



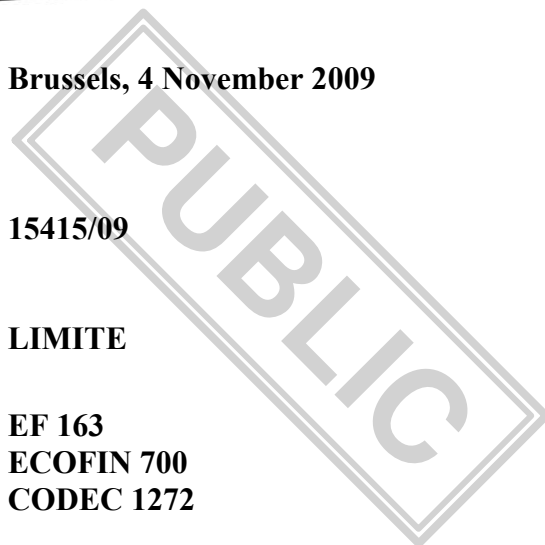
**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 November 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 further 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,

[...]

Whereas:

- (12) It is necessary to ensure that AIFM operate subject to robust governance controls. AIFM should be managed and organised so as to minimise conflicts of interest. Recent developments underline the crucial need to separate asset safe-keeping and management functions, and segregate investor assets from those of the manager. Although AIFM manage AIF with different business models and arrangements for i.a. asset safe-keeping, it is essential that a depositary separate from the AIFM is appointed to provide depositary functions with respect to AIF. The depositary will be responsible for the booking of investor money ~~To this end, the AIFM has to appoint a depositary and entrust it with the booking of investor money~~ on a segregated account, the safe-keeping of financial instruments and other securities, including the holding in custody of financial instruments and other securities not registered by a central securities depository, and the verification of whether the AIF or the AIFM on behalf of the AIF has obtained ownership of all other assets.

- (20) ~~It is appropriate to allow the AIFM to delegate administrative tasks to an entity established in a third country provided that necessary safeguards are in place. Similarly, a depositary may delegate its depositary tasks in respect of AIF domiciled in a third country to a depositary domiciled in that third country, provided that the legislation of that third country ensures a level of protection of investor interests which is equivalent to that in the Community. Under certain conditions, it should also be possible for the AIFM to appoint an independent valuator established in a third country.~~

HAVE ADOPTED THIS DIRECTIVE:

Chapter III

Operating conditions for AIFM

SECTION 3: ORGANISATIONAL REQUIREMENTS

Article 17

Depositary

1. For each AIF it manages, the AIFM shall ensure that a depositary is appointed to fulfil, where relevant, the following ~~tasks~~ depositary functions:
 - (a) ~~receive~~ ensure that all payments made by or on behalf of investors ~~when subscribing upon the subscription of shares or units or shares of an AIF managed by the AIFM and all payments received by or for the benefit of investors upon the repurchase of shares or units of such an AIF have been correctly~~ and booked ~~them~~ on behalf of the AIFM in a segregated account;

- (b) safe-keep any financial instruments and other securities which belong to the AIF, namely:
 - (i) hold in custody all financial instruments and other securities that can be kept and ensure that these are registered within segregated accounts opened in the name of the AIF, so that in the event of the depositary's default they can be clearly identified as belonging to the AIF;
 - (ii) maintain the records necessary to undertake the monitoring of all other financial instruments and other securities, based on the information provided by the AIFM and external evidence of transactions made;
- (bb) ensure that the financial instruments and other securities referred to in subparagraph b(i) may not be re-used without the express consent of the AIFM with has not been withdrawn;
- (c) verify whether the AIF or the AIFM on behalf of the AIF holds has obtained the ownership of title to all other assets the AIF invests in which are not financial instruments or other securities, based on internal and external evidence of ownership.

