

AIFMD and (Belgian) Real Estate Funds An overview of recent scope and impact discussions



Introduction

Following the financial crisis, the G20 leaders concluded that a secure and stable financial system requires that all significant financial market actors are subject to appropriate regulation and supervision. One of the European Commission's answers to this conclusion is the **Alternative Investment Fund Managers Directive (AIFMD)**¹ which sets out the regulatory framework for managers of alternative investment funds (AIFs). AIFMs are defined as legal persons whose regular business is managing one or more AIFs. The term AIF encompasses a wide range of investment funds that are not already regulated at European level by the UCITS Directive². They include hedge funds, private equity funds, real estate funds and a wide range of other types of institutional funds.

A key element in determining the scope of the AIFMD, and as such the applicability of the directive to real estate funds/vehicles, is the **definition of AIF and the concepts used therein**. The concepts of the definition are **particularly relevant for the real estate sector** given the diversity of structures and vehicles existing in the different national real estate markets.

This briefing note aims to summarize the scope discussion³ related to real estate funds/vehicles and approach in a number of EU Member States, and to consider from a more Belgian point of view the possible impacts of the directive on Belgian real estate funds (**Sicafi/vastgoedbevaks**).

¹ Directive 2011/61/EC of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) N° 1060/2009 and (EU) N° 1095/2010.

² Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertaking for collective investment in transferable securities (UCITS)(recast).

³ The note aims to cover the discussion on the application of the AIFMD as such on real estate vehicles. The possible scope exemptions of the AIFMD related to asset thresholds.

AIFMD Scope in relation to real estate funds/vehicles

ESMA consultation paper, Guidelines on key concepts of the AIFMD

On 19 December 2012 ESMA published a consultation paper⁴ on key concepts of the AIFMD. The paper follows up on some of the topics covered by the ESMA discussion paper published in February 2012⁵. The consultation document provides draft guidelines on topics that ESMA considers essential to ensure a common, uniform and consistent application of the provisions of the AIFMD throughout Europe.

ESMA focuses specifically on the **definition of AIF**. The directive⁶ defines AIFs as 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 the benefit of those investors and
- do not require authorisation pursuant to Article 5 of the UCITS Directive⁷.

The consultation paper sets out guidelines aiming to clarify the different parts of the definition.

Collective investment undertaking

If all of the following characteristics apply to an undertaking or an investment compartment, the undertaking would be considered as an undertaking for collective investment:

- It is not an ordinary company with general commercial purpose
- It pools together capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors from investments (whether or not different investors receive returns on different bases)
- The unitholders or shareholders of it have no day to day discretion or control over the management of the undertaking's assets.

The guidelines leave some discretionary powers to national competent authorities and market participants by indicating that they should not consider the absence of all or any of the characteristics demonstrating conclusively that the undertaking is not a collective investment undertaking.

Raising Capital

The draft guidelines aim to clarify which characteristics should be taken into account to determine whether or not the activity should amount to the activity of raising capital:

- Taking direct or indirect steps to procure the transfer or commitment of capital by one or more investors to an undertaking for the purpose of investment with a view to generating a pooled return for the investors and/or
- Commercial communication between the undertaking seeking capital or a person or entity acting on its behalf (typically, the AIFM), and the prospective investors, which aims at procuring the transfer of investor's capital.

The draft guidelines determine that it is immaterial whether these activities take place only once (i.e. initial subscription to a closed ended fund), on several occasions or on an ongoing basis (i.e. certain open-ended funds). In addition the draft guidelines set out some exemptions to the concept of raising capital.

⁴ Consultation paper, Guidelines on key concepts of the AIFMD, 19 December 2012, ESMA/2012/845

⁵ Discussion paper, Key concepts of the Alternative Investment Managers Directive and types of AIFM, 23 February 2012, ESMA/2012/117.

⁶ Art. 4(1)(a) of the AIFMD

⁷ The UCITS Directive includes a definition of UCITS (Art. 1(2)) but not of the concept *undertaking for collective investment*.

