

## Chapter 16

# Scope of the Alternative Investment Fund Managers Regime

## 16.5 How AIFMD affects other regulated activities

### G Overlap with the collective investment scheme definition

#### Question 5.1: Do the definitions of collective investment scheme and AIF overlap?

Yes. The definition of a *collective investment scheme* does not exclude an *AIF*. The two definitions sit alongside each other and overlap extensively. Many *AIFs* will also be *collective investment schemes*. Therefore, it is possible that an *unauthorised person* who operates a fund will be *establishing, operating or winding up a collective investment scheme* and *managing an AIF*.

However, not every *AIF* is a *collective investment scheme*. The main example of an *AIF* that is not a *collective investment scheme* is an *AIF* in the form of a body corporate other than an *open-ended investment company*. Therefore, the existing case law on the definition of a *collective investment scheme* does not decide whether an undertaking is an *AIF* or *CIU* and the material in ■ PERG 16 about the definition of an *AIF* and *CIU* does not determine whether an undertaking is a *collective investment scheme*.

#### Question 5.2: Won't the overlap between collective investment schemes and AIFs mean that an AIFM will need unnecessarily overlapping permissions?

No. There are two important exclusions.

(1) If a *person* has a *Part 4A permission to manage an AIF*, activities carried on by that *person* in connection with or for the purposes of *managing an AIF* are excluded from all other *regulated activities*.

(2) A *person* (A) does not carry on the *regulated activity of establishing, operating or winding up a collective investment scheme* if A carries on that activity in relation to an *AIF*, and:

(a) at the time A carries on the activity, the *AIF* is managed by:

(i) a *person* with a *Part 4A permission to manage an AIF* (who may be a third party or A itself); or

(ii) a *person* registered as a *small registered UK AIFM* because the conditions in regulation 10(4) of the *AIFMD UK Regulation* are met in respect of that *AIF*; or

(b) no more than 30 days have passed since the *AIF* was managed by a *person* with that *permission* or registration.

The 30-day period in (b) can be extended in certain circumstances, as set out in article 51ZG(2) of the RAO.

**Overlap between the depositary and custody activities**

**Question 5.3: Does the depositary of an AIF also need permission for safeguarding and administering investments?**

No. A *person* does not safeguard and administer investments if the *person* carries on the activity in relation to an *AIF* and the *person* has a *Part 4A permission* to act as a depositary of an *AIF* in respect of that *AIF*.

**Interests in an AIF as specified investments**

**Question 5.4: How do the advising and intermediary activities relate to an AIF?**

Although an interest in an *AIF* is not separately specified by the RAO as a type of *security* or relevant investment in its own right it will normally fall within one of the other categories of *security* or relevant investment, such as a *share* or *unit*. That means that the *regulated activities* of:

- (1) *dealing in investments as agent*;
- (2) *arranging (bringing about) deals in investments*;
- (3) *making arrangements with a view to transactions in investments*; and
- (4) *advising on investments*;

will apply in the same way as they do to other investments of the relevant type. Therefore, for example, a *firm* that advises on investing in an *AIF* that is a *collective investment scheme* will be advising on *units*.

**Examples**

**Question 5.5: Please give me some examples of how the regulated activities specific to AIFs interact with other regulated activities.**

Please see the following table. All the examples involve *UK persons* and activities carried on in the *UK*. It is assumed that any manager delegating functions is not a letter-box entity.

Part 1: Examples of how the <i>regulated activities</i> specific to <i>AIFMs</i> interact with other <i>regulated activities</i>	
Example	Explanation of interaction with other <i>regulated activities</i>
(1) A <i>firm</i> (A) with <i>permission to manage an AIF</i> , manages an <i>AIF</i> that is also a <i>collective investment scheme</i>	A does not need <i>permission to establish, operate or wind up a collective investment scheme</i> . The <i>CIS exclusion</i> applies.
(2) A <i>firm</i> (A) with <i>permission to establish, operate or wind up a collective investment scheme</i> wants to <i>manage an AIF</i>	A needs to vary its <i>permission to cover managing an AIF</i>
(3) An <i>unauthorised person</i> (A) <i>manages an AIF</i> that is also a <i>collective</i>	A will be <i>establishing, operating or winding up a collective investment</i>

*investment scheme* and also operates it. No authorised AIFM is in place.

(4) A firm (A) with *permission to manage a UK UCITS* wishes to act as an AIFM

(5) A firm (A) with *permission to manage an AIF* delegates the management of some of the AIF's securities portfolios to B.

(6) Same as (5). B's *Part 4A permission* covers *managing an AIF* or *managing a UK UCITS*.

(7) A has *permission to manage an AIF*. The AIF has several investment compartments. A appoints B to manage the *securities* portfolio which makes up one of these compartments.

(8) A firm (A) with *permission to manage an AIF* delegates risk management to a UK firm, B.

*scheme* and *managing an AIF*. The effect on *unauthorised persons* of the overlap between the definitions of AIF and *collective investment schemes* is different to the effect on *authorised persons*. The CIS exclusion does not apply as A is not an *authorised person*.

A needs to vary its *permission* to cover managing an AIF.

B does not *manage an AIF* for the reasons described in the part of the answer to Question 3.7 (What effect does delegation have?) dealing with the delegation of core functions. However, B *manages investments*. See article 78 of the AIFMD level 2 regulation (Delegation of portfolio or risk management) on the ability of an AIFM to delegate portfolio management or risk management to a *person* authorised or registered for the purpose of asset management.

Even if B's activity could otherwise be *establishing, operating or winding up a collective investment scheme*, it will not be in this case because A's role means that the CIS exclusion is available to B.

Same answer. B's *Part 4A permission* should be amended to cover *managing investments*.

