



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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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 2003/41/EC and 2009/65/EC

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Delegations will find attached a new compromise proposal by the Presidency with regard to the above-mentioned Commission proposal.

Earlier deletions of the Commission's text are denoted by (...) and new deletions by **bold (...)**. Earlier additions are denoted by thin underlining and new additions by **bold underlining**.

2009/0064 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on Alternative Investment Fund Managers and amending Directives 2003/41/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:

- (1) Managers of alternative investment funds (AIFM) are responsible for the management of a significant amount of invested assets in Europe, account for significant amounts of trading in markets for financial instruments, and can exercise an important influence on markets and companies in which they invest.
- (2) The impact of AIFM on the markets in which they operate is largely beneficial, but recent financial difficulties have underlined how activities of AIFM may also serve to spread or amplify risks through the financial system. Uncoordinated national responses to these risks make the efficient management of these risks difficult. This Directive therefore aims at establishing common requirements governing the authorisation and supervision of AIFM in order to provide a coherent approach to the related risks and their impact on investors and markets in the Community.

- (3) Recent difficulties in financial markets have underlined that many AIFM strategies are vulnerable to some or several important risks in relation to investors, other market participants and markets. In order to provide comprehensive and common arrangements for supervision, it is necessary to establish a framework capable of addressing those risks taking into account the diverse range of investment strategies and techniques employed by AIFM. Consequently, this Directive should apply to AIFM managing (...) all types of funds which are not covered by Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to the undertakings for collective investment in transferable securities (UCITS) (recast)<sup>9</sup>, irrespective of the legal or contractual manner in which the AIFM is entrusted with this responsibility. AIFM should not be entitled to manage UCITS within the meaning of Directive 2009/65/EC on the basis of authorisation under this Directive.
- (4) The Directive lays down requirements regarding the way in which AIFM should manage alternative investment funds (AIF) under their responsibility. It would be disproportionate to regulate the structure or composition of the portfolios of the AIF managed by AIFM and it would be difficult to provide for such extensive harmonisation due to the very diverse types of AIF managed by AIFM.
- (5) The scope of this Directive should be confined to the management of (...) AIF of both the open-ended and the closed-ended type, irrespective of their legal form, whether listed or not, which raise capital from a number of investors **by issuing shares or units** with a view to investing it in accordance with a defined investment policy (...) for the benefit of those investors. Management of AIF should mean providing at least investment management services. An authorised AIFM should not be prevented from also engaging in activities of administration and marketing of AIF, or from engaging in activities related to (...) the underlying assets of the AIF.. An externally appointed AIFM should not be prevented from also providing the service of management of portfolios of investments with mandates given by investors on a discretionary, client-by-client basis, including portfolios owned by pension

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<sup>9</sup> OJ L 302, 17.11.2009, p. 32.

funds and institutions for occupational retirement provision which are covered by Directive 2003/41/EC of the European Parliament and the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision<sup>1</sup>, or from providing the non-core services of investment advice and safe-keeping and administration in relation to units of collective investment undertakings. Pursuant to authorisation under Directive 2009/65/EC, an externally appointed AIFM should be allowed to also manage UCITS.

(5a) This Directive should provide for a single AIFM for each AIF managed within the scope of the Directive, which should be responsible for the compliance with the requirements of this Directive. Depending on their legal form, AIF could be either externally or internally managed. AIF should be deemed internally managed when the management functions are performed by the governing body or any other internal resource of the AIF. Where the legal form of the AIF permits an internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF and the AIFM are identical. In that case the AIF is also an AIFM and should therefore comply with all requirements for AIFM under this Directive and be authorised as such. An AIFM which is an internally managed AIF should however not be authorised as the external manager of one or more other AIF. An AIF should be deemed externally managed when an external legal person has been appointed as manager by the AIF or on account of the AIF (the appointed AIFM), which through this appointment is responsible for managing the portfolio of the AIF. In either case only an internally managed AIF or an external AIFM should be able to delegate the portfolio management or risk management functions to other entities in accordance with Article 18. Where an external AIFM has been appointed to perform management functions in relation to a particular AIF, it should not be deemed to be providing the investment service of portfolio management, as defined by Article 4(1)(9) of Directive 2004/39/EC on Markets in Financial Instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC<sup>10</sup>, but instead providing the function of collective portfolio management in accordance with this Directive.

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<sup>1</sup> OJ L 235, 23.9.2003, p. 10.

<sup>10</sup> OJ L 145, 30.4.2004, p. 1.

(5aa) Several provisions of this Directive oblige the AIFM to ensure compliance with requirements for which, in some fund structures, the AIFM is not responsible. An example is fund structures where the responsibility for appointing the depositary rests with the AIF or another entity acting on behalf of the AIF. In such cases, the AIFM has no ultimate control over whether a depositary is actually appointed, unless the AIF is internally managed. Since this Directive does not regulate the AIF, there could be no obligation in the Directive on the AIF to appoint a depositary. In cases of failure of an AIFM to ensure compliance with requirements for which the AIF or another entity on its behalf is responsible, the competent authorities should require the AIFM to take the necessary steps to remedy the situation. If, despite such steps, the non-compliance persists, the AIFM should resign as manager of that AIF, and if the AIFM does not resign, the competent authorities of its home Member State should require that it resign. In that case the AIF may no longer be marketed in the Community.