Number of investors

The concept of a number of investors from which capital is raised, can apply even if the undertaking in fact only has one investor or if a sole investor invests funds which it has raised from more than one legal or natural person for the benefit of those persons.

Defined investment policy

An undertaking which has a policy about how the pooled capital in the undertaking is to be managed to generate a pooled return for the investors from whom it has been raised should be considered to have a defined investment policy for the purposes of the AIFMD. The consultation paper sums up the factors that could, singly or cumulatively, tend to indicate the existence of such a policy:

- The investment policy is determined and fixed, at the latest by the time that investors' commitments to the undertaking become binding on them
- The investment policy is set out in a document which becomes part of or is referenced in the rules or instruments of incorporation of the undertaking
- The undertaking or the entity managing it has an obligation (however arising) to investors, which is legally enforceable by them, to follow the investment policy, including all changes to it
- The investment policy specifies investment guidelines, with reference to criteria including the following:
 - To invest in certain categories of asset, or conform to restrictions on asset allocation
 - To pursue certain strategies
 - To invest in particular geographical regions
 - To conform to restrictions on leverage
 - To conform to minimum holding periods or
 - To conform to other restrictions designed to provide risk diversification.

Again the consultation paper gives some discretionary powers to competent authorities and market participants as they should not consider that the absence of all or any one of the factors mentioned above conclusively demonstrates that no such policy exists.

Although the draft guidelines offer a **good basis for understanding of the AIF definition**, some of the elements would benefit from **further clarification** in order to, as demonstrated by the possible different scope approaches below, **avoid inconsistent application** throughout Europe. Through its consultation paper ESMA has asked stakeholders for further input on different elements amongst others the notion of "ordinary company with general commercial purpose".

In relation to this concept, it is interesting to note that in its first consultation paper on the implementation of the AIFMD⁸, the UK FSA comments on property investment firms indicating that "some of these investment firms have the characteristics of an investment fund such as pooled investment, a defined investment policy, etc., but they may also have characteristics of a commercial company, such as employees, and may perform service activities such as property construction and development". The FSA sets out that "real estate investment trusts (REITs) are a type of property investment firm, and accordingly it considers that they may or may not be AIFs depending on the specific activities they carry on". From a report⁹ issued by the French regulator, on the transposition of the AIFM Directive, we also learn that the French SIIcs are developing strong arguments to demonstrate that most of the French real estate vehicles do not correspond to the definition of AIF under the AIFMD.

In terms of consistent application it is also important to note that, as indicated above, the draft guidelines leave some **room for competent authorities and market participants** to interpret and conclude.

⁸ FSA Consultation paper CP 12/32, Implementation of the Alternative Investment Fund Managers Directive, 14 November 2012, p. 25

⁹ Comité de mise en place présidé par M. Cohen et J.-L. Enguéhard, 15 juin 2012. "Rapport sur la transposition de la directive AIFM et de développement de la gestion innovante en France"

Comparative view on scope approaches in a selection of Member States

Competent authorities and market participants in different Member States are, whilst preparing national transposition, still heavily **debating the AIFMD scope**.

The information¹⁰ currently available to us seems to demonstrate that national competent authorities might not all be taking the same view, particularly on whether different types of companies, funds and other business structures engaged in real estate management/property investment activities are to be considered AIF. Such is the case for listed real estate companies and/or Real Estate Investment Trusts (REITs or equivalents of REITs like the French SIIC and the Belgian SICAFI/VASTGOEDBEVAKS) for which the approach, on making the managers of these vehicles subject to the Directive, is under discussion. The discussion is driven by different national circumstances and arguments such as:

- The differences in the exact nature of the structure of vehicles existing in the national real estate market
- The existing regulatory framework (are the vehicles – all or some - currently yet considered as undertakings for collective investment or otherwise regulated or not?)
- The wish/urge to regulate the full (local) market
- The willingness in different Member States to create a level playing field for the local and European real estate vehicles
- The impact of the AIFMD requirements
- The impact of other regulatory initiatives such as EMIR¹¹ and the financial transaction tax
- Etc.

The table below provides an overview, based on the information currently available to us¹², of the **current regulatory status** of the most important real estate vehicles active in a selection of Member States and an **indication of whether or not they (their managers) would be considered in scope of the AIFMD**.

