A survey on the implementation of Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011, on alternative investments fund managers in Germany, Italy, Spain, United Kingdom and France

(Encuesta sobre la implementación de la Directiva 2011/61/UE del Parlamento Europeo y del Consejo de 8 de junio de 2011, relativa a los gestores de fondos de inversión alternativos, en Alemania, Italia, España, Reino Unido y Francia)

Ángel García
Socio
Osborne Clarke

Javier Beltran
Asociado Senior
Osborne Clarke

Raquel Blanco
Asociado Junior
Osborne Clarke

Sumario: 1. Introduction. 2. The current status of national implementation of AIFMD in each country. 2.1. Germany. 2.2. Italy. 2.3. Spain. 2.4. United Kingdom. 2.5. France. 3. The scope of application of the legal act implementing AIFMD of each country. 3.1. Germany. 3.2. Italy. 3.3. Spain. 3.4. United Kingdom. 3.5. France. 4. Types of AIFs regulated under each national law. 4.1. Germany. 4.2. Italy. 4.3. Spain. 4.4. United Kingdom. 4.5. France. 5. Types of AIFMs regulated under each national law. 5.1. Germany. 5.2. Italy. 5.3. Spain. 5.4. United Kingdom. 5.5. France. 6. Substantial changes in respect of the previous national legislation with regard to the conditions for carrying out activities by AIFMs. 6.1. Germany. 6.2. Italy. 6.3. Spain. 6.4. United Kingdom. 6.5. France. 7. Specific legal regime for depositaries different from the AIFMD provisions. 7.1. Germany. 7.2. Italy. 7.3. Spain. 7.4. United Kingdom. 7.5. France. 8. AIF cross-border marketing regime. 8.1. Germany. 8.2. Italy. 8.3. Spain. 8.4. United Kingdom. 8.5. France.
Ángel García, Javier Beltrán, Raquel Blanco

A survey on the implementation of Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011, on alternative investments fund managers in Germany, Italy, Spain, United Kingdom and France

Resumen: El objetivo de la encuesta es determinar de qué manera distintos Estados Miembros de la UE (Alemania, Italia, España, Reino Unido y Francia) han implementado la AIFMD en sus correspondientes jurisdicciones así como en qué medida se ha visto afectada la previa regulación del capital riesgo de cada país. Los resultados de la encuesta muestran valiosas aportaciones de los distintos Estados Miembros de la UE sobre el grado de adaptación de la regulación del capital riesgo a la AIFMD desde su transposición.

Palabras clave: Transposición, AIFM, AIF, depositario, comercialización

Abstract: The scope of the survey is to determine how the different EU Member States (Germany, Italy, Spain, United Kingdom and France) have implemented the AIFMD into national law and to what extent their previous regulation on private equity has been affected. The results of the survey provide valuable insights of each EU Member State into the level of alignment of private equity regulation with the AIFMD since its implementation.

Keywords: Implementation, AIFM, AIF, depositary, marketing

1. Introduction

During a period of strong global growth, growing capital flows and prolonged stability prior to the first decade of the 2000’s, market participants sought higher yields without an adequate appreciation of the risks and failed to exercise proper due diligence.

By 2008, weak subscription standards, erroneous risk management practices, increasingly complex financial products and consequent excessive leverage combined to create vulnerabilities in the system.

At the same time, regulators and supervisors in some countries did not adequately appreciate and address the risks in financial markets, keep up with financial innovation, or take into account the systemic division of domestic regulatory actions.

Also, many of the strategies of managers of alternative investment funds (hereinafter referred to “AIFMs”) were vulnerable to several important risks in relation to investors and other market participants. In order to provide comprehensive and common arrangements for supervision, it was necessary to establish a framework capable of addressing those risks taking into account the diverse range of investment strategies and techniques employed by AIFMs.
In such a context, the G20 leaders held a meeting on 15 November 2008 where it was agreed that a broader policy response was needed, based on closer macroeconomic cooperation, to restore growth, avoid negative spillovers and support emerging market economies and developing countries.

As an immediate step to achieve such objectives, as well as to address longer-term challenges, in April 2009 the European Commission published a proposal for a Directive on Alternative Investment Fund Managers. The proposed Directive required all AIFMs within the scope to be authorised and subject to harmonised regulatory standards on an ongoing basis. It was also intended to improve the macro-prudential oversight of the sector and allow coordinated action as necessary to ensure the proper functioning of financial markets.

The text was finally agreed in October 2010 by the EU legislators and formally entered into force on 21 July 2011 with the title of Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011, on alternative investments fund managers (hereinafter referred to the “AIFMD”), becoming the most significant piece of EU legislation affecting the private equity industry. EU Member States had to transpose the AIFMD into national law by 22 July 2013.

Setting the global standard for private equity regulation, the AIFMD creates a secure and harmonised regulatory framework for the supervision and prudential oversight of the management and marketing of private equity, venture capital and other alternative investment funds in the European Economic Area (hereinafter referred to “AIFs”) for the first time. It essentially lays down the rules for the authorisation, ongoing operation and transparency of AIFMs, and establishes some major changes for their depositaries.

2. The current status of national implementation of AIFMD in each country

2.1. Germany

The German Act for implementing the AIFMD – which included the centrepiece Capital Investment Act (Kapitalanlagegesetzbuch – KAGB) – mainly entered into force on 22 July 2013.

On 19 July 2014 the KAGB was amended by means of the Financial Market Adaptation Law (Gesetz zur Anpassung von Gesetzen auf dem Gebiet des Finanzmarktes – Finanzmarktanpassungsgesetz) which adjusted the definitions of open-ended and
closed-ended funds according to the definitions contained in the Delegated Regulation (Verordnung) of 17 December 2013 of the European Commission.

On 28 January 2016 the German Bundestag adopted the Act on the implementation of Directive 2014/91/EU (UCITS-V-Implementation Act – OGAW-V-Umsetzungsgesetz) which entered into force on 18 March 2016. The UCITS-V-Implementation Act also contains specific amendments of the KAGB regarding AIFs and AIFM:

- The granting of loans and shareholder loans by certain types of AIFs was legally permitted under certain conditions.
- A new category of semi-professional investors (as defined below) was introduced.

2.2. Italy

The AIFMD has been implemented in Italy by Legislative Decree 4 March 2014 n. 44 entered into force on 9 April 2014, which has amended the relevant provisions on collective investment undertakings of the Italian Consolidated Law on Finance: Legislative Decree 24 February 1993 number 58 – Testo Unico delle disposizioni in materia di intermediazione finanziaria (“TUF”).