(5b) This Directive should not apply to (...) managers of non-pooled investments such as endowments and sovereign wealth funds (...), to the management of portfolios of investments in accordance with mandates given by investors on a discretionary, client-by-client basis nor to any other form of individual portfolio management. Nor should this Directive apply to managers insofar as they manage AIF whose only investors are the managers themselves or their parent undertakings, their subsidiaries or other subsidiaries of their parent undertaking and where these investors are not themselves AIF. Nor should this Directive apply to holding companies insofar as they hold shares in their subsidiaries, given that such holding companies are not established for the main purpose of generating returns for their investors by means of, in particular, the divestment of their subsidiaries within a set timeframe, but which are aimed at carrying out a business strategy through their subsidiaries. This Directive should furthermore not apply to the management of pension funds, (...) to supranational institutions, national central banks or national, regional and local governments and bodies or institutions which manage funds supporting social security and pension systems, nor to employee participation schemes or to securitisation vehicles. (...)

(5c) Investment firms authorised under Directive 2004/39/EC (...) and credit institutions authorised under Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)<sup>10a</sup> should not be required to obtain an authorisation under this Directive in order to provide investment services such as **individual** portfolio management in respect of AIF. (...)

(6) In order to avoid imposing excessive or disproportionate requirements, this Directive provides for an exemption for AIFM where the cumulative AIF under management fall below a threshold of EUR 100 million. The activities of the AIFM concerned are unlikely to have significant consequences for financial stability or market efficiency. For AIFM which only manage unleveraged AIF and do not grant investors redemption rights during a period of five years a specific threshold of EUR 500 million applies. This specific threshold is justified by the fact that managers of unleveraged funds, specialised in long term investments, are even less likely to cause systemic risks. Furthermore, the five years lock-up of investors eliminates liquidity risks. AIFM which are exempt from this Directive should (...) be subject to registration in their home Member States. They should however be allowed to be treated as AIFM subject to the opt-in procedure foreseen by this Directive. **In addition, the Directive imposes Member States some minimum requirements. Those AIFM have to be registered in their home Member State and will need to provide competent authorities with relevant information regarding the main instruments in which it is trading, markets of which it is a member or where it actively trades and on the principal exposures and most important concentrations of each AIF it manages. Home Member States may impose additional requirements.**

(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 (...) management (...) of AIF throughout the Community. (...) This should include marketing to professional investors of AIF managed by the AIFM and established in a Member State.

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<sup>10a</sup> OJ L 177, 30.6.2006, p. 1.

- (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 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.
- (9) (...) Member States may allow the marketing of all or certain types of AIF managed by AIFM to retail investors on their territory. (...) If a Member State allows the marketing of certain types of AIF, the Member State should make an assessment case-by-case to determine whether a specific AIF may be referred to as a type of AIF which may be marketed to retail investors on its territory. Without prejudice to the application of other instruments of Community law, Member States may in such cases impose stricter requirements on AIF and AIFM as a precondition for marketing to retail investors than what is the case for AIF marketed to professional investors on their territory, irrespective of whether AIF are marketed on a domestic or cross-border basis. Where a Member State allows the marketing of AIF to retail investors on its territory, this possibility should be available regardless of the Member State where the AIFM is established, and Member States may not impose stricter requirements on AIF established in the Community and marketed on a cross-border basis than on AIF marketed domestically. In addition, investment firms authorised (...) under Directive 2004/39/EC and credit institutions authorised under Directive 2006/48/EC which provide investment services to retail clients have to take into account any (...) additional (...) requirements when assessing whether a certain AIF is suitable or appropriate for an individual retail client or whether it is a complex or non-complex financial instrument. (...)
- (10) **Deleted**

- (11) It is necessary to provide for the application of minimum capital requirements to ensure the continuity and the regularity of the management (...) of AIF provided by the AIFM. (...) If an AIFM not reaching the threshold of EUR 500 million set out in Article 2a(1)(a) opts in as an AIFM falling under the scope of this Directive and the AIFM solely manages AIF which, according to their investment strategy and objectives, make investments and divestments solely on a non-frequent basis, are not leveraged and do not grant investors redemption rights during a period of five years, the capital requirements should be reduced.
- (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 *inter alia* 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 ensuring that investor money is booked correctly in segregated accounts, for the safe-keeping of financial instruments, including the holding in custody of financial instruments that can be kept, and the verification of whether the AIF or the AIFM on behalf of the AIF has obtained ownership of all other assets. When ensuring investor money is booked in segregated accounts, the depositary should at least ensure that appropriate and rigorous processes for segregation are in place and routinely observed. The holding of assets could be delegated to a third party, which in its turn could delegate this function. A third party may maintain a common segregated account for multiple AIF. A depositary should act honestly, fairly, professionally, independently and in the interest of the AIF or the investors of the AIF. **The depositary should be liable for the losses suffered by the AIFM, the AIF and the investors as a result of its failure to perform its obligations, including the obligation to return the financial instruments lost while held in its custody. The depositary, however, should be able to discharge itself from this restitution if it has lawfully delegated such custody and it would be unreasonable for it to remain liable. Finally, this liability regime acknowledges the existence of other circumstances caused by force majeure that may exempt the depositary from its liability, although the legal regime of such circumstances of force majeure is a matter of national private laws and, therefore, beyond the harmonising objective of this Directive.**

- (12a) 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 the risk profiles of AIF they manage, remuneration policies and practices that are consistent with sound and effective risk management. These categories of staff should at least include senior management, risk takers and control functions.
- (12aa) The principles governing remuneration policies should recognise that AIFM may apply the provisions in different ways according to their size and the size of the AIF they manage, their internal organisation and the nature, the scale and the complexity of their activities.
- (12b) The principles regarding sound remuneration policies set out in the Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector<sup>1</sup> are consistent with and complement the principles of this Directive.
- (12c) 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. The Committee of European Banking Supervisors should assist in the elaboration of such guidelines.
- (13) Reliable and objective asset valuation is crucial for the protection of investor interests. Different AIFM employ different methodologies and systems for valuing assets, depending on the assets and markets in which they predominantly invest. It is appropriate to recognise these differences but to, nevertheless, require the (...) AIFM to implement valuation procedures resulting in the proper valuation of assets of the AIF.

