
THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL

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Navigating the Alternative Investment Fund Managers Directive: A Regulatory Odyssey

Stephen Sims, Amin Doulai, Andreas Böhme, and Kasia Thevissen*

In this article, the authors take a look at the main changes introduced by the long-awaited update to the Alternative Investment Fund Managers Directive, as approved recently by the European Parliament. The authors highlight the new regime for loan originating alternative investment funds as well as the changes applicable to all EU alternative investment fund managers such as the additional reporting and disclosure requirements, the liquidity management framework, the amended delegation, and substance requirements.

The European Parliament has approved the final and long anticipated text amending the Alternative Investment Fund Managers Directive (AIFMD II). AIFMD II will enter into force 20 days following publication in the *Official Journal of the European Union*, with the bulk of the changes coming into effect in 2026.

Despite some early speculation among market commentators, AIFMD II is not a full revamp of the AIFMD (the key regulatory framework applicable to EU private funds) but rather a collection of strategic updates.

In fact, other than the provisions relating to loan origination, the changes are relatively moderate.

Key Changes

This article walks through the key changes introduced by AIFMD II and is applicable to:

- Loan originating funds only (see below, “Changes Relevant to EU AIFMs Engaging in Loan Origination”); and
- All EU alternative investment fund managers (AIFMs) (see below, “Changes Relevant to All EU AIFMs”).

Scope: To Whom Does It Apply?

Scope

- *EU Full-Scope AIFMs.* Most of the changes apply to all EU full-scope AIFMs. However, as noted above, certain provisions will only apply where the alternative investment fund (AIF), managed by an EU full-scope AIFM, is engaged in loan origination activities. The changes will not be relevant for EU sub-threshold AIFMs.
- *Non-EU AIFMs.* The new Article 23 disclosure requirements (relating to pre-contractual disclosures to investors) and Annex IV reporting rules (on reporting to national regulators) will also apply to non-EU AIFMs marketing AIFs under National Private Placement Regimes (NPPRs).

Other than with respect to NPPR marketing in Europe, the AIFMD II will not apply to firms authorised in the United Kingdom under the UK Alternative Investment Fund Manager Regulations 2023 (AIFMR) or any other non-EU managers.¹

There is currently no indication that similar changes will be made in the United Kingdom (although the Financial Conduct Authority has suggested that it may consult on the UK AIFMR in 2024).

Changes Relevant to EU AIFMs Engaging in Loan Origination

AIFMD II establishes a new regime for loan originating AIFs, which has been the subject of heated debate and heavily negotiated during the EU trialogue.

Some market commentators were hoping for an EU-wide “loan originating passport,” yet the AIFMD II does not fully offer this. In respect of a number of provisions (e.g. leverage limits and loan origination to consumers) the EU member states are permitted to adopt local frameworks with more restrictive rules. The member states are likely to take advantage of this flexibility.

Would a fully operational EU-wide loan originating passport be helpful? We think so. In the pre-AIFMD II world, some EU member states (like the Netherlands, Spain, and Luxembourg)

already made loan origination easier to access; however, the loan origination landscape across the European Union has generally been a difficult maze to navigate for managers.

Applicability

Most loan origination provisions of the AIFMD II apply to all AIFs that originate loans, whether such loan origination is key to their strategy or not (see below, “Requirements Applicable to All Loan Origination Activity”).

However, certain provisions apply only to AIFs that originate loans as a fundamental element of their strategy, that is, Loan Originating AIFs (see below, “Requirements Applicable Only to Loan Origination AIFs”).

An AIF will be considered to engage in “loan origination” activity where the fund:

- Grants a loan directly as original lender; or
- Grants a loan indirectly through a third party or a special purpose vehicle (SPV), which originates a loan on behalf of the AIF/AIFM, where the AIF/AIFM is involved in structuring the loan or defining or pre-agreeing its characteristics prior to gaining exposure to the loan.

It remains to be seen whether and to what extent private credit secondary funds, which are not typically known for originating loans but may get involved in restructuring existing loans, would be caught by this definition.

On the basis of the above definition of “loan origination,” it seems that the AIF would be seen as originating a loan it grants, regardless of how the loan was sourced (i.e., introduced to the AIF through an intermediary such as a debt adviser, law firm, or accountancy firm, as well as sourced directly by the AIF or AIFM).

There is no definition of “loan” in AIFMD II. However, quasi-debt instruments such as preferred equity and/or issuances of debt securities such as bonds and notes issued by a portfolio company to an AIF would likely not be caught.

