



Financial Services
Commission

Information page

Alternative Investment Fund Managers Directive Frequently Asked Questions

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Any advice or interpretation covered in this information page represents the views of the FSC as to its expectations of how the requirements of the AIFMD are to be complied with and/or how it fails to be applied. This however is not intended as a definitive interpretation of the AIFMD which is ultimately a matter for the courts to determine. The FSC does not provide, or purport to offer, legal advice.



Introduction

In this information page, reference is made to the Alternative Investment Fund Managers Directive 2011/61/EU ("AIFMD") and to the supplementing Level 2 Delegated Regulation ("Level 2"). This information sets out some of the most frequently asked questions and provides answers and references to other FSC information pages on the AIFMD.

Key words

AIF	alternative investment fund
AIFM	alternative investment fund manager
AIFMD	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
EC	European Commission
EIF	Experienced Investor Fund, as established in accordance with the Financial Services (Experienced Investor Funds) Regulations 2012.
EIF Regulations	Financial Services (Experienced Investor Funds) Regulations 2012.
ESMA	European Securities and Markets Authority
Fee Regulations	Financial Services (Alternative Investment Fund Manager) (Fees) Regulations 2013
FSC	Gibraltar Financial Services Commission
Level 2	European Commission's regulation on AIFMD implementing measures
MiFID	Directive 2004/39/EC on Markets in Financial Instruments
UCITS	Undertaking for Collective Investment in Transferable Securities
UCITS Directive	Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to UCITS (recast)



Frequently asked questions

1. What is the AIFMD?

The AIFMD is a new European Directive the purpose of which is to establish common requirements governing the authorisation and supervision of AIFMs in order to provide a coherent approach to the related risks and their impact on investors and markets in the EU.

AIFMD was transposed into Gibraltar law on 22 July 2013. AIFMD seeks to regulate the non-UCITS fund sector, in particular hedge funds, private equity funds and real estate funds. The AIFMD lays down the rules for the authorisation, on-going operation and transparency of AIFMs which manage and/or market AIFs in the EU.

AIFMs falling within the scope of AIFMD will have to comply with AIFMD in full including requirements, among others, on the following:

- organisational
- leverage
- depositary
- delegation
- risk management
- liquidity management
- reporting & disclosure.

2. What is an AIFM?

The AIFMD defines AIFMs as “legal persons whose regular business is managing one or more AIFs”. As a result, the definition of AIFMs is heavily dependent on the definition of an AIF.

The AIFMD defines AIFs as “collective investment undertakings, including investment compartments thereof, which:

- (a) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (b) do not require authorisation pursuant to Article 5 of the UCITS Directive.”

Each AIF must have a single AIFM which shall be responsible for ensuring compliance with the AIFMD. The AIFMD provides for two possible types of AIFM:

- (a) the external manager that manages AIFs; and
- (b) the AIF itself, when it is self-managed.

Unless explicitly differentiated, references to AIFM include both external managers and internally managed AIFs. For further information please refer to the information pages on AIFMD.



3. What are “Small AIFMs” and the “*de minimis* thresholds”?

“Small AIFMs” are AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by substantive direct or indirect holding, manage portfolios of AIFs whose assets under management:

- (a) including any assets acquired through use of leverage, in total do not exceed a threshold of EUR100 million; or
- (b) in total do not exceed a threshold of EUR500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

The above thresholds are commonly referred to as the “*de minimis* thresholds”.

Although Small AIFMs do not fall within the full scope of AIFMD they are still required to register with the FSC in accordance with Article 3 of the AIFMD. However, small non-EU AIFMs which manage EU AIFs (this includes Gibraltar AIFs) only have to register with the FSC if they are marketing the EU AIF in Gibraltar until 2015.

Only Articles 3(3), (4) and 46 of the AIFMD apply to Small AIFMs.

For further information, please refer to the FSC information page “AIFMD – Small AIFMs”.

4. How does the AIFMD affect private funds?

Provided that they fall within the definition of an “AIF” (see question 1), private funds will be subject to the AIFMD. At a minimum, this will mean that these private funds will need to register with the FSC (for Small AIFMs) or, in the case of private funds which do not fall below the *de minimis* thresholds, will need to comply with the AIFMD in full.

This is a big change for Gibraltar private funds which have never been required to register with the FSC before.

5. By when do Small AIFMs need to be registered?

It is recommended that Small AIFMs set up before 22 July 2013 register during the first quarter 2014. These Small AIFMs will be able to register as from 22 July 2013.

