



**Financial Services
Commission**

Information page

Alternative Investment Fund Managers Directive Types of firms caught by AIFMD

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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

With the introduction of the Alternative Investment Fund Managers Directive (AIFMD) on 22 July 2013, many more firms will now be required to register with the FSC than previously due to the new definitions applied by this Directive. The purpose of this information page is to raise awareness and ensure a common, uniform and consistent application of the concepts that comprise the definition of an AIF and an Alternative Investment Fund manager (AIFM).

It is imperative that anyone who deals with an AIF or an entity providing services to an AIF, structured in any form, considers whether the AIFMD is applicable to that entity. More specifically, it needs to be determined whether the entity falls within the definition of an AIF or an AIFM. This information page provides information on the individual concepts of the definition of AIF and AIFM.

AIFMD's definition of AIFM and AIF

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.

Article 4(1)(a) of the AIFMD defines AIFs as "collective investment undertakings, including investment compartments thereof, which:

- (a) raise 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 Directive 2009/65/EC (on UCITS)."

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.

All elements of definition must be met

The definition of AIF, as set out above, can be broken down into the following elements:

- (i) collective investment undertaking.
- (ii) raising capital,
- (iii) number of investors, and
- (iv) defined investment policy.

An entity should not be considered an AIF unless all the elements included in the definition are present. By way of example, undertakings which do raise capital from a number of investors, but do not do so with a view to investing it in accordance with a defined investment policy, should not be considered AIFs for the purposes of the AIFMD.

Investment compartments

Where an investment compartment of an undertaking exhibits all the elements in the definition of AIF, this is sufficient to determine that the undertaking as a whole is an AIF.

Meaning of 'collective investment undertaking'

Please note that definitions from the AIFMD of some of the terminology used in these descriptions have been included as Appendix 1 for ease of reference.

The following characteristics, if all of them are exhibited by an undertaking, are evidence that the undertaking is a collective investment undertaking mentioned in Article 4(i)(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.

Meaning of 'raising capital'

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.

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.

Without prejudice to the following paragraph, 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.

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.

Meaning of 'number of investors'

An undertaking which is not prevented by 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.

An undertaking which is not prevented by Gibraltar 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.

An undertaking which is prevented by Gibraltar 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.

Examples of arrangements or structures within the paragraph immediately above 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.

Meaning of 'defined investment policy'

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.

In point (d) of the paragraph above, 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'.

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.



Next steps

All persons involved with AIF's need to be aware of the scope and obligations under the AIFMD and that the Directive is considered in relation to both existing and future structures to determine whether they are caught by it. In particular, private funds are generally within the scope of AIFMD and will therefore either be subject to registration with the FSC or will be required to apply for an In-Scope AIFM licence. For further details of the registration and other requirements please refer to <http://www.fsc.gi/firms/aifmd.htm>.



Appendix 1 - Relevant Definitions

general commercial or industrial purpose:

the purpose of pursuing a business strategy which includes characteristics such as running predominantly

- (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.

pooled return:

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.

day-to-day discretion or control:

a form of direct and ongoing 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.

pre-existing group:

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.