

15 April 2024

AIFMD II enters into force – the implementation period has started

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On 15 April 2024, the directive amending the EU Alternative Investment Fund Managers Directive (AIFMD II) enters into force. AIFMD II is primarily aimed at EU AIFMs. It also contains important adjustments for non-EU AIFMs active in EU member states under national private placement regimes. It introduces notable changes to the fund regulation framework for both AIFs and UCITS.

With a local transposition deadline of 16 April 2026, fund managers (AIFMs) must now assess the impact of AIFMD II on the AIFs and UCITS they manage and/or market within the EU, their loan portfolio, their policies and the disclosures in the documentation provided to investors and to the competent authorities. In this update, we summarise the main changes relevant to AIFs that market units or shares of AIFs in the EU.

We focus on the key amendments relevant to (non-)EU AIFMs such as substance requirements and the governance models, including the ESG component, loan origination by funds, delegation arrangements, liquidity management tools, investor disclosure requirements, provision of additional services and adjustments to the NPPR.

1. Substance requirements and governance models

Substance requirements

AIFMD II aims to clarify the authorisation process for AIFMs. An important point of discussion across the EU has been the determination of the point at which an AIFM can be considered to have sufficient substance. Under AIFMD II, AIFMs must demonstrate that they have sufficient and appropriate technical and human resources to carry out their functions and supervise their delegates, if applicable. Detailed descriptions of these resources must be submitted with the licence application.

Management board

AIFMD II provides that:

- The persons who effectively conduct the business of the AIFM shall be of sufficiently good repute and sufficiently experienced in relation to the investment strategies pursued by the AIF managed by the AIFM.
- The conduct of the business of the AIFM shall be decided by at least two natural persons who are employed full time by the AIFM or who are executive members or members of the management body of the AIFM who are committed full time to conducting the business of the AIFM and who are resident in the EU.

The second criterion may have a significant impact, particularly in relation to board members who sit on more than one board of a group of companies. It is yet to be determined whether such a governance structure would still be deemed sufficient. AIFMD II goes on to state that, depending on the size and complexity of the AIF, these minimum requirements may not be sufficient. Additional board members and key function holders may be required to ensure effective operations.

Independent board member

AIFMs managing AIFs marketed to retail investors are encouraged to appoint at least one independent or non-executive director as a member of their governing body or management body, where possible in accordance with national law or industry standards of the AIFM's home member state. Although not currently enforceable, the European Securities and Markets Authority (ESMA) is required to assess the suitability of implementing a binding regulation on this matter as part of its review.

Integration of ESG parameters

It goes without saying that the integration of environmental, social, and governance (ESG) parameters into the governance of financial institutions is a key focus point of the EU authorities. AIFMD II also contains ESG-related provisions, including an obligation for AIFMs to integrate ESG parameters into their governance and risk management.

2. Loan origination funds

New regime

One of the most significant changes to the AIFMD framework is the introduction of a loan origination regime. AIFMD II defines 'loan origination' as the granting of a loan either:

- a. directly by an AIF as the original lender; or
- b. indirectly through a third party or special purpose vehicle which originates a loan for or on behalf of the AIF, or for or on behalf of an AIFM in respect of the AIF, where the AIFM or the AIF is involved in structuring the loan or defining or pre-agreeing its characteristics, prior to becoming exposed to the loan.

A 'loan-originating AIF' is defined as an AIF:

- a. whose investment strategy is mainly to originate loans; or
- b. whose originated loans have a notional value that represents at least 50% of its net asset value.

Broad scope of AIFs potentially impacted by the new regime

The new framework encompasses not only AIFs that originate loans themselves, but also AIFs that are linked to a loan originator that is responsible for originating loans specifically for the AIF. In other words, a situation where a bank or a separate specialised lender originates the loans and the receivables are assigned to the AIF, will fall within the scope of the loan originating funds regime.

Requirements for loan origination by AIFs

Loan origination by AIFs will be subject to a number of new rules, including:

- A ban on 'originate-to-distribute strategies'
- Risk diversification requirements
- Risk retention requirements
- A requirement to have specific loan origination policies and procedures
- Conflict of interest provisions
- Article 23 AIFMD disclosure requirements specific to loan origination and related fees and costs

AIFMD II specifies the preference for loan originating AIFs to be closed-ended. AIFMs may manage an open-ended AIF provided that they are able to demonstrate that the AIF's liquidity risk management system is compatible with its investment strategy and redemption policy. AIFMD II also imposes restrictions on the use of leverage by requiring AIFMs managing loan originating AIFs to ensure that the leverage does not exceed 175% for open-ended AIFs and 300% for closed-ended AIFs.