In countries like **Belgium and Italy**, but also the **Netherlands and Luxembourg**, all (or most in the case of Luxembourg) real estate vehicles would, based on the existing regulatory framework, be brought into scope of the AIFMD. In these countries, real estate vehicles, in general, are already regulated as undertakings for collective investment. As indicated above, in a number of these Member States there is still an ongoing discussion on the rationale of the AIFMD and the possible impacts for the vehicles when in scope of the AIFMD. In Belgium for example, the discussion relates to the question whether or not the SICAFI/VASTGOEDBEVAKS (the equivalent of the UK REIT or the French SIIC) should remain within the existing regulatory framework applicable to undertakings for collective investment. The most commonly referred to arguments for excluding them are the current regulatory regime which could be viewed as adequate the fact that SICAFI/VASTGOEDBEVAKS operate more as ordinary companies with general commercial purpose (as specifically introduced in the ESMA consultation paper) that is in the business of managing real estate assets rather than managing AIF, as well as the lack of a defined investment policy. Also in the Netherlands, the competent authority has indicated not to be blind to initiatives taken in other countries which might lead to another interpretation than the one being upheld currently .

¹⁰ Please note that the information available to us is mostly based on consultation documents and informal gathering of information. Most positions are not yet official (and may be still subject to further refinement or change).

¹¹ EU Regulation on OTC derivatives, central counterparties (CCPs) and trade repositories (TRs) (EMIR) that has entered into force on 16 August 2012.

¹² Please note that the information available to us is mostly based on consultation documents and informal gathering of information. Most positions are not yet official (and may still be subject to further refinement or change).

Also in the Netherlands, the competent authority has indicated not to be blind to initiatives taken in other countries which might lead to another interpretation than the one being upheld currently¹³.

In Member States like **France and Germany**, but also **Ireland and the UK**, different structures exist, some of which are currently regulated as undertaking for collective investment, others as (listed) real estate companies or REITs. We understand that the plain investment fund structures would also be considered as AIFs in the future, but the position of the competent authorities differs with regard to the property investments held in regular companies and the listed property sector (listed real estate companies and REITs).

In France for instance, the most recent position is that SIICs (listed real estate investment companies) have good arguments to support being out-scoped. Arguments are based on their current regulatory framework (the fact that they are already subject to the prospectus directive) and the definition of an AIF (no defined investment policy, etc.).

The UK FSA noted that some of these firms can be considered as corporate vehicles in the business of managing real estate assets rather than managing AIFs. In Ireland, it is being discussed whether or not these vehicles may be able to avail of the exemptions for SPVs or holding companies (or even joint ventures) depending on their activities and structure. It is however expected that there is not much room for most vehicles to make use of the narrow exemptions in the directive. There is no clear line set in Germany. It is possible that REITs will not be subject to the AIFMD national implementation act in the future, but this is still subject to discussion and clarification at national level.

As third viewpoint finally, the **Austrian Financial Market Authority** is taking a very strict approach wanting to regulate as many companies as possible. Consequently, it is most likely that all listed real estate companies and REITs will be considered AIFs and thus, their managers would fall into scope of the Directive.

¹³ Voorstel Memorie van Toelichting bij het bij de Tweede Kamer ingediende AIFMD-wetsvoorstel: Meerdere partijen hebben met het oog op een level playing field gewezen op het belang van een gelijklozend standpunt van de lidstaten over de toepasselijkheid van de richtlijn op beursgenoteerde vastgoedinstellingen en pensioenpoolingstructuren. Het belang van een level playing field op deze punten wordt onderschreven. Aan de Europese Commissie is de vraag voorgelegd of beursgenoteerde vastgoedinstellingen onder de reikwijdte van de richtlijn vallen... De Europese ontwikkelingen op dit punt zullen nauwlettend worden gevolgd.

