

Case C-174/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

21 March 2023

Referring court:

Cour de cassation (France)

Date of the decision to refer:

15 March 2023

Appellants in cassation:

HJ

IK

LM

Respondents in cassation:

Twenty First Capital S.A.S.

Succinct presentation of the facts and procedure in the main proceedings

- 1 In March 2014, R Participation, a company established by HJ with LM and IK as partners, sold three collective investment schemes dedicated to investments in emerging markets (the ‘R funds’) to the T company by way of a transfer of business. HJ became an employee of the T company.
- 2 On 5 June 2014, in order to organise the takeover of that business by Twenty First Capital (the ‘TFC company’), HJ entered into an agreement with it, under the terms of which the TFC company promised to hire him by 1 November 2014 at the latest.
- 3 On 27 June 2014, the same parties entered into a partnership agreement providing for various remunerations in favour of IK, HJ and LM. On 24 October 2014, the T company sold part of its business comprising the R funds to the TFC company; on

11 December 2014, HJ joined the TFC company as a board member, managing director and second most senior manager of that company.

- 4 HJ and IK sued the TFC company to enforce the partnership agreement and for damages. LM voluntarily joined the proceedings. The TFC company counter-claimed the nullity of the partnership agreement.
- 5 In a judgment of 10 January 2019, the Tribunal de grande instance de Paris (Regional Court of Paris, France) found that the remuneration provided for in the partnership agreement was intended to remunerate the cooperation to be exercised in the context of the salaried functions of HJ and LM, as well as in the context of HJ's corporate mandates. Noting that the TFC company was an asset management company managing at least one alternative investment fund ('AIF'), it ruled that the remuneration had to comply with the rules set out in Article L. 533-22-2 of the *code monétaire et financier* [French Monetary and Financial Code] and Article 319-10 of the General Regulation of the AMF [*Autorité des marchés financiers* (Financial Markets Authority, France)], which fall within the scope of public policy rules designed to order society [(*ordre public de direction*)]. Finding that the remuneration did not comply with those rules, it annulled the partnership agreement and rejected the claims.
- 6 By a decision on 8 February 2021, the Cour d'appel de Paris (Court of Appeal of Paris, France) confirmed that judgment. IK, HJ and LM appealed in cassation against that decision.

Relevant provisions of European Union law

Directive 2011/61/EU 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) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174, p. 1) ('the AIFM directive' or 'the AIFMD').

Article 13

'1. Member States shall require AIFMs to have remuneration policies and practices for those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage.

The AIFMs shall determine the remuneration policies and practices in accordance with Annex II.

2. ESMA shall ensure the existence of guidelines on sound remuneration policies which comply with Annex II. The guidelines shall take into account the principles on sound remuneration policies set out in Recommendation 2009/384/EC, the size of the AIFMs and the size of AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities. ESMA shall cooperate closely with the European Supervisory Authority (European Banking Authority) (EBA).’

Article 61(1)

‘AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date.’

Entry into force and transposition period

In accordance with Article 70 thereof, the AIFM Directive came into force on 21 July 2011. Under Article 66 thereof, Member States had until 22 July 2013 to transpose the main provisions of the Directive, including Article 13 thereof.

National provisions relied on

Article L.533-22-2 of the French Monetary and Financial Code, introduced by *ordonnance n° 2013-676* du 25 juillet 2013 modifiant le cadre juridique de la gestion d'actifs [Order No 2013-676 of 25 July 2013 and amending the legal framework for asset management] (which came into force on 28 July 2013) transposes Article 13 of the AIFM Directive. It sets out the following:

‘I.- The AIF asset management companies mentioned in points 1 and 2 of paragraph II of this article shall determine the remuneration policies and practices of the following persons, when their professional activities have an impact on the risk profiles of the asset management companies or of the AIFs they manage:

1. managers;
2. members of the board of directors or the management board;
3. directors of simplified joint stock companies and persons exercising a management function [...];
4. risk takers;
5. persons exercising a control function;
6. persons under the authority of the asset management company receiving total remuneration that takes them into the same remuneration bracket as management [...] and risk takers.

Remuneration policies and practices shall be consistent with and promote sound and effective risk management and shall not encourage risk-taking that is inconsistent with the risk profiles of AIFs and their rules or articles of association.

II – This article applies to asset management companies managing AIFs:

1. [...]

2. [...].

The *règlement général de l'Autorité des marchés financiers* [AMF General Regulation] shall set the terms for the remuneration policies and practices of these asset management companies.'

Article 33, I of the Order of 25 July 2013 provides for a transitional provision under which 'management companies performing, on the date of publication of this Order, activities corresponding to the provisions contained herein shall apply for authorisation as asset management companies [...] before 22 July 2014.'

