

**AMF position 2012-12
A guide to fees**

Background regulations: Articles 314-78, 411-129-1 and 411-130 of the AMF General Regulation

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1. Rebates on subscription-redemption fees and management fees in funds of funds

1.1. Reminder of the applicable provisions

Article 411-130 of the AMF General Regulation provides for preventing an investee fund¹ (also referred to as bottom-tier fund in the IOSCO Best Practice Standards) from transferring a portion of the rebates on management fees and subscription/redemption fees it received to the asset management company investing in it or to any third party. The idea is that the rebates must exclusively benefit the investor fund (also referred to as top-tier fund in the IOSCO Best Practice Standards), and not the asset management company or any other person or fund.

Rebates on subscription/redemption fees and management fees shall be granted in accordance with the method for calculating the net asset value insofar as it helps prevent conflicts of interest and ensure that the fund is managed in the interest of investors and that the latter are treated equally and provided with all the information needed.

More specifically:

- Article 411-130 of the AMF General Regulation provides that:
"Rebates on management fees or subscription and redemption fees that arise from investments made by the management company in shares or units of a CIS or investment fund on behalf of a CIS distributed in the territory of the French Republic, are prohibited, with the exception of the following:
 - 1° Fees and fees referred to in the eighth paragraph of Article 314-79;*
 - 2° Rebates that exclusively benefit the CIS;*
 - 3° Rebates paid by the management company of a master CIS in order to remunerate a third party in charge of marketing the feeder CIS of this master CIS ;*
 - 4° Rebates remunerating a third party in charge of marketing CIS or investment funds where this third party acts*

¹ By conventional definition, the term investee fund refers here to a fund in which another fund, known as the investor fund, invests.

independently of the management company investing in these CIS or investment funds.

The receipt by the management company of the following rebates in particular is prohibited:

- 1° Subscription or redemption fees relating to investments by the portfolio under management in a CIS or investment fund;*
- 2° Management fees relating to investments of the portfolio of a CIS under management in another scheme or investment fund. ”*

- Article 411-129-1 of the AMF General Regulation provides that:

“Rebates on management fees received for investments made on behalf of a CIS in FCP units or SICAV shares, or in investment fund units or shares as defined in Article R. 214-33 of the Monetary and Financial Code shall be paid into the CIS:

- 1° either through a direct payment to the CIS;*
- 2° or by means of a deduction from the management fees charged by the management company.”*

- Article 411-132 states in particular that Articles 411-129-1 and 411-130 apply to CIS distributed in France, referred to in Articles 411-135 and 412-28, namely foreign CIS either UCITS or non-UCITS.

These provisions result in:

- CIS governed by French Law and distributed in France being prevented from receiving rebates. This ban shall not apply to French CIS distributed in the European Economic Area and/or in the rest of the world, with the exception of France,
- the distribution of a CIS governed by foreign Law and approved for distribution in France being conditional upon confirmation by the asset management company that no one benefits from the rebates prohibited under Article 411-130 when investments in units or shares in other CIS are made on behalf of the said CIS.

Overall, this scheme bans the distribution of CIS in France to target persons (asset management companies and any other person or fund) receiving rebates on fees that arise from investments in CIS distributed in France. However, it does not ban the payment of fees to third parties managing or distributing CIS that are not distributed on the French territory, unless domestic law provides otherwise.

From an international perspective, it bears noting that this regulation complies with the IOSCO best practice standards published in November 2004². In the medium term, incorporating this provision in European Law would be the best option, as much as it is already applied by some countries.

² “Conflicts of interest that arise because of the investment in other funds should be minimized. If permitted, fee-sharing agreements should benefit exclusively the top-tier fund. They should not benefit the Fund operator, be it directly or through a third party (article. 43). »

1.2. Details on prohibited and authorised rebates

Pursuant to Article 411-130 of the AMF General Regulation, asset management companies managing investee funds are allowed to use distribution platforms to market units or shares in a CIS in exchange for rebates on management fees. However, this practice is strictly regulated in order to avoid that the asset management company responsible for managing the investor fund circumvents the ban on rebates by creating a third-party vehicle that would receive the rebates for its own account.