Country	Type of real estate vehicles	Current regulatory framework	Trend: In or out AIFMD?	Drivers for discussion
Austria	Publicly offered real estate funds.	The Managers are currently subject to the Real Estate Fund Act (Immobilien-Investmentfondsgesetz).	In scope.	<ul style="list-style-type: none"> The wish to regulate the full (local) market.
	Listed real estate companies/ REITs.	Regulated through the Stock Corporate Act.	In scope.	
Belgium	SICAFI/VASTGOEDBEVAKS [or fixed capital real estate investment trust (REIT)].	Currently SICAFI/VASTGOEDBEVAKS are regulated as undertakings for collective investment (in direct or indirect property assets), and hence, the vehicle is regulated.	In scope as currently considered as undertaking for collective investment.	<ul style="list-style-type: none"> Currently regulated as undertaking for collective investment Already currently under stringent regulatory regime/supervision Impact of the AIFMD and possible cascade effect towards other regulatory initiatives Concerns regarding European level playing field.
France	Real Estate funds (non- listed public offerings) can be: <ul style="list-style-type: none"> • SCPI (Société Civile de Placement Immobilier) or • OPCI (Organisme de Placement Collectif Immobilier), i.e.: <ul style="list-style-type: none"> - FPI (fonds de placement immobilier) or - SPICV (sociétés de placement à prépondérance immobilière à capital variable). 	SCPI and OPCI are subject to licensing and regulated by AMF.	In scope.	<ul style="list-style-type: none"> Concerns regarding European level playing field¹⁴ Possible cascade effect towards other regulatory initiatives when in scope but also when explicitly exempt SICC: current regulatory framework (already subject to prospectus directive), and concept of "no defined investment policy" as part of AIF definition.
	Property companies can be: <ul style="list-style-type: none"> • SCI: non listed real estate investment company • SIIC: listed real estate investment company. 	Vehicle currently unregulated.	SIICs: not in scope. SCI: no clear position. Property companies offered to retail investors, or those subject to private placement for professional investors, could be considered as AIF.	

¹⁴ Extract of « Rapport sur la transposition de la directive AIFM et développement de la gestion innovante en France », Comité de mise en place présidé par M. Cohen et J.-L. Enguéhard, 15 juin 2012, p. 31

Le Comité de Place suggère également aux institutions européennes de répondre de manière claire et non interprétable à la question de savoir si certaines entités du monde de l'investissement immobilier relèveront de la directive AIFM. Les professionnels des SIC en France, développent des arguments solides, tendant à montrer que la plupart de ces produits ne correspondraient pas à la définition des FIA de la directive AIFM. Enfin, le Comité de Place estime hautement souhaitable que les institutions européennes puissent clarifier la question de savoir si une entité qui serait expressément exclue du champ de la directive, mais dont les caractéristiques correspondraient à celles définissant un FIA dans la directive AIFM, serait considérée comme un FIA. Si tel était le cas, de nombreuses dispositions applicables aux "entités financières" (EMIR, Dodd-Frank Act, Taxe sur les transactions financières, etc.) s'appliqueraient à cette entité.

Country	Type of real estate vehicles	Current regulatory framework	Trend: In or out AIFMD?	Drivers for discussion
Germany	Real Estate funds can be: <ul style="list-style-type: none"> • Mutual real estate funds (Immobilien-Sondervermögen) • Open ended special real estate funds only for institutional investors (Spezial-Sondervermögen). 	Regulated investment funds under (German) Investment Act.	In scope of AIFMD implementation Act in the future.	<ul style="list-style-type: none"> • Current regulatory framework of regulated investment funds • Difference between financial “oriented” vehicles and “commercial/operative” vehicles.
	German closed-end funds are most commonly set up as a German limited partnership (KG).	Largely non-regulated vehicles, only subject to some distribution requirements.	Most likely in the scope of the AIFMD implementation Act in the future.	
	REITS (so called G-REIT).	Introduced in 2007 by the “Act on German Real Estate Stock Corporations with Listed Shares (REIT Act)”.	Probably not in scope but no clear position.	
Ireland	CIS - Collective Investment Scheme	Regulated under the Collective Investment Scheme (CIS) legislation.	In scope.	<ul style="list-style-type: none"> • Current regulatory environment • Wish that the future REIT structure will be regulated under AIFMD • ESMA’s final guidelines to be assessed against the nature of the structure.
	Property investments held in regular limited companies or SPVs.	Currently not regulated unless they are an integral part of a CIS structure.	No clear position. Case by case review against the ESMA criteria in the absence of firm guidance.	
	Irish REIT structure (in development, future structure).	The Irish Dept. of Finance intends to publish legislation in its Finance Bill (end of February) that will introduce an Irish REIT structure.	Most probably in scope.	
Italy	REIF - Real Estate investment funds.	Real estate funds are considered UCI (closed and regulated funds) they can be managed exclusively by authorized management companies. If the fund is “retail” or listed, then there is also the supervision of the Consob.	In scope.	<ul style="list-style-type: none"> • Current regulatory environment and degree of regulation.

