



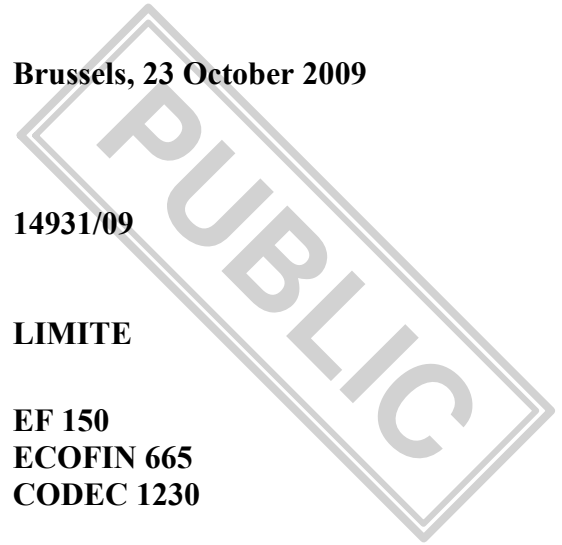
**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 23 October 2009

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NOTE

from: Presidency
to: Delegations

Subject: Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/.../EC
- Compromise proposals by the Presidency

Delegations will find attached compromise proposals by the Presidency with regard to the above-mentioned Commission proposal. Changes compared to the Commission proposal are indicated in track changes.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on Alternative Investment Fund Managers and amending Directives ~~2004/39/EC~~ and
2009/...65/EC**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

SECTION 3: ORGANISATIONAL REQUIREMENTS

Article 15

General principles

AIFM shall, at all times, use adequate and appropriate human and technical resources that are necessary for the proper ~~performance of their~~ management activities of AIF.

They shall have updated systems, documented internal procedures and regular internal controls of their conduct of business, in order to mitigate and manage the risks associated with their activity.

2009/0064 (COD)

Proposal for a

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**on Alternative Investment Fund Managers and amending Directives ~~2004/39/EC~~ and
2009/...65/EC**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

[...]

Whereas:

[...]

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

General provisions

[...]

Article 3

Definitions

For the purpose of this Directive, the following definitions shall apply:

[...]

- (h) ‘Home Member State’ means the Member State in which the AIFM has its registered office~~been authorised pursuant to Article 6~~;
- (i) ‘Host Member State’ means a Member State, other than the home Member State, within the territory of which an AIFM ~~provides management services to AIF or~~ markets shares or units thereof;

[...]

(m) ‘Qualifying holding’ means any direct or indirect holding in an AIFM which represents 10% or more of the capital or of the voting rights, as set out in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market¹⁷, taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists. ~~For this purpose the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market¹⁷ shall be taken into account;~~

(ma) ‘Parent undertaking’ means a parent undertaking as defined in Articles 1 and 2 of Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts^{16a}.

(mb) ‘Subsidiary’ means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;

(mc) ‘Control’ means control as defined in Article 1 of Directive 83/349/;

¹⁷ OJ L 390, 31.12.2004, p. 38.

¹⁷ OJ L 390, 31.12.2004, p. 38.

^{16a} OJ L 193, 18.7.1983, p. 1.

[...]

(oa) 'Close links' means a situation in which two or more natural or legal persons are linked by:

(a) participation which means the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking.

(b) control which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered a subsidiary of the parent undertaking which is at the head of those undertakings.

A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons.

Chapter II

AUTHORISATION OF AIFM

Article 4

Requirement for authorisation

[...]

Article 5

Procedure for granting the authorisation

Member States shall require that aAn AIFM applying for an authorisation shall provide the following to the competent authorities of the home Member State ~~where it has its registered office~~:

- (a) information on the persons who effectively conduct the business of the AIFM and the identities of the ~~AIFM~~-shareholders or members of the AIFM, whether direct or indirect, natural or legal persons, that have qualifying holdings and of the amounts of those holdings;
- (b) a programme of activity, including information on how the AIFM intends to comply with its obligations under Cehapters III, IV, and where applicable, V, VI [and VII];
- (c) ~~detailed~~ information about the characteristics of the AIF it manages or intends to manage, including the identification of the Member States or third countries ~~on whose territory~~ in which they are ~~established~~ domiciled or to be established;

- [(d) the fund rules or instruments of incorporation of each AIF the AIFM manages and where available, the fund rules or instruments of incorporation of each AIF the AIFM intends to manage;]
- (e) [...];
- ~~(f) information on the arrangements made for the safe keeping of the assets of AIF including[, where applicable, arrangements made under Article 38];~~
- (g) any relevant additional information referred to in Article 20(1).