The possibility to pay the distributor with rebates depends on the context in which it operates. Only asset management companies investing in CIS or investment funds in an independent manner may qualify for a rebate.

The distributor may be considered independent from the asset management company when it meets the following criteria:

- it has no majority stake in the group to which the asset management company responsible for managing the investor fund belongs;
- if controlled by a group to which the asset management company responsible for managing the investor fund belongs, it shall introduce rules of good conduct and sell a significant amount of products to clients outside the group in order to demonstrate its independence.

It bears adding that Article 411-130 on rebates only applies to CIS management. The ban on rebates does not apply to non-UCITS and non-French funds - hence not authorised for distribution in France - directly managed or managed under a discretionary agreement by a French asset management company insofar as, although managed by a French asset management company, such products cannot be distributed in France.

1.3. Schemes compatible with Articles 411-129-1 and 411-130 of the AMF General Regulation

1.3.1. Rebates on subscription or redemption fees

- When the investor fund is granted a rebate on the subscription fees charged to an investee fund, the said rebate shall be directly deducted from the subscription fees charged to the CIS.

Accordingly:

- Where the CIS includes all the costs relating to a transaction in its books of account, the amount recognised shall be equal to the subscription value, plus the subscription costs charged to the CIS and less the rebate on subscription fees allocated to the CIS;
- Where the CIS records the transaction net of expenses in its books of account, the amount recognised in respect of the transaction fees shall be equal to the subscription fees charged to the CIS less the rebate on subscription fees granted to the CIS.

Rebates on subscription fees cannot transit through the asset management company. They cannot be granted to the CIS by deducting the management fees charged by the asset management company or be paid to the asset management company, which would then grant them back to the CIS.

- Where the investor fund is granted a rebate on redemption fees when redeeming units in an investee fund, the scheme implemented is symmetric.

1.3.2. Rebates on management fees

1.3.2.1. Rebates accounted for by the investor fund when calculating the CIS's net asset value (NAV)

The rebates on management fees receivable shall be accounted on each NAV calculation day. Regardless of the arrangements under which the investor fund receives these rebates, and pursuant to the fund's accounting policies, the rebates shall be accrued on an account distinct from the management fee accrual. The amount accrued shall be equal to the portion of the rebate received for the period covered and thereby depends on the expected rebates, on the level and duration of the investment in the investee funds. This amount shall be adjusted on a regular basis so as to take into account the changes in the composition of the investor fund's portfolio and in the nature of the rebate agreements. Adjustment shall be made by reconciling the amount accrued and the rebates effectively received or to be received.

The amount accrued shall be accurate enough to avoid any material impact on the fund's net asset value at the time of adjustment. Accordingly, the adjustment frequency depends on the fund's portfolio turnover rate and composition, and on the rebate agreements. These parameters may be reviewed at different frequencies. Adjustment will be all the more frequent as the fund's portfolio turnover rate is high, its composition liable to change over a short period and as the amounts refunded vary according to the investee funds selected. In any case, adjustment shall be completed at least every three months.

1.3.2.2. Allocation of the rebates to the investor fund

Three schemes:

1) the rebates do not transit through the asset management company and are directly granted to the fund. The granting of a rebate to the fund translates into the amount accrued for the said rebate being balanced up to the amount of the rebate after verification of the amounts received and identification of the investee funds and investment periods;

2) the asset management company receives the rebates on behalf of the fund and grant them back to the fund immediately.

When the asset management company receives rebates from an investee fund that arise from investment by several investor funds in the said investee fund, it shall ensure that the principle of equal treatment between investors and the portfolios managed is complied with when allocating the rebates to the investor funds. In practice, the rebates shall be allocated in proportion to the amount and duration of the investment made by each investor fund in the investee fund³. Accordingly, the allocation of rebates cannot result in a remaining balance being allocated to the asset management company or to a third party.