Country	Type of real estate vehicles	Current regulatory framework	Trend: In or out AIFMD?	Drivers for discussion
Luxembourg	Real Estate funds (Collective Investment Funds) can be set up according to different legal regimes, of which the SIF is most often used. Within these legal regimes, different legal structures are possible (SICAV / SICAF / FCP).	Currently all regulated as Collective Investment Funds.	In scope as currently considered as undertaking for collective investment.	<ul style="list-style-type: none"> • Real Estate fund already present since many year / current regime need minor adaptation to be compliant with new regulation • Tax efficient structure.
	L-REIT (Luxembourg Real Estate Investment Trust).	Regulated through a dedicated law (proposal).	Possibly in scope.	
	Unregulated vehicles (SPVs): Soparfi (1915 Act) or limited partnerships.	Unregulated vehicles.	Possibly out of scope, no clear position.	
The Netherlands	Many Real Estate fund vehicles possible (e.g. FBI – “fiscale beleggingsinstelling”).	In principle all subject to regulation, but due to existing exceptions and exemptions, a large number of them currently do not require a license.	In scope.	<ul style="list-style-type: none"> • The current regulatory framework • The wish to regulate the full (local) market • Concerns regarding European level playing field.
UK	Many legal forms possible.	Some managers of Real Estate funds are currently not subject to FSA authorisation.	No clear position.	Some of these firms might be considered corporate vehicles in the business of managing real estate assets rather than managing AIF ¹⁵ .

¹⁵ FSA Consultation paper CP 12/32, Implementation of the Alternative Investment Fund Managers Directive, 14 November 2012, p. 25

Impact of AIFMD on BE real estate funds

Current Belgian Regulatory Framework

As indicated above, Belgian **Sicafi/vastgoedbevaks** (the Belgian REIT equivalent) are currently regulated as undertakings for collective investment¹⁶. The Belgian legislator has defined an undertaking of collective investment quite broadly as a Belgian or foreign undertaking of which the sole purpose is the collective investment of financial means. As a consequence of this broad definition, limited room for investment vehicles exist to be exempt from the regulatory framework of undertakings for collective investment.

The regulatory requirements that apply to the Belgian **Sicafi/vastgoedbevaks**, which are closed-end funds, are varied and relate to, amongst others, the license to be obtained with the Belgian regulator - the FSMA -, governance, capital, conflicts of interest, risk diversification, leverage, etc. The most recent change to regulatory environment occurred in 2010 with the publication of a Royal Decree¹⁷ that updated the existing regulations and amongst others introduced the concept of an “institutional” **Sicafi/vastgoedbevaks** next to the existing “public” **Sicafi/vastgoedbevaks**, allowed **Sicafi/vastgoedbevaks** to issue bonds next to shares and abolished the existing requirement to appoint a depositary taking into account the specific category in which the **Sicafi/vastgoedbevaks** invest i.e. real estate.

Sicafi/vastgoedbevaks can either be self-managed or appoint a management company. In practice, most **Sicafi/vastgoedbevaks** are self-managed which can be explained by the nature of the activities that need to be performed in relation to the management and operation of the underlying assets. **Sicafi/vastgoedbevaks** as such have an organisational structure, including a number of staff members that serves to execute the management of the vehicle.