Consob and the Bank of Italy have subsequently approved the amendments to the relevant regulations necessary to complete the transposition of the AIFMD in Italy; these regulations entered into force on 9 April 2015. On 9 March 2015 the Ministry of Treasure have also adopted a regulation on the matter.

In particular: (a) Consob has amended the following regulations: Regulation n. 16190 concerning the discipline of Issuers and Regulation n. 11971 concerning the discipline of Intermediaries; (b) Bank of Italy has amended the Regulation on collective investment undertakings; (c) Bank of Italy and Consob have jointly amended the Joint Regulation on the organization and intermediary procedures providing investment services or collective investment management services; and (d) the Ministry of Finance has adopted the Decree n. 30 of 5 March 2015 on the criteria for Italian collective investment schemes.

2.3. Spain

AIFMD has been implemented into Spanish law under Act 22/2014 of 12 November which entered into force on 14 December 2014. This Act has completely repealed Act 25/2005 of 24 November regulating Private Investment Entities and their Managers, and amended Act 35/2003 on Collective Investment Schemes of 4 November, which regulates open-ended funds.
2.4. United Kingdom

AIFMD has been implemented into national law. This has been done by the Financial Conduct Authority (“FCA”) working jointly with HM Treasury through a combination of HM Treasury Regulations (The Alternative Investment Regulations 2013) and the FCA’s Investment Fund sourcebook (FUND).

2.5. France

AIFMD has been transposed into French law by Order 2013-676 published in the Official Journal on 27 July 2013. Its aim is to:

- create a harmonised framework for AIFMs in Europe and a simplified legal framework for asset management, while enhancing professional and retail investor protection;

- enhance transparency of AIFMs towards their supervisory authorities, investors and other key stakeholders in order to increase investor confidence;

- regulate the main sources of risk associated with alternative investment management.

3. The scope of application of the legal act implementing AIFMD of each country

3.1. Germany

Prior to the implementation of the AIFMD in Germany alternative investment funds were subject to the following regulation:

- Open-ended funds were regulated by the German Investment Act (Investmentgesetz)

- Closed-ended funds were only governed by the German Investment Products Act (Vermögensanlagengesetz – “VermAnlG”) which entailed a prospectus requirement.

---

1 All information referred to France contained in this Survey has been prepared by Osborne Clarke based on the information provided by the official site of the French securities markets regulator (Autorité des Marchés Financiers) and has not been independently verified as to its accuracy by any party. Whilst the information referred to France contained in this Survey has been prepared in good faith, no representation or warranty, express or implied, is given by Osborne Clarke as to the accuracy or completeness of the contents of this Survey that are referred to France.
Apart from that closed-ended funds and especially the managers of closed-ended funds were not regulated.

The German implementation of the AIFMD changed the regulatory framework for alternative investment funds immensely. German investment law for open-ended funds was significantly overhauled and the former Investment Act (*Investmentgesetz*) was replaced by the KAGB. Further, the KAGB expands the scope of regulation to AIFM of closed-ended funds and provides for extensive product regulation.

Hence the German KAGB contains provisions regarding open-ended AIF, closed-ended AIF and Undertakings for Collective Investments in Transferable Securities – UCITS (*Organismen für gemeinsame Anlagen in Wertpapieren – OGAW*).

The German legislator did not merely implement the minimum requirements of the AIFMD into German law but decided to go far beyond what is required under the AIFMD on some essential issues (“gold plating”):

- While the AIFMD provides only manager-related regulation (and only indirectly product regulation), the KAGB contains extensive rules on product regulation.

- The German legislator opted to include a so called “semi-professional investor” (section 1 subsection 19 no. 32 KAGB). The AIFMD does not provide for detailed provisions and classifies semi-professional investors as retail investors (Art. 43 subsection 1 AIFMD).

Semi-professional investors (including private individuals) within the meaning of the KAGB are treated like professional investors if they meet certain requirements, e. g.

- minimum commitment amount of EUR 200,000 and a certain degree of sophistication (sufficient knowledge and experience etc.),

- minimum commitment amount of EUR 10 million or

- public institutions / foundations o new category introduced by UCITS-V-Implementation Act (*OGAW-V-Umsetzungsgesetz*)

In addition, the KAGB provides for an extensive regulation of retail AIFs (*Publikums-AIF*):

- Besides professional investors and semi-professional investors (that are eligible to invest in special AIF (*Spezial-AIF*)) retail investors are generally eligible as investors in AIF.
There are high requirements for retail AIFs (*Publikums-AIF*) to protect retail investors, i.e.:

- very high demands regarding own capital, risk management, experience of the managers etc.
- limitations of eligible assets
- restrictions for use of leverage and hedging
- detailed information duties vis-à-vis the retail investors, e.g. approved prospectus or approved investment conditions.

### 3.2. Italy

In the transposition of the AIFMD the approach chosen by the Italian Legislator and by the relevant competent Authorities (Consob, Bank of Italy, and Ministry of Treasure) was to identify a single regulatory *corpus* of rules applicable to the entire sector of collective investment management.

In implementing the AIFMD the Italian Legislator has also introduced a new type of investment structure: the SICAF, an investment company which acts as AIF/AIFM by offering its own shares to raise money.

No exceptions were provided to the general rules to the advantage of so-called “sub-threshold” AIFM (subjects for which the total value of assets under management does not exceed EURO 100 million or EURO 500 million if the funds managed by them do not make use of leverage and do not allow investors to exercise the right of redemption for five years after the initial investment). In this case the relevant AIFM has to be authorized by the Bank of Italy to operate as fund manager following the same procedure provided for the other Italian fund managers (SGRs), but the minimum capital required to obtain such authorization is equal to EURO 50,000.

### 3.3. Spain

Act 22/2014 has extended the scope of application of the former Act 25/2005 of 24 November regulating Private Investment Entities and their Managers so that AIFMs and all collective investment entities that obtain funds from a series of investors in order to invest such funds in accordance with a defined investment policy are now regulated within the scope of Act 22/2014. Such collective investment entities are:
Private investment entities that raise funds from a series of investors through a commercial activity whose purpose is to generate profit or returns for such investors (ECRs).

Other collective investment entities of a closed-ended type that, not having a commercial or industrial purpose, raise funds from a series of investors by means of a marketing activity, in order to invest such funds in any type of financial or non-financial assets, according to a defined investment policy (EICCs).

Act 22/2014 does not apply, amongst others, to pension funds, REITs (Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario), holding companies whose securities are admitted for trading on a stock market and open-ended collective investment entities.

