CONTINUITY OF MANAGEMENT ACTIVITIES DURING THE CORONAVIRUS CRISIS – THE AMF CONTINUES TO SUPPORT MARKET PARTICIPANTS

In the context of the current health crisis and high market volatility, which require special arrangements to be put in place in the asset management industry to protect the interests of unitholders or shareholders of collective investment undertakings (CIUs), the AMF is committed to supporting portfolio asset management companies (AMCs) and addressing questions raised by some market participants or their industry associations.

This publication may be supplemented or updated as needed or in response to individual questions from market participants that the AMF deems to be of general interest.

A) Business continuity arrangements

<u>What are my business continuity obligations as an AMC in the current crisis?</u>

AMCs are required to produce and maintain operational business continuity plans.[1] In the current situation, AMCs are expected to ensure continuity in managing their portfolios and fulfilling their regulatory obligations, while also taking appropriate measures to protect their employees. In particular, suspending redemptions of units or shares for certain funds may only be considered for reasons relating to the potential inability, given the exceptional circumstances, to value portfolios or to meet redemption requests (see below).

<u>Do I have to report the activation of my business continuity plan (BCP) to the AMF?</u>

Not in most cases. The AMF has contacted directly those market participants about whose situation it wanted to have a clear picture. Other AMCs may activate their BCPs under their own responsibility, without providing the AMF with any specific information. However, if they experience any particular difficulties (e.g. the malfunction of certain provisions of their plan), they are asked to contact their usual contact.

<u>Can my employees come and work at the company's premises?</u>

AMCs must comply with health advice issued by the public authorities, which may change over time. Currently, working from home must be given priority and implemented for all job functions that can be carried out remotely and staying at home should be mandatory for those people in high-risk categories or who may be infected. However, if certain essential tasks require a physical presence at the AMC's premises, certain employees may continue to enter those premises, subject to their compliance with the instructions issued by the authorities.

[1] *Under (i) Article 321-25 of the AMF General Regulation for UCITS and AIF management companies below the thresholds that have not opted for full application of the AIFM Directive and (ii) Article 57(3) of Commission Delegated Regulation 231/2013 of 19 December 2012 for AIF management companies that are subject to full application of the AIFM Directive.*

The AMF reminds AMCs that there is no provision that prohibits their employees from working from home. However, AMCs are expected to be vigilant with regard to working from home, particularly in relation to:

- Issues of conflict of interest and confidentiality regarding other household members;
- Potential latency risks that make it difficult to monitor market activities in real time;
- Aspects related to cybersecurity.

I have activated my BCP and my employees are working from home. Can I stop recording phone calls?

The applicable regulations do not allow AMCs to be exempted from these obligations. The AMF again stresses the importance of maintaining an audit trail and recording conversations. Exchanges with participants have shown that several technical solutions already exist that ensure compliance with these regulatory obligations when working from home. However, the rapid large-scale deployment of these solutions is challenging, and the AMF will take this into account in its supervisory actions. The AMF does however expect participants to take appropriate measures to ensure that they meet these obligations under operational conditions that are deteriorated by the geographical distance between teams. Please refer to the communication on market activities continuity.

https://www.amf-france.org/en/news-publications/news/market-activities-continuity-during-covid-19-pandemic-amf-states-its-expectations

I usually receive client orders by post. Can I switch to fully electronic procedures?

There is no blanket response to this. It depends on the nature of your client communications and the regulatory and contractual framework of the communication in question. For example, for real estate investment companies, there is no legislative or regulatory provision prohibiting orders being sent by electronic means. However, the method for sending orders may have been stipulated in your instruments of incorporation. For the specific case of real estate investment companies that have opted for variable capital, the AMC must be informed of redemption requests by registered letter with return receipt requested or by any other means specified in the instrument of incorporation and offering document (Article 422-218 of the AMF General Regulation).

It is the responsibility of each AMC to determine the conditions required to ensure the continued operation of the vehicles it manages. Therefore, if an AMC considers that the postal service is no longer a reliable means of sending orders, it must assess the need to use alternative means, in particular electronic means. In such situation, it must be particularly vigilant in ensuring that investors are properly informed, that the principle of equal treatment of investors[2] is respected and that orders are processed in accordance with current regulations.

With specific regard to holding general meetings for CIUs with a corporate form (for example, open-ended investment companies or open-ended real estate investment companies), the AMF draws the attention of AMCs to the provisions of Order 2020-321 of 25 March 2020 permitting, by way of derogation, the full use of electronic means to conduct these general meetings (and in some cases the postponement of general meetings held to approve financial statements under the terms of Order 2020-318 of 25 March 2020).