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<sup>1</sup> C(2009) 3159

- (14) AIFM may delegate (...) the performance of its functions in accordance with this Directive. AIFM should however not be able to delegate their functions to the extent that they become a letter-box entity. AIFM should remain responsible for the proper performance of their functions and compliance with the rules set out in this Directive. The functions of an AIFM are listed in Annex I. All functions may not be applicable for all kinds of AIFM. For example, a closed-ended AIF does not redeem shares (or units). In some cases, when delegating the functions of investment management, it is not possible to delegate to entities under supervision, whether or not they are established within the Community. This concerns in particular the investment strategies of private equity and real estate funds. It may occasionally be applicable for other investment strategies. Where this condition cannot be satisfied, delegation may only be given on the condition of prior authorisation by the competent authorities of the home Member State. It is appropriate to allow the AIFM to delegate (...) the performance of its functions to an entity established in a third country (...). Where the delegation concerns investment management, supervisory cooperation with that third country should be ensured. One way of ensuring supervisory cooperation could be through an appropriate cooperation agreement between the authorities concerned.
- (15) Given that an AIFM may employ (...) leverage, at the level of the AIF, (...) and may, under certain conditions, contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFM employing leverage (...). The information needed to detect, monitor and respond to those risks has not been collected in a consistent way throughout the Community, and shared across Member States so as to identify potential sources of risk to the stability of financial markets in the Community. To remedy this situation, special requirements should apply to AIFM, which employ (...) leverage at the level of the AIF (...). Such (...) AIFM should be obliged to disclose information regarding the (...) use and sources of leverage in their AIF. (...) Information gathered by competent authorities should be aggregated and shared with other authorities in the Community, so as to facilitate a collective analysis of the impact of the leverage of (...) AIF managed by AIFM on the financial system in the Community, as well as a common response. If one or several AIF managed by an AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States, such information should also be shared with the relevant authorities.

- (16) (...) It is considered necessary to allow the competent authorities of the home Member State of the AIFM (...) to impose limits on the level of leverage that AIFM could (...) employ in AIF where the stability and integrity of the financial system may be threatened. (...)
- (17) It is necessary to ensure that an AIFM provides (...) companies over which it can exercise control (...) with the information necessary for the company to assess how this control (...) in the short to medium term impacts the company's (...) situation. When AIFM are managing AIF which are in a position to exercise control over an issuer whose shares are admitted to trading on a regulated market, information shall be disclosed according to Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids<sup>1</sup> and 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 market and amending Directive 2001/34/EC<sup>2</sup>. To this end, particular requirements should apply to AIFM managing AIF which are in a position to exercise control (...) over a (...) non-listed company (...). In order to ensure transparency regarding the controlled company, enhanced reporting requirements should apply. The annual reports of the relevant AIF should be supplemented with (...) regard to the controlled company. When an AIFM is exempted from the obligation to make available annual reports for an AIF it manages, the AIFM should be obliged to make available this additional information in a separate document. When an AIFM manages AIF which reach a position to exercise control over a non-listed company, the AIFM should be obliged to provide the competent authorities of its home Member State and the investors of the AIF concerned with information on the debt supported directly or indirectly by the non-listed company, directly before and immediately after the control has been reached and six months and twelve months thereafter. These obligations to provide information on debt should apply also when an AIFM manages AIF which reach a position to exercise control over an issuer of shares admitted to trading on a regulated market. The obligations to report and provide information should apply without prejudice to Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>3</sup> and Directives 2004/25/EC and 2004/109/EC.

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<sup>1</sup> OJ L 142, 30.4.2004, p. 12.

<sup>2</sup> OJ L 390, 31.12.2004, p. 38.

<sup>3</sup> OJ L 80, 23.3.2002, p. 29.

(17a) In order to ensure a level playing field, also other entities than AIFM should provide companies over which they can exercise control with the information necessary for the company to assess how this control in the short to medium term impacts the company's situation. For the same reason, reporting requirements regarding such controlled companies should be equivalent to the requirements regarding companies over which an AIFM can exercise control. For this purpose, the Commission should conduct a review of relevant company law legislation as well as relevant financial sector directives before three years after the date the rules enter into force in the Member States.

(18) Many AIFM currently manage AIF (...) established in third countries. It is appropriate to allow authorised AIFM to manage AIF (...) established in third countries, subject to appropriate arrangements that ensure the sound administration of those AIF (...). It should be ensured that the AIF in the third country in question complies with standards set by international organisations, *inter alia* the IOSCO standards on hedge funds oversight. Furthermore, cooperation with that third country enabling proper supervisory arrangements should be ensured.

(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. (...)

**(19a) The Commission should review the relevant legislation about institutional investors before two years after the entry into force of this Directive in order to assess the need to impose tighter requirements and more transparency for those institutional investors investing in AIF managed by AIFM established outside the European Union.**

(20) Deleted, see (14)

(21) Deleted

- (22) It is necessary to clarify the powers and duties of competent authorities responsible for implementing this Directive, and to strengthen the mechanisms needed to ensure the necessary level of cross-border supervisory cooperation, including efficient mechanisms for information sharing. In this context, subsequent changes to the Directive will at a later stage have to be made in order to take into account the coming establishment of the European Securities Markets Authority (ESMA).
- (23) The relative importance of the activities of AIFM in some financial markets, especially in those cases where the AIF they manage do not have a material interest in the underlying products or instruments from which those markets derive, could, under some circumstances, hinder the efficient functioning of those markets. For example it could make those markets excessively volatile or affect the correct pricing of the instruments traded in them. It is therefore considered necessary to make sure the competent authorities enjoy the powers necessary to monitor the activities of AIFM in those markets and to intervene in those circumstances where it would be necessary to protect their orderly functioning. It would also be necessary to provide for a possibility for the new European Systemic Risk Board to request systemically relevant information from the competent authorities.
- (24) Member States should lay down rules on sanctions applicable to infringements of the provisions of this Directive and ensure that they are implemented. The sanctions should be effective, proportionate and dissuasive.
- (25) Any exchange or transmission of information between competent authorities, other authorities, bodies or persons should be in accordance with the rules on transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>1</sup>.