Finally, as its shares need to be quoted on the stock exchange, the **Sicafi/vastgoedbevaks** also fall in scope of the regulatory requirements set out for listed companies.

¹⁶ Law of 3 August 2012 on certain forms of collective management of investment portfolios.

¹⁷ RD 7 December 2010 on with regard to SICAFI/VASTGOEDBEVAKS

AIFMD Impact on Belgian Real Estate Funds

As explained above, the Belgian **Sicafi/vastgoedbevaks** is a listed closed-end self-managed real estate investment fund (REIT equivalent). The self-managed status implies that the AIF is also the AIFM (no external AIFM appointed), and hence the AIF will need to be authorised as AIFM and should comply with all the requirements of the Directive.

Taking into account the current regulatory framework set out above that already applies to **Sicafi/vastgoedbevaks**, some of the more general (e.g. capital) and organisational requirements (e.g. governance, conflicts of interest) are expected to have a limited impact on the Belgian real estate AIFs.

However a number of AIFMD provisions will have a major impact on the Belgian listed real estate sector. An overview of the most relevant obligations is set out hereafter.

Depositary requirements

The AIFMD will, contrary to the decision taken by the Belgian legislator in 2010, reintroduce the **requirement to appoint a depositary**. Although the depositary requirement was included in the former Belgian regulatory framework, the scope and extent of AIFMD depositary's duties and responsibilities (see table below for a summarised overview) differs significantly from the former regime, representing significant operational change and a new level of due diligence.

In line with the results of a recent Deloitte Survey¹⁸ indicating the appointment of a depositary and related costs as the most pressing concern, the impact of the depositary provisions is considered major¹⁹. Under the directive, every AIF is to appoint a single depositary (separate from the AIFM), which would as a rule be an EU credit institution or similar. For closed-end AIFs that do not invest in assets to be held in custody i.e. other assets²⁰, national regulators may allow for the appointment of a notary, a law firm, a registrar, ... subject to mandatory professional registration. Based on our current understanding, the Belgian regulator would also allow for this option.

¹⁶ Responding to the new reality Alternative Investment Fund Managers Directive Survey, Deloitte July 2012.

¹⁷ The depositary requirements of the AIFMD are generally seen as possibly the most onerous and costly on the industry, potentially requiring significant strategic changes in the service offerings and cost structures of depositaries. The industry expects this to have potential significant knock-on effects on the landscape of the investment management industry, leading to new pricing models to price in this risk and additional oversight.

¹⁸ Assets not classified as financial instruments that can be held in custody (also called non-financial instruments) like derivatives, cash deposits, real estate, private equity shares, shares in SPVs, etc.

Depositary Duties		
Safe-keeping function	Control functions	
<ul style="list-style-type: none"> • All financial instruments that can be held in custody (account or physically) - including collateral owned by the AIF (both pledged and received collateral) • Segregation • Ownership verification and record keeping 	<p>Cash flow monitoring</p> <ul style="list-style-type: none"> • Proper monitoring and reconciliation of cash flows • Ensure that all payments by investors have been received and are accounted for 	<p>Oversight</p> <ul style="list-style-type: none"> • Booking of subscriptions/redemptions • Valuation of shares or units of the AIF • Oversee carrying out of AIFM's instructions • Timely settlement of transactions • AIF's income distribution
<ul style="list-style-type: none"> • Safe-kept assets shall not be re-used by the depositary without prior consent of the AIFM/AIF • Due diligence (appointment, ongoing, exceptional) • No potentially conflicting activities, unless these are functionally and hierarchically separated from the depositary tasks. 		

The safekeeping responsibility over other assets like real estate is one of ownership verification and record keeping. In order to maintain at any time a record of these assets, the depositary shall ensure procedures are in place at the level of the AIFM enabling him to be informed of all transactions and provide him without undue delay with certificates and documentary evidence. These duties also apply on a look-through basis to underlying assets held by any structure controlled directly or indirectly by the AIF(M). Depositaries will be liable for losses as a result of their negligence or failure to properly fulfil their obligations under the directive.