1a. In addition to the tasks referred to in paragraph 1, the depositary shall ensure that:

- (a) the sale, issue, re-purchase, redemption and cancellation of shares or units of the AIF are carried out in accordance with the applicable national law and the AIF rules or instruments of incorporation;
- (b) where relevant, the value of the shares or units of the AIF is calculated in accordance with the applicable national law and the AIF rules or instruments of incorporation;
- (c) in transactions involving the AIF's assets any consideration is remitted to it within the usual time limits;

(d) no AIFM instructions which conflict with the applicable national law or the AIF rules or instruments of incorporation are carried out.

2. An AIFM shall not act as depositary.

2a. In the context of their respective roles, the AIFM and the depositary shall act honestly, fairly, professionally, independently and solely in the interest of the AIF or the investors of the AIF investors.

3. The depositary shall be either:

(a) a credit institution having its registered office in the Community and be authorised in accordance with Directive 2006/48/EC of the European Parliament and Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)¹; or

(b) an investment firm authorised in accordance with Directive 2004/39/EC, having its registered office in the Community; or

(c) a legal person which is subject to prudential regulation and ongoing supervision and which can furnish sufficient financial and professional guarantees to be able to effectively perform the relevant depositary functions and meet the commitments inherent in those functions; or

(d) a legal person which carries out depositary functions as part of professional or business activities in respect of which it is subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct and which can furnish sufficient financial and professional guarantees to be able to effectively perform the relevant depositary functions and meet the commitments inherent in those functions.

¹ OJ L 177, 30.6.2006, p. 1.

4. The depositaries depositary may delegate to third parties their tasks referred to in paragraph 1(b) and (c) other depositaries.

When the depositary delegates the task of being custodian of financial instruments and other securities according to paragraph 1(b)(i), it must ensure that the sub-custodian fulfils the following conditions:

(a) it is subject to supervision in the jurisdiction concerned;

(b) it has structures and expertise that are adequate and proportionate to the nature, scale and complexity of the AIF;

(c) it is subject to periodic audit to ensure that the financial instruments and other securities are in its possession;

(d) it segregates the financial instruments and other securities from its own assets; and

(e) it may not make use of the financial instruments and other securities without the express consent of the AIFM which has not been withdrawn.

4a. The depositary shall exercise all due skill, care and diligence for the selection, appointment and periodic review of any third party as referred to in paragraph 4.

4b. In the case of loss of financial instruments and other securities held in custody according to paragraph 1 (b) (i), the depositary shall be liable to the AIFM, the AIF and the investors of the AIF. This liability shall not be affected by a delegation to a sub-custodian in accordance with paragraph 4.

However, the depositary may, on a contractual basis, discharge itself of this liability if it can prove that it has fulfilled its obligations pursuant to paragraphs 4 and 4a.

5. The depositary shall be liable to the AIFM, the AIF and the investors of the AIF for any other losses suffered by them as a result of its failure to perform its obligations pursuant to this Directive paragraphs 1, 1a, 2a, 4 and 4a. The depositary's liability shall not be affected by any delegation referred to in paragraph 4.

~~In case of any loss of financial instruments which the depositary safe keeps, the depositary can only discharge itself of its liability if it can prove that it could not have avoided the loss which has occurred.~~

6. Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.

~~The depositary's liability shall not be affected by any delegation referred to in paragraph 4.~~

7. Liability under paragraphs 4b and 5 shall not apply in cases of abnormal and unforeseeable circumstances beyond the control of the party pleading for the application of those circumstances, the consequences of which would have been unavoidable despite all efforts to the contrary (force majeure), or where a depositary is bound by other legal obligations covered by national or Community legislation.

8. The depositary shall make available on request to the competent authorities of its home Member State all information which it has obtained while undertaking its duties and that is necessary for the competent authorities to supervise the AIFM. If the home Member State of the AIFM is different from that of the depositary the competent authorities of the depositary home Member State shall share the information received without delay with the competent authorities of the AIFM home Member State.

9. Any appointment of a depositary shall be subject to approval from the competent authorities of the home Member State of the AIFM.

10. The Commission shall adopt implementing measures further specifying the notions of safe-keeping and custody and the supervisory and due diligence duties of depositaries.