~~The AIFM must have its head office in the same Member State as its registered office.~~

Article 6

Conditions for granting the authorisation

1. The competent authorities of the home Member State shall grant authorisation only if they are satisfied that the AIFM will be able to fulfil the conditions of this Directive.

The authorisation shall be valid for all Member States.

- ~~1a. The competent authorities of the home Member State shall not grant authorisation to an AIFM unless~~
 - ~~(a) the AIFM has sufficient initial capital in accordance with the requirements in Article [6a/14];~~

(b) the persons who effectively conduct the business of an AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the type of AIF managed by the AIFM, the names of those persons and of every person succeeding them in office being communicated forthwith to the competent authorities and the conduct of the business of an AIFM being decided by at least two persons meeting such conditions;

(c) the shareholders or members of the AIFM that have qualifying holdings are suitable taking into account the need to ensure the sound and prudent management of the AIFM; and

(d) the head office and the registered office of the AIFM are located in the same Member State.

[1c. The competent authorities of the other Member State involved shall be consulted beforehand in relation to the authorisation of any AIFM which is one of the following:

(a) a subsidiary of another AIFM, a management company authorised under Directive 2009/65/EC (hereinafter referred to as a UCITS management company), an investment firm, a credit institution or an insurance undertaking authorised in another Member State;

(b) a subsidiary of the parent undertaking of another AIFM, a UCITS management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State; or

(c) a company controlled by the same natural or legal persons as control another AIFM, a UCITS management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State.]

2. The competent authorities of the home Member State shall refuse authorisation where the effective exercise of their supervisory functions is prevented by any of the following:

(aa) close links between the AIFM and other natural or legal persons:

(a) the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the AIFM has close links ~~as defined in Article 4(31) of Directive 2004/39/EC;~~

(b) difficulties involved in the enforcement of those laws, regulations and administrative provisions-

The competent authorities of the home Member State shall require that an AIFM provides them with the information they require to monitor compliance with the conditions referred to in this paragraph on a continuous basis.

3. [...]

4. The competent authorities of the home Member State shall inform the applicant, within [two/six] months of the submission of a complete application, whether or not authorisation has been granted.

~~Reasons shall be given whenever an authorisation is refused or when restrictions are imposed.~~

5. Without prejudice to Article 31 as regards marketing, AIFM may start ~~providing~~ managementing services AIF in the home Member State as soon as the authorisation is granted.

Article [6a/14]

Initial capital and own funds

[...]

Article 7

Changes in the scope of the authorisation

Member States shall require that AIFM ~~shall~~, before implementation, shall notify the competent authorities of the home Member State of any material changes ~~to~~ regarding the information provided in their initial application that may substantially affect the conditions for under which the initial authorisation has been granted[, in particular substantial changes of the investment strategy and policy of any AIF managed by it, ~~of the AIF rules or instruments of incorporation~~ and the identity of any further AIF the AIFM intends to manage].

If ~~t~~the competent authorities decide to impose restrictions or reject those changes, they shall, within [a month/three months] of receipt of that notification, ~~either approve, or impose restrictions, or reject those changes~~ inform the AIFM and provide the reasons for that decision. If the competent authorities do not oppose the changes within the assessment period, they shall be deemed to be approved.

Article 8

Withdrawal of the authorisation

The competent authorities may withdraw the authorisation issued to an AIFM where that AIFM:

- (0) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased the activity covered by this Directive for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (1) has obtained the authorisation by making false statements or by any other irregular means;
- (2) no longer fulfils the conditions under which authorisation was granted;
- (3) has seriously or systematically infringed the provisions adopted pursuant to transposing this Directive; ~~or~~
- (3a) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.]

Operating conditions for AIFM

[SECTION 01: GENERAL PRINCIPLES]

[...]