Depositaries of non-financial instruments should also properly monitor and reconcile cash flows (and this on a daily basis), and ensure that all payments have been received and are accounted for (duplication of administrators' cash position reconciliations). They should equally have oversight of the AIFMs processes and procedures, related to amongst others subscriptions and redemptions, and valuations.

Risk management

The AIFM will need to establish, implement and maintain an adequate and documented risk management policy in line with the risk profile of the AIFs it manages. A permanent risk management function is to be installed, which has to be functionally and hierarchically separated from operating units including portfolio management, and of which the adequacy and effectiveness is to be assessed, monitored and periodically reviewed. Part of the risk management procedures is also to set quantitative or qualitative risk limits and a maximum level of leverage for each AIF, as well as the adoption of adequate and effective risk measurement and management arrangements, processes and techniques (including the necessary reviews thereof through back- and stress-testing).

The existing requirements relating to risk management to which the Belgian **Sicafi/vastgoedbevaks** are currently subject - although more high level and a lot less detailed - are a good starting point for further alignment with the AIFMD requirements. In our view, the main challenges will lie in the instalment of the permanent risk management function, and its required independence (both hierarchically as well as functionally) from the portfolio management function. Many of the Belgian **Sicafi/vastgoedbevaks** rely on small teams that might not be equipped for a separation of portfolio and risk management functions.

Linked to this are also the severe technical requirements on systems and tools, their overall governance, integration and testing of vulnerability through back- and stress testing.

Liquidity management

AIFMs are required to adopt appropriate liquidity management policies and procedures taking into account the investment strategy, the liquidity profile and the redemption policy of each AIF (not applicable to unleveraged, closed-end AIFs). The liquidity systems and procedures need to ensure that a level of liquidity is maintained in the AIF appropriate to its underlying obligations, not only to investors, but also to counterparties, creditors and other third parties. This would imply that the AIFM of a leveraged, closed-end AIF (what the Belgian **Sicafi/vastgoedbevaks** are), would be required to maintain an appropriate level of liquidity to be able to service the debt in respect of any borrowing²¹. AIFMs are also to define, if relevant, liquidity limits, and conduct at least annually, stress tests (under normal and exceptional liquidity conditions) to assess the liquidity risk of each AIF under management.

As the Belgian **Sicafi/vastgoedbevaks** are (mostly) leveraged closed end AIFs, most of the AIFMD liquidity requirements will be applicable to them. The current regulatory framework foresees little or no requirements in this field which entails that the impact of the newly introduced stipulations will be most tangible. Firstly, the implementation will entail a high degree of formalisation and documentation. But even more so will the challenge for the Belgian **Sicafi/vastgoedbevaks**, investing in highly illiquid property, lie in maintaining in the AIF a level of liquidity appropriate to all its obligations, including any kind of borrowing. And lastly, as was already the case for risk management, implementing all these requirements will most likely also require (technical) systems and tools. We want to note, however, that it was recognised by ESMA that with regard to the regular stress tests, it may not always be appropriate to prepare quantitative calculations, in which case a qualitative assessment should be performed.

²¹ Source: ESMA's Technical Advice, Box 32, explanatory text 13.

AIFMD Impact in a selection of Member States

In the table below, we have included, for a selection of Member States, a high level comparison of the AIFMD impacts on the real estate funds/vehicles existing in the respective real estate market, ranging from Low (L), Medium (M) to High (H). Obviously the actual impact on an existing real estate fund / vehicle will depend on many factors, one of which is of course the current regulatory regime under which it is operating, and as indicated above, this can be different for different vehicles operating in the same country. The impacts that we highlight below, are to be interpreted in that sense, reflecting more an average expected impact across the different types of funds / vehicles.