Also, it has introduced into national law two new structures in light of the AIFMD: (i) the ECRs-Pyme, ECRs that must invest at least a 75% of their total accountable net asset value in SMEs (Pyme) shares, participating in their management and developing advising activities, and (ii) the said EICCs.

3.4. United Kingdom

UK implementing regulation focuses specifically on matters contained in AIFMD but adapts existing legislation in light of it. The UK legislature has, in the process of implementing AIFMD, exercised implementing discretion in a number of areas where permitted, for example in the authorisation of certain types of small AIFMs, the application of reverse solicitation rules and rules applying to depositories. In addition to transposing AIFMD, the UK continues to have national laws concerning collective investment schemes and financial promotions.

No new legal structures have been created as a direct response to the introduction of AIFMD.

3.5. France

The AIFMD applies to AIFMs handling more than EUR 100 million for leveraged funds or more than EUR 500 million for unleveraged funds through one or several funds not covered by the UCITS Directive, in which redemption rights are blocked for a period of 5 years following the initial investment.
Ángel García, Javier Beltrán, Raquel Blanco

A survey on the implementation of Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011, on alternative investments fund managers in Germany, Italy, Spain, United Kingdom and France

4. Types of AIFs regulated under each national law

4.1. Germany

A) Types

- Open-ended AIFs, which comply with the requirements of Art. 1 subsection 2 of the Delegated Regulation (Verordnung) (EU) No. 694/2014 of the Commission of 17 December 2013 (investors can claim for redemption prior to the commencement of the liquidation phase)²:
  
  • Open-ended special AIFs (Spezial-AIF): only professional or semi-professional investors are eligible to invest.
  
  • Open-ended retail AIFs (Publikums-AIF): also retail investors are eligible to invest.

- Closed-ended AIFs, which are all AIFs that do not constitute an open-ended fund (investors cannot claim for redemption prior to the commencement of the liquidation phase):
  
  • Closed-ended special AIFs (Spezial-AIF): only professional investors or semi-professional investors are eligible to invest.
  
  • Closed-ended retail AIFs (Publikums-AIF): also retail investors are eligible to invest.

B) Legal Form

- Open-ended AIFs
  
  • Open-ended AIF with a contractual investment arrangement (Sondervermögen) i.e. pooling the AIF’s assets without using a corporate structure,
  
  • investment stock corporations with variable capital (Investment-aktiengesellschaft mit variablen Kapital) or

  • investment limited partnerships (Investmentkommanditgesellschaft) o only for special-AIFs

² As amended by means of the Finanzmarktanpassungsgesetz.
Ángel García, Javier Beltrán, Raquel Blanco

A survey on the implementation of Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011, on alternative investments fund managers in Germany, Italy, Spain, United Kingdom and France

- Closed-ended AIFs
  - Investment stock corporations with fixed capital (*Investmentaktiengesellschaft mit fixem Kapital*) or
  - investment limited partnerships (*Investmentkommanditgesellschaft*)

- Exception: however, AIFs that are managed by an AIFM that falls under one of the De Minimis provisions, e.g. “small special-AIF” under De Minimis threshold (Art. 3 subsection 2 and 4 AIFMD), are not obliged to use the above said legal forms but can use other legal forms as well, e.g. a limited liability company (*GmbH*).

C) Investment Regime

Applicable investment regime to every AIF is:

- the KAGB or
- the directly applicable European Venture Capital Regulation (*EuVECA-Verordnung*) / European Social Entrepreneurship Funds Regulation (*EuSEF-Verordnung*).

D) Recent developments

New legal regime regarding the granting and restructuring of (shareholder) loans by AIFs pursuant to UCITS-V-Implementation Act (*OGAW-V-Umsetzungsgesetz*):

- granting of loans by AIF, especially by closed-ended special-AIFs, is legally permitted under certain conditions (for AIF and AIFM) pursuant to KAGB
- granting of shareholder loans is now permitted for AIFs (subject to certain restrictions)
- restructuring (Restrukturierung) and extension (Prolongation) of unsecuritized loans by AIFs are not considered as granting of loans within the meaning of the KAGB or not subject to the abovementioned restrictions regarding granting of (shareholder-)loans (regarding retail-AIFs subject to certain other restrictions of the KAGB)
4.2. Italy

AIFs include all investment funds which do not fall within the scope of the European directive on UCITS (Directive 2009/65/EC), that is: (a) open or closed-end hedge or speculative funds; (b) closed-end equity and real estate funds and (c) open-end funds not harmonised with the UCITS directive.

Moreover, in Italy the TUF regulates specifically three types of AIFs: (i) AIF investment funds managed by a fund manager; (ii) SICAV (Variable Capital Investment Company) (ii) and SICAF (Fixed Capital Investment Company).

An “AIF investment fund” is a UCI falling within the scope of the AIFMD and constituted in the form of an autonomous complex of assets, divided into units, set up and managed by a fund manager (SGR or EU AIFM).

A SICAV is open-ended UCI constituted in the form of a joint stock company with variable capital and with registered office and general management in Italy with the exclusive purpose of the collective investment of the assets obtained by the offer of its own shares.

A SICAF is closed-ended UCI constituted in the form of a joint stock company with fixed capital and with registered office and general management in Italy with the exclusive purpose of the collective investment of the assets obtained by the offer of its own shares and other financial instruments of equity held by the same.

4.3. Spain

Act 22/2014 has excluded the two categories of ECRs that Act 25/2005 recognised, namely the common and simplified regime entities. The simplified regime entities were subject to less restrictive regulations (e.g. reduced investment diversification requirements) and were exclusively reserved to professional investors. Instead, Act 22/2014 now recognises an ordinary regime that applies to all collective investment entities (ECRs and EICCs).

ECRs and EICCs can adopt the legal form of companies (SCRs and SICCs) or funds (FCRs and FICCs).

Apart from ECRs and EICCs, Act 22/2014 also recognises the European venture capital funds (EuVECA) and the European social entrepreneurship funds (EuSEF), but refers their regulation to EU Regulation 345/2013 and EU Regulation 346/2013, respectively.

In relation to ECRs:
FCRs are separate assets without legal personality that belong to a number of investors and whose management and representation correspond to a managing entity which develops its power of control without being the owner of the fund. The main activity of the FCRs (which is performed by the manager) consists of acquiring temporary shareholdings in companies of a non-real estate and non-financial nature which, at the time of the acquisition, are not listed on the primary stock exchange market or other equivalent EU regulated market. Also, as complementary activities, they can grant participative loans and any other forms of financing, and can carry out advisory activities to the invested companies. FCRs must have minimum committed funds of EUR 1,650,000.