Small AIFMs set up after 22 July 2013 will need to register immediately. For EIFs this is set by legislation, for private funds this would be prior to establishment.

6. By when do in-scope AIFMs need to be authorised?

Existing in-scope AIFMs will have until 22 July 2014 to submit an application for the AIFM authorisation. However, the EC has stated that such AIFMs should ensure compliance with AIFMD on a best efforts basis as of 22 July 2013.



The EC has also advised that existing In-scope AIFMs will be expected to start reporting as of 22 July 2013 in accordance with the reporting obligations in the AIFMD and Level 2.

Until such time as they obtain the authorisation, such AIFMs will not be allowed to market their AIFs within the EU. AIFs will however be able to continue to market as they did before 22 July 2013.

AIFMs set up after 22 July 2013 will need to apply for authorisation immediately.

For further information, please refer to the FSC information page "AIFMD – Authorisation of AIFMs – General".

7. What do Small AIFMs that intend to 'opt-in' to the AIFMD need to do?

If a Small AIFM wishes to opt-in before the deadline for registration for Small AIFMs (see question 4 for further information), then a full application for the AIFM authorisation should be submitted to the FSC by 31st December 2013 and no registration as a Small AIFM is required.

If the Small AIFM wishes to opt-in after the deadline for registration for Small AIFMs, then it will initially be required to register as a Small AIFM before the deadline and it can then submit a full application for the AIFM authorisation to the FSC when it decides to opt-in.

8. Will the pre-authorisation launch of EIFs be available for authorised, large AIFMs?

This will not be feasible or possible for authorised AIFMs, whether externally managed or self-managed, due to how the AIFMD is worded. For your ease of reference, the relevant Articles in the AIFMD are Articles 31, 32, 35, 36, 39, 40 and 42.

Internally managed AIFMs will need to go through the whole application process and become authorised before going to market. Such AIFMs will need to comply fully with the requirements of the AIFM Directive including rules on remuneration, valuation, delegation etc.

External AIFMs will need to advise the FSC of the AIFs that they intend to market in Gibraltar or elsewhere within the EU. Within 20 days the FSC must inform the AIFM whether it may start marketing the AIF. In the case of a positive decision, the AIFM may start marketing the AIF as from the date of such notification. In such a scenario the EIF needs to be aware that it cannot be marketed until a notification is received from the FSC.

9. Will the pre-authorisation launch of EIFs be available for Small AIFMs?

It will be possible for Small AIFMs to launch pre-authorised EIFs. Such EIFs will need to comply with the timings contained in the EIF Regulations.



10. Can an entity be authorised under AIFMD and MiFID concurrently?

The EC has stated that an AIFM authorisation is incompatible with a MiFID authorisation. Therefore a single entity will not be able to hold a dual authorisation under AIFMD and MiFID.

MiFID firms wishing to become AIFMs in order to manage AIFs will be required to apply for authorisation under the AIFMD and then surrender their MiFID licence. Those opting to do this should refer to the MiFID services being provided to non-AIFs as the AIFMD sets out restrictions in this respect.

Note that MiFID firms acting as Small AIFMs do not need to apply for authorisation under AIFMD or relinquish their MiFID licence – these firms would continue to be regulated under MiFID. Investment firms may also provide services to AIFMs without obtaining authorisation under the AIFMD subject to providing these services solely on a delegated basis.

11. Marketing – what is marketing in the context of AIFMD?

Article 4(1)(x) of the AIFMD defines 'marketing' as "a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union."

Under the AIFMD, marketing is generally only allowed to 'professional investors' as defined in MiFID. However, under Article 43 of the AIFMD, each Member State may allow marketing of AIFs to 'retail investors' and may impose stricter requirements on such marketing. Considering that the definition of 'professional investors' is higher than that of an Experienced Investor, this may allow the marketing of In-scope EIFs to some Experienced Investors who do not qualify as 'professional investors'.

Annex I of the AIFMD lists 'marketing' as one of the AIFM's functions. Therefore, it is a function which it can delegate to a third party as long as the delegation is in accordance with Article 20 of the AIFMD.

For further information, please refer to the FSC information page "AIFMD – Marketing".

12. Is the AIFMD applicable to a Gibraltar AIF managed by a non-EU AIFM?

Yes, please see the FSC information page "AIFMD – Implications for non-EU AIFMs managing Gibraltar AIFs". Please note that in-scope non-EU AIFMs and small non-EU AIFMs managing Gibraltar AIFs, but do not market AIFs under management in Gibraltar, need not register with the FSC until 2015.