The explanatory note to *décret n° 2013-687 du 25 juillet 2013 pris pour l'application de l'ordonnance n° 2013-676* [Decree No 2013-687 of 25 July 2013 for the implementation of Order No 2013-676] includes the following statement: 'Entry into force: Management companies carrying out activities corresponding to the provisions mentioned in the present decree on the date of its publication shall take all necessary measures to comply with its provisions and shall submit a suitable application for authorisation by 22 July 2014 at the latest [...].'

Main arguments of the parties in the main proceedings

- 7 In their appeal, the appellants argue, in particular, that the requirements set out in Article 13 of the AIFM Directive, and transposed into French law by Article L. 533-22-2 of the Monetary and Financial Code, only apply from the time the AIF manager obtains its authorisation. As the TFC company only obtained its authorisation on 18 August 2014, they conclude that the rules on remuneration were not applicable to that company on the date the partnership agreement was signed, namely, on 27 June 2014. In the alternative, they argue that these rules were not binding on 27 June 2014. They argue that the Court of Appeal, in considering these rules applicable as of 22 July 2013, infringed Article 1 of the French Civil Code and Article 33 of the Order of 25 July 2013, interpreted in light of Article 61(1) of the AIFM Directive.
- 8 In support of their analysis, the applicants produce an English-language document translated into French and entitled 'AIFMD Q&A from the European Commission':

'[question] Article 61(1) provides that AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with

national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date. Does this mean that existing AIFMs have one year to comply in full with national law and to submit an application for authorisation?

[answer] During the one-year transitional period, AIFMs are expected to comply, on a best efforts basis, with the requirements of the national law transposing the AIFMD. The AIFM's obligation to seek an authorisation [...] is legally binding, but only needs to be complied with within a year of the entry into force of the Directive. In respect of other requirements contained in the AIFMD (such as [...] remuneration [...]), an AIFM that exists at the date of entry into force of the AIFMD, shall – already during the transitional period – take all necessary measures (i.e., expend its best efforts) to comply with the AIFMD in respect of all relevant activities undertaken subsequent to the entry into force of the AIFMD (22 July 2013). After the transitional period, all of the obligations arising under the AIFMD are legally binding.'

- 9 They also rely on the Questions and Answers on the AIFM Directive, published by ESMA, which state:

'Question 1 [last update 17 February 2014]: To which accounting period should AIFMs performing activities under the AIFMD before 22 July 2013 and submitting an application for authorisation under the AIFMD between 22 July 2013 and 22 July 2014 apply the AIFMD remuneration rules for the first time? Answer 1: Paragraph 4 of the Guidelines on sound remuneration policies under the AIFMD (ESMA/2013/232) [...] states that "These Guidelines apply from 22 July 2013, subject to the transitional provisions of the AIFMD".

The Commission Q&A on the AIFMD provided specific guidance on the interpretation of the transitional provisions under Article 61(1) of the AIFMD. [...] Once a firm becomes authorised under the AIFMD, it becomes subject to the AIFMD remuneration rules and the Remuneration Guidelines. Therefore, the relevant rules should start applying as of the date of authorisation.

However, as for the rules on variable remuneration (i.e. the ones for which guidance is provided under Sections XI. (Guidelines on the general requirements on risk alignment) and XII. (Guidelines on the specific requirements on risk alignment) of the Remuneration Guidelines), AIFMs should apply them for the calculation of payments relating to new awards of variable remuneration to their *identified staff* (as defined in the Remuneration Guidelines) for performance periods following that in which they become authorised. So the AIFMD regime on variable remuneration should apply only to full performance periods and should first apply to the first full performance period after the AIFM becomes authorised.

For example: [...] for an existing AIFM whose accounting period ends on 31 December which submits an application for authorisation by 22 July 2014 and obtains an authorisation after that date (including when the authorisation is

obtained after 31 December 2014), the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2015 accounting period.’

- 10 Finally, they rely on the *Guide AIFM – Rémunération des gestions de FIA* [AIFM Guide – AIF Management Remuneration], published by the AMF, which states (p. 3):

‘Pursuant to Article 61(1) of the AIFM Directive, management companies in existence on 22 July 2013 will have one year until 22 July 2014 to comply with the obligations under the AIFM Directive and to apply for authorisation from their competent authority.