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<sup>1</sup> OJ L 281, 23.11.1995, p. 31.

- (26) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>1</sup>. Regarding the procedure for the adoption of technical standards, subsequent changes will at a later stage have to be made in order to take into account the coming establishment of ESMA.
- (27) In particular the Commission should be empowered to adopt the measures necessary for the implementation of this Directive. In this respect, the Commission should be able to adopt measures clarifying (...) how to treat AIFM whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold set out in this Directive and the procedures under which AIFM managing portfolios of AIF whose assets under management do not exceed the threshold set out in this Directive may exercise their right to be treated as AIFM covered by this Directive. These measures are also designed to clarify the definition of leverage, to specify when leverage is considered to be employed on a systematic bases and how leverage is to be calculated. They are designed to specify the circumstances under which marketing should be deemed to be at the initiative of the AIFM or on behalf of the AIFM. They are 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 when the risk management function does not need to be separated, the appropriate frequency for review of the risk management system and 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 (...). They are designed to specify the liquidity management systems and procedures that AIFM shall employ, when an AIF shall be considered not to be closed-ended and the alignment of the investment strategy, liquidity profile and redemption policy (...).

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<sup>1</sup> OJ L 184, 17.7.1999, p. 23.

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. They are designed to specify the procedures for the proper valuation of the assets and shares or units of AIF, the appropriate level of functional independence of the valuation function and the periodicity for valuation appropriate for open-ended funds. As regards depositaries, they are designed to specify the modalities for the segregation of payments in different accounts, the notions of safe-keeping and custody, including the modalities for the segregation of financial instruments in different accounts, the determination of when financial instruments can be kept or subject to trading and when there is a loss of financial instruments or other losses, the supervisory duties of depositaries. Those measures are also designed to specify the conditions for delegation of depositary functions, including the due diligence duties of depositaries, the determination of when there are objective reasons for delegation, the need for cooperation arrangements with other jurisdictions and the conditions under which a depositary may discharge itself of liability in the case of loss of financial instruments held by a sub-custodian. They are also designed to specify the conditions for approval of depositaries, including an assessment of whether the depositary 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. They are designed to specify the conditions under which the delegation of AIFM functions should be approved and the conditions under which the manager could no longer be considered to be the manager of the AIF in case of excessive delegation. They are designed to specify the content (...) of the annual report that AIFM have to make available for each AIF they manage and to specify the disclosure obligations of AIFM to investors and reporting requirements to competent authorities as well as their frequency. They are designed to specify the disclosure requirements imposed on AIFM, particularly with (...) regard(...) to leverage and the frequency of reporting to competent authorities and of disclosure to investors. They are also designed to specify the principles competent authorities should use when considering implementation of limits on leverage. (...) They are designed to specify the international standards and cooperation arrangements in relation to AIF established in

third countries. They are designed to specify the modalities, content and frequency of exchange of information regarding AIFM between the competent authorities of the home Member State of the AIFM and other competent authorities where the AIFM individually or collectively with other AIFM may have an impact on the stability of systemically relevant financial institutions and the orderly functioning of markets. They are designed to specify the procedures for on-the-spot verifications and investigations.

- (28) Since those measures are of general scope and are designed to amend non-essential elements of this Directive, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC. Measures not falling under the above category should be subject to the regulatory procedure provided in Article 5 of that Decision. Those measures are designed to (...) specify standard models for notification and attestations and to specify the procedure for the exchange of information between competent authorities.
- (29) Since the objectives of the action to be taken, namely to ensure a high level of consumer and investor protection by laying down a common framework for the authorisation and supervision of AIFM cannot be sufficiently achieved by the Member States, as evidenced by the deficiencies of existing nationally based regulation and oversight of these actors, and can therefore, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. 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 those objectives.
- (29a) In accordance with point 34 of the Interinstitutional Agreement on better law-making<sup>12a</sup>, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

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<sup>12a</sup> OJ C 321, 31.12.2003, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

## **Chapter I** **General provisions**

### *Article 1*

#### *Subject matter*

This Directive lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFM) established in the Community.

### *Article 2*

#### *Scope*

1. This Directive shall apply to all AIFM established in the Community, which (...) manage one or more alternative investment funds (AIF) irrespective of:

(a) whether the AIF is (...) established inside or outside of the Community;

(b)(...)

(c) whether the AIF belongs to the open-ended or closed-ended type;

(ca) whether the AIF is constituted under the law of contract or under trust law, under statute or has any other legal form;

(d) the legal structure (...) of the AIFM.

An AIFM authorised in accordance with this Directive to (...) manage one or more AIF is also entitled to market shares or units of these AIF to professional investors in the Community subject to the conditions laid down in Chapter VI (...).

An AIF shall be deemed to be established inside the Community if it is established in a home Member State as defined in point (ia) of Article 3(1).

1a. [ (...) AIFM (...) which manage AIF (...) which are neither established nor marketed in the Community shall not be subject to Articles 17 and 19 and Chapter VI in respect of those AIF. ]

(...)