13. Can a fund of funds or feeder funds benefit from the EU marketing passport?

A fund of funds or a feeder fund will only have access to the EU marketing passport if the master funds have the ability to obtain the EU marketing passport themselves.



A feeder AIF is defined as an AIF investing at least 85% of its assets into another AIF (the master AIF).

14. Will family offices or private wealth undertakings be caught by the AIFMD?

Recital 7 of the AIFMD states that:

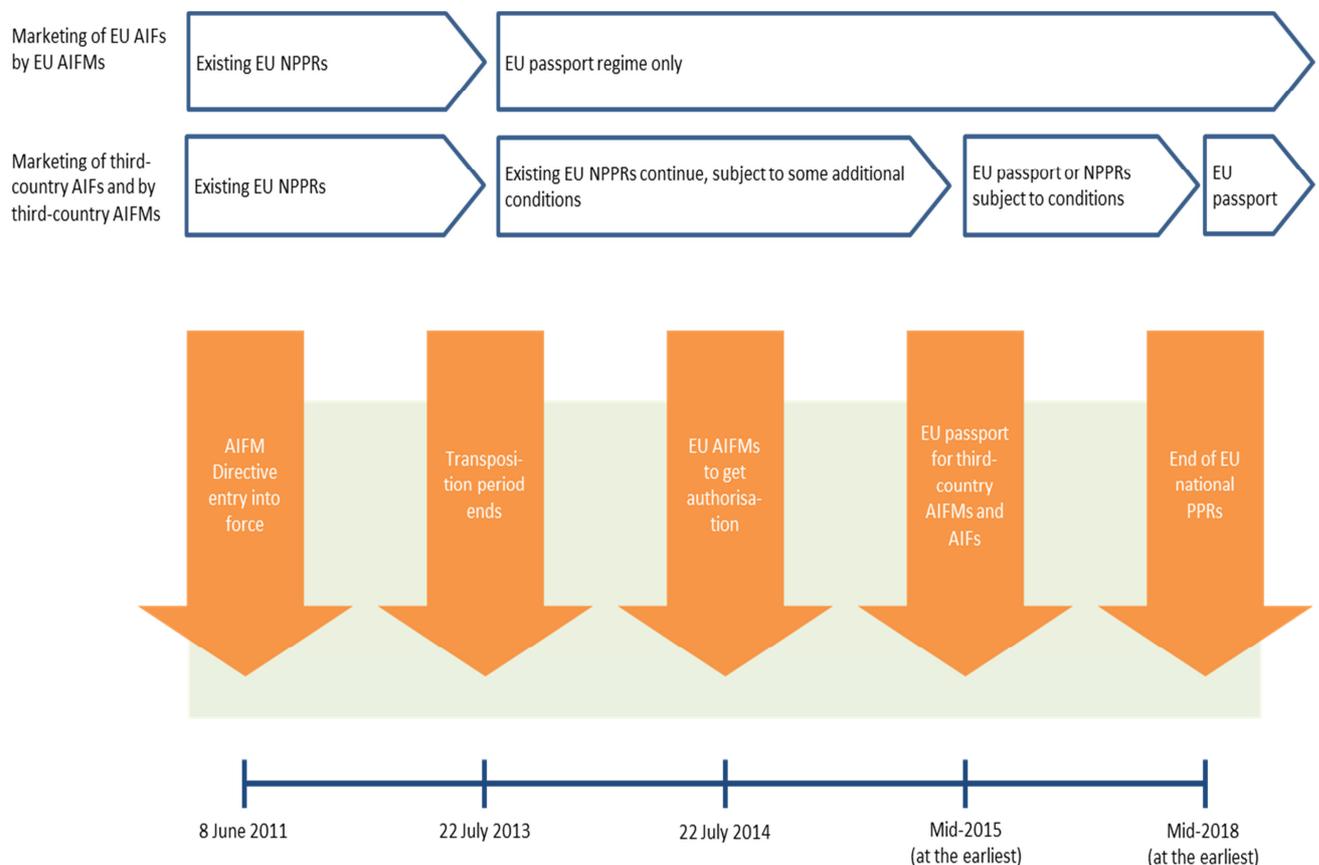
“Investment undertakings, such as family office vehicles which invest the private wealth of investors without raising external capital, should not be considered to be AIFs in accordance with this Directive.”