These 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).

Chapter VII

Specific rules in relation to third countries

Article 38

Delegation of the depositary tasks in respect of AIF domiciled in third countries

~~1. By way of derogation from Article 17(4), in respect of AIF domiciled in a third country Member States shall allow the depositary of that AIF appointed in accordance with Article 17 to delegate the performance of one or more of its functions to a sub-depositary domiciled in the same third country provided that the legislation of that third country is equivalent to the provisions of this Directive and is effectively enforced.~~

~~The following conditions shall also be met:~~

- ~~(a) the third country is the subject of a decision taken pursuant to paragraph 4 stating sub-depositaries domiciled in that country are subject to effective prudential regulation and supervision which is equivalent to the provisions laid down in Community law;~~
- ~~(b) co-operation between the home Member State and the relevant authorities of the third country is sufficiently ensured;~~
- ~~(c) the third country is the subject of a decision taken pursuant to paragraph 4 stating that the standards to prevent money laundering and terrorist financing are equivalent to those laid down in Community law.~~

- ~~2. The depositary's liability towards investors shall not be affected by the fact that it has delegated to a third country depositary the performance of all or a part of its tasks.~~
- ~~3. The Commission shall adopt implementing measures specifying the criteria for assessing the equivalence of the prudential regulation, supervision and standards of third countries as referred to in 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).~~

- ~~4. On the basis of the criteria referred to in paragraph 3, the Commission shall, in accordance with the procedure referred to in Article 49(2), adopt implementing measures, stating that prudential regulation, supervision and standards of a third country are equivalent to this Directive.~~

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,

Whereas:

[...]

- (7) This Directive aims at providing a harmonised and stringent regulatory and supervisory framework for the activities of AIFM. Authorisation in accordance with this Directive should cover the ~~services of management and administration~~ of AIF throughout the Community. ~~In addition, authorised AIFM should be entitled to market AIF in the Community to professional investors, subject to a notification procedure. This should include marketing to professional investors of AIF managed by the AIFM and established in a Member State.~~
- (8) This Directive does not regulate AIF. AIF may therefore continue to be regulated and supervised at the national level. (...) The Directive therefore does not prevent Member States from adopting or from continuing to apply (...) national requirements in respect of AIF established on their territory. The fact that a Member State may impose additional requirements on AIF (...) established on its territory compared to requirements applicable in other Member States should not prevent the exercise of rights of AIFM authorised in other Member States in accordance with this Directive to market to professional investors AIF (...) established outside in another Member State than the Member State imposing additional requirements and which are therefore not subject to and do not need to comply with those additional requirements.

[...]

- (19) In order to ensure investor protection, the right for an AIFM to market AIF to professional investors in the Community on the basis of a single authorisation (the European passport for AIFM) should only be granted where the AIF is established in a Member State. This objective should not be circumvented through master-feeder structures. Therefore, when a feeder AIF invests in a master AIF which would not benefit from the right to market in the Community, the feeder AIF should not benefit from such passport either. Member States may, however, allow or continue to allow AIFM to market AIF established in third countries to professional investors on their territory subject to national law. AIFM should also be able to market AIF domiciled in third countries to professional investors both in the home Member State of the AIFM and in other Member States. That right should be subject to notification procedures and the existence of a tax agreement with the third country concerned which ensures an efficient exchange of information with the tax authorities in the domicile of the Community investors. Given the fact that such AIF and the third country in which they are domiciled have to meet additional requirements, some of which first have to be laid down in implementing measures, the rights granted under the Directive to market AIF domiciled in third countries to professional investors should only become effective three years after the transposition period. In the meantime Member States may allow or continue to allow AIFM to market AIF domiciled in third countries to professional investors on their territory subject to national law. During this period of three years, AIFM can however not market such AIF to professional investors in other Member States on the basis of rights granted under this Directive.

[(19a) The investment of an AIFM, on behalf of an AIF it manages, in an AIF established in a third country should be subject to requirements that ensure proper transparency regarding the third country AIF.]