SCRs are public limited companies (sociedades anónimas) regulated under the Spanish Companies Act (Ley de Sociedades de Capital) which can carry out the same activities as the FCRs whether by themselves or through an SGEIC (as defined in point 4 of this Article). SCRs must have minimum share capital of EUR 1,200,000 (EUR 900,000 in the case of ECR-Pyme).

The applicable investment regime to the ECRs by virtue of Act 22/2014 has been made more flexible, allowing the use of a wider range of financial instruments such as participative loans and giving more flexibility in the calculations of the terms of fulfilling the mandatory investment ratio. Thus, the investment regime of ECRs consists of investing at least 60% of their total accountable net asset value in:

(i) shares or other securities or financial instruments that may give a right to subscribe or acquire the foregoing and shareholdings in the capital of companies within the scope of their main activity;

(ii) participative loans granted to companies within the scope of their main activity, with a rate of return fully linked to the company's profits or losses;

(iii) other participative loans granted to companies within the scope of their main activity, up to 30% of their total accountable net asset value; and

(iv) shares of other ECRs.

Also, included in such mandatory investment ratios are the investments in the share capital of non-financial companies traded on a Spanish secondary stock market, a multilateral trading facility or an equivalent market in other countries, as well as the granting of participative loans to such companies.
The remaining 40% is the unrestricted investment ratio, by which ECRs may invest such a percentage in fixed income securities traded in regulated markets or secondary markets, shares of companies not within the scope of their main activity, cash, participative loans and any type of financing of invested companies within the scope of their main activity. With regard to ECR-Pyme, these must invest in companies that meet the following requirements at the time of the investment:

- Are unlisted companies;
- Have less than 250 employees;
- Annual asset value or annual business volume do not exceed EUR 43 million and EUR 50 million, respectively;
- Are not collective investment schemes;
- Are not financial or real estate entities;
- Are established in an EU Member State or third countries provided that they are not listed as a non-cooperative country or territory elaborated by the Financial Action Task Force (FATF) on anti-money laundering and have signed a convention for the avoidance of double taxation with a provision of the exchange of information with Spain.

Under Act 22/2014 the ECRs-Pyme must invest at least 75% of their total accountable net asset value with the following financial instruments that provide financing to the companies’ asset value:

(i) shares, other securities or financial instruments that may give a right to subscribe or acquire the foregoing and shares in the capital;

(ii) participative loans;

(iii) hybrid financial instruments with a rate of return linked to the company’s profits or losses and provided that the recovery of the principal in case of insolvency is not fully secured;

(iv) secured or unsecured debt instruments issued by companies of which the FCR-Pyme already holds shares through any of the instruments mentioned in the points above.
Finally, the applicable regime of **EICCs** is the same as that one established for ECRs but with the following exceptions:

- They are not allowed to carry out complementary activities of ECRs.

- They may only invest in securitisations whose originator retains at least 5% and will be subject to the limits of the positions of securitisations established by the Delegated Regulation (EU) No. 231/2013 of the Commission of 19 December 2012.

**4.4. United Kingdom**

The AIFMD applies to a significant number of UK-based firms managing assets of both retail and institutional investors. All of these funds carry out similar activities by virtue of the fact that they all fall within the scope of the AIFMD regulatory regime: they are all collective investment undertakings. Some examples of the different types of investment undertaking are:

- Limited Partnerships

- Limited Liability Partnerships

- Authorised Unit Trusts ("**AUTs**") or unauthorised unit trusts

- Open-Ended Investment Companies ("**OEICs**")

- Authorised Contractual Schemes ("**ACSs**"), which may take the form of a co-ownership scheme or limited partnership scheme

- Real Estate Investment Trusts

- Investment Trusts and Venture Capital Trusts (which are public limited companies, but with specific tax benefits)

Some funds in the UK are subject to regulation beyond that found in AIFMD. AUTs, OEICs and ACSs are regulated at a national level as either UCITS or Non-UCITS Retail Schemes ("**NURS**") (that fall outside the scope of UCITS, e.g. real estate funds), which may be marketed to the general public, or qualified investor schemes ("**QIS**"), which may only be marketed to qualified investors. These funds are subject to a higher level of regulation, for example liquidity and diversity requirements that correspond to their open-ended nature.
The steps that are required to lawfully incorporate each type of fund structure will vary significantly.

4.5. France

The French securities markets regulator (Autorité des Marchés Financiers or 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. 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 a number of investors, with a view to investing it in accordance with a defined investment policy for their benefit, and are not subject to authorisation under Article 5 of Directive 2009/65/EC (UCITS Directive). In particular, such AIFs are:

- **AIFs listed in Article L. 214-24 of the Monetary and Financial Code:** general purpose investment funds, private equity funds, alternative funds of funds, real estate collective investment schemes, employee savings funds, real estate investment companies, forestry investment companies, closed-ended investment companies, specialised professional funds, professional private equity funds, professional real estate collective investment schemes and securitisation schemes.

- **Other AIFs defined in paragraph III of Article L. 214-24 of the Monetary and Financial Code:** vehicles falling under the definition of AIF laid down in paragraph I Article L. 214-24 but not listed in paragraph II of the same article.

5. Types of AIFMs regulated under each national law

5.1. Germany

German AIFMs can be structured as:

- **Internal AIFMs** that manage the AIFs themselves o AIF and AIFM are identically.

- **External AIFMs** o the management of the AIF does not manage the AIF itself but appoints an external company to manage the AIF.
In order to manage an AIF every German AIFM must have a registration pursuant to section 44 KAGB or a licence pursuant to section 20 KAGB:

- Registration pursuant to section 44 KAGB (often used by Private Equity/Venture Capital funds in Germany) o De Minimis provisions pursuant to section 2 of the KAGB:
  - "Small AIFM" which exclusively manage special AIFs (section 2 sub-section 4 KAGB) o thresholds: EUR 100 million (with use of leverage), EUR 500 million (without use of leverage).
  - "Small AIFM" which also manage retail AIFs (section 2 subsection 5 KAGB) o threshold: EUR 100 million (with use of leverage).
  - Limited (maximum 5 individuals) group of investors (section 2 subsection 4a KAGB)

- All other AIFMs require a licence pursuant to section 20 KAGB o the requirements depend on whether the AIFM manages:
  - Only special AIFs o less requirements for a licence since only professional and semi-professional investors are allowed to invest.
  - Retail AIFs o higher requirements for a licence since the German legislator seeks to protect retail investors.

5.2. Italy

According to the TUB in Italy there are three types of AIFMs: (a) SGR acting as AIF fund manager; (b) SICAV which acts also as fund manager (the purpose of the company is in fact to collect money by offering its own shares); (c) SICAF which acts also as manager (the purpose of the company is in fact to collect money by offering its own shares).