1b. [ AIFM which manage AIF which are not established but, in accordance with Article 31.4a, are marketed in the Community shall not be subject to Article 17 in respect of those AIF. **However, the AIFM shall provide competent authorities with the information about the identity of those persons responsible for carrying out the duties referred to in paragraphs 1 and 1a of article 17. The AIFM shall not perform those functions.** ]

*Article 2a*

*Exemptions*

(...)1. This Directive shall not apply to any of the following:

- (a) AIFM which either directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIF whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million (...) or EUR 500 million (...) when the portfolio of AIF consists of AIF that are not leveraged and (...) have no redemption rights exercisable during a period of 5 years following the date of initial investment in (...) each AIF; such AIFM shall however be subject, at least, to registration in their home Member States.

**In addition, those AIFM shall regularly provide the competent authorities of its home Member State with information on the main instruments in which it is trading, markets of which it is a member or where it actively trades and on the principal exposures and most important concentration of each AIF it manages;**

- (b) (...)

(ba) AIFM insofar as they manage one or more AIF whose only investors are the AIFM themselves or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors itself is an AIF;

(c) (...)

(d) (...)

(e) institutions which are covered by Directive 2003/41/EC of the European Parliament and the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision<sup>1</sup> (IORP), including, where applicable, the authorised entities responsible for managing IORP and acting on their behalf referred to in Article 2(1) of that Directive or the appointed investment managers pursuant to Article 19(1) of the same Directive, insofar as they do not manage AIF established in the Community;

(f) (...)

(g) supranational institutions, such as the World Bank, the IMF, the ECB, the EIB, the EIF, other supranational institutions and similar international organisations (...);

(h) national central banks;

(i) national, regional and local governments and bodies or institutions which manage funds supporting social security and pension systems;

(ia) employee participation schemes;

(j) securitisation special purpose entities.

(...)2. Member States shall ensure that AIFM not reaching the relevant threshold set out in paragraph (...)1(a) are entitled to be treated as AIFM falling under the scope of this Directive if they choose to opt in under the Directive.

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<sup>1</sup> OJ L 235, 23.9.2003, p. 10.

- (...)3. The Commission shall adopt implementing measures with a view to clarifying (...):
- (a) how to treat AIFM referred to in paragraph 1(a) whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold;
  - (b) the procedures under which AIFM managing portfolios of AIF whose assets under management do not exceed the threshold set out in paragraph (...)1(a) may exercise their right under paragraph 2(...)
  - (c) the obligations to provide information referred to in paragraph 1 (a) and their frequency.**

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 3*

#### *Definitions*

1. For the purpose of this Directive, the following definitions shall apply:
- (a) ‘Alternative investment fund’ or AIF means any collective investment undertaking, including investment compartments thereof, (...)
    - (i) which raises capital from a number of investors by issuing shares or units, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
    - (ii) which does not require authorisation pursuant to Article 5 of Directive 2009/65/EC (...);
  - (b) ‘Manager of alternative investment funds’ or AIFM means any legal (...) person (...) **(...)managing** one or (...) more AIF (...);

- (c) (...)
- (d) ‘Managing AIF’ means providing at least investment management services referred to in point 1(a) and (b) of Annex I to one or more AIF;
- (e) ‘Marketing’ means any (...) direct or indirect offering or placement, at the initiative of the AIFM or on behalf of the AIFM, of (...) shares or units in an AIF it manages to or with investors domiciled in the Community (...);
- (ea) “activities related to the underlying assets of AIF” means performing services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the AIF and the companies and other assets it has invested in.**
- (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;
- (g) ‘Retail investor’ means any investor who is not a professional investor;
- (ga) ‘Feeder AIF’ means an AIF which invests at least 85 % of its assets in shares or units of another AIF (the master AIF) or in more than one master AIF where those master AIF have identical investment strategies;
- (h) ‘Home Member State of an AIFM’ means the Member State in which the AIFM has its registered office (...);
- (i) ‘Host Member State of an AIFM’ means a Member State, other than the home Member State, within the territory of which an AIFM (...) manages (...) AIF or markets shares or units thereof through the establishment of a branch or the free provision of services;

- (ia) ‘Home Member State of an AIF’ means
- (i) the Member State in which the AIF is authorised or registered under applicable national law; or
  - (ii) if the AIF is not authorised or registered in a Member State, the Member State in which the AIF has its registered office and/or head office;
- (ib) ‘Host Member State of an AIF’ means a Member State, other than the home Member State, within the territory of which the shares or units of the AIF are marketed;
- (ic) ‘Home Member State of a depositary’ means
- (i) if the depositary is a credit institution authorised under Directive 2006/48/EC, the home Member State as defined in Article 4(7) of that Directive;
  - (ii) if the depositary is an investment firm authorised under Directive 2004/39/EC, the home Member State as defined in Article 4(1)(20)(a) of that Directive;
  - (iii) if the depositary is a legal person referred to in point (c) of the first subparagraph of Article 17(3) or an entity referred to in the second subparagraph of that Article, the Member State in which it has its registered office;
- (j) ‘Competent authorities of an AIFM’ means the national authorities which are empowered by law or regulation to supervise AIFM;
- (ja) ‘Competent authorities of an AIF’ means the national authorities of a Member State which are empowered by law or regulation to supervise AIF;
- (jb) ‘Competent authorities of a depositary’ means
- (i) if the depositary is a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in Article 4(4) of that Directive;
  - (ii) if the depositary is an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in Article 4(1)(22) of that Directive;

- (iii) if the depositary is a legal person referred to in point (c) of the first subparagraph of Article 17(3), the national authorities of its home Member State which are empowered by law or regulation to supervise such legal persons;
- (k) ‘Financial instrument’ means an instrument as specified in Annex I Section C of Directive 2004/39/EC;
- (l) ‘Leverage’ means any method by which the AIFM increases the exposure of an AIF it manages (...) whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means;
- (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, 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 (...);
- (ma) ‘Branch’ means a place of business which is a part of the AIFM, which has no legal personality and which provides the services for which the AIFM has been authorised; all the places of business established in the same Member State by an AIFM with its head office in another Member State shall be regarded as a single branch;
- (mb) ‘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<sup>16a</sup>;
- (mc) ‘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;

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<sup>16a</sup> OJ L 193, 18.7.1983, p. 1.

