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THE EUROPEAN PARLIAMENT

THE COUNCIL

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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of over-reliance on credit ratings

COMMON GUIDELINES

Consultation deadline for Croatia: 10.5.2013

**DIRECTIVE 2013/.../EU
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

of

**amending Directive 2003/41/EC on the activities and supervision
of institutions for occupational retirement provision,
Directive 2009/65/EC on the coordination of laws,
regulations and administrative provisions relating to undertakings
for collective investment in transferable securities (UCITS)
and Directive 2011/61/EU on Alternative Investment Funds Managers
in respect of over-reliance on credit ratings**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular
Article 53(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure³,

¹ OJ C 167, 13.6.2012, p. 2.

² OJ C 229, 31.7.2012, p. 64.

³ Position of the European Parliament of 16 January 2013 [(OJ ...)] [(not yet published in the Official Journal)] and decision of the Council of

Whereas:

- (1) Directive 2003/41/EC of the European Parliament and of the Council¹ provides for regulation at Union level of institutions for occupational retirement provision (IORPs). Directive 2009/65/EC of the European Parliament and of the Council² provides for regulation at Union level of undertakings for collective investment in transferable securities (UCITS). Similarly, Directive 2011/61/EU of the European Parliament and of the Council³ provides for regulation at Union level of managers of alternative investment funds (AIFMs). All three Directives establish prudential requirements as regards risk management by IORPs, by management and investment companies with regard to UCITS, and by AIFMs, respectively.
- (2) An effect of the financial crisis has been that there is over-reliance by investors, including IORPs, UCITS, and alternative investment funds (AIFs), on credit ratings to carry out their investments in debt instruments, without necessarily conducting their own assessments of the creditworthiness of issuers of such debt instruments. In order to improve the quality of the investments made by IORPs, UCITS and AIFs and, therefore, to protect investors in those funds, it is appropriate to require IORPs, management and investment companies with regard to UCITS, and AIFMs to avoid relying solely or mechanistically on credit ratings or using them as the only parameter when assessing the risk involved in the investments made by IORPs, UCITS and AIFs. The general principle against over-reliance on credit ratings should therefore be integrated into the risk-management processes and systems of IORPs, management and investment companies with regard to UCITS, and AIFMs, and adapted to their specificities.

¹ OJ L 235, 23.9.2003, p. 10.

² OJ L 302, 17.11.2009, p. 32.

³ OJ L 174, 1.7.2011, p. 1.

- (3) In order to specify further the general principle against over-reliance on credit ratings, which should be introduced into Directives 2009/65/EC and 2011/61/EU, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission to ensure that management and investment companies with regard to UCITS, and AIFMs are effectively prevented from over-reliance on credit ratings for assessing the creditworthiness of the assets held. It is appropriate in this regard to amend the powers of the Commission in those Directives to adopt delegated acts in respect of the general provisions regarding risk-management processes and systems employed by management and investment companies with regard to UCITS, and AIFMs. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that it publish the results of such consultations. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (4) The relevant measures set out in this Directive should be complementary to other provisions in Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies¹. Those provisions set the general objective of reducing over-reliance by investors on credit ratings and should facilitate the achievement of that objective.

¹ OJ L 302, 17.11.2009, p. 1.

- (5) Since the objective of this Directive, namely to contribute to the reduction of the over-reliance of IORPs, UCITS and AIFs on credit ratings when making their investments, cannot be sufficiently achieved at the Member State level acting in a coordinated manner and can therefore, by reason of the pan-Union structure and impact of the activities of IORPs, UCITS, AIFs and credit rating agencies, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (6) Directives 2003/41/EC, 2009/65/EC and 2011/61/EU should therefore be amended accordingly.
- (7) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents¹, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

¹ OJ C 369, 17.12.2011, p. 14.

Article 1
Amendment to Directive 2003/41/EC

In Article 18 of Directive 2003/41/EC, the following paragraph is inserted:

"1a. Taking into account the nature, scale and complexity of the activities of the institutions supervised, Member States shall ensure that the competent authorities monitor the adequacy of the institutions' credit assessment processes, assess the use of references to credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies*, in their investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings.

* OJ L 302, 17.11.2009, p. 1."

Article 2
Amendments to Directive 2009/65/EC

Article 51 of Directive 2009/65/EC is amended as follows:

(1) in paragraph 1, the first subparagraph is replaced by the following:

"1. A management or investment company shall employ a risk-management process which enables it to monitor and measure at any time the risk of the positions and their contribution to the overall risk profile of the portfolio of a UCITS. In particular, it shall not solely or mechanistically rely on credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies*, for assessing the creditworthiness of the UCITS' assets.

* OJ L 302, 17.11.2009, p. 1.";

(2) the following paragraph is inserted:

"3a. Taking into account the nature, scale and complexity of the UCITS' activities, the competent authorities shall monitor the adequacy of the credit assessment processes of the management or investment companies, assess the use of references to credit ratings, as referred to in the first subparagraph of paragraph 1, in the UCITS' investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings.";

(3) paragraph 4 is amended as follows:

(a) point (a) is replaced by the following:

"(a) criteria for assessing the adequacy of the risk-management process employed by the management or investment company in accordance with the first subparagraph of paragraph 1;"

(b) the following subparagraph is added:

"The criteria referred to in point (a) of the first subparagraph shall ensure that the management or investment company is prevented from relying solely or mechanistically on credit ratings, as referred to in the first subparagraph of paragraph 1, for assessing the creditworthiness of the UCITS' assets."

Article 3
Amendments to Directive 2011/61/EU

Article 15 of Directive 2011/61/EU is amended as follows:

(1) in paragraph 2, the first subparagraph is replaced by the following:

"2. AIFMs shall implement adequate risk-management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed. In particular, AIFMs shall not solely or mechanistically rely on credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies*, for assessing the creditworthiness of the AIFs' assets.

* OJ L 302, 17.11.2009, p. 1.";

(2) the following paragraph is inserted:

"3a. Taking into account the nature, scale and complexity of the AIFs' activities, the competent authorities shall monitor the adequacy of the credit assessment processes of AIFMs, assess the use of references to credit ratings, as referred to in the first subparagraph of paragraph 2, in the AIFs' investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings.";

(3) in paragraph 5, the following subparagraph is added:

"The measures specifying the risk-management systems referred to in point (a) of the first subparagraph shall ensure that the AIFMs are prevented from relying solely or mechanistically on credit ratings, as referred to in the first subparagraph of paragraph 2, for assessing the creditworthiness of the AIFs' assets.".

Article 4

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...*. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

* OJ please insert date: 18 months after the date of entry into force of this Directive.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 5

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 6

Addressees

This Directive is addressed to the Member States.

Done at ...,

For the European Parliament

The President

For the Council

The President