Although, to the extent a loan is granted, this is likely intended to cover any type of loan granted for any purpose, and not confined narrowly, say, to new money loans for working capital, acquisitions, and/or developments, and would extend broadly to (among other

things) refinancings, recapitalisation loans, and distressed and rescue financings. Further, while the term “loan” may be interpreted broadly, AIFMD II does provide specific exclusions from the requirements imposed on loan originating funds (e.g., with respect to shareholder loans).

A “Loan Originating AIF” is defined as an AIF:

- Whose investment strategy is mainly to originate loans; or
- For which the notional value of its originated loans represents at least 50 percent of its net asset value.

This definition is narrower than had originally been feared and is aimed at AIFs that originate loans as a principal activity.

Requirements Applicable to All Loan Origination Activity

- *Concentration Limits.* AIFs must not make loans in excess of 20 percent of their capital to a single borrower if that borrower is an AIF, a UCITS (Undertakings for Collective Investment in Transferable Securities) fund, and/or a financial undertaking.
- *Restrictions on Lending.* An AIF must not make loans to the AIFM or the depositary (including their respective delegates and staff).

Certain helpful exclusions from the 20 percent limit apply (e.g., where the AIF is selling assets to meet redemptions or in connection with a liquidation).

- *Risk Retention.* AIFs must retain five percent of each loan they originate and subsequently transfer to third parties for at least eight years (or until maturity, if shorter).

While it seems that the legislators were focused on ensuring risk retention requirements would regulate activity in the context of loan transfers by the AIF, there is some ambiguity around how such requirements would impact prepayments initiated by the borrower itself. It is acknowledged that certain derogations from the risk retention rules will be necessary (e.g., where there is incompatibility with the AIF’s investment strategy or regulation), but it is less clear whether such derogation would be permitted where a

loan is voluntarily prepaid during its life and the borrower wishes to prepay the AIF in preference to other lenders, and whether the AIF would be permitted to accept such prepayment if it would cause its retention to fall below 5 percent.

Exemptions from the risk retention obligations apply where:

- An EU AIFM sells assets of the AIF on liquidation of the AIF;
 - Sale is necessary to comply with EU sanctions;
 - Sale is necessary to implement the investment strategy of the AIF, in the best interests of the investors; and/or
 - Sale is due to a deterioration in the risk associated with the loan and the purchaser is informed of such deterioration when buying the loan.
- *Policies and Procedures.* EU AIFMs will need to implement effective and up-to-date policies and procedures for the granting of credit, assessing credit risk, and administering and monitoring the credit portfolio. Such policies and procedures must be kept up to date and reviewed regularly—at least once a year.

In the case of shareholder loans (i.e., loans made to an undertaking in which the AIF holds at least 5 percent of capital or voting rights) this requirement does not apply if the aggregate notional value of the loans is below 150 percent of the AIF's capital.

- *No Originate to Distribute.* AIFs are prohibited from employing “originate to distribute” as a strategy.

It is yet to be seen how private credit market participants (especially larger players) will digest this prohibition on “origination to distribute” strategies, particularly as there has been increasing discussion by market participants and commentators around the potential (and perhaps necessity) for a liquid secondary market for direct lending loans in the near future. Indeed, this discussion has been driven in part by the marked increase in large unitranche loans originated by AIFs, involving many multiple private credit lenders, particularly following the retreat of the syndicated large-cap loan market in 2023. Such “large-cap” private credit financings with multiple participants may not be sustainable over the longer term without a functioning secondary loan market to sell down

into, potentially blurring the lines between the direct lending model and the broadly syndicated loan model.

Requirements Applicable Only to Loan Originating AIFs

- *Limits on Leverage.* Open-ended funds (which are perceived to pose a greater risk) are subject to a 175 percent limit on leverage, and closed-ended funds are subject to a 300 percent limit on leverage, both measured on the commitment basis. Exclusions include:
 - Subscription line financing,
 - Passive breaches of the leverage limit, and
 - Where Loan Originating AIFs' loan origination activity is limited to making shareholder loans.

Although passive breaches are excluded, they will still have to be remedied within a specified period of time.

- *Requirement to Be Closed-Ended.*

Loan Originating AIFs are required to be closed-ended unless the EU AIFM can demonstrate that its liquidity risk management system is compatible with its investment strategy and redemption policy. The European Securities and Markets Authority (ESMA) is expected to provide further guidance on how this compatibility is to be demonstrated.

Grandfathering Provisions

For the first five years after AIFMD II comes into force (i.e., 2024), the leverage limits, the concentration limits and the requirement to be closed-ended will not apply to preexisting AIFs. As currently scheduled, the grandfathering period will likely run from 2024 until 2029 (but, due to the 24-month transposition period, be effective in practice for only three years).

- *Closed AIFs.* The grandfathering will apply indefinitely if the AIF is not fundraising after AIFMD II comes into force.