When the asset management company is granted a rebate on behalf of the fund:

- The amount of the rebate shall be verified. The investee funds and associated investment periods shall be identified.
- The rebate is directly paid back to the fund.
- The amount accrued in the fund's accounts for the expected rebate is balanced up to the amount of the rebate.

3) the asset management company receives the rebates on behalf of the fund and pay them back to the investor fund by waiving the management fees it charges to the fund.

When the asset management collects the management fees:

- The amount of the rebates actually collected by the asset management company for investment in the investee funds by the investor fund shall be verified. The investee funds and the associated investment periods shall be identified,
- The provision recognised for the expected rebates in the account of the CIS is balanced up to the amounts accrued for the rebates received by the asset management company during the period,

³ The procedures are similar to those applicable to interest scales.

- The provision for management fees that must be paid to the asset management company shall be balanced up to the actual amount of the management fees in the accounts of the CIS.
- The asset management company shall segregate the cash flow associated with the rebates from that associated with the management fees in the bank statement of the investor fund.

Accordingly, the amount actually received or paid by the asset management company responsible for managing the investor fund shall be equal to the management fees due to the asset management company for the period covered, less the rebates received by the asset management company over the same period. Rebates to the investor fund cannot possibly take the form of rebates going back and forth between the investor fund and the asset management company at the time of payment of the management fees to the latter⁴. Such a scheme involves increasing a posteriori the fees received by the asset management company by the amount of the rebates it received. It is compliant with either Article 411-129-1 of the AMF General Regulation or with the chart of accounts of the CIS.

1.3.2.3. Conditions for adjusting the rebates accrued and the rebates received

The amount accrued in the accounts of the investor fund in respect of the rebates to be paid by the investee fund shall be accurate enough to avoid any material impact on the investor fund's net asset value at the time of payment of the rebates to the investor fund.

When the amount accrued for rebates to be paid by an investee fund is equal to the amount actually paid, the actual payment of rebates by the investee fund to the investor fund must not have any impact on the investor fund's net asset value.

Any potential difference between the amount accrued (for the rebates to be paid by an investee fund) and the amount actually paid is fully accounted for when calculating the net asset value confirming payment of the said rebates to the investor fund. Indeed, the provision for rebates is recognised up to the amount accrued for rebates to be paid by the investee fund in the investor fund's accounts and the amount received by the investor fund corresponds to the amount of the rebates actually paid by the investee fund.

2. Variable management fees involving equalisation liabilities and deferred subscription fees

Authorised ARIA funds with streamlined investment rules (OPCVM Agréés à Règles d'Investissement Allégées), alternative funds of funds and contractual CIS are investment vehicles which allow investors to have access to all types of direct alternative management strategies, in a secure on-shore environment and not only through:

- Strategies compatible with the regulatory requirements imposed on traditional CIS governed by French Law;
- Strategies implemented in off-shore foreign investment funds, unregulated or barely regulated ("hedge funds").

This part aims to describe a method for remunerating managers according to the performance achieved by the CIS. This method of remuneration must be compatible with the regulatory framework applicable to these new categories of CIS.

Two major types of methods for calculating and collecting variable management fees apply to CIS governed by French Law and those governed by Foreign Law.

They aim at preserving equal treatment of investors, although they are based on different concepts:

⁴ Accordingly, the following scheme is not allowed:

- Rebates on management fees have not been accrued in the accounts of the CIS ;
- When the management fees are paid to the asset management company:
 - the cash account of the CIS is debited and the provision for management fees is balanced,
 - the account on which the management fees are recognised is credited up to the amount of the rebates granted to the asset management and is debited up to the same amount, thereby resulting in the rebates being recognised in the accounts of the CIS without any impact on the net asset value of the CIS.