[...]

(27) [...] They are designed to specify the types of restrictions or conditions that can be imposed on the marketing of AIF to professional investor in the home Member State of the AIFM. [...] and, for the purpose of the authorisation of AIFM established in third countries, the equivalence of prudential regulation and ongoing supervision. They are designed to specify general criteria for assessing whether third countries grant Community AIFM effective market access comparable to that granted by the Community to AIFM from third countries. [...]

(28) [...] [Those measures are designed to specify the relevant international standards applicable to information-sharing cooperation agreements with third countries and the reporting requirements applicable to AIFM regarding their investments in third country AIF.] [...] They are designed to state that the legislation on prudential regulation and on-going supervision of AIFM in a specific third country is equivalent to this Directive. They are designed to state whether a specific third country grants Community AIFM effective market access comparable to that granted by the Community to AIFM from that third country.

[...]

HAVE ADOPTED THIS DIRECTIVE:

[...]

Article 3
Definitions

[...]

- (e) 'Marketing' means any ~~general~~ direct or indirect offering or placement, at the initiative of the AIFM, of ~~units or shares~~ or units in an AIF to or with investors domiciled in the Community, ~~regardless of at whose initiative the offer or placement takes place~~; this includes all unsolicited communication in any form and by any means, presenting information on the AIF and the placing of AIF through financial intermediaries;

[...]

Chapter VI

Rights of AIFM to market and manage AIF in the Community (...)

Article 31

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

1. Member States shall ensure that an authorised AIFM may market shares or units of an AIF that it manages and that is established in a Member State to professional investors in the home Member State as soon as the conditions laid down in this Article are met.

Where the AIF is a feeder AIF it is a condition for the right to market referred to in the first subparagraph that the master AIF is established in a Member State and managed by an authorised AIFM.

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 (...) is established;
- (b) the AIF rules or instruments of incorporation;
- (ba) identification of the depository of the AIF;
- (c) a description of, or any information on the AIF available to investors;
- (d) where relevant, information on the arrangements established to prevent (...) shares or units of (...) 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.

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, (...) 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 (...) require that AIF managed by AIFM are only marketed to professional investors.

4a. Member States may allow AIFM to market to professional investors on their territory shares or units of an AIF it manages that is established in a third country and of a feeder AIF that does not fulfil the requirements referred to in the second subparagraph of paragraph 1.

[...]

Article 33

Conditions for marketing in other Member States

1. Member States shall ensure that (...) an authorised AIFM may (...) market (...) shares or units of an AIF that it manages and that is established in a Member State to professional investors in another Member State than the home Member State as soon as the conditions laid down in this Article are met. (...)

Where the AIF is a feeder AIF it is a condition for the right to market referred to in the first subparagraph that the master AIF is established in a Member State and managed by an authorised AIFM.

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 (...) is established;
- (b) the AIF rules or instruments of incorporation;
- (ba) identification of the depository of the AIF;

- (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 (...) shares or units of (...) the AIF (...) to professional investors;
 - (e) information on arrangements made for the marketing of AIF and, where relevant, information on the arrangements established to prevent (...) shares or units of (...) 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 (...) 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 (...) marketing (...) 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 (...) 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 other language.

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 (...) established in a third country to professional investors domiciled in another Member State than the home Member State (...) as from the date referred to in the second subparagraph of Article 54(1).~~

Chapter VII

Specific rules in relation to third countries

Article 35

Conditions for the marketing in the Community of AIF domiciled in third countries

~~An AIFM may only market shares or units of an AIF domiciled in a third country to professional investors domiciled in a Member State, if the third country has signed an agreement with this Member State which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters.~~

~~Where AIFM market shares or units of AIF domiciled in a third country the home Member States may prolong the period referred to in Article 31(3), when this is necessary to check whether the conditions of this Directive are met.~~

~~Before allowing AIFM to market shares or units of AIF domiciled in a third country, the home Member State shall have particular regard to the arrangements made by the AIFM in accordance with Article 38, where relevant.~~

[Article 35a

Conditions for investing in AIF established in third countries

1. An AIFM may invest, on behalf of an AIF it manages, in an AIF established in a third country provided that:
 - (a) the AIF is managed by an AIFM authorised under this Directive, or,
 - (b) where the AIF is managed by an AIFM established in a third country, the third country has in place arrangements for information-sharing arrangements with the home Member State of the AIFM which are in line with relevant international standards.