The answer in (5) applies here too. The investment compartment is not treated as a separate AIF (see Question 2.63 (Is each investment compartment a separate AIF?)). This arrangement is not contrary to the requirement in article 5(1) of AIFMD that each AIF have only one AIFM, as that requirement operates at the level of the AIF and not each separate investment compartment.

B does not *manage an AIF*. If the fund is also a *collective investment scheme*, B does not need *permission to establish, operate or wind up a collective investment scheme*. (5) explains the reasons for this.

If B's functions involve *managing investments* it will need *permission* for that (see (5)).

Even if B's activities are not *regulated activities*, A will not be able to delegate to B unless B has *permission to manage investments, manage an AIF or manage a UK UCITS*

(9) A carries out portfolio and risk management of an *AIF*. B runs the rest of the scheme.

(10) A is *managing an AIF* (and has *permission* to do so). B is in charge of administering the scheme.

(11) Same as (10). Then A resigns as manager.

(12) A is *managing an AIF* (and has *permission* to do so) and is responsible for issuing and selling *units* or *shares* in the *AIF*.

(13) A *firm* (A) with *permission* to *manage an AIF* sets up an *AIF* that is also a *collective investment scheme*. A intends to manage it.

(14) A (acting by way of business) sets up an *AIF* that is also a *collective investment scheme*. A does not intend to manage it. B has been appointed as *AIFM*. B has *permission* to *manage an AIF*.

because of article 78 of the *AIFMD level 2 regulation* (Delegation of portfolio or risk management).

A is *managing an AIF*. The difference from (5) is that B has not delegated portfolio management to A.

B is not *establishing, operating or winding up a collective investment scheme* because of the CIS exclusion. B is not *managing an AIF* for the reasons described in the answer to Question 3.5 (Does anyone carrying on only the activities listed in the answer to Question 3.4 carry on the regulated activity of managing an *AIF*?).

Same answer as (10). B may carry on its activities for 30 days while a new *AIFM* is put in place. That 30-day period may be extended in certain circumstances.

Selling *shares* or *units* often involves dealing in investments as principal or dealing in investments as agent. However, A does not need these *permissions* as the activities are covered by the extended definition of *managing an AIF* described in the answer to Question 3.4 (What are the additional activities referred to paragraph (1) of the answer to Question 3.3?) and hence the connected purposes exclusion applies.

The fact that A is establishing a *collective investment scheme* does not mean A needs *permission* to *establish, operate or wind up a collective investment scheme*. In our view, taking preliminary steps towards the carrying on of a *regulated activity* is itself carrying on that activity. A manager who is setting up a scheme is taking preliminary steps of that kind to *manage an AIF*. Hence, the connected purposes and CIS exclusions apply.

As explained in (13), taking preparatory steps towards carrying on a *regulated activity* is itself a *regulated activity*. On this approach, as B has started *managing an AIF*, the CIS exclusion comes into play and A does not need *permission* for establishing a *collective investment scheme*.

(15) A (acting by way of business) sets up an *AIF* that is also a *collective investment scheme*. A does not intend to manage it. A has lined up a *firm* (B) with permission to manage an *AIF* to be the *AIFM* but B has not been appointed yet.

A will require *permission* to *establish, operate or wind up a collective investment scheme* as B has not begun to *manage an AIF*.

(16) A *firm* (A) with *permission* to *manage an AIF* manages an *AIF* and carries out portfolio and risk management for the *AIF*. A also is in charge of marketing and issuing units in the *AIF*. As part of that process A gives investment advice to potential investors.

A does not need *permission* for *advising on investments*. Instead the advisory activity is included within *managing an AIF*. The reasons are similar to those in (12). Marketing and issuing units in the *AIF* is part of the extended managing activity (see Question 3.4). The advising is carried on by A in connection with, or for the purposes of, marketing and issuing. As explained in paragraph (2) of the answer to Question 3.3 (Are the activities mentioned in the answer to Question 3.1 the only activities included in managing an *AIF*?), this means that the advising is included in *managing an AIF*. Therefore, the connected purposes exclusion excludes it from *advising on investments*.

(17) Same as (16). However, (leaving aside the RAO provisions explained in PERG 16.3 and PERG 16.5) the advisory activity would not have involved *advising on investments*.

For the reason in (16) the advisory activity is still a *regulated activity*, as part of *managing an AIF*.

References to the "connected purposes exclusion" are to the exclusion described in paragraph (1) of the answer to Question 5.2 (Won't the overlap between collective investment schemes and *AIFs* mean that an *AIFM* will need unnecessarily overlapping permissions?). References to the "CIS exclusion" are to the exclusion described in paragraph (2) of the answer to Question 5.2.

**Part 2: Examples of how the *regulated activities* specific to depositaries interact with other *regulated activities***

**Example**

**Explanation of interaction with other regulated activities**

(1) A is the depositary of an *AIF* and its *permission* covers this activity

A acts as a depositary of an *AIF*. A does not *safeguard and administer investments*.

(2) A is the depositary of an *AIF* and its *permission* covers this activity. A delegates some of the custody activities to B.

For A, the result is the same as under (1). B does not act as a depositary of an *AIF* but instead *safeguards and administers investments*.

(3) A is depositary of an *AIF*. A carry vehicle or co-investment scheme invests alongside the *AIF*. That vehicle is a *collective investment scheme* and A is its custodian. The schemes invest in financial assets.

A's role in relation to the *AIF* means that its *permission* should cover acting as a depositary of an *AIF*. A's role in relation to the carry or co-investment vehicle means that its *permission* should cover *safeguarding and administering investments*. The exclusion described in the answer to Question 5.3 (Does the depositary of

an AIF also need permission for safe-guarding and administering invest-ments?) does not apply in relation to the carry or co-investment vehicle.