- (md) ‘Control’ means control as defined in Article 1 of Directive 83/349/EC;
- (me) ‘Initial capital’ means the funds as referred to in Article 57(a) and (b) of Directive 2006/48/EC;
- (mf) ‘Own funds’ means own funds as referred to in Title V, Chapter 2, Section 1 of Directive 2006/48/EC;
- (n) ‘Issuer’ means any issuer (...) within the meaning of Article 2(1)(d) of Directive 2004/109/EC domiciled in the Community whose shares are admitted to trading on a regulated market within the meaning of Article 4(1), point 14, of Directive 2004/39/EC;
- (na) ‘Non-listed company’ means any company domiciled in the Community whose shares are not admitted to trading on a regulated market within the meaning of Article 4(1), point 14, of Directive 2004/39/EC;
- (nb) ‘Securitisation special purpose entity’ means, **for the purpose of paragraph 1 (j) of article 2a**, an entity whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (ECB/2008/30)<sup>1</sup> and other activities which are appropriate to accomplish that purpose;
- (o) ‘Representatives of employees’ means representatives of employees as defined by Article 2(e) of Directive 2002/14 of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>2</sup>(...);
- (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.

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<sup>1</sup> OJ L 15, 20.1.2009, p. 1.

<sup>2</sup> OJ L 80, 23.3.2002, p. 29.

(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.

2. For the purposes of paragraph 1(mf), Articles 13 to 16 of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast)<sup>1</sup> shall apply *mutatis mutandis*.

3. The Commission shall adopt implementing measures with a view to clarifying

(a) the circumstances referred to in point (e) of paragraph 1 under which marketing shall be deemed to be at the initiative of the AIFM or on behalf of the AIFM, taking into account the means of communication to the investors and the form and content of available information on the AIF;

(b) the methods of leverage as defined in point (l) of paragraph 1 and for the purpose of Articles 20(3) and 21(4) specify when leverage is considered to be employed on a systematic basis and how leverage shall be calculated.

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 an Article 49(3).

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<sup>1</sup> OJ L 177, 30.6.2006, p. 201.

## Chapter II

### AUTHORISATION OF AIFM

#### Article 3a

#### Determination of the AIFM

1. Without prejudice to the right granted under Article 18 to delegate functions, Member States shall ensure that each AIF managed within the scope of this Directive shall have a single AIFM, which shall be responsible for ensuring compliance with the requirements of the Directive. The AIFM shall be either:
  - (a) an external manager, which is the legal person appointed by the AIF or on behalf of the AIF (the appointed AIFM) and which through this appointment is responsible for managing the portfolio of the AIF; or
  - (b) where the legal form of the AIF permits an internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF itself, which shall then be authorised as AIFM.
2. In cases where **this Directive requires the(...)** appointed AIFM to ensure a certain **outcome (...)**for which **the AIF or another entity on its behalf is responsible and where the AIF or the other entity on its behalf does not undertake the necessary measures to allow the AIFM to ensure that outcome, the AIFM** shall immediately inform the competent authorities of its home Member State. (...)
3. If (...) **the situation** referred to in paragraph 2 **cannot be remedied (...), the competent authorities of the home Member State of the AIFM shall require that it resigns as AIFM** of that AIF. In that case the AIF may no longer be marketed in the Community. The competent authorities of the home Member State of the AIFM shall immediately inform the competent authorities of other Member States where the intention to market that AIF has been notified pursuant to Article 33.

#### *Article 4*

##### *Requirement for authorisation*

1. Member States shall (...) require that no AIFM covered by this Directive (...) manages AIF unless it has been authorised in accordance with this Directive.

(...)

2. Member States may authorise AIFM (...) to (...) manage (...) AIF in accordance with all or certain (...) investment strategies.

(...)

The Committee of European Securities Regulators (CESR) established by Commission Decision 2009/77/EC of 23 January 2009<sup>1</sup> shall ensure the existence of guidelines on classifying different investment strategies.

#### *Article 4a*

##### *Activities of an AIFM*

1. Member States shall require that no externally appointed AIFM covered by this Directive shall engage in activities other than the management of one or more AIF in accordance with this Directive, with the exception of the activities referred to in points 2 and 3 of Annex I of this Directive, activities related to the underlying assets of AIF (...)and of additional management of UCITS pursuant to authorisation under Directive 2009/65/EC.
2. Member States shall require that no internally managed AIF covered by this Directive shall engage in activities other than the internal management, activities referred to in points 2 and 3 of Annex I of that AIF and activities related to the underlying assets of that AIF (...).
3. By way of derogation from paragraph 1, Member States may authorise an externally appointed AIFM to provide the following services:

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<sup>1</sup> OJ L 25, 29.01.2009, p. 18.

(a) management of portfolios of investments (...), including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Annex I Section C of Directive 2004/39/EC; and

(b) as non-core services:

(i) investment advice concerning one or more of the instruments listed in Annex I, Section C of Directive 2004/39/EC;

(ii) safekeeping and administration in relation to units of collective investment undertakings.

4. AIFM shall not be authorised under this Directive to provide only the services referred to in point (a) of paragraph 3, or to provide non-core services without being authorised for the services referred to in point (a) of paragraph 3 or to provide only the activities referred to in points 2 and 3 of Annex I of this Directive.

5. Article 2(2) and Articles 12, 13 and 19 of Directive 2004/39/EC shall apply to the provision of the services referred to in paragraph 3 of this Article by AIFM.