2. The Commission shall, in accordance with the procedure referred to in Article 49(2), adopt implementing measures specifying the following:
 - (a) the relevant standards referred to in paragraph 1;
 - (b) reporting requirements applicable to professional investors regarding their investments in AIF established in a third country.]

Article 39

Authorisation of AIFM established in third countries

- ~~1. Member States may authorise, in accordance with this Directive, AIFM established in a third country to market units or shares of an AIF to professional investors in the Community under the conditions of this Directive, provided that:~~

- ~~(a) the third country is the subject of a decision taken pursuant to paragraph 3 (a) stating that its legislation regarding prudential regulation and on-going supervision is equivalent to the provisions of this Directive and is effectively enforced;~~
- ~~(b) the third country is the subject of a decision taken pursuant to paragraph 3 (b) stating that it grants Community AIFM effective market access comparable to that granted by the Community to AIFM from that third country;~~
- ~~(c) the AIFM provides the competent authorities of the Member State in which it applies for authorisation with the information referred to in Articles 5 and 31;~~
- ~~(d) a cooperation agreement between the competent authorities of that Member State and the supervisor of the AIFM exists which ensures an efficient exchange of all information that are relevant for monitoring the potential implications of the activities of the AIFM for the stability of systemically relevant financial institutions and the orderly functioning of markets in which the AIFM is active.~~
- ~~(e) the third country has signed an agreement with the Member State in which it applies for authorisation which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters.~~

~~2. The Commission shall adopt implementing measures aimed at establishing:~~

- ~~(a) general equivalence criteria for the equivalence and effective enforcement of third country legislation on prudential regulation and on-going supervision, based on the requirements laid down in Chapters III, IV and V.~~
- ~~(b) general criteria for assessing whether third countries grant Community AIFM effective market access comparable to that granted by the Community to AIFM from those third countries.~~

~~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).~~

~~3. On the basis of the criteria referred to in paragraph 2, the Commission shall, in accordance with the regulatory procedure referred to in Article 49(2), adopt implementing measures stating:~~

~~(a) that the legislation on prudential regulation and ongoing supervision of AIFM in a third country is equivalent to this Directive and effectively enforced;~~

~~(b) that a third country grant Community AIFM effective market access at least comparable to that granted by the Community to AIFM from that third country.~~

2009/0064 (COD)

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,

[...]

Whereas:

[...]

(X) In order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals, there should be an express obligation for AIFM to establish and maintain, for those categories of staff whose professional activities have a material impact on their risk profile or the risk profiles of AIF they manage, remuneration policies and practices that are consistent with effective risk management. These categories of staff should at least include senior management, risk takers and control functions.

(Y) The principles regarding sound remuneration policies set out in Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector¹ are consistent with and complement the principles of this Directive.

(Z) In order to promote supervisory convergences in the assessment of remuneration policies and practices, the Committee of European Securities Regulators should ensure the existence of guidelines on sound remuneration policies in the AIFM sector.

[...]

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

General provisions

[...]

Chapter II

[...]

Operating conditions for AIFM

SECTION 1: CONDUCT OF BUSINESS

[...]