- *Fundraising AIFs.* For AIFs that are still fundraising, although the leverage limits and concentration limits are generally disapplied, notable exceptions are included.
 - AIFs already in breach of the leverage and/or concentration limits at the time AIFMD II comes into force must not increase their leverage or lending, and
 - AIFs not in breach of the leverage and/or concentration limits may increase leverage or lending to the relevant borrower but only if the relevant limits would not be exceeded.

Loans originated prior to AIFMD II coming into force will not need to comply with, among other things, the prohibition on lending to certain types of persons, risk retention requirements, or prohibition on originate-to-distribute strategies.

Changes Relevant to All EU AIFMs

Permitted Activities

AIFMs are currently prohibited from carrying out any activities other than those for which they are specifically authorised (i.e., managing AIFs) and have the option to obtain additional “top-up” UCITS and/or MiFID (Markets in Financial Instruments Directive) authorisations only.

Pursuant to AIFMD II:

- *Loan Origination and Servicing.* Originating loans and servicing securitisation SPVs will be included as permitted ancillary activities.

This change allows loan origination activities to be carried out in other member states on a cross-border basis. Commentators refer to this change as creating the EU loan originating passport. While this may be the effect for commercial loan activity, the member states have the discretion to impose additional requirements in their own jurisdictions with respect to certain aspects of loan origination activities (e.g., consumer and retail lending, which tend to be highly regulated on a jurisdiction specific basis), which introduces some limitations on the use of the passport in practice.

- *Other Services.* EU AIFMs will be able to provide any other service that is already provided by them in respect of the AIFs they manage if any related conflicts are appropriately managed.
- *MiFID.* Portfolio management will no longer be a mandatory top-up permission. This will allow firms to apply for top-up permissions for other activities (e.g., advising, safekeeping, or reception and transmission of orders) without the need to also be authorised for portfolio management.
- *Benchmarks.* EU AIFMs may now perform benchmark administration with top-up permissions.

Delegation

- *Non-EU Delegates.* The AIFMD delegation requirements apply “irrespective of the regulatory status or location of any delegate” and note that the AIFM needs to ensure that non-EU delegates will also comply with AIFMD.

Although the full impact of the above changes is still being digested by the market, in our view, this provision reflects the regulatory concerns that unregulated non-EU delegates (including, in some jurisdictions, large cloud service providers) are beyond reach of the EU authorities (whereas the AIFMD Delegated Regulation requires that the EU authorities can audit the delegate (e.g., by getting access to data and premises) and there is no EU-wide legal basis for issuing orders directly to the delegate (however, the German legislator has provided for such competences in national law). In this context, one of the options discussed was to empower ESMA to enforce EU delegation rules on delegates based in third countries. At least at this stage, there are no specific rules proposed to deal with this issue (e.g., to empower the regulators to issue orders to the delegate, obligations on the AIFM to ensure that non-EU delegates appoint EU representatives).

- *Conflicts.* There is also a new requirement for EU AIFMs managing AIFs on behalf of a third party to provide additional information to their competent authority on their management of conflicts of interest.
- *Reporting to Regulators.* EU AIFMs will have to provide additional information to regulators (as part of Annex IV

reporting), including details of the delegates and information on the delegation.

This may result in the third-party AIFM model being put under some pressure.

- A detailed description of the human and technical resources to be used by the EU AIFM for day-to-day portfolio and risk management and for monitoring the delegated activity, and
- A description of the periodic due diligence measures used to monitor the delegated activity.

Substance Requirements

- EU AIFMs will be required to have at least two full-time people in the European Economic Area with the skills and expertise necessary to oversee the retained and delegated functions.

It is unclear whether this applies retrospectively, but if member states interpret this as applying to existing EU AIFMs, then some EU AIFMs may have to re-examine their existing structures. For most fund managers, however, this should not be far from their current practice.

AIFMD II introduces no requirement to appoint any non-executive directors at this stage (although this may change in the future and is encouraged, although not obligatory, in the context of AIFs marketing to retail investors).

- Applications for authorisation will need to provide more information concerning the individuals who are “effectively conducting the business” of the AIFM, including:
 - A detailed description of their role, title, and level of seniority;
 - A description of their reporting lines and responsibilities in the AIFM and outside the AIFM;
 - An overview of the time allocated to each responsibility; and
 - A description of the technical and human resources that support their activities and that are to be used by the AIFM for monitoring and controlling the delegate.

Liquidity Management for Open-Ended AIFs

EU AIFMs that manage open-ended AIFs are required to select at least two liquidity management tools (LMTs) from a specified list (see below) and implement detailed policies and procedures for the activation and deactivation of the selected LMTs:

- Redemption gates,
- Notice period extensions,
- Redemption fees,
- Swing pricing or dual pricing,
- Anti-dilution levy, and
- Redemptions in kind.