First method: calculating the variable management fees according to the performance achieved by the CIS

When the CIS achieves a performance or when it outperforms⁵ its performance objective, variable management fees are paid to the asset management company. This scheme is based on:

- a provision⁶ for variable management fees on each NAV calculation day;
- the payment⁷ of the provision for variable management fees.

Second method: calculating the variable management fees according to the performance, for the benefit of each investor

This method involves individual follow-up on the real performance achieved by each investor⁸ in order to calculate the associated variable management fees.

The first method is the calculation method most used by French CIS. Its main advantage is that it is simple to calculate and implement. However, the downside to this method is that it introduces, in some cases, residual inequality between investors.

For instance, and in general terms, investors buying units or shares at their highest in a CIS for which a performance fee is accrued lose less when the net asset value decreases, since the loss is mitigated due to the reduction of the provision, even though their investment did not contribute to the recognition of the provision. Conversely, investors buying units or shares in a CIS at their lowest⁹ are advantaged and, should the net asset value increase, they will reap the benefits of a non-degraded performance of the said provision.

The second method, though significantly more complex, offers a solution to this problem. It is mainly used in funds that implement alternative management strategies.

The example below, based on the second method, lays out the circumstances under which CIS governed by French Law may use such a scheme and, more generally, this method.

The scheme presented demonstrates technical differences with the methods used abroad in order to take into account the characteristics of French Law. In addition to the features of the first method, it is based on payments made directly by the investors. It is called “*Scheme for variable management fees involving equalisation liabilities and deferred subscription fees contingent upon performance*”.

2.1. Operating principles of the scheme

In this scheme, the total amount of variable management fees is:

- calculated on each NAV calculation day as equal to a percentage of each investment exceeding a benchmark NAV (often 20% or 25%)
- Composed of:
 - a provision for the variable management fees to the benefits of the asset management company,
 - equalisation liabilities, which consist of an amount calculated on an investor-by-investor basis, pursuant to an adjustment procedure aimed at increasing or reducing the financial costs falling on an investor when it subscribes for units or shares in a CIS in the course of the financial year.

A distinctive feature of this scheme is that it sets a threshold for triggering variable management fees that shall be readjusted periodically. This trigger threshold corresponds to the highest NAV calculated at the end of each reference period, when the variable management fees are accrued. The graph below shows the changes in this

⁵ This performance or outperformance is calculated on the basis of a reference net asset value.

⁶ If the net asset value declines, provisions are reversed.

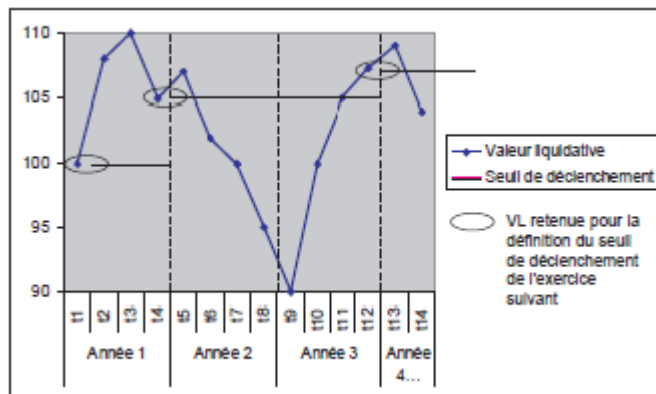
⁷ In practice, this is :

- a reversal of the provisions which results in the CIS having a liability towards the asset management;
- the payment of a debt, which may occur after the close of the period considered or subsequently.

⁸ This involves that an investor which would subscribe for shares in a CIS on the basis of two different net asset values would have its investments being tracked in a differentiated and customised manner.

⁹ A low net asset value cannot give rise to the payment of a performance fee.

threshold, with quarterly NAV being referred to as "ti"¹⁰ and a yearly frequency of payment of the variable management fees accrued.