Article 9a

Remuneration

OPTION 1

1. The AIFM shall establish, implement and maintain a remuneration policy for those categories of staff whose professional activities have a material impact on their risk profile. The remuneration policy shall comply with the following principles:

¹ C(2009) 3159

- (a) The remuneration policy shall take into account the size of the AIF managed by the AIFM, the nature of the AIF managed as well as the business model, scope and the complexity of the AIFM's activities.
- (b) The remuneration policy shall be consistent with and promote sound and effective risk management and not encourage risk taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the AIF the AIFM manages.
- (c) The remuneration policy shall be in line with principles related to the protection of the interests of the AIF or the investors of the AIF in the course of collective portfolio management activities provided by the AIFM.
- (d) The remuneration policy shall be clear and documented. It shall be internally transparent and made available on request to all relevant stakeholders, including any changes to the policy.

2. The implementation of the remuneration policy shall be, at least annually, subject to central and independent internal review for compliance with policies and procedures referred to in paragraph 1.

3. The Commission shall adopt implementing measures specifying the reasonable steps AIFM are expected to take in terms of remuneration policy, internal and organizational procedures, including what staff should be included under the remuneration policy, and the criteria to be used by competent authorities to assess whether AIFM comply with their obligations under this Article.

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).

OPTION 2

1. Member States shall require that AIFM establish and apply remuneration policies for those categories of staff, including senior management, whose professional activities have a material impact on their risk profile or the risk profiles of AIF they manage, and that AIFM comply with the following principles in a way and to the extent that is appropriate to their size and the size of AIF they manage, their internal organisation and the nature, the scope and the complexity of their activities:
 - (a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking that exceeds the level of tolerated risk of the AIFM or which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the AIF it manages;
 - (b) the remuneration policy is in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIF it manages or the investors of the AIF, and includes measures to avoid conflicts of interest;
 - (c) the management body in its supervisory function of the AIFM adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;
 - (d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;
 - (e) staff members engaged in risk management are independent from the business units they oversee, have appropriate authority, and are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;

- (f) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;
- (g) the assessment of performance is set in a multi-year framework in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the underlying business cycle of the AIFM and the AIF it manages and their business risks;
- (h) guaranteed variable remuneration is exceptional and occurs only in the context of hiring new staff and is limited to the first year;
- (i) fixed and variable components of total remuneration are appropriately balanced; the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;
- (j) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;
- (k) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes an adjustment for all types of current and future risks and takes into account the cost of the capital and the liquidity required;

- (l) a substantial portion, which is at least 50 % of any variable remuneration component is made in shares or share-linked instruments of the AIFM, subject to the legal structure of the AIFM concerned, or, for non-listed AIFM, in other non-cash instruments where appropriate; these shares, share-linked instruments and non-cash instruments are subject to an appropriate retention policy designed to align incentives with the longer-term interests of the AIFM and, where relevant, of the AIF it manages;
- (m) a substantial portion, which is at least 40 % of the variable remuneration component is deferred over a period which is not less than three years and is correctly aligned with the nature of the business, its risks and the activities of the member of staff in question; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount is deferred;
- (n) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned; the total variable remuneration is generally considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs;
- (o) staff members are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements.

2. The principles set out in paragraph 1 shall apply both to the remuneration paid by the AIFM and to the remuneration paid by the AIF itself (carried interest).

Point (m) of paragraph 1 shall not apply to remuneration paid in connection with the liquidation of an AIF.

3. AIFM that are significant in terms of their size or the size of the AIF they manage, their internal organisation and the nature, the scope and the complexity of their activities shall establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk.

The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the AIFM or the AIF concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the AIFM concerned.

4. The Committee of European Securities Regulators shall ensure the existence of guidelines on sound remuneration policies which comply with the principles set out in paragraph 1 to 3. The guidelines shall also take into account the principles on sound remuneration policies set out in the Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector.

Chapter IV

Transparency requirements

Article 19 *Annual report*

1. [...]
2. The annual report shall at least contain the following:
 - (a) [...]
 - (b) [...]
 - (c) [...]
 - (d) the total amount of remuneration, distinguishing fixed and variable remuneration paid by the AIFM and, where relevant, carried interests paid by the AIF;
 - (e) the individualised amount of remuneration of employees whose remuneration, including carried interests, exceeds the average remuneration of the members of the board of directors in unnamed form.
3. [...]
4. [...]