allocation;
 - (ii) to pursue certain strategies;
 - (iii) to invest in particular geographical regions;
 - (iv) to conform to restrictions on leverage;
 - (v) to conform to minimum holding periods; or
 - (vi) to conform to other restrictions designed to provide risk diversification.

18. In paragraph 20(d), any guidelines given for the management of an undertaking that determine investment criteria other than those set out in the business strategy followed by an undertaking having a general commercial or industrial purpose should be regarded as ‘investment guidelines’.

19. Leaving full discretion to make investment decisions to the legal person managing an undertaking should not be used as a mean to circumvent the provisions of the AIFMD.

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The clarification provided in this position is applicable only to Directive 2011/61/EU on alternative investment fund managers and is not intended to alter the meaning of any similar concept contained in other European legislative instruments, including Directives 2009/65/EC and 2010/73/EU.