As provided by the AIFMD all these three AIFMs are allowed to delegate management functions to an external manager.

All of the three types of Italian AIFM need to obtain a specific authorization by the Bank of Italy to operate as AIFM in Italy (also in the case they delegate management functions to an external manager).

In particular, in order to obtain such authorization SGR, SICAV and SICAF have to fulfil the following conditions: (a) be a joint stock company having share capital not less than
EURO 1 million for SGR (except in case the SGR manages only reserved close-end funds, in this case the capital is EURO 500,000); EURO 1 million for SICAV and EURO 1 million for SICAF (reduced to EURO 500,000 in case of SICAF reserved to professional investors); (b) have the head office and the general management in the Italian Republic; (c) have the persons which manage and control the company fulfilling the requisites of professional standing, independence and honour established by the Ministry of Finance; (e) have the controlling shareholders fulfilling the requisites of honour established by the Ministry of Finance; (f) in case the company is part of a group it has not to be structured in order to prejudice the effective supervision of the Bank of Italy over the company; (g) have to file before the Bank of Italy a program concerning the initial activity of the company as well as a report on the organizational structure of the company in compliance with the scheme provided by the Bank of Italy in its Regulation.

5.3. Spain

Under Act 22/2014 AIFMs are public limited companies whose corporate purpose is the management of investments in one or several ECRs and EICCs and the supervision and management of their risks (SGEICs).

Where ECRs and EICCs adopt the legal form of a company, the company itself can manage one or several ECRs and EICCs. These self-managed ECRs and EICCs companies are subject to SGEICs regime in all matters where Act 22/2014 does not provide a different regime.

Act 22/2014 also allows managers of collective investment schemes (SGIIC) to be managers of ECRs and EICCs.

AIFMs shall apply for authorisation from the Spanish regulator (Comisión Nacional del Mercado de Valores or CNMV) in order to be able to perform their activities. For this purpose, Act 22/2014 requires them to meet all requirements provided by Article 48 of the AIFMD which are more flexible than those previously established by former regulation.

5.4. United Kingdom

For full scope UK AIFMs the UK (and specifically the FCA’s overarching regulation of financial service firms) has specific rules pertaining to:

- Authorised persons
- Financial promotions and distance marketing
- Format and content of fund documents
- Best execution
Ángel García, Javier Beltrán, Raquel Blanco  
A survey on the implementation of Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011, on alternative investments fund managers in Germany, Italy, Spain, United Kingdom and France

- Use of dealing commission  
- Telephone recording  
- Investor reporting  
- Regulatory reporting  
- Financial Services Compensation Scheme  
- Financial Ombudsman Service

UK law also regulates small AIFMs (i.e. underneath the AIFMD thresholds).

5.5. France

The AMF authorises and monitors investment management companies, which are investment firms whose main activity is:

- Portfolio management for third parties (or discretionary management), consisting of managing individual portfolios of financial instruments on behalf of clients, whether retail or institutional investors. A management mandate is signed between the management company and its client.

- Collective management or management of collective investments (particularly UCITS or AIFs) which broadly consists of managing collective portfolios. A collective investment comprises sums pooled by investors and managed on their behalf by a portfolio manager. The latter manages the sums raised in accordance with an investment policy, investing them in assets such as financial investments (shares or bonds). Shares or units are issued, representing a portion of the assets in the collective investment, in return for the sums paid into the collective investment.

In principle, all legal entities managing AIFs or Other AIFs must be authorised as portfolio management companies pursuant to paragraphs II and III of Article L. 214-24 and Article L. 532-9 of the Monetary and Financial Code.

Notwithstanding this principle, legal entities exclusively managing other AIFs whose total asset value calculated in accordance with Article 2 of Commission Delegated Regulation (EU) No. 231/2013 of 19 December 2012 falls below the thresholds of EUR 100 million (including assets acquired using leverage), or EUR 500 million (where those legal entities do not use leverage and cannot redeem units or shares for a period of 5 years with effect from the date of their initial investment in each AIF), and where all unitholders or shareholders are professional investors, are not required to be authorised as portfolio management companies but must register with the AMF. They may, however, apply to be authorised as portfolio management companies, for
example if they wish to benefit from the opportunities offered by the AIFMD. Also, an AIF may be self-managed, in which case the vehicle must meet the same criteria as, and be authorised in the same way, as a portfolio management company.

6. Substantial changes in respect of the previous national legislation with regard to the conditions for carrying out activities by AIFMs

6.1. Germany

The implementation of the AIFMD has led to substantial and important modifications to closed-ended AIFs which are predominantly used for Private Equity and Venture Capital funds in Germany. Closed-ended AIFs were only subject to a prospectus requirement pursuant to the VermAnlG and neither the AIFM nor the AIF were regulated.

No substantial changes to open-ended AIFs. Open-ended AIFs were already subject to regulation pursuant to the former Investment Act (Investmentgesetz) which was replaced by the KAGB. So the changes were not really substantial.

6.2. Italy

The implementation of the AIFMD has introduced important modification in the discipline concerning: (a) remuneration; (b) risk management, and risk containment (c) valuation; (d) liquidity management.

With regard to remuneration the Consob - Bank of Italy Joint Regulation adhere strictly to the rules and application guidance established at the European level, that is the ESMA directive and guidelines No. 2013/232 of 3 July 2013 on the subject of sound policies for remunerating AIFMs.

On risk management the Bank of Italy Regulation provides that any AIFM has to separate both functionally and hierarchically the functions of risk management from the operating units, including from the functions of portfolio management. Moreover with reference to risk containment the Bank of Italy Regulation has introduced specific regulation on the permitted leverage.

On liquidity management any AIFM has to employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligation.
Valuation AIFMs shall ensure that, for each AIF, appropriate and consistent procedures are established, so that a proper and independent valuation of the assets of the AIF can be performed.

6.3. Spain

The main development introduced by Act 22/2014 into Spanish law is the application to AIFMs of two different regimes of carrying out their activities: a general regime and a special one.

- AIFMs subject to the **general regime**: Act 22/2014 has introduced new requirements regarding their structure and organisation in order to guarantee the control of risks, liquidity and conflicts of interest and, more specifically, to comply with remuneration guidelines that avoid excessive risk-taking. In addition, Act 22/2014 includes new requirements on reporting to investors and the CNMV.