Thus, there are three possible cases:

- management companies obtaining their AIFM authorisation between 22 July 2013 and 31 December 2013: the measures provided for by the position [on AIFM remunerations concerning remuneration] will apply to the 2014 accounting year (for the variable remuneration paid in 2015);
- management companies obtaining their AIFM authorisation between 1 January 2014 and 22 July 2014: the measures provided for by the position [on AIFM remunerations concerning remuneration] will apply to the 2015 accounting year for variable remuneration paid in 2016;
- thereafter, new management companies obtaining their AIFM authorisation in year N, after 22 July 2014, will have the same logic applied: the first accounting year to be taken into account for the application of the measures provided for by the position [on AIFM remunerations] will be year N+1 for the variable remuneration paid in N+2.’

- 11 The respondent TFC company states in reply that the provisions of Article L. 533-22-2 of the French Monetary and Financial Code were applicable on 27 June 2014, the day the partnership agreement was signed, to the extent that, while the Order of 25 July 2013 provides for a deferred entry into force of certain transposition provisions, this is not the case for those provisions requiring operators to establish for directors of AIFMs remuneration policies and practices that are ‘consistent with sound and effective risk management’.

- 12 It further argues that, even if AIFMs are given a period of time to comply with the new provisions transposing the AIFM Directive, they cannot, during that period, enter into any agreement providing for remuneration contrary to Article 13 of that Directive, as Article 61(1) of the Directive requires them to ‘take all necessary measures to comply with national law stemming from this Directive’.

Summary of the grounds for the reference and questions referred for a preliminary ruling

- 13 The solution to the dispute depends on whether Article L. 533-22-2 of the French Monetary and Financial Code, which entered into force on 28 July 2013, was applicable when the partnership agreement was signed on 27 June 2014. The answer to this question requires the interpretation of the AIFM Directive, in particular Articles 13 and 61 thereof.
- 14 The Court of Cassation notes that the Commission's document appears to acknowledge that there is a one-year transition period ending on 21 July 2014, that before that date, AIFMs are only expected to make their best efforts to comply with the requirements of the national law transposing the AIFM Directive, and that it is only after that date that all the obligations under the AIFM Directive become legally binding. In this analysis, neither the date of application for authorisation nor the date it is obtained would be relevant.
- 15 On the other hand, it seems to the Court of Cassation that the ESMA and AMF analyses show that an AIFM would only be subject to the rules on remuneration of the AIFM Directive and the remuneration guidelines from the date on which it has obtained authorisation, whereas prior to such authorisation it would not be subject to these rules. According to the same analyses, these rules would only apply from the beginning of the financial year following the authorisation.
- 16 The Court of Cassation deems that none of the proposed interpretations of Article 61(1) of the AIFM Directive is self-evident. In particular, the link between obtaining the authorisation and being subject to the rules of the Directive cannot be clearly inferred from that article.
- 17 Another interpretation seems possible, in which a distinction would be made depending on whether the remuneration was agreed before or after the transposition of the AIFM Directive into national law: in the former case, it could be accepted that it is difficult to ask the AIFM to immediately call into question a remuneration that did not infringe any rules when it was agreed, and that it could at most be required, during a transitional period, to make its best efforts to comply with the new remuneration requirements; in the latter case, it is conceivable that the entry into force of the national text transposing the AIFM Directive would immediately prohibit the manager from agreeing, for the future, to remuneration contrary to the rules laid down by this Directive after it has already entered into force.
- 18 Since the exact interpretation of the relevant provisions of the AIFM Directive is not self-evident and the Court of Justice has not had the opportunity to interpret Article 61(1) of that Directive, the Court of Cassation considers that the following questions should be referred to the Court for a preliminary ruling.
 1. a) Are Articles 13 and 61(1) of Directive No 2011/61/EU 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) No 1060/2009 and (EU) 1095/2010 to be interpreted as meaning that managers performing activities under the Directive before 22 July 2013 are required to comply with the obligations relating to remuneration policies and practices:

- i) at the expiry of the period for transposition of that directive,
 - ii) at the date of entry into force of the provisions transposing the Directive into national law,
 - iii) from the expiry of the period of one year, expiring on 21 July 2014, referred to in Article 61(1); or
 - iv) from the time of obtaining authorisation as manager under the Directive?
- b) Does the answer to this question depend on whether the remuneration paid by the AIFM to an employee or a director was agreed before or after:
- i) the expiry of the period for transposition of that directive;
 - ii) the date of entry into force of the provisions transposing the Directive into national law;
 - iii) the expiry on 21 July 2014 of the period laid down in Article 61(1) of the Directive;
 - iv) the date on which the AIFM obtained its authorisation?
- 2) If it follows from the answer to Question (1) that, following the transposition of the Directive into national law, an AIFM is, for a certain period of time, only obliged to make its best efforts to comply with the national legislation resulting from this Directive, does it fulfil that obligation if, during that period, it hires an employee or appoints a director on terms of remuneration which do not comply with the requirements of the national provision transposing Article 13 of the Directive?