Stricter rules, but harmonisation may also create opportunities

Additional rules and requirements will apply to AIFs that currently originate or invest in loans. The carrot in this respect is that - as a result of the harmonised EU regime - AIFs may extend loans throughout the EU, which promotes harmonisation and potentially creates business opportunities beyond their home member state. The idea of the European legislator, with a view to creating one EU Capital Markets Union, is that this harmonisation will be of particular benefit to small and medium-sized enterprises (SMEs), which may currently find it difficult to secure loans from traditional credit institutions. By providing alternative sources of financing, AIFs can help SMEs to access much-needed capital. AIFMD II further amends Annex I of the AIFMD by allowing AIFMs to originate loans on behalf of AIFs.

It should be noted that while AIFMD II facilitates loan origination for AIFs across the EU, member states retain the option to impose more restrictive rules within their national frameworks for certain categories of AIFs, for example in respect of granting of loans to consumers.

Grandfathering

Grandfathering provisions apply to the loan origination rules. For existing loans originated before 15 April 2024, AIFMs will not have to comply with most of the rules. Existing AIFs that originate loans and that were constituted before 15 April 2024 will be deemed to comply with certain requirements, such as the risk diversification requirements and the leverage limits, until 16 April 2029. However, existing AIFs that exceed the risk diversification or leverage limits during the grandfathering period may not increase their lending to the relevant borrower or exceed the leverage. AIFs that were below such limits may not exceed these limits anymore.

3. Delegation

Several AIFMs rely on third-party delegation to increase efficiency and benefit from external expertise. While delegation offers benefits, AIFMs must at all times retain sufficient substance to effectively supervise and control the delegated functions. The current AIFMD already contains extensive delegation requirements, including requirements regarding the delegation agreement to be concluded with service providers. AIFMD II enhances this regime. Firstly, it introduces further formal substance requirements for AIFMs that delegate activities, amongst others in relation to the oversight responsibility of the AIFMs.

In addition, AIFMs are required to provide the national competent authorities with regular and more information on the applicable delegation arrangements. This includes details of the third party service provider, sub-delegation, delegation of portfolio management and risk management, and on periodic due diligence to be carried out. AIFMD II clarifies that the delegation rules apply to all the functions listed in Annex I of the AIFMD and to the ancillary services. AIFMD II also emphasises the need to observe MiFID-related outsourcing rules to the extent that the AIFM is authorised to provide MiFID services on the basis of a top-up licence.

4. Distribution of AIFs or delegation of marketing

Marketing activities are not automatically carried out directly by the AIFM as one or more distributors may carry out this task on behalf of the AIFM or independently. There are cases where an independent financial adviser promotes and distributes an AIF to its clients without having a direct relationship with the AIFM. In such cases, most fund distributors will be subject to regulatory requirements under MiFID II.

Recognising their diverse nature, AIFMD II introduces a distinction between two types of distribution arrangements: (i) situations where a distributor acts on behalf of the AIFM, which may be considered as delegation and must comply with AIFMD delegation rules; and (ii) situations where a distributor acts independently when marketing the AIF under MiFID or, as the case may be, through life insurance-based investment products in accordance with the EU Insurance Distribution Directive (IDD). AIFMD II makes clear that in the latter scenario, the delegation provisions of AIFMD do not apply, regardless of any distribution agreement between the AIFM and distributor.

5. More ancillary services possible

The core activity of an AIFM is the management of AIFs. AIFMs are currently restricted in the ancillary activities they may provide. With the adoption of AIFMD II, AIFMs will be authorised to provide additional services such as (i) the administration of benchmarks in accordance with the Benchmark Regulation; and (ii) credit servicing activities in accordance with the Non-Performing Loan (NPL) Directive. This is of course relevant for loan originating funds, but the concept can be applied more broadly.

Another important extension is that AIFMs will be permitted to provide investment advice as an additional service under a MiFID top-up licence, irrespective of whether they also perform discretionary portfolio management activities. Currently, only AIFMs performing discretionary portfolio management are allowed to provide such investment advice. This constitutes a burden for AIFMs that wish to advise their participants on potential investment strategies that they do not offer. Under the current regime, this is not possible unless the AIFM also manages individual strategies for such participants. In our view, this is a very valuable adjustment for the asset management market.

6. Liquidity management tools

A new notion is the list of liquidity management tools (LMTs) included in Annex V of AIFMD II. LMTs enable AIFMs to address liquidity stress in the event of redemptions, particularly in volatile market conditions and aim to safeguard the interests of AIF participants.

AIFMs of open-ended AIFs are required to implement at least two of the LMTs listed in that Annex. These are:

- The use of redemption gates, *i.e.* a ban on redemptions in certain situations
- Longer notice periods for handling redemption requests
- The implementation of redemption fees linked to liquidity costs applicable in a given scenario
- Swing pricing or dual pricing through which the redemption price includes a liquidity factor
- Anti-dilution levies
- Redemptions in kind rather than cash
- Formation of side pockets

AIFMs must inform their regulator of the LMTs that have been selected and implemented and of the activation or deactivation of a LMT.