#### *Article 5*

##### *(...) Application for (...) authorisation*

Member States shall require that an AIFM applying for an authorisation shall provide the following to the competent authorities of the home Member State (...):

(a) information on the persons who effectively conduct the business of the AIFM and the identities of the (...) 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 setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under Chapters II, III, IV, and where applicable, V, VI and VII;
- (c) (...) information about the investment strategies, risk profiles and other characteristics of the AIF it manages or intends to manage, including information about (...) the Member States or third countries (...) in which they are established (...) or are expected to be established;
- (d) the fund rules or instruments of incorporation of each AIF the AIFM manages;
- (da) where already available, the fund rules or instruments of incorporation of each AIF the AIFM intends to manage;
- (e) where already available, information on arrangements made for the delegation **and sub delegation** to third parties of (...) functions as referred to in Article 18 (...);
- (f) where already available, information on the arrangements made for the safe-keeping of the assets of AIF (...);
- (g) where already available, any additional information referred to in Article 20(1) for each AIF the AIFM manages or intends to manage.

(...)

### *Article 6*

#### *Conditions for granting the authorisation*

1. The competent authorities of the home Member State of an AIFM shall not grant an authorisation (...) unless:

(a0) they are satisfied that the AIFM will be able to fulfil the conditions of this Directive (...);

(...)

- (a) the AIFM has sufficient initial capital in accordance with the requirements in Article 6a;
- (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 investment strategies pursued by the 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.

The authorisation shall be valid for all Member States.

- 1a. 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 (...);

(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. (...)The competent authorities of the home Member State may restrict the scope of the authorisation, in particular as regards the (...) investment strategies of AIF the AIFM is allowed to manage.(...)

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

For the purpose of this paragraph an application is deemed complete, if the AIFM has at least submitted the information referred to in Article 5(a) to (d).

(...)

4a. As soon as it is available, the AIFM shall provide to the competent authorities the information referred to in Article 5(da) to (g).

5. AIFM may start (...) managing (...) AIF with investment strategies described in the application in accordance with Article 5(c) in (...) their home Member State as soon as the authorisation is granted, but not earlier than one month after having submitted any missing information referred to in Article 5(da) to (g).

*Article 6a (...)*

*Initial capital and own funds (...)*

1. Member States shall require that an AIFM which is appointed as external manager of one or more AIF (...) has an initial capital (...) of at least EUR 125 000, taking into account the following:
  - (a) when (...) the value of the portfolios of AIF managed by the AIFM exceeds EUR 250 million, the AIFM (...) must be required to provide an additional amount of own funds (...) which is equal to 0.02 % of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million but the required total of the initial capital and the additional amount must not, however, exceed EUR 10 million;

(...)
  - (b) for the purposes of point (a) (...) AIF (...) managed by the AIFM, including AIF for which the AIFM has delegated one or more functions in accordance with Article 18 (...) but excluding AIF portfolios that the AIFM is managing under delegation, shall be deemed to be the portfolios of the AIFM;
  - (c) irrespective of the amount of those requirements, the own funds of the AIFM shall never be less than the amount required under Article 21 of Directive 2006/49/EC.
2. Member States may authorise AIFM not to provide up to 50 % of the additional amount of own funds referred to in point (a) of paragraph 1 if they benefit from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in a Member State, or in a third country where it is subject to prudential rules considered by the competent authorities as equivalent to those laid down in Community law.
- 2a. Member States shall require that an AIFM which is an internally managed AIF has an initial capital of at least EUR 300 000.
3. Paragraphs 1, (...) 2 and 2a shall not apply to AIFM not reaching the threshold of EUR 500 million set out in Article 2a(1)(a) which opt in as AIFM falling under the scope of this Directive when managing solely AIF which;

- (a) are not leveraged at the level of the AIF;
- (b) have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF; and
- (c) which, according to their investment strategy and objectives, make investments and divestments solely on a non-frequent basis.

Member States shall require that an AIFM which fulfils the conditions of the first subparagraph has an initial capital of at least EUR [50 000].

4. This Article shall not apply to management companies authorised under Directive 2009/65/EC which also manage AIF.

#### *Article 7*

##### *Changes in the scope of the authorisation*

Member States shall require that AIFM (...), before implementation, shall notify the competent authorities of the home Member State of any material changes to (...) the conditions for (...) initial authorisation (...), in particular material changes in the programme of activity of the AIFM, of the investment strategy and policy of any AIF managed by it, (...).

If the competent authorities decide to impose restrictions or reject those changes, they shall, within (...) two months of receipt of that notification, (...) inform the AIFM. If the competent authorities do not oppose the changes within the assessment period, they may be effected.

#### *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;
- (2a) no longer complies with Directive 2006/49/EC if its authorisation also covers the discretionary portfolio management service referred to in Article 4a(3)(a) of this Directive;
- (3) has seriously or systematically infringed the provisions adopted pursuant to (...) 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.

## **Chapter III**

### **Operating conditions for AIFM**

#### **SECTION 01: GENERAL PRINCIPLES**

##### *Article 8a*

##### *Ongoing requirements*

The competent authorities of the AIFM home Member State shall require that the AIFM which they have authorised complies with the provisions of this Directive on an ongoing basis.

The own funds of an AIFM shall not fall below the level specified in Article 6a. If they do, however, the competent authorities may, where the circumstances so justify, allow such AIFM a limited period in which to rectify their situations or cease their activities.

*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’.

**SECTION 1: CONDUCT OF BUSINESS**

*Article 9*  
*General principles*

1. Member States shall (...) require that AIFM (...) comply with the following on an ongoing basis.

The AIFM shall:

- (a) act honestly, (...) in the best interests of the AIF or 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 AIF or the investors of the AIF it manages (...) 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 AIF or the investors of the AIF it manages and the integrity of the market;
- (c) treat (...) all AIF investors (...) fairly.