- AIFMs subject to the **special regime** shall not be subject to any of the requirements provided in the general regime when they manage assets below the following thresholds: a) EUR 100 million (including assets acquired with leveraged financing); or b) EUR 500 million, when the managed investment entities are not leveraged and do not have reimbursement rights that can be exercised during the five years following the initial investment date. The special regime also applies to AIFMs that manage one or more ECRs or EICCs whose sole investors are the AIFM itself, the parent company or the subsidiaries of the AIFM or any other subsidiaries of such parent company, provided that none of the investors are also an ECR or EICC and that they have voluntarily submitted to Act 22/2014.

Notwithstanding the above, the special regime shall not be applicable to those AIFM that market ECRs or EICCs to retail investors, even if their managed assets are below the aforementioned thresholds.

6.4. United Kingdom

The introduction of AIFMD has led to substantial changes to the regulatory landscape for affected funds. Some of the most significant changes include rules relating to:

- Marketing
- Loss of body corporate exemption (definition of ‘fund’ widened to include close-ended companies)
- The regulation of AIF depositaries
- Reporting to the regulator
- Increased regulatory capital requirements
- Liquidity management (for non-retail funds)
- Restrictions on leverage
- Remuneration

6.5. France

The requirements applicable to AIFMs laid down by the AIFMD are broadly aligned with those set out in the UCITS and MiFID Directives. As a consequence, the implementation of the AIFMD did not result in substantial changes for French management companies that had been already licensed by the AMF, but had lead to a smooth transition for managers wishing to be authorised as an AIFM.

In addition, management companies that fall below the De Minimis thresholds set out in the AIFMD but which decide to opt into the AIFMD in order to benefit from the pan-European marketing passport do not need to substantially modify their internal structures.

As part of the completion of the transposition of the AIFMD, the AMF has modified the books of its General Regulation concerning services providers and collective investment schemes. The minister of finance approved the new measures by a ministerial approval order dated 11 December 2013 and published in the Official Journal of the French Republic on 20 December 2013 and by a ministerial approval order dated 11 February 2014 and published in the Official Journal of the French Republic Official Journal on 20 February 2014.

Main changes to the General Regulation concern Book IV about collective investment products and involve:

- Creation of Title II for AIF and, in particular, notification of requests to market these funds in France, evaluation of assets, and informing investors and the AMF.

- Enforcement of certain marketing rules currently applicable to UCITS to all AIF marketed in France.

- Inclusion of competitiveness provisions recommended by the cross-industry Committee’s report on transposing the AIFMD and developing innovative management in France involving in particular making certain investment rules more flexible and simplification of subscription thresholds into two levels (EUR 100,000 for AIF open to professional investors and zero for AIF open to the general public).
- Integration of provisions taking into account modification of Article R. 214-15-1 of the Monetary and Financial Code concerning calculation of exposure and investment ratios for UCITS.

In addition, the AMF has brought its entire General Regulation, including Book III, into compliance concerning references to the provisions of the Monetary and Financial Code relating to AIF and their management companies, new designations for AIF and the concept of collective investment.

7. Specific legal regime for depositaries different from the AIFMD provisions

7.1. Germany

The German legislator has exercised an option of the AIFMD (Art. 21 subsection 3 AIFMD) that – apart from banks and investment firms subject to regulatory supervision – alternatively other service providers (e. g. notaries public or attorneys at law) may be permitted as a depositary which is called “alternative depositary” (section 80 subsection 3 KAGB).

In practice “alternative depositaries” are not often used in Germany since the requirements – set out in the KAGB and pursuant to the administrative practice of BaFin – are very high. “Alternative depositaries” must i. a. be:

- subject to legally recognized obligatory professional registration or

- subject to laws, administrative or binding professional provisions which in each case provide sufficient financial and professional guarantees that it will be able to effectively perform the functions and obligations of a depositary.

7.2. Italy

With reference to the discipline of the depositary the implementation of the AIFMD has not introduced a specific legal regime for depositaries.

7.3. Spain

AIFMs that (i) manage assets subject to the general regime, (ii) market ECRs or EICCs to retail investors, or (iii) have been voluntarily subject to the general regime must have one depositary whose appointment shall be formalised through a written agreement.
While such an obligation has traditionally been required for collective investment schemes of open-ended type, Act 22/2014 has introduced the obligation of appointing a depositary as a new requirement for such AIFMs in relation to each managed collective investment entity, in such a way as to unify the depositaries legal regimen applicable to both open-ended and closed-ended collective investment entities.

Depositaries of collective investment entities shall be subject to the legal regime of depositaries provided for open-ended collective investment entities by Act 35/2003 of Collective Investment Schemes of 4 November and its implementing regulations, which has been amended by virtue of Act 22/2014 in order to adapt it to the AIFMD and to the Delegated Regulation (EU) No. 231/2013 of the Commission of 19 December 2012.

On 16 January 2014 CNMV published a Draft Circular in order to complete the current legal regime of depositaries developing certain technical aspects of their functions. The final text of the Draft Circular has not yet entered into force.

7.4. United Kingdom

UK national law provides for the regulatory capital requirements for depositories. In summary this is €125,000 for Private Equity AIF depositories and £4 million for retail fund AIF depositories. In addition depositories will be subject to the FCA Client Money Rules and the approved persons regime for authorised firms.

7.5. France

The AMF examines authorisation applications for custody account-keeping activities filed with the Autorité de Contrôle Prudentiel et de Résolution (ACPR) by institutions wishing to exercise the function of depositary. The AMF defines the attributions and obligations relating to this function in its General Regulation.

The legal system applicable to depositaries is defined in the Monetary and Financial Code, the AMF General Regulation and in the additional provisions set out in Delegated Regulation (EU) n° 231/2013 of the Commission of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

Within the framework of custody of assets belonging to an AIF, the depositary:
- keeps the custody account for the financial securities except for pure registered financial securities;
- keeps the position of the assets of the AIF other than the financial securities mentioned above and pure registered financial securities. Position keeping consists in keeping a book of open positions, identifying the characteristics of the assets and recording any movements to provide traceability.

The following institutions can be the depositary of an AIF:

- the Banque de France;
- the Caisse des Dépôts et Consignations;
- credit institutions;
- investment firms authorised to carry out financial instrument custody account keeping;
- insurance companies and capitalisation undertakings governed by the Insurance Code;
- branches established on French territory of credit institutions that have their registered office in the EU and are authorised as depositaries in their home State and pursuant to Directive 2006/48/EC of the European Parliament and the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions;
- branches established on French territory of investment firms that have their registered office in a EU Member State, are authorised as depositaries in that State and are subject to the capital requirements under the terms of Article 20, Paragraph 1 of Directive 2006/49/EC of the European Parliament and the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions. In all cases, such investment firms must have capital of an amount of at least the level of initial capital referred to in Article 9 of Directive 2006/49/EC.