	Austria ¹	Belgium	Germany	Germany ²	Ireland	Luxembourg	The Netherlands	UK
Licensing	L	M	L	M/M	L	L	M/H	L/H (4)
Capital requirements and insurance	L/M	L/M	L	L/M	L/M	L/M	L/M	L/H (5)
Boards and senior management	L	M	L	L/M	M	M	M	M
Remuneration	H	M	M	H/ H	M	M	M	M
Conflicts of interest	H	M	M	M/ M	M	M	M	M
Risk management	M/H	M/H	M	M/H	L	L	M	M/H
Control functions	M/H	M	H	M/H	M	M	M	M
Liquidity management	H	H	M	M/ M	M	M	M	M
Valuation	M	L	M	L/H	M	M	L	L
Delegation/ outsourcing	L	M	H	M/H	L	L	M/H	M
Depositary	M/H	H	H	M/H	M	M	H	H
Due diligence requirements	M/H	M	M	M/ M	H	H	H	M
Disclosure requirements	H	M	M	M/ M	M	M	M	M

- (1) Depends on whether manager is a licensed real estate investment manager pursuant to Immobilieninvestmentfondsgesetz or a listed company.
- (2) Left impact indicator: regulated open ended mutual real estate funds, already regulated under (German) Investment Act. Right impact indicator: closed ended funds mostly unregulated but probably within scope of the AIFMD.
- (3) Some Real Estate managers in the UK are currently regulated and unless otherwise stated the impact below has been completed based on those firms.
- (4) There will be a high impact for those firms currently not authorized.
- (5) Some Real Estate managers in the UK are authorised in such a way as to have a low capital requirement, others have a permission which means that they have essentially a 1/4 fixed overhead requirement. The former will be impacted to a greater extent than the latter.

Conclusions

AIFMD & the real estate sector

It is clear, from the current discussions, that Member States are still in the process of defining their position on the applicability of the AIFMD in relation to different types of real estate investment vehicles and structures. The potential impact of the AIFMD on these structures and vehicles is significant and a number of competent authorities and market participants are rightfully concerned by the possible lack of level playing field that could derive from an inconsistent approach. We understand that the Belgian authorities shall certainly carefully evaluate the potential consequences of this directive on the sector of the **Sicafi/vastgoedbevaks** in terms of costs and adequate functioning, considering also the fact that relatively “comparable” vehicles in neighbouring countries might continue to operate in a less constraining environment.

Clear guidance on the concepts of the AIF definition is therefore of specific importance to the sector in order to ensure the common, uniform and consistent application of the provisions of the AIFMD throughout Europe that ESMA is pursuing.

The broader context

The application of the AIFMD has as spill-over effect that it triggers the application of other regulatory initiatives. An example of that effect relates to the EMIR²².

The EMIR definition of ‘financial counterparties’ includes, amongst others, AIFs managed by AIFMs authorised or registered in accordance with the AIFMD. While EMIR carries some relief from the clearing and margining requirements for non-financial firms, pension funds and intra-group transactions, EMIR applies in full to financial counterparties.

AIFs should therefore also consider the impact of EMIR’s main pillars:

- Obligation to **clear** all standardised OTC derivatives through central counterparties
- Non-cleared derivatives are subject to strengthened **risk management requirements**, including the need to **collateralise positions**
- All OTC and exchange traded derivatives must be **reported** to trade repositories.

²² Regulation (EU) N° 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

Practical steps to consider

Sicafi/vastgoedbevaks should monitor very closely the discussion on the AIFMD scope.

Taking into account the impact of the AIFMD and the ongoing scope discussions, **Sicafi/vastgoedbevaks** should consider the following practical steps:

- Analyse in depth the content and interpretation of the AIFMD rules but also the regulatory initiatives that can be linked to the AIFMD such as EMIR
- Review business strategies and models taking into account the possible future regulatory framework
- Assess the impact of the rules on liquidity, collateralization and costs
- Assess, on the basis of a gap analysis, necessary changes to governance, organization, systems and internal control and reporting processes
- Consider possible cross border implications.

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List of abbreviations

AMF	Autorité des marchés financiers (France)
CONSOB	Commissione Nazionale per le Società e la Borsa (Italy)
EMIR	European Market Infrastructure Regulation
FSA	Financial Supervisory Authority (Denmark) Financial Services Authority (UK)
FSMA	Financial Services and Markets Authority (Belgium)
REIT	Real Estate Investment Trust
SICAFI	Société d'Investissement à Capital Fixe en Immobilier
SIIC	Sociétés d'investissement immobilier cotées (the French REIT)

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