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

**1a. Each AIFM the authorisation of which also covers the discretionary portfolio management service referred to in paragraph 3 (a) of article 4a shall:**

**(a) not be permitted to invest all or a part of the client's portfolio in units or shares of the AIF it manages, unless it receives prior general approval from the client.**

**(b) Be subject with regard to the services referred to in paragraph 3 of article 4a to the provisions laid down in Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.**

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 9a*

*Remuneration*

1. Member States shall require AIFM to have remuneration policies and practices **for those categories of staff, including senior management, whose professional activities have a material impact on the risk profiles of AIF 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, fund rules or instruments of incorporation of the AIF it manages.

The policies and practices shall be comprehensive and proportionate to the nature, scale and complexity of the AIFM's activities and to the AIF it manages. The **principles (...)** laid down in Annex II shall be taken into account.

2. CESR shall ensure the existence of guidelines on sound remuneration policies which comply with the principles set out in Annex II. 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. The Committee of European Banking Supervisors (CEBS) established by Commission Decision 2009/78/EC of 23 January 2009<sup>1</sup> shall cooperate closely with CESR in ensuring the existence of guidelines on remuneration policies.

*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 (...) AIF managed by the AIFM or the investors in the AIF, or
- b) between one (...) AIF and another, or
- c) between the AIF or the investors of the AIF and another client of the AIFM. (...)
- (...)(...)
2. Where organisational arrangements made by the AIFM to manage conflicts of interest, **according to paragraph 1 of article 15,** 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;

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<sup>1</sup> OJ L 25, 29.01.2009, p. 23.

- (b) specifying the reasonable steps AIFM are expected to take in terms of internal (...)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 **functionally separate** the functions of risk management and portfolio management.(...).

**For AIFM for whom it would not be proportionate to functionally separate the functions of risk management and portfolio management in view of the nature, scale and complexity of the AIF it manages, the competent authorities of the AIFM home Member State may approve a derogation from subparagraph 1. (...) The AIFM must nevertheless be able to demonstrate that the risk management process satisfies the requirements of this Article and is consistently effective.**

2. The AIFM shall implement adequate 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 with appropriate frequency, no less than (...) 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 (...) identified, measured and monitored on an ongoing basis (...) including through the use of 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, prospectus and offering documents.

4. **Deleted**

4a. **Deleted (moved to Art 21)**

5. The Commission shall adopt implementing measures further specifying (...) **how the risk management function shall be functionally separated from the portfolio management function, the conditions for approving a derogation from the requirement of the functional separation, (...)the appropriate frequency for review of the risk management system,** 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 and the risks incurred and the requirements referred to in paragraph 3. (...)

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. The AIFM shall for each AIF it manages, that is not an unleveraged closed-ended AIF, (...) employ an appropriate liquidity management system and adopt procedures which enable it to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.

The AIFM shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess(...) the liquidity risk of the AIF (...).

2. The AIFM shall ensure that for each AIF it manages the investment strategy, the liquidity profile and the redemption policy are consistent.

3 The Commission shall adopt implementing measures further specifying (...) the liquidity management systems and procedures (...), when an AIF shall be considered not to be **unleveraged** closed-ended as set out in paragraph 1 and the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2 (...).

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 13*

#### *Investment in securitisation positions*

In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that repackage loans into tradable securities and other financial instruments (originators) and AIFM that invest in these securities or other financial instruments on behalf of one or more AIF, the Commission shall adopt implementing measures laying down the requirements in the following areas:

- (a) the requirements that need to be met by the originator in order for an AIFM to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of one or more AIF, including requirements that ensure that the originator retains a net economic interest of not less than 5 per cent;
- (b) qualitative requirements that must be met by AIFM which invest in these securities or other financial instruments on behalf of one or more AIF.

Those measures, designed to amend 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).

## SECTION 2: CAPITAL REQUIREMENTS

### *Article 14*

#### *Initial capital and own funds (...)*

See Article 6a

## SECTION 3: ORGANISATIONAL REQUIREMENTS

### *Article 15*

#### *General principles*

1. AIFM shall, at all times, use adequate and appropriate human and technical resources that are necessary for the proper (...) management (...) of AIF.

(...)

**In particular, the AIFM shall:**

**(a) have sound administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms including, in particular, rules for personal transactions by its employees or for the holding or management of investments in order to invest on its own account and ensuring, at least, that each transaction involving the AIF may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected and that the assets of the AIF managed by the AIFM are invested according to the fund rules or the instruments of incorporation and the legal provisions in force;**

**(b) 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.**

**2. The Commission shall adopt implementing measures specifying the procedures and arrangements as referred to under point (a) of the paragraph 1 and the structures and organisational requirements to minimise conflicts of interests as referred to under point (b) of 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 16*

*Valuation*

1. The AIFM shall ensure that, for each AIF that it manages, (...) appropriate and consistent procedures are established so that the proper valuation of the assets of the AIF can be performed and, **for those AIF that are not close ended and are not admitted to trading on a regulated market,** the value of the shares or units of the AIF can be calculated and, where appropriate, published.
  - 1a. **(...)The AIFM shall ensure the independence of the valuation function when the AIFM receives a fee, commission or other payments which is directly or indirectly linked to the performance of the AIF irrespective of whether the valuation function is performed by the AIFM or by an external valuer. In all other cases the AIFM shall ensure the independence of the valuation function in view of the nature, scale and complexity of each AIF that it manages.**
  - 1b. The (...) valuation procedures used shall ensure that the assets (...) and shares (...) or units are valued at least once a year. (...) If the AIF is of the open-ended type, such valuations shall also be carried out at a frequency which is appropriate given the specificities of the underlying assets held by the fund and its issuance and redemption policy. (...