[Article 8b]

[Qualifying holdings]

- [1. Qualifying holdings in AIFM shall be subject to the same rules as those laid down in Articles 10, 10a and 10b of Directive 2004/39/EC.]
- [2. For the purposes of this Directive, the terms ‘investment firm’ and ‘investment firms’ referred to in Article 10 of Directive 2004/39/EC, mean ‘AIFM’.]

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Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

[...]

Whereas:

[...]

(27) In particular the Commission should be empowered to adopt the measures necessary for the implementation of this Directive. [...] These measures are also designed to specify the criteria to be used by competent authorities to assess whether AIFM comply with their obligations as regards their conduct of business, the type of conflicts of interests AIFM have to identify, as well as the reasonable steps AIFM are expected to take in terms of internal and organizational procedures in order to identify, prevent, manage and disclose conflicts of interest. They are designed to specify the risk management requirements to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages ~~[as well as any arrangements needed to enable AIFM to manage the particular risks associated with short selling transactions, including any relevant restrictions that might be needed to protect the AIF from undue risk exposures]~~. They are designed to specify the liquidity management requirements of this Directive ~~and in particular the minimum liquidity requirements for AIF~~. They are designed to specify the requirements that originators of securitisation instruments have to meet in order for an AIFM to be allowed to invest in such instruments issued after 1 January 2011. They are as well designed to specify the requirements that AIFM have to comply with when investing in such securitisation instruments. [...]

[...]

HAVE ADOPTED THIS DIRECTIVE:

[...]

Chapter III

Operating conditions for AIFM

SECTION 1: CONDUCT OF BUSINESS

Article 9

General principles

1. Member States shall (...) require that AIFM may only manage AIF (...) (...) within the Community ~~only~~ if they comply with the provisions of this Directive (...).

The AIFM shall:

- (a) act honestly, ~~with due skill, care and diligence and fairly in conducting its activities~~ in the best interests of the investors of the AIF it manages and the integrity of the market when conducting its business activities;
- (b) act ~~with due skill, care and diligence,~~ in the best interests of the investors of the AIF it manages, ~~the investors of those AIF~~ and the integrity of the market;

(ba) have and employ effectively the resources and procedures that are necessary for the proper performance of its business activities:

(bb) try to avoid conflicts of interests and, when they cannot be avoided, ensure that the AIF it manages are fairly treated:

(bc) comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of the investors of the AIF it manages its investors and the integrity of the market:

(c) treat ~~ensure that~~ all AIF investors ~~are treated~~ fairly.

No investor may obtain a preferential treatment, unless this is disclosed in the AIF rules or instruments of incorporation.

2. The Commission shall adopt implementing measures specifying the criteria to be used by competent authorities to assess whether AIFM comply with their obligations under paragraph 1.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

Article 10
Conflicts of interest

1. Member States shall require AIFM to take all reasonable steps to identify conflicts of interest that arise in the course of managing one or more AIF:
 - a) between the AIFM, including their managers, employees or any person directly or indirectly linked to the AIFM by control, and the investors in AIF managed by the AIFM or the investors in the AIF, or
 - b) between one such investor or AIF and another, or
 - c) between one such investor or AIF and another client of the AIFM, that arise in the course of managing one or more AIF.

AIFM shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of the AIF and its investors.

~~AIFM shall segregate within its own operating environment, tasks and responsibilities which may be regarded as incompatible with each other. AIFM shall assess whether its operating conditions may involve any other material conflicts of interest and disclose them to the AIF investors.~~

2. Where organisational arrangements made by the AIFM to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to investors' interests will be prevented, the AIFM shall clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf, ~~and develop appropriate policies and procedures.~~

3. The Commission shall adopt implementing measures:
 - (a) further specifying the types of conflicts of interests as referred to in paragraph 1;
 - (b) specifying the reasonable steps AIFM are expected to take in terms of internal and organizational procedures in order to identify, prevent, manage and disclose conflicts of interest.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

Article 11

Risk management

1. The AIFM shall ensure that the functions of risk management and portfolio management are separated so far as is appropriate and proportionate in view of the nature, scale and complexity of the AIFM and the AIF it manages ~~and subject to separate reviews.~~
2. The AIFM shall implement effective risk management systems in order to measure and monitor appropriately all risks associated to each AIF investment strategy and to which each AIF is or can be exposed to.

The AIFM shall review the risk management systems at least once a year and adapt it, whenever necessary.