Those institutions wishing to conduct activities as depositaries of AIFs must apply for an authorisation from the ACPR to exercise custody account-keeping activities. The AMF is informed of authorisation applications by the ACPR and issues observations on the programme of operations.
8. AIF cross-border marketing regime

8.1. Germany

A) Basic Structure

With the implementation of the KAGB the private placement regime in Germany was completely abolished with effect to 22 July 2013.

The main distinction of the German Passport regulation is whether the AIFM is based in a member state of the EU (or European Economic Area (“EEA”)) or in a Non-EU (Non-EEA) country.

B) EU-AIFM

AIFM having a licence in any member state of the EEA may freely market AIFs across the EEA (“EU-AIFM”) without the need to gather licences from all national regulatory authorities (“Passporting”).

However, the question of whether an EU-AIFM can market AIFs to German investors depends on the qualification of the AIFs – special AIF or retail AIF – as well as the qualification of the investors:

- EU-AIFMs can passport AIFs of a member state of the EEA (“EU-AIFs”) or German special AIFs if these AIFs are only marketed to professional and semi-professional investors o this requires:
  
  • Notification procedure (section 323 KAGB) in the country of origin of the EU-AIFM and
  
  • information document for investors pursuant to section 307 KAGB.

- corresponding to the German De Minimis provision (see under d)) “small EU-AIFM” which manage AIFs (Art. 3 subsection 2 AIFMD / section 2 subsection 4 KAGB) can market AIFs to professional and semi-professional investors when following requirements are met:
  
  • Notification procedure with BaFin (section 330a KAGB).
Ángel García, Javier Beltrán, Raquel Blanco
A survey on the implementation of Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011, on alternative investments fund managers in Germany, Italy, Spain, United Kingdom and France

- Registration with supervisory authority in country of origin according to the provisions applicable in the country of origin and transposing Art. 3 AIFMD.

- Country of origin of EU-AIFM also permits marketing of AIFs by an AIFM which satisfies the conditions corresponding to section 2 subsection 4 KAGB and is registered according to section 44 KAGB, and does not impose higher requirements to the marketing than the KAGB o “principle of reciprocity” between country of origin and Germany.

C) Non-EU-AIFM

a) Interim period

For the interim period until the introduction of a passporting regime for AIFM from a third country (“Non-EU-AIFM”) Non-EU-AIFM can market Non-EU-AIF and EU-AIF to professional investors if the following conditions are met:

- Notification procedure with BaFin (section 330 KAGB).

- Information document for investors pursuant to section 307 KAGB.

- Appointment of one or more entities that carry out the duties pursuant to Art. 21 subsections 7 to 9 AIFMD (depositary functions)

- Further requirements, i. a.

  • reporting obligations pursuant to section 35 KAGB,

  • special requirements for Private Equity funds, if applicable (information obligations and further requirements regarding the acquisition of non-listed companies),

  • appropriate cooperation arrangements are in place between BaFin and the relevant regulators/supervisory authorities of the countries of origin of the AIFs and the AIFM,

  • the country of origin of the AIF and the AIFM is not listed by the Financial Action Task Force as a “Non Cooperative Country and Territory”
• appropriate measures have been taken to prevent the marketing of the AIFs to retail investors

If the Non-EU-AIFM intends to market Non-EU-AIFs and EU-AIFs also to semi-professional investors, the Non-EU-AIFM must be fully compliant with the AIFMD / KAGB requirements

b) Passporting regime

The passporting regime for Non-EU-AIFM will enter into force after a delegated act of the European Commission pursuant to Art. 67 subsection 6 AIFMD (expected not before mid-2016).

Every Non-EU-AIFM will by then be able to “passport” German special AIFs, EU-AIFs and Non-EU-AIFs managed by the Non-EU-AIFM if these AIFs are only marketed to professional or semi-professional investors and pursuant to the below-mentioned requirements, i.e.

- Non-EU-AIFM will be obliged to denominate an EU member state of reference.
- Notification procedure with BaFin (sections 325 to 328 KAGB) o similar to notification procedure for EU-AIFM (see under 2.).
- Information document for investors pursuant to section 307 KAGB.

D) Passporting to retail investors?

There is no passporting regime for the marketing of AIFs to retail investors in Germany o every EU-AIFM and Non-EU-AIFM must comply with requirements that correspond to the requirements for German retail AIFs which are extensively regulated (see under c).

8.2. Italy

An EU AIFM can provide its services (either by establishing a branch or directly) in Italy after it has first notified its home Member State Regulator of its intention to commence such marketing activity. The notification must also enclose the filing package with all the documentation and information contemplated in the AIFMD.

Marketing in Italy can commence after the EU AIFM receives confirmation from its home Member State Regulator that the filing package and the attestation, in which the home
Member State regulator declares that the EU AIFM is authorised to manage the AIF in the home Member State, is sent to the Bank of Italy and Consob. As a condition to marketing the units of any EU AIFs, the new Consob Regulation on Issuers provides that the EU AIFM must complete the registration procedure in advance of performing the activity of collective asset management.

There is no passport regime for marketing AIF to retail investors.

In Italy, units of EU AIFs may be marketed to retail investors, provided that the following conditions are met: (a) the EU AIF is already marketed in the home Member State of the AIF; (b) the notification procedure between Regulators has been completed; (c) CONSOB has issued its authorisation after consulting the Bank of Italy; (d) the EU AIFM must have completed the registration procedure to perform the activity of collective asset management in Italy; (e) the organisational structure of the EU AIF is in line with the requirements applicable to Italian AIFs; (f) the rules on the depositary of AIF are equivalent to those applicable to non-reserved Italian AIFs; (g) the rules of the AIF do not discriminate amongst investors; (h) the organisational allows Italian unit-holders to exercise their voting and economic rights; (i) the information made available to retail investors is complete, coherent and understandable; (h) the application for authorisation encloses all the information required in the CONSOB Regulation on Issuers a prospectus is prepared.

CONSOB will issue its authorisation within 20 days for closed-ended fund and within 60 days for open-ended funds. All the documentation above must either be produced in Italian or duly translated into Italian.

The Bank of Italy, in accordance with Consob, authorises non-EU AIFMs to manage Italian and EU AIFs or to market in the EU the AIFs managed, when Italy, pursuant to Directive 2011/61/EU, is the State of reference. The Bank of Italy immediately transmits to Consob copy of the authorisation application of such companies.