ESMA, in its consultation paper of 19 December 2012, clarified that the investment in an undertaking by a member of a group of persons connected by a close familial relationship that pre-dates the establishment of the undertaking, for the investment of whose private wealth the undertaking has been exclusively established, is not likely to be within the scope of raising capital.

Therefore, family offices will be generally exempt but a determination on whether the vehicle falls within the widely accepted definition of a family office will be based on a case-by-case assessment.

For further guidance please refer to the FSC Information Page on Types of firms caught by AIFMD.

15. On what date is the EU marketing passport available for non-EU AIFMs and/or non-EU AIFs?





For further information, please refer to the FSC information pages: “AIFMD – Implications for non-EU AIFMs managing Gibraltar AIFs” and “AIFMD – Marketing – General”

16. Will the FSC allow AIFMs to provide individual portfolio management on a client-by-client discretionary basis under Article 6 of AIFMD? Will these services be passportable?

The FSC will allow additional services to be performed by external AIFMs under Article 6(4) of the AIFMD. Such services being:

Management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis;

Non-core services comprising:

Investment advice;

Safe-keeping and administration in relation to shares or units of collective investment undertakings;

Reception and transmission of orders in relation to financial instruments.

Until recently the European Commission advised that passporting these services under AIFMD was not allowed. However, in a more recent proposal published by the European Commission, an amendment to Article 33 AIFMD has been proposed allowing firms to passport these services permissible under the AIFMD license into other Member States.

Other jurisdictions are already implementing this update in legislation. The UK had already implemented this into their legislation prior to the proposal, and Ireland is implementing this change with immediate effect. The decision on whether to implement this change into legislation has yet to be determined in Gibraltar,

17. If a firm is considering applying for an in-scope Gibraltar AIFM and there is a one year transitional period for AIFMD compliance which is provided until July 2014, why would the in- scope AIFM still be required to comply on a “best efforts basis” during the one year transitional period?

There is a one year transitional period but the European Commission has clarified that AIFMs are expected to comply with the requirements of the AIFMD on a best efforts basis as from 22 July 2013.

18. For the situation described above, what is the FSC’s application process and what AIFM compliance is required if a firm wants to establish and begin marketing the In- Scope EIF during the transitional period?

It is important to note that the transitional period is only available for AIFMs that have been marketing AIFs in the EU prior to 22 July 2013. If it is a new AIFM, the transitional period is unavailable and the AIFM will need to comply in full with AIFMD before it can manage and market a new EU AIF.

**19. How soon can an In-Scope AIF be passported in the EU?**

This process can be completed within a deadline of 20 days if various factors are completed, such as the AIFM being authorised, the fund being registered and correct information and forms being complied with.

If an Experienced Investor Fund submits its correct registration documents, and the AIFM submits the passporting documents, on Day 1, the EIF registration decision will be reached by Day 10 (business days) as per established service level standards. If the EIF is registered, 10 working days after that, namely Day 20 in the process, the FSC advise the AIFM that they can passport the AIF.

This ensures a quick and efficient process on behalf of the FSC when marketing into the EU.

20. If the fund is out of scope, what would the FSC requirements be?

Further information in this regard can be found in the FSC's information page on Small AIFMs. Registration forms are also available on the FSC website. Essentially, these firms will need to register and will be subject to annual reporting. Small AIFMs will also be required to monitor TAuM.

21. Given the one year transitional period in place in Gibraltar, is it possible to begin marketing a fund in other EU jurisdictions via a Private Placement during the transitional period?

Yes, provided that the AIFM has been marketing AIFs in the EU prior to 22 July 2013. Please note that the fund will need to explore what it needs to comply with in respect of the other jurisdiction separately, as these requirements may vary.

22. How does the FSC interpret "an AIFM marketing in the EU immediately prior to 22 July 2013"? If an AIFM has marketed in Europe over the past year or two, will that be sufficient?

Yes. If an AIF commenced marketing in the EU before 21st July this will be considered sufficient to be able to take advantage of the one year transitional period. Article 61 of the Directive, which relates to transitional provisions, states that AIFMs performing activities under the Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date.

23. Does a separate co-operation agreement need to be signed between Gibraltar and a third country as well as between for example the UK and the third country in order for an In-Scope third country AIFM to be able to market a Gibraltar AIF in the UK?

The FSC is of the view that the transitional provisions apply to all entities that were already carrying out the activity prior to 22 July 2013 i.e. both EU and non-



EU AIFMS can take advantage of the transitional provisions. In-scope AIFMs will still have to comply with provisions on a best effort basis. They will also need to make sure that they comply with the provisions in each jurisdiction in respect of any marketing being conducted.