3. The AIFM shall at least:

- (a) implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF, according to the investment strategy, the objectives and risk profile of the AIF;
- (b) ensure that the risks associated to each investment position of the AIF and their overall effect on the AIF's portfolio can be properly accurately identified, measured and monitored at any time through appropriate stress testing procedures;
- (c) ensure that the risk profile of the AIF shall correspond to the size, portfolio structure and investment strategies and objectives of the AIF as laid down in the AIF rules or instruments of incorporation.

~~[4. In the case of AIFM which engage in short selling when investing on behalf of one or more AIF, Member States shall ensure that the AIFM operates procedures which provide it with access to the securities or other financial instruments at the date when the AIFM committed to deliver them, and that the AIFM implements a risk management procedure which allows the risks associated with the delivery of short sold securities or other financial instruments to be adequately managed.]~~

5. The Commission shall adopt implementing measures further specifying ~~[the following:~~

- ~~(a)]~~ the risk management requirements to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages;
- ~~[(b) any arrangements needed to enable AIFM to manage the particular risks associated with short selling transactions, including any relevant restrictions that might be needed to protect the AIF from undue risk exposures.]~~

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

Article 12

Liquidity management

1. For each AIF it manages the AIFM shall employ an appropriate liquidity management system and adopt procedures which ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.

The AIFM shall regularly conduct stress tests which enables it to assess, ~~both under normal and exceptional liquidity conditions and monitor~~ the liquidity risk of the AIF accordingly.

2. AIFM shall where relevant ensure that the liquidity profile of each AIF it manages is appropriate to the redemption policy of the ~~each AIF it manages has a redemption policy which is appropriate to the liquidity profile of the investments of the AIF and which must be laid down in the AIF rules or instruments of incorporation.~~

3. The Commission shall adopt implementing measures further specifying:

(a) ~~the liquidity management~~ systems and procedures ~~requirements~~ set out in paragraph 1, ~~and~~

(b) ~~in particular, the minimum liquidity requirements for AIF which redeem units or shares more often than half yearly.~~

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

[...]

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

[...]

HAVE ADOPTED THIS DIRECTIVE:

[...]

Article 3
Definitions

[...]

- (f) ‘Professional investor’ means any investor which is considered to be a professional client or may be treated as a professional client on request within the meaning of Annex II of Directive 2004/39/EC;

[...]

Chapter VI

Rights of AIFM to market and manage AIF in the Community

Provision of management and marketing services by AIFM

Article 31

Marketing of shares or units of AIF in the home Member State

1. Member States shall ensure that an ~~An~~ authorised AIFM may market shares or units of an AIF it manages to professional investors in the home Member State as soon as the conditions laid down in this Article are met.
2. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each AIF that it intends to market.

That notification shall comprise the following:

- (a) identification of the AIF it intends to market and information on where the AIF ~~are domiciled~~ is established;
- (b) the AIF rules or instruments of incorporation;
- (c) a description of, or any information on the AIF available to investors;
- (d) where relevant, information on the arrangements established to prevent ~~units or~~ shares or units of ~~that the~~ AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of its the AIF.

3. No later than ten working days after receipt of a complete notification pursuant to paragraph 2, the competent authorities of the home Member State shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2.

Subject to the implementing measures referred to in the third subparagraph, ~~the competent authorities~~ Member States may impose restrictions or conditions on the marketing of AIF pursuant to this Article.

The Commission shall adopt implementing measures specifying the types of restrictions or conditions that can be imposed on the marketing of AIF pursuant to the second subparagraph of this paragraph. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

4. Without prejudice to Article 32(1), Member States shall ~~ensure~~ require that AIF managed by AIFM are only marketed to professional investors.

[...]

Article 33

Conditions for marketing in other Member States

1. Member States shall ensure that ~~Where an authorised AIFM may intends to market to professional investors the units or shares or units of an AIF it manages to professional investors in another Member State than the home Member State as soon as the conditions laid down in this Article are met,~~ it shall submit the following documents to the competent authorities of its home Member State: 1a. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each AIF that it intends to market.