8.3. Spain

In relation to the marketing of collective investment entities incorporated in another EU member State and managed by AIFMs authorised in an EU Member State under AIFMD to professional investors in Spain, such marketing activity shall be free as the competent authority of the EU Member State that has authorised the AIFMs will communicate to the latter that it has sent a written notice regarding certain information on the collective investment entities that the AIFM intends to market to the CNMV.
On the contrary, the marketing of collective investment entities incorporated in a non-EU member State and managed by AIFMs authorised in an EU member State under AIFMD to professional investors require such AIFMs to previously give evidence before the CNMV regarding the following issues:

- That there are proper cooperation agreements set out between the competent authorities of the AIFMs’ home Member State and the supervisory authorities of the non-EU Member State where the collective investment entity is based;

- That the non-EU Member State where the collective investment entity is based does not appear on the FATF’s list as a non-cooperative country and territory;

- That the non-EU Member State where the collective investment entity is based has signed an agreement with Spain that fully complies with the provisions set out in Article 26 of the OECD’s Model Tax Convention on Income and Capital and guarantees an effective exchange of tax information, including, if appropriate, multilateral tax treaties;

- Additionally, it will be necessary to apply to the CNMV for the relevant authorisation in relation to the collective investment entities and to register the AIFM and such collective investment entities in the CNMV Registry.

Where marketing collective investment entities managed by non-EU Member State AIFMs to professional investors, such AIFMs shall give prior evidence before the CNMV regarding the following issues:

- That there are proper cooperation agreements set out between the CNMV, the competent authorities of the manager’s home country, the supervisory authorities of the third country where the collective investment entity is based and, if applicable, the supervisory authorities of the EU Member State where the collective investment entity is based.

- That the non-EU Member State where the AIFM is based and, if applicable, the non-EU Member State where the collective investment entity is based do not appear on the FATF’s list as a non-cooperative country and territory.

- Additionally, it will be necessary to apply to the CNMV for the relevant authorisation in relation to the collective investment entities and to register the AIFM and such collective investment entities at the CNMV Registry.
Act 22/2014 also regulates the marketing to non-professional investors of private investment entities (ECRs) in Spain. In this regard, Act 22/2014 recognises the following retail investors:

- Investors who (i) undertake to invest at least EUR 100,000 and (ii) expressly state in writing, in a document other than the investment agreement, that they are aware of the risks inherent to the undertaking;

- Directors, executives or employees of external AIFMs or self-managed ECRs and EICCs companies, in respect of the company itself or those entities managed or advised by the external manager;

- Investors who invest in ECRs listed on a stock exchange;

- Investors who justify having experience in the investment, management or advice in an ECR similar to the one in which they intend to invest.

The marketing to the abovementioned retail investors of ECRs in Spain requires AIFMs to give prior evidence before the CNMV regarding certain issues, apply to the CNMV for the relevant authorisation in relation to the ECRs and register the AIFMs themselves and such ECRs at the CNMV Registry.

8.4. United Kingdom

In order to apply for a passport, a UK AIFM would need to make an application to the FCA, indicating the EEA states into which services are to be provided. The application requires the AIFM to provide details of the fund’s programme of operations and intended marketing approach as well as specifying the identity of the depository. These requirements broadly follow the minimum requirements of the Directive. In terms of incoming passport applications from other EEA regulators, the FCA has not gold-plated any of the AIFMD requirements.

EEA fund managers falling below the AIFMD thresholds, marketing EEA based funds, can do so in the UK without any requirement to register.

From the perspective of non-EEA fund managers, the UK NPPR is relatively permissive. To be able to market under NPPR, an AIFM must satisfy a number of conditions, as detailed in regulations 57, 58 and 59 of the UK Alternative Investment Fund Managers Regulations 2013. Broadly these require the AIFM to notify the FCA of the intended marketing under NPPR. The NPPR distinguishes between non-EEA fund managers depending on whether
they would fall below the AIFMD threshold tests (“small third country managers”) or not. Both types must register the fund with the FCA before marketing can commence in the UK. If the fund manager is a small third country manager there are very few additional requirements. If it is not, the notice must include a statement covering the following matters (amongst other things): the AIFM complies with the relevant requirements of the directive; the relevant third country is not listed as a ‘Non-Cooperative Country’; and that there are arrangements in place for the relevant regulatory authorities in both countries to facilitate the joint supervision of the AIFM.

No fees are payable in the UK to access either passport or NPPR rights.

The abolition of NPPR would be unlikely to improve access to the market. However, devising a 3rd country passport would be useful for non-EU managers wishing to target the EU market. A combination of 3rd country passports and the NPPR, with an opt-in approach to the passport, would be the most flexible.

8.5. France

The AMF has opted for a broad interpretation of marketing, defined as “a direct or indirect offering or placement, at the initiative of the manager or on behalf of the manager, of units or shares of an AIF or UCITS it manages to investors domiciled or with their registered office in the EU”. Instruction DOC-2014-03 sets out the conditions applicable to the procedure for marketing in France of units or shares of AIFs:

- established in France or in an EU Member State other than France and managed by an asset management company authorised in France under AIFMD.

Pursuant to Article 421-1 of the AMF General Regulation, these AIFs must be the subject of a procedure of notification of the AMF prior to marketing their units or shares in France to professional clients.

Pursuant to Article 421-13 of the AMF General Regulation, all marketing in France to retail clients is subject to an authorisation procedure. Such authorisation applications must also be accompanied by a marketing notification referred to in the preceding paragraph or must be made after such a notification.

- established in France or in an EU Member State other than France and managed by an asset management company authorised in an EU Member State other than France under AIFMD.
Prior to the marketing in of their units or shares to **professional clients** in France, these AIFs must be the subject of a notification to the authority of the said management company (Article 32 of AIFMD). This notification is transmitted by the home authority of the management company to the AMF. This transmission is notified to the management company by its home authority. Marketing may start in France as of the date of the notification of the management company by its competent authority.

Prior to the marketing of their units or shares to **retail clients** in France, these AIFs must be the subject of an authorisation procedure (Article 421-13 of the AMF General Regulation). The marketing authorisation application file may not be made before the AMF has received the notification referred to in the preceding paragraph.

- established in a third country or in an EU Member State (France included) and/or managed by a manager established in a third country.

Pursuant to Article 421-13-1 of the AMF General Regulation, these AIFs must be the subject, prior to the marketing of its units or shares in France, of an authorisation procedure by the AMF. The marketing application must (i) provide evidence of compliance with the conditions set out in Article D. 214-32 of the Monetary and Financial Code, and (ii) for marketing to retail clients, provide evidence of compliance with the conditions set out in Article 421-13 of the AMF General Regulation.