7. Cross border depositary services

The current AIFMD regime requires the appointment of a depositary for each AIF established in the same member state as the AIF. This is particularly challenging for AIFs located in member states with a small fund market and for fund structures with AIFs in more than one EU member state. There were discussions about the possibility of granting a European passport to depositaries in AIFMD II, which would remove this hurdle. However, this idea was dropped in favour of a provision that only applies to member states with few service providers. AIFs established in such states will be allowed to use depositary services located in other member states, subject to prior approval by the AIF's competent authorities.

8. Key considerations for (non-)EU AIFMs

The National Private Placement Regime (NPPR) framework under Article 42 of the AIFMD has proved to be a robust tool allowing non-EU AIFMs to market units or shares of the AIF(s) they manage within the EU to professional investors.

One of the prerequisites for this was that the relevant third countries were not listed as a non-cooperative country and territory by the Financial Action Task Force (FATF). AIFMD II replaces this condition by providing that non-EU AIFMs and their AIFs may not be established in a high risk third country as defined in article 9(2) of the AMLD ([EU AML List](#)). In addition, the third country must not be listed in Annex I to the Council Conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes ([EU Tax List](#)).

AIFMD-prospectus

Non-EU AIFMs marketing under the NPPR are required to provide an AIFMD prospectus (sometimes referred to as an AIFMD wrapper) in addition to the global or local prospectus already made available. AIFMD II introduces some additional article 23 AIFMD disclosure requirements which must be observed by non-EU AIFMs:

- The name of the AIF must not be deemed unfair, unclear or misleading
- Further descriptions of the AIF's liquidity risk management and the possibility of using LMTs
- A list of fees, charges and expenses that are borne by the AIFM in connection with the operation of the AIF which are directly or indirectly attributable to the AIF.

With regard to periodic investor disclosure requirements, AIFMD II extends their scope by including:

- The composition of the originated loan portfolio
- On an annual basis: all fees, charges and expenses that were directly or indirectly borne by investors
- On an annual basis: any parent undertaking, subsidiary or special purpose vehicle utilised in relation to the AIF's investments by or on behalf of the AIFM

Reporting requirements to competent authorities

The reporting obligations of Annex IV AIFMD are expanded, in particular in relation to delegation arrangements concerning portfolio management or risk management functions.

Annex IV AIFMD reports must include, among other things:

- Elaborate information on the delegates
- A description of the delegated portfolio management and risk management functions
- Where the portfolio management function is delegated, the percentage of the AIF's assets subject to such delegation
- Information on the substance and key functions still performed within the AIFM and the monitoring capacity
- Information on the periodic due diligence reviews carried out by the AIFM
- Information on sub-delegation arrangements
- The start and expiry dates of the delegation and sub-delegation arrangements

ESMA shall develop draft regulatory technical standards on those requirements by 16 April 2027.

9.

Transparency requirements

The enhanced transparency requirements for non-EU AIFMs active under the NPPR also apply to EU AIFMs active under the full AIFMD regime. This means that the AIFMD prospectuses will need to be updated and that more elaborate Annex IV and ongoing reporting requirements will apply, such as the ones set out in the previous paragraph.

What this means for you

It is recommended to review the potential impact of AIFMD II on the AIFs managed and/or marketed, their loan portfolio, their policies and the disclosures in the documentation provided to investors and to the competent authorities.

Important items to review are:

- Substance requirements - Are any changes to the current governance required?
- Delegation arrangements - Are they in line with the new requirements?
- Liquidity management - What LMTs are required or advisable? Is the current liquidity risk management policy still sufficient?
- Disclosure - Is the prospectus up to date? Can the additional Annex IV reporting requirements be met?
- Additional services - What additional services become available? Can clients be offered a more exhaustive pallet of services?

We would be pleased to assist you with such analysis. Feel free to contact our Financial Regulation team should you have any questions.

Contact

For further insight, please contact our Benelux Financial Regulation team.



Frans van der Eerden | partner | the Netherlands
T: +31 6 51 86 97 12
frans.vandereerden@nautadutilh.com



Pierre de Pauw | partner | Brussels
T: +32 499 69 84 72
pierre.depauw@nautadutilh.com



Géraldine Léonard | partner | Luxembourg
T: +352 621 55 49 53
geraldine.leonard@nautadutilh.com



Anne Fontaine | partner | Brussels
T: +32 496 26 59 75
anne.fontaine@nautadutilh.com



Jennifer Esakwa Ayimona | associate | Brussels
T: +32 497 97 01 15
jennifer.esakwaayimona@nautadutilh.com