That notification shall comprise the following:

- (a) a notification letter, including a programme of operations identifying the AIF it intends to market and information on where the AIF ~~are domiciled~~ is established;
- (b) the AIF rules or instruments of incorporation;
- (c) a description of, or any information on the AIF available to investors;
- (d) the indication of the Member State in which it intends to market the ~~units or shares or units of an~~ the AIF ~~under its management~~ to professional investors;
- (e) information on arrangements made for the marketing of AIF and, where relevant, information on the arrangements established to prevent ~~units or shares or units of that~~ the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

2. The competent authorities of the home Member State shall, no later than ten working days after the date of receipt of the complete documentation, transmit the complete documentation referred to in paragraph 1 to the competent authorities of the Member State where the AIF ~~will~~ is intended to be marketed. They shall enclose an attestation that the AIFM concerned is authorised.
3. Upon transmission of the documentation, the competent authorities of the home Member State shall without delay notify the AIFM about the transmission. The AIFM may start ~~the~~ marketing ~~of~~ the AIF in the host Member State as of the date of that notification.
4. Arrangements referred to in point (e) of paragraph 1 shall be subject to the laws and supervision of the host Member State.
5. Member States shall ensure that the notification letter referred to in paragraph 1 and the attestation referred to in paragraph ~~1~~ 2 are provided in a language customary in the sphere of international finance[, unless the home Member State and the host Member State agree to the documentation being provided in an official language of both Member States].

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 2 is accepted by their competent authorities.

6. In the event of a change in any of the particulars communicated in accordance with paragraph 2, an AIFM shall give written notice of that change to the competent authorities of its home Member State at least one month before implementing the change.

The competent authorities of the home Member State shall without delay inform the competent authorities of the host Member State of those changes.

7. The Commission shall, in accordance with the procedure referred to in Article 49(2), adopt implementing measures specifying the following:
- (a) the form and content of a standard model of the notification letter;
 - (b) the form and content of a standard model of attestation.
- [8. AIFM may only market shares or units of an AIF ~~domiciled~~ established in a third country to professional investors domiciled in another Member State than the home Member State ~~of the AIFM~~ as from the date referred to in the second subparagraph of Article 54(1).]

Article 34

Conditions for ~~providing the~~ management services of AIF in other Member States

1. Member States shall ensure that an authorised AIFM may ~~provide management services in relation to~~ manage an AIF ~~domiciled~~ established in another Member State either ~~directly or via~~ through the establishment of a branch ~~or the free provision of services~~, provided that the AIFM is authorised to manage that type of AIF.
2. Any AIFM wishing to ~~provide management services in relation to an~~ manage AIF ~~domiciled~~ established in another Member State for the first time shall communicate the following information to the competent authorities of its home Member State:
 - (a) the Member State in which it intends to ~~provide management services~~ manage AIF ~~directly or establish a branch~~;
 - (b) a programme of operations ~~stating in particular the services which it intends to perform and~~ identifying the AIF it intends to manage.

3. If the AIFM intends to establish a branch, it shall provide, in addition to paragraph 2, the following information:
- (a) the organisational structure of the branch;
 - (b) the address in the ~~home~~host Member State from which documents may be obtained;
 - (c) the names of persons responsible for the management of the branch.
4. The competent authorities of the home Member State shall, no later than [ten working days] after the date of receipt of the complete documentation, transmit the complete documentation referred to in paragraph 2, and where relevant 3, as well as an attestation that they have authorised the AIFM concerned to the competent authorities of the host Member State ~~where the management services will be provided and an attestation that they have authorised the AIFM concerned~~. They shall immediately notify the AIFM about the transmission.
- ~~The AIFM may start the management of AIF through the free provision of services Upon receipt of the transmission notification the AIFM may start to provide its services in the host Member State~~ upon receipt of the transmission notification.
- A branch may be established and commence business on receipt of a communication from the competent authorities of the host Member State, or failing such communication after two months from the date of transmission of the communication by the competent authorities of the home Member State.
5. The host Member States shall not impose any additional requirements on the AIFM concerned in respect of the matters covered by this Directive.

6. In the event of a change in any of the particulars communicated in accordance with paragraph 2, and where relevant 3, an AIFM shall give written notice of that change to the competent authorities of its home Member State at least one month before implementing the change.

The competent authorityies of the home Member State shall inform the competent authorityies of the host Member State of those changes.

7. If the AIFM intends to market shares or units of an AIF it manages in the host Member State pursuant to this Article, the conditions laid down in Article 33 shall be met.

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Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

[...]