B) Relationship with the AMF – support arrangements

Are the AMF's services still available during the lockdown period?

Yes. The AMF has taken steps to ensure the continuity of its duties, particularly in terms of investor protection, while at the same time providing support for market participants. Almost all AMF teams are working fom home, following processes that are routinely used when operating in normal times. Electronic procedures are also being used, including for AMF decision-making (the Board and Internal Products Committee providing an opinion for decisions made by the Chairman on delegation of the Board). Some of the maximum legal or regulatory deadlines

[2] *The term "investors" refers both to unitholders of a unit trust and shareholders of an open-ended investment company.*

that the AMF has for making its decisions, and in particular the authorisation periods for new CIUs, were extended by Article 7 of Order 2020-306 of 25 March 2020. For example, the authorisation period for UCITS (a deadline governed by European Union law) was extended from 30 days to two months. It is a suspension of deadlines that has no impact on the continuity of the AMF's activities. Deadlines that started to run before 12 March are therefore suspended and continue to run from the end of the month following the state of health emergency, i.e., currently 24 June 2020. Deadlines starting during the state of health emergency are suspended until 24 June 2020. This suspension of deadlines does not mean that the AMF will no longer be able to take any actions and decisions in respect of its duties to regulate and supervise all market participants and products, particularly in the area of asset management, insofar as these market participants and the regulator are able to meet the deadlines.

In this context, applications for authorisation are being processed in the normal way, and the AMF intends to examine applications within the same time frames as in normal times, with a few practical adjustments made to take account of the current situation:

- Processing regular mail received by the French postal service can no longer be guaranteed. Until further notice, applications must only be submitted electronically, as is already expected for certain types of applications. Please refer to the communication of 18 March 2020 on this subject. https://www.amf-france.org/fr/actualites publications - /actualites/coronavirus-informations-pour-les-societes-de-gestion
- AMCs that experience particular difficulties, especially those that need to activate certain liquidity management mechanisms (gates, side pockets, suspension of subscription and redemption orders, etc.) on their French or foreign funds (managed under the European passport), are asked to contact the AMF without delay, especially for transactions requiring authorisation (including, where applicable, the possible creation of side pockets under the provisions of the PACTE Law).
- An AMC does not, however, have to inform the AMF about activating its BCP, unless there are specific difficulties related to its implementation.

Are there any tolerance measures for submitting the Annual Disclosure Sheet (FRA), Annual Control Report (RAC) or annual internal control report on anti-money laundering and counter-terrorist financing (AML/CFT) to the AMF?

For AMCs closing their accounts at the end of December, the deadline for submitting FRA-RACs[3] has been extended to 24 June 2020.
The deadline for the annual AML/CFT internal control report[4] has been extended to 24 June 2020. However, market participants are asked to be extremely vigilant in matters relating to AML/CFT, as the level of attention and requirements cannot be reduced in these areas.

In addition:

- For AMCs responding to the questionnaire on the monitoring of climate commitments, the deadline has been extended to 30 April 2020;
- For AMCs affected by SFTR reporting, for which the reporting obligations were due to come into force on 13 April 2020, in line with ESMA's recommendations, goodwill will be exercised by the AMF in its supervisory actions until 13 July 2020. https://www.amf-france.org/en/news-publications/news/market-activities-continuity-during-covid-19-pandemic-amf-states-its-expectations

However, there are no exemptions for the various daily reports, which must still be submitted without delay and provide the regulator with information on the state of the market that is useful in carrying out its monitoring and oversight role (e.g. NAV reports to the AMF, etc.).
Furthermore, for information purposes, ESMA has decided, as a general rule, to extend the deadline for responding to its various ongoing consultations by four weeks.
https://www.esma.europa.eu/press-news/esma-news/esma-extends-consultations-response-dates

[3] Submissions to the AMF pursuant to Articles 318-37 and 321-75 of the AMF GR and Instruction DOC-2008-03, within four and a half months of the end of the financial year.
[4] As stipulated in Articles 320-20 and 321-47 of the AMF GR.

C) Reminder of the framework applicable to liquidity risk management tools for UCITS and AIFs

The AMF reminds AMCs of their obligations to put in place adequate and effective arrangements, procedures and techniques, to measure and manage at any time the risks which the UCITS and AIFs they manage are or might be exposed to[5], in particular liquidity risk management,[6]

As such, in the context of the current health crisis and market turmoil, the AMF reminds AMCs that they have tools for managing the liquidity risk of French CIUs.[7] These tools are designed not only to protect the interests of clients and ensure that they are treated fairly, but also to ensure financial stability and guarantee market integrity.