An AIFM cannot select swing and dual pricing only as its two LMTs.

EU AIFMs that manage money market funds are only required to select one LMT.

In addition to the LMTs, EU AIFMs managing open-ended AIFs are also permitted temporarily to suspend the repurchase or redemption of the AIF units or shares, activate or deactivate their selected LMTs, or activate side pockets.

This new power is designed to be used only in the most exceptional cases, where this is necessary in the best interests of the AIF's investors.

Despite some criticism, the EU regulators in the relevant member state also now have the power, in exceptional circumstances and after consultation with the relevant EU AIFM, to require EU AIFMs to suspend (or cease the suspension of) redemptions and subscriptions.

It remains subject to continued debate as to whether the EU regulators are in the best position to decide how liquidity management tools should be imposed with respect to a particular AIF on a case-by-case basis.

In the case of non-EU AIFMs marketing in the EU, ESMA may require activation/deactivation of redemptions and subscriptions.

AIFMs must notify their respective regulators when they activate/deactivate the LMTs.

Article 23 Disclosures to Investors

Additional Article 23 investor pre-contractual disclosures will need to be provided, including:

- The name of the AIF.

The name of the AIF already forms part of the pre-contractual information; however, the EU legislators would like to emphasise its importance in creating the first impression of the AIF's strategy in the mind of the investors. To that effect, ESMA will be tasked with developing guidelines on unfair, unclear, or misleading names of AIFs.

- A list of the fees, charges, and expenses borne by the EU AIFM in connection with the operation of the AIF and directly or indirectly allocated to the AIF; and
- For open-ended funds, information on the liquidity management tools identified by the AIFM.

Additional periodic disclosures to investors include:

- All fees, charges, and expenses directly or indirectly borne by investors;
- Any parent company, subsidiary, or special purpose entity utilised in relation to the AIF's investments by or on behalf of the EU AIFM; and
- For loan originating funds only, details of portfolio composition of an AIF's originated loans.

Annex IV Reporting

An EU AIFM will be required to report to the regulators:

- On all markets, instruments, and exposures and assets of each AIF that it manages;

Currently, an EU AIFM only has to report on the principal markets and instruments in which it trades, the main instruments in which it is trading, and the principal exposures and most important concentrations of each of the AIFs it manages.

- Total amount of leverage employed by the AIF,
- Detailed information on delegation arrangements concerning portfolio management or risk management functions, and
- The member states in which the AIFs are being marketed.

Marketing

Non-EU AIFMs and non-EU AIFs applying for authorisation to market in the EU pursuant to the NPPR must not be located in a third country that is (1) identified as high risk under EU legislation and included on the anti-money laundering (AML) blacklist² (which replaces the Financial Action Task Force list previously featured in the AIFMD), or (2) deemed non-cooperative in tax matters and included on the tax blacklist.³

Managers will need to monitor these lists, as these are regularly updated. The AML blacklist currently includes the United Arab Emirates and Panama (noting that the Cayman Islands does not appear on it anymore but has in the past). The non-cooperative tax blacklist includes the U.S. Virgin Islands, Russia, and Panama.

Depositories

It will now no longer be necessary for a depository to be established in the same member state as the relevant EU AIF. The local regulator in an EU member state may allow an EU AIF, on a case-by-case basis, to appoint a depository that is an EU credit institution located in another member state if certain conditions are met (i.e., there are no appropriate depository services in the home member state of the AIF).

AIFMD II does not, however, provide for a “depository passport” as some earlier discussions suggested.

Next Steps

Transposition

AIFMD II must now be approved by the member states before it is formally adopted and published in the *Official Journal of the*

European Union. Member states then have two years to transpose AIFMD II into national laws after its publication. Assuming that the directive is adopted promptly and published in the *Official Journal* without delay, most of the changes will come into effect in 2026 (subject to the grandfathering provisions).

ESMA Level 2 Rules

The final text will also require ESMA to produce:

1. Draft rules on liquidity management by open-ended AIFs, and on supervisory reporting content and processes, within a year of AIFMD II coming into force;
2. Guidelines on the power of regulators to initiate or end the suspension of a fund, and on fund-naming conventions, within 24 months of AIFMD II coming into force; and
3. Before the next reviews of the AIFMD and UCITS Directive, a report on delegation arrangements.

Notes

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1. <https://www.fca.org.uk/news/speeches/updating-and-improving-uk-regime-asset-management-our-priorities>.

2. See the AML blacklist at https://finance.ec.europa.eu/financial-crime/anti-money-laundering-and-counteracting-financing-terrorism-international-level_en.

3. See the tax blacklist at <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>.