The Cooperation agreement is a precondition of allowing non-EU managers access for their funds to EU markets or to perform fund management functions on behalf of EU managers; and of EU managers being allowed to delegate functions to service providers outside the union. Whilst ESMA has negotiated the MoUs centrally, they are bilateral agreements that still need to be concluded individually between each EU regulator and non-EU regulators. Since the actual supervision of alternative fund managers is undertaken by national regulators, it is up to each regulator to decide with which non-EU authorities it wishes to sign an MoU. Gibraltar has not yet signed any bilateral agreements with third countries. We will shortly be writing to all relevant countries that ESMA has negotiated MoUs with. Please note that the provision of MoUs is in relation to in-scope funds.

24. Will a limited partnership in which there is a single limited partner making a substantive contribution and a general partner making a nominal £1 contribution, be considered an AIF?

No. A collective investment undertaking will be an AIF where, among other things, it raises capital from a number of investors with a view to investing that capital for the benefit of those investors in line with a defined policy. A wholly nominal investment by an investor would not, in the FSC's view, meet the requirement for capital to be invested for the benefit of such as investor in accordance with a defined investment policy.

25. If a person performs functions for an AIF that have been delegated to it by another person will it be considered an AIFM?

A person does not manage an AIF if the functions it performs for the AIF have been delegated to it by another person, provided that such other person is not an AIFM that has delegated such functions to the extent that it is a letter-box entity. If delegation by an AIFM results in it becoming a letter-box entity, its delegate may be considered to be managing an AIF. It is important that firms are appropriately authorised, and do not carry out regulated activities which are not authorised to perform.

26. What criteria does the FSC apply to determine whether marketing is at the investors' initiative?

Firms may generally rely on confirmation from an investor that the approach is at his/her own initiative. However when supervising this area, the FSC will consider any evidence indicating that marketing activity has been going on, as that might point to circumvention of the Directive's obligations. We would expect that intermediaries acting on behalf of an AIFM might need to verify with the AIFM whether a particular investor's request is at his/her initiative, but this would be dependent on the circumstances such as the distribution agreement in place, etc.



27. Where a bank or manager which allocates an AIF (of which it is not itself the manager) to a client of the bank or manager under a discretionary or advisory mandate, does this qualify as “marketing”?

No, the FSC would not consider this marketing so long as the following conditions are satisfied:

1. there is no nexus with the underlying fund or its manager (other than to the extent that contact is required when performing due diligence on that AIF, at which point the manager is aware that being approved would mean that the fund is available for both discretionary and advisory products);
2. the bank or manager received no monetary or other benefit from the underlying AIF or its AIFM for recommending or choosing a particular underlying fund; and
3. the bank or manager acts in the best interests of its clients in determining which funds to choose and the recommendations/decisions are periodically reviewed.

28. Can an AIFM choose to market one or more sub-funds in Gibraltar or other member states without marketing the entire umbrella?

The FSC would expect notifications to market AIFs in Gibraltar, or requests to the FSC to notify authorities in other member States of marketing, to specify which sub-funds in an umbrella are to be marketed. An umbrella which is an AIF will be required to have in place a single AIFM for the umbrella as a whole.

29. Do AIFs structured as umbrellas have to report for the overall fund structure or do they report per individual investment compartment/sub-fund?

If an AIF takes the form of an umbrella structure with several investment compartments, sub-funds or cells, AIF specific information should be reported at the level of the investment compartment, sub-fund or cell.

30. How should the reports be completed for AIFs structured as an umbrella?

Complete the relevant report for each individual investment compartment, sub-fund or cell as you would for a single fund structure.

31. If a firm lists an AIF on a public market for an AIF that it manages, does it constitute marketing under the AIFMD?

Listing an AIF is not in itself marketing under the AIFMD. To note however that the process of listing an AIF may however be accompanied by marketing activity which would be captured.

32. How are open and closed-ended Funds defined under the AIFMD?

The main distinguishing factor which determines whether an AIFM is managing AIFs of the open-ended or closed-ended type, would be that an open-ended AIF allows for redemption or repurchase of shares or units with its investors, at the request of any of its shareholders, before the beginning of the liquidation stage of the Fund.

A decrease in the capital of an AIF in connection with distributions according to the rules of incorporation of the AIF would not be taken into account in determining whether an AIF is of the open ended-type. Only redemptions that are made out of the assets of the AIF are relevant in determining whether the AIF is of the open-ended type. Whether or not shares of the AIF can be bought or sold on a secondary market should not be taken into consideration.