Accordingly, depending on the degree of deterioration in liquidity, it may be in the interest of investors to activate one of the mechanisms listed below (non-exhaustive list).

The AMF also favours the use of "swing pricing" and "anti-dilution levies" mechanisms during the current crisis, given the low liquidity of certain underlying assets and the sometimes high costs involved in restructuring portfolios.

1. "Swing pricing" (or "adjusted net asset value") and "anti-dilution levies" mechanisms

"Swing Pricing" (also called "adjusted net asset value") and "Anti-Dilution Levies" mechanisms, when the change in liabilities is positive (or negative), involve the upward (or downward) adjustment of the net asset value (Swing Pricing) or of the amount of entry and exit fees accruing to the fund (Anti-Dilution Levies).

With regard to the Swing Pricing mechanism, this practice allows a single net asset value to be applied to each calculation date and offsets the costs of portfolio restructuring and their impact on the long-term performance of the fund. The AMC may decide to implement only partial swing pricing (or swing pricing with a trigger threshold), triggering the mechanism only when net subscription/redemption flows exceed a certain threshold.

With regard to the Anti-Dilution Levies mechanism, this practice allows the exiting or entering investor to be charged the buy or sell costs incurred when the portfolio is restructured, without adjusting the net asset value of the CIU. The AMC may also opt for a "partial" anti-dilution levies mechanism, in which case the anti-dilution levies are only charged when the net subscription/redemption flows exceed a certain threshold.

These mechanisms can therefore reduce, for current investors in the fund, the cost of liability movements generated by entering or exiting investors, thus ensuring the fair treatment of investors.

Since 2014, AMF policy has specified the conditions for using swing pricing and anti-dilution levies for UCITS, retail investment funds, funds of alternative funds, professional investment funds, employee savings funds, private equity funds and real estate CIUs,[8] whose prospectuses must include the general principles.

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[5] *Pursuant to Article 46 of Commission Delegated Regulation (EU) No. 231/2013 of 19 December 2012 for AIFs and Article 321-81 III of the AMF General Regulation for UCITS.*

[6] *Depending on the management company's authorisation, pursuant to the first paragraph of Article 318-40 and to Article 321-81 I a) of the AMF General Regulation.*

[7] *As a reminder, liquidity risk means the risk that a position in the portfolio cannot be sold, liquidated or closed out at limited cost in an adequately short time frame and that the ability of the UCITS or AIF to comply at any time with the requirement to issue and redeem as requested by investors.*

[8] *AMF Instructions DOC- 2011-19 (for UCITS), DOC-2011-20 (for retail investment funds, funds of aternative funds and professional investment funds), DOC-2011-21 (for employee savings funds), DOC-2011-22 (for private equity funds) and DOC-2011-23 (for real estate CIUs).*

AMCs that use these mechanisms must also formally establish a Swing Pricing and Anti-Dilution Levies Policy, which describes in particular the methodology used to calculate the total cost of restructuring the portfolio and its parameters, as specified in the Charter of Good Conduct for Swing Pricing and Anti-Dilution Levies Accruing to Funds, published by the AFG (French asset management association) and updated in January 2016.[9] This charter also describes several good practices in this area. This policy is not made public, but it may be inspected by the AMF and must be kept up to date by the AMC.

The AFG's Charter specifies that it is the AMC's responsibility to define the investors and types of CIUs concerned (scope of application of the mechanisms), to define the calculation method used, to implement it and to control it in line with the principles of the Charter. Lastly, the AMC must identify and manage potential conflicts of interest resulting from these mechanisms.

The AMF favours the use of these mechanisms during the current crisis, given the low liquidity of some underlying assets and the sometimes high costs involved in restructuring portfolios.

For funds that have not yet included these mechanisms in their prospectuses, or for funds that need to amend the mechanism described in their prospectuses (for example, by amending or removing a maximum swing range ceiling that was already specified in the prospectus), it should be noted that, in accordance with the requirements set out in the AMF Instructions, these prospectus amendments fall into the category of changes that do not require AMF authorisation and which, as for the Swing Pricing mechanism, must simply be disclosed to investors through any means.[10]

With regard to the Anti-Dilution Levies mechanism, the AMF Instructions currently stipulate that, when its introduction involves an increase in redemption fees, a specific disclosure must be provided to investors along with the ability for them to exit free of charge. However, the AMF is aware of the operational difficulties that this may cause in the current climate. It has therefore decided to align this procedure with the procedure for Swing Pricing on a temporary basis, until the end of the month following the state of health emergency provided for in Emergency Law No. 2020-290 of 23 March 2020 to deal with the COVID-19 epidemic (i.e. as of 24 June 2020). It is therefore up to the AMC to determine the most appropriate procedures for notifying investors of this change. In any event, any adjustment to these fees must be justifiable and must be non-confiscatory and non-dissuasive.