Whereas:

[...]

HAVE ADOPTED THIS DIRECTIVE:

[...]

Chapter VIII

Competent authorities

SECTION 1: DESIGNATION, POWERS AND REDRESS PROCEDURES

Article 40

Designation of competent authorities

Member States shall designate the competent authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof, indicating any division of duties.

~~Where a Member State designates several competent authorities it shall inform the Commission thereof, indicating any division of duties.~~

The competent authorities shall be public authorities.

Article 40a

Responsibility of competent authorities in home and host Member States

1. The prudential supervision of an AIFM shall be the responsibility of the competent authorities of the home Member State, whether the AIFM carries out the functions referred to in Article 3(2) in another Member State or not, without prejudice to those provisions of this Directive which confer responsibility to the competent authorities of the host Member State.
2. The supervision of compliance with Articles [9 and 10] shall be the responsibility of the competent authorities of the host Member State when an AIFM carries out the functions referred to in Article 3(2) through a branch within the territory of that Member State.

Article 41

Powers of competent authorities

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Such powers shall be exercised in any of the following ways:
 - (a) directly;
 - (b) in collaboration with other authorities;
 - (c) under their responsibility by delegation to entities to which tasks have been delegated;
 - (d) by application to the competent judicial authorities.

2. The competent authorities shall have at least the following powers ~~of investigation~~:
 - (a) have access to any document in any form and to receive a copy of it;
 - (b) require information from any person and if necessary to summon and question a person with a view to obtaining information;
 - (c) carry out on-site inspections with or without prior announcements;
 - (d) require existing records of telephone and existing data traffic records;
 - (e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
 - (f) request the freezing or the sequestration of assets;

- (g) request the temporary prohibition of professional activity;
- (h) require authorised AIFM or depositaries to provide information;
- (i) adopt any type of measure to ensure that AIFM or depositaries continue to comply with the requirements of this Directive;
- (i) withdraw the authorisation granted to an AIFM or a depositary;
- (k) refer matters for criminal prosecution;
- (l) allow auditors or experts to carry out verifications or investigations.

Article 42

Supervisory powers

- ~~1.~~ The home Member State shall ensure that the competent authorities may take the following measures:
- ~~(a) impose a temporary prohibition of professional activity;~~
 - ~~(b) take appropriate measures to ensure that AIFM continue to comply with the relevant legislation;~~
 - ~~(c) refer matters for criminal prosecution to the competent jurisdictions.~~
- ~~2.~~ Member States shall ensure that the competent authorities have the powers necessary to take all measures required in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIF in the market for a financial instrument could jeopardise the orderly functioning of that market.

Article 43

Administrative sanctions

1. Member States shall lay down the rules on measures and sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. Member States shall provide that the competent authority may disclose to the public any measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets, be detrimental to the interests of the investors or cause disproportionate damage to the parties involved.

Article 44
Right of appeal

1. The competent authorities shall give written reasons for any decision to refuse authorisation, or any negative decision taken in the implementation of the general measures adopted in application of this Directive, and communicate them to applicants.
2. Member States shall provide that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned, ~~communicated to the addressee,~~ and is the subject of the right of appeal to the courts.

That right to appeal to the courts shall apply also where, in respect of an application for authorisation which provides all the information required, no decision is taken within [two/six] months of the submission of the application.

SECTION 2

CO-OPERATION BETWEEN DIFFERENT COMPETENT AUTHORITIES

[...]

Article 46

Exchange of information relating to the potential systemic consequences of AIFM activity

1. The competent authorities responsible for the authorisation and supervision of AIFM under this Directive shall communicate information to the competent authorities of other Member States where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFM or AIFM collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFM are active. The Committee of European Securities Regulators (CESR) established by Commission Decision 2009/77/EC of 23 January 2009²⁵ shall also be informed and shall forward this information to the competent authorities of the other Member States.
2. Aggregated information relating to the activities of AIFM under its responsibility shall be communicated on a quarterly basis by the competent authority of the AIFM to ~~the Economic and Financial Committee established by Article 114(2) of the EC Treaty~~ CESR.
3. The Commission shall adopt implementing measures specifying the modalities, content and frequency of the information to be exchanged pursuant to paragraph 1.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

²⁵ OJL 25, 29.01.2009, p. 18-22.