

AIFMD review
France Invest comments in view of trilogues

This note presents France Invest's comments on the proposals of the Commission, of the Council and of the Parliament in view of the upcoming interinstitutional negotiations.

1. Definitions (article 4 paragraph 1)

- **Capital**

We would like to ensure that the definition in the AIFMD and the ETLIF Regulation are consistent.

In our view, this definition, proposed by both Council and Parliament with regards AIFMD, should be clarified. It is not sufficiently specific, in particular regarding the fees, charges and expenses to take into account. As a consequence, capital will be calculated on the basis of different calculation methods.

We therefore propose specifying that the fees, charges and expenses to take into account are the fees, charges and expenses **as known at the date of calculation**.

It should also be noted that, if "capital" is taken to include uncalled committed capital pursuant to this new definition, this essentially means that admitting investors triggers a valuation event.

- **Leveraged AIF**

In our view, the definition proposed by both Council and Parliament is not appropriate. It is too vague (it should be clarified what is covered by "any other means") and, as it includes derivatives, it will potentially cover a majority of AIFs.

2. Non executive directors (article 8 paragraph 1 point ca)

Although we support the aim of protecting retail investors, we are not in favour of the Parliament's proposal to introduce a systematic obligation to have a non-executive director at the governing body of AIFMs which manage AIFs that are marketed to retail investors. In our view, such an obligation is disproportionate.

Indeed, AIFMs are generally required to act in the best interests of the funds or the investors of the funds they manage. Also, the good governance of companies is tackled in national commercial law. In other words, this issue is already addressed in other regulatory frameworks and any superposition of rules would be inefficient.

In any case, it should be clarified that the "independence" of the non-executive directors may be satisfied in cases whereby the director is an independent compliance officer (in the same way the valuation function can be performed by the AIFM provided that the valuation task is functionally independent from the portfolio management and the remuneration policy, and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented).

Furthermore, triggering the proposed obligation by the AIFM marketing of a single AIF to retail investors in general would be disproportionate. The obligation should be circumscribed to “pure retail” investors. In the case of venture capital and private equity, most AIFs are marketed to high net worth/sophisticated investors which generally benefit from experience or external advice.

It should also be noted that the introduction of non-executive directors will necessarily increase costs, as these directors would have to be remunerated for their services. It would be burdensome for management companies, especially for small or middle-sized ones. In turn, applying such an application at the AIFM level would discourage AIFM targeting professional investor from opening up their services to retail investors as well.

Hence, as a last resort, such an obligation should apply at the level of the AIFM (at the level of its advisory body rather than of its governing body) or of the AIF, in order to take into account the different types of management companies and AIFs.

3. ESMA report on undue costs (article 12 paragraph 3a)

While we appreciate that retail investors should be protected against disproportionate costs, France Invest does not support the mandate that the Parliament proposes to grant to ESMA to submit a report on costs charged by AIFMs to investors in AIFs. Indeed, we understand that this issue will be covered during discussions in the context of the upcoming Retail Investment Strategy (RIS). We believe that, for now, it should be left out of the scope of AIFMD.

In any case, this mandate to ESMA should be more specific regarding the costs concerned, and limited to retail investors. We would like to remind here that professional investors are in a position to negotiate with AIFMs.

In addition, any review of costs and fees should also consider the investment strategy pursued by an AIF and the jurisdiction where the AIFM is located. In the context of certain investment strategies, in particular private equity and venture capital which invest in private companies, costs are inherently higher than in the context of an AIF that invest in public companies because of the additional work required in sourcing deals, conducting due diligence, structuring the transactions and taking an active part in governance.

4. Loan originating funds

• Definition of loan originating AIF (article 4 paragraph 1)

France Invest supports the definition proposed by the Parliament which specifies that a “loan originating AIF” means an AIF whose principal activity is to originate loans and for which the notional value of its originated loans exceeds 60% of its NAV. Indeed, this will leave AIFs which perform this activity as an ancillary activity out of scope.

• Definition of shareholder loan (article 4 paragraph 1)

We warmly welcome the caveat proposed by the Council and the Parliament for shareholder loans. However, we are not in favour of the obligation for the AIFs to hold at least 5% of the capital or voting rights of the relevant undertakings. Indeed, there will be difficulties in reaching the 5% threshold in a venture capital context. As businesses usually receive capital from more than one venture fund, it is unlikely that these managers will hold more than 5% of the interests of the business. Moreover, this could induce a change of investment strategy, which could lead to a narrowing of the equity and quasi

[equity of the portfolio companies, investors preferring to use debt instruments instead of shareholder loans with such obligation.](#)

- **Shareholder loans (article 15 paragraph 3 point d)**

We support the Parliament's proposal regarding loan originating granting activities as it would ensure a higher level of harmonization across the EU (i.e. no discretion for Member States).

- **5% retention obligation (article 15 paragraph 4f)**

France Invest prefers the Council's proposals regarding the 5% retention obligation applicable to loan originating AIFs. Indeed, the Council proposed to apply it on a period of two years or until maturity, whichever is shorter (whereas the Parliament's proposal sets out that such an obligation applies on an ongoing basis and until maturity). In our opinion, the obligation proposed by the Council will suffice to ensure an alignment of interests.

- **Grandfathering clause for loan originating AIFs (article 62 paragraph 5)**

We strongly support the Council's and Parliament's proposals to introduce a grandfathering clause for loan originating AIFs. Indeed, loan originating funds have long term investment horizons. For example, a typical loan to an SME or mid-market business may have a duration of between three and seven years. This means that private credit managers lending to businesses today will be making investments which may not come to fruition until after any amendments to the Directive are finalised. A grandfathering provision will provide private credit managers with certainty to continue lending and prevent any disruption to the flow of capital to European businesses.

Last, we suggest specifying that AIF which issue shareholder loans at the date of adoption of the revised Directive are not considered as loan originating AIFs.

5. Persons who effectively conduct the business of the AIFM (article 8 paragraph 1 point c)

We call for flexibility in the implementation of the requirement to have 2 persons who effectively conduct the business of the AIFM.

We support the Commission's and the Parliament's proposals to specify that these 2 persons are resident in the EU.

We also support the Parliament's proposal to have 2 persons committed on a full-time equivalent basis to conduct the business of the AIFM. This would for example allow a person to share his/her work time (e.g. for family reasons or any other reason) or allow a senior manager to pass on his/her responsibilities in view of his/her retirement (please refer to AMF position 2012-19).

6. Marketing function performed by distributors (article 21 paragraph 6a (new))

We support the Council's and Parliament's proposals to clarify that the marketing function performed by distributors which act on their own behalf is not considered as a delegation.

7. Other topics

- **Ancillary services (article 6 paragraph 4b)**

France Invest support the Council's proposal to add ancillary services which represents a continuation of the services already undertaken by the AIFM and does not create conflicts of interest that could not be managed. These complementary activities will allow AIFMs to generate additional revenues and make economies of scale.

- **Delegation notifications by NCAs to ESMA (article 7 paragraph 5)**

We support the Council and the Parliament's proposals to drop any reference to the concept "delegate more than retain".

- **Relationships in case of significant control of third party (article 14 paragraph 2a)**

The type of relationship between the AIFM and the third party should be specified ("including but not limited to"). The requirements proposed by the Parliament appear redundant, as rules on conflicts of interests and disclosure are already in place.

- **AIFM's liability in case of delegation (article 20 paragraph 3)**

France Invest does not have any specific comment on the Parliament's proposal.