2. Mechanism for capping redemptions (gates mechanism)

When exceptional circumstances so require, and if the interests of shareholders or the public demand it, the gates mechanism allows redemption requests relating to a UCITS, a retail investment fund, a fund of alternative funds, a private equity fund, a professional private equity fund, a real estate CIU, a professional real estate CIU or an employee savings fund to be temporarily spread over several net asset values, provided that they exceed a certain level previously stipulated in the fund's instruments of incorporation.

In its publication of 6 March 2018 on clarifying the framework applicable to investment fund liquidity risk management tools, the AMF encouraged AMCs to investigate including in the regulatory documents of certain CIUs the option of using gates to facilitate the management of liquidity crises in the best interests of investors.

In exceptional circumstances, it may be difficult to sell quickly and at the best price without harming the interests of the CIU and its unitholders.

To avoid having to carry out forced sales under poor price conditions while allowing the fund to honour redemption requests gradually, the AMC can spread the redemption requests over several net asset values using gates. By

[9] *These provisions have been applicable since the publication of good practices relating to these mechanisms by the AFG on 24 June 2014.*
[10] *With the exception of private equity funds, for which Instruction DOC-2011-22 details the specific disclosure to be provided to unitholders.*

deferring these requests, this mechanism can be used to block redemptions only temporarily and partially, rather than completely as in a CIU that does not have such a mechanism.

The option of using gates – and in particular the trigger threshold, the maximum duration of the phasing and the procedures for managing the remaining orders (postponement or cancellation, at the investor's discretion or not) – must have been provided for in the CIUs' instruments of incorporation after (for authorised CIUs) authorisation by the AMF, along with the ability for investors to exit free of charge for at least 30 calendar days.

When the AMC decides to activate gates, it must inform the public under the conditions set out in the CIU's prospectus.
The implementation procedures were specified in AMF Instruction DOC-2017-05 and in AMF Position-Recommendation DOC-2011-25.

3. Side pocket mechanism

Since 2008, in exceptional circumstances, when the disposal of certain assets would not be in the interest of unitholders, the AMC has been able to ring-fence these assets in a "side pocket" CIU. This provision allows the AMC to continue to manage and establish a net asset value on the "healthy" assets and consequently continue to honour subscription/redemption requests on these assets.

The PACTE Law[11] amended the legislative provisions relating to the side pockets of UCITS and retail investment funds[12] in order to introduce the following new mechanism: the initial UCITS (or AIF) is split to keep the **illiquid assets within this UCITS (or AIF) and is placed into liquidation (it therefore becomes the side pocket) while the healthy assets are transferred to a new UCITS (or AIF of the same type) created for this purpose**.[13] The law has retained the requirement that this new mechanism may only be implemented *"when exceptional circumstances require it and if the interests of investors or the public demand it"*.

The legislative provisions have been supplemented by regulatory provisions (Decree No. 2020-286 of 21 March 2020), applicable since 22 March last.
Although this does not prevent AMCs from using this mechanism, these provisions will be followed in the near future by an amendment to the AMF General Regulation and the relevant policy documents. However, the AMF asks AMCs considering using this mechanism to contact their contact in the AMF prior to doing so.

4. Temporary suspension of redemptions

When exceptional circumstances so require, and if the interests of shareholders, unitholders or the public demand it, the AMC may decide to completely suspend, on a temporary basis, the redemption of units or shares in UCITS, retail investment funds, funds of alternative funds, employee savings funds, real estate CIUs, professional real estate CIUs, professional specialised funds, including limited partnerships, or professional private equity funds.

This mechanism helps to preserve the equal treatment of investors in very difficult market situations, such as when the disposal of assets is impossible.