Please see the Commission Delegated Regulation (EU) No 694/ 2014, for further guidance:

<http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32014R0694&from=EN>

AIFMD Fees

The following information sets out some scenarios and provides the answer in relation to the fee payable by the AIFMs described:

It would be useful to refer to the Tables provided in the Financial Services (Alternative Investment Fund Manager) (Fees) Regulations 2013("the Fee Regulations") when considering each scenario.

In-Scope AIFMs:

Transitional Set Off

When discussing initial fee proposals with industry it was mooted that paying two sets of fees could deter potential applicants from applying early, in some instances. The following provision was, therefore, inserted in the Fee Regulations:

"Until 22 July 2014, the Commission may set off, against all or part of a fee payable under these regulations, all or part of a fee paid under another enactment."

Please note that the FSC has interpreted this to be applicable to In-Scope AIFMs.

1. AIFM X, an external AIFM (already authorised as a Category 3 MiFID) firm, applied on 21st September 2013 (i.e. within the transitional period – before 22 July 2014) with 1 EIF and 1 non-EIF.
The fee payable would be **£7,500 + £300 + £500 – [transitional set-off - £3,248] = £5,052.**
Comprised of the £7,500 application fee together with the £300 AIF (EIF) fee and £500 AIF (non-EIF) fee, less the applicable transitional set-off amount.
2. AIFM Y, an external AIFM (already authorised as a Category 3 MiFID firm), applied on 1st November 2013 (i.e. within the transitional period – before 22 July 2014) with 1 EIF.
The fee payable would be **£7,500 + £300 – [transitional set-off- £2,551] = £5,249.**



Comprised of the £7,500 application fee together with the £300 AIF (EIF) fee, less the applicable transitional set-off amount.

3. **The following year, an external AIFM Y (already authorised under the AIFMD Regulations) has 1 EIF and 1 non-EIF (i.e. AIFM X now manages an additional non-EIF).**

The fee payable would be $£8,400 + £300 + £500 + £100 = £9,300$

This is calculated by adding the £8,400 annual fee; the £300 AIF (EIF) fee; the £500 AIF (non-EIF); and the £100 in respect of the additional AIF (non-EIF) currently managed by the AIFM.

4. **AIFM Z, an external small AIFM (Financial) that has decided to opt-in under the Directive, applied on 1st October 2013 (i.e. within the transitional period – before 22 July 2014) with 1 EIF and 1 non-EIF.**

The fee payable would be $£7,500 + £300 + £500 - [\text{transitional set-off } £249] = £8,051$.

Comprised of the £7,500 application fee together with the £300 AIF (EIF) fee and £500 AIF (non-EIF) fee, less the applicable transitional set-off amount for the £500 External AIFM (Financial) application fee.

Note that where small AIFMs choose to opt-in under the Directive, the AIFMD will become applicable in its entirety, that is, the AIFM will not be exempt from any of the provisions of the AIFMD and may not choose which conditions and requirements it will adhere to.

Hence, such small AIFMs are required to pay the In-scope AIFM fees.

Small AIFMs:

1. **AIFM Q, an external (financial) AIFM, registers in January 2014 (i.e. within the transitional period – before 22 July 2014) with 2 EIFs and 1 non-EIF.**

The fee payable is $£500 + (2 \times £0) + £500 = £1,000$

Comprised of the £500 application fee together with the £500 AIF (non-EIF) fee.

Note that:

- There are no AIF fees payable for EIFs; and
- The (financial) AIFM is for example a MIFID firm.

2. **The following year, AIFM Q (already authorised under the AIFMD Regulations) has 3 EIFs and 2 non-EIFs (i.e. AIFM P now manages an additional EIF and an additional non-EIF).**

The fee payable is $£500 + (2 \times £500) + (3 \times £0) + (2 \times £100) = £1,700$

This is calculated by adding the £500 annual fee; £500 AIF fees for each of the 2 non-EIFs; £100 in respect of each additional AIF (one EIF and one non-EIF) currently managed by the AIFM.

Note, that there are no AIF fees payable for EIFs.

3. **A self-managed EIF, registering in January 2014 (i.e. within the transitional period – before 22 July 2014).**

The fee payable would be the **£100** registration fee and **£100** annual fee.

4. **A registered self-managed EIF.**

The fee payable would be the **£100** annual fee. Once registered it would be the **£100** annual fee.



The AIFM is the AIF therefore there are no AIF fees payable.