This definition requires that a distinction be made depending on whether subscription by an investor is made on the basis of a NAV higher or below the trigger threshold.

First case: the investor subscribes for units or shares in a CIS on the basis of a NAV below the trigger threshold

In this case, and by definition, there is no such thing as performance and no provision is recognised by the CIS. However, an investor which would subscribe for units or shares in the CIS in the course of the financial year (after the close of the previous financial year) knows, as of subscription, that he will be required to pay variable management fees to the asset management company if the value of its investment increases, which means if the redemption NAV of its investment exceeds its initial NAV.

In this case, deferred subscription fees contingent upon performance shall be paid to the asset management company. These subscription fees shall be received:

- either upon the next payment date of variable management fees;
- or upon redemption of the units, should units or shares in the CIS be redeemed before the next payment date of variable management fees.

Second case: the investor subscribes for units or shares in a CIS on the basis of a NAV exceeding the trigger threshold

In this case, and just as in the first case, the CIS shall accrue variable management fees equal to a percentage of the performance observed (before any subscription or redemption of units or shares on the basis of the current NAV). Should the NAV of the CIS decrease, an investor which would have subscribed for shares or units at this very moment would be granted performance fee rebates. Thus, the decline in the NAV will be amortised even though the investor did not benefit from this performance and did not contribute to establishing the performance fee provision.

Recognition of an equalisation liability:

In order to remedy this inequality, the investor is required to pay additional fees to the CIS upon subscription of units or shares in the CIS. This amount shall be equal to the difference between the NAV of the CIS before consideration of the provision accrued for variable management fees and the real NAV (after provision). It results in the investor incurring a liability towards the CIS upon subscription of units or shares in the CIS, which corresponds to the maximum amount of the deferred subscription fees to be determined and calculated upon payment of the provision accrued for the variable management fees initially recognised as an asset in the fund's accounts.

¹⁰ Where i = the number of the quarter.

The AMF reminds that the principle for subscribing units or shares in a CIS or redeeming them on the basis of the fund's NAV prohibits the payment of additional money as a complement to the NAV, excluding subscription fees. Indeed, Article L. 214-7 and L. 214-8 of the Monetary and Financial Code provide that the units or shares in a CIS shall be issued and redeemed at the request of investors on the basis of the NAV plus or less subscription fees, as appropriate.

Changes in the equalisation liability:

The value of the liability changes according to the changes in the NAV of the CIS.

- If the NAV increases, variable management fees are accrued and the amount of the liability remains unchanged.
- If the NAV decreases, the provision accrued for variable management fees is reversed by the CIS and the value of the equalisation liability decreases accordingly. Should the NAV fall below the trigger threshold, variable management fees will no longer be accrued and the equalisation liability will accordingly become null.

Future of the equalisation liability:

At the time when the variable management fees accrued are paid to the asset management company, the investor does no longer need the equalisation liability as he will pay its variable management fees at the same time as the other investors, namely as of the start of the next financial year. As a result, the liability is cleared. This liability is certain, tangible and liquid. It is paid to the investor in the form of additional units or shares, issued on the basis of the NAV calculated at year-end.

In the same way, if the investor exits the fund in the course of the financial year, the total provision for performance fees is reduced, resulting in:

- variable management fees being paid to the asset management company, the amount of which depends on the number of units or shares held by the investor exiting the fund and on the investment performance;
- the equalisation liability being balanced in the form of issuance or redemption of additional units or shares on the basis of the redemption NAV.

2.2. Summary of the operating conditions and the conditions of use of the scheme and of the second method

2.2.1. Principles governing the use of a scheme involving variable management fees based on the second method

Generally, asset management companies which wish to use schemes based on the second accounting method shall:

- ensure that the scheme is compliant with the French legal, accounting, tax and economic principles;
- determine the conditions for implementing and using each scheme.

The findings arising from this compliance assessment and the standardisation of the conditions for implementing the scheme shall be described within procedures kept available for the *Autorité des Marchés Financiers*.

These procedures shall include in particular one allowing entities involved in the scheme to exchange data, and it shall contain comprehensive accounting schemes. The internal control of the asset management company shall validate the schemes and monitors their application. It shall transmit to the AMF a certificate certifying that the procedures governing variable management fees have been reviewed when filing for approval or for declaration of the CIS.

For instance, as regards the scheme presented above, the concerned entities are: the administration and accounting department of the asset management company, the administration and accounting representative where appropriate, the entity which receives the subscription or redemption orders and the entity responsible for verifying the financial capacity of investors.

Moreover, the use of this scheme or other schemes based on the second method shall be clearly explained to investors. The prospectus of the CIS must include a detailed and full description of any scheme involving variable management fees and using equalisation liabilities.

2.2.2. Application of these principles to the scheme presented

The technical arrangements of the scheme presented make it possible for CIS with the following characteristics to use it:

1) ARIA funds with streamlined investment rules, alternative funds of funds, real estate funds with streamlined investment rules (OPCI RFA) and contractual CIS the NAV of which is not calculated on a daily basis.

Indeed, the scheme implies collecting variable management fees on the first euro of performance and tracking several stages and back and forth movements between the administration and accounting department of the asset management company and the person responsible for collecting the individual subscription or redemption orders of investors in the CIS.

2) Administered registered CIS managed by a person ensuring that the financial capacity requirements imposed on investors are met and that the latter have been provided with the information necessary¹¹.

Indeed, accounting for variable management fees requires individual knowledge of each subscription orders placed by each investor.

3) CIS that distribute profits in the form of units or shares only.

Indeed, applying the new scheme would result in investors being treated unfairly if dividends were to be distributed.

It is stipulated that, in order to preserve equal treatment of investors¹², some changes in the functioning of the CIS are not compliant with the use of this scheme. For instance, and unless otherwise demonstrated by the asset management company, it is impossible to change the method for calculating variable management fees or to merge the CIS with other investment funds.

3. Outperformance fees

Pursuant to the principles set out by IOSCO¹³ in November 2004¹⁴, which must be complied with by all members of IOSCO, management fees charged to a CIS may include a variable part where:

1. it does not incite the asset management company to take excessive risks in the hope of increasing the performance of the CIS;
2. it is compatible with the performance objective and risk profile of the CIS, which was previously presented to the investors;
3. the calculation of the performance can be verified to prevent any potential manipulation. In this context, the payment frequency set by the asset management company shall be reasonable. It should be noted that a twelve-month period is considered reasonable;
4. it does not breach the principle of equal treatment of investors;
5. investors in the CIS know that there is an outperformance fee and are aware of its potential impact on the performance of the CIS.

¹¹ This person is specified in the prospectus of the CIS.

¹² Article 314-3-1 of the AMF General Regulation.

¹³ The International Organization of Securities Fees (IOSCO) is an international organisation created in 1983 which brings together the regulators of the world's major stock exchanges.

¹⁴ Principles incorporated in Article 314-78 of the AMF General Regulation.

3.1. Payment frequency

Pursuant to the aforementioned principles, the calculation of the performance shall be verifiable in order to prevent any manipulation. In this context, the payment frequency set by the asset management company shall be reasonable. It should be noted that a twelve-month period is considered reasonable. Accordingly, a sampling period of less than one year shall not be considered adequate.

3.2. Outperformance share

The asset management company shall provide the AMF with a technical note as soon as the outperformance share that may be granted to it exceeds the 30% threshold. This note aims at documenting the scheme in its entirety, in particular by providing details about the scheme implemented in order to avoid that excessive risks be taken.

Below 30%, the AMF may ask the asset management company for a technical note as soon as it considers that the level of the outperformance share could result in important risks being taken and/or that it could prove incompatible with the fund's management objective and risk profile.