When the AMC implements such a mechanism, it must immediately disclose the reasons and the procedures for the suspension of redemptions to the AMF, to all the authorities of the European Union Member States and to all

[11] *Law No. 2019-486 of 22 May 2019 on business growth and transformation.*
[12] *It should be noted that the system applicable to retail investment funds is also intended to apply, by way of reference, to funds of alternative funds, professional investment funds, private equity funds, employee savings funds, professional specialised funds, including limited partnerships, and professional private equity funds.*
[13] *Which will use the ISIN code of the initial UCITS or AIF.*

the States party to the European Economic Area agreement where the units or shares of the funds concerned are marketed.[14]

5. Redemption notice period

For funds with a daily net asset value ("NAV"), Articles 411-20-2 (UCITS) and 422-21-2 of the AMF General Regulation (retail investment funds, applicable by reference to funds of alternative funds, professional investment funds and employee savings funds) provide for the option of implementing a subscription or redemption notice understood as denoting the period between (i) the date a redemption order is centralised and (ii) the settlement or delivery date. This period may not exceed ten business days, including a maximum of five business days' notice between the centralisation date and the order execution date and a maximum of five business days between the order execution date and the delivery or settlement date.

Pursuant to AMF Instructions DOC-2011-19, DOC-2011-20 and DOC-2011-21, the introduction of a redemption notice period or the increase of an existing redemption notice period is a specific disclosure that must be provided to investors along with the right to exit free of charge. However, the AMF is aware of the operational difficulties that this may cause in the current climate. It has therefore decided to temporarily allow management companies of CIUs with daily NAVs to waive the specific investor disclosure requirements and the ability for them to exit free of charge if the redemption notice period is extended to a maximum of two business days, provided that this does not result in the maximum of five business days between the centralisation date and the order execution date and the maximum of five business days between the order execution date and the settlement date, as provided for in the AMF General Regulation, being exceeded. This relaxation will expire at the end of the month following the state of health emergency provided for in Emergency Law No. 2020-290 of 23 March 2020 to deal with the COVID-19 epidemic (i.e. as of 24 June 2020). It is therefore up to the AMC to determine the most appropriate procedures for notifying investors of this change, and **any extension of the notice period must be justifiable, including with regard to the asset class in question**.

D) Market operations

<u>Can I initiate new net short positions in my portfolios?</u>

In light of the coronavirus epidemic and its consequences for the economy and financial markets in France, the AMF has decided to ban, from 18 March 2020 at 00:00 hours until 16 April 2020 at midnight, any creation of net short positions and any increase in an existing position in the equity securities of issuers whose shares are admitted to trading on a French trading platform and for which the AMF is the relevant competent authority as defined by Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012.

https://www.amf-france.org/en/news-publications/news/ban-net-short-positions-frequently-asked-questions

<u>Is the short-selling calculation, corresponding thresholds calculation, reporting and publication performed at the level of the management company as a whole or on a fund-by-fund basis?</u>

Regarding the ban on net short positions, the ban applies on a fund-by-fund basis. Regarding reporting obligations, the reporting and publication obligations of Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit risk swap agreements apply to any natural person or legal entity domiciled or established within the Union or in a third country (see Article 11). Commission Delegated Regulation 918/2012 of 5 July 2012 (Article 12) and ESMA Q&A 70-145-408 (Q8) specify the conditions applicable to funds managed by the same AMC. Reporting and publication is only required at the AMC level (by AMC), but the calculation must first be performed for each fund issuer (by issuer). To determine the AMC's position,

[14] *See Article 411-20 (UCITS) and Article 422-21 (retail investment funds) of the AMF General Regulation.*

the positions of funds with net short positions are aggregated without offsetting them against those of funds with net long positions. A calculation and ad hoc reporting must be performed where the AMC also carries out activities other than fund management.

E) Other matters

What should I do if investment restrictions are exceeded?

The AMF reminds AMCs that if the investment ratios of certain CIUs are exceeded through no fault of their own or as a result of the exercise of subscription rights, their priority objective, in their sales transactions, must be to rectify the situation while protecting the interests of investors.[15] When such situations cannot be rectified, the AMF reminds AMCs that they should consider all the tools available to them, including the temporary suspension of subscriptions and/or redemptions (see above).

Can I change the frequency of my net asset value calculation?

The AMF reminds AMCs of the rules in force regarding the net asset value frequency.[16] It should be noted in particular that any decrease in the net asset value (NAV) frequency, such as a change from a daily to a weekly NAV, is a change that requires a specific disclosure to be provided to investors in UCITS, retail investment funds, funds of alternative funds, professional investment funds, private equity funds or employee savings funds along with the ability for them to exit free of charge for at least 30 calendar days.[17]

[15] *Pursuant to Articles R. 214-27 (UCITS) and R. 214-32-38 (retail investment funds) of the Monetary and Financial Code.*
[16] *AMF Instructions DOC-2011-19 (for UCITS), DOC-2011-20 (for retail investment funds, funds of alternative funds and professional investment funds), DOC-2011-21 (for employee savings funds), DOC-2011-22 (for private equity funds).*
[17] *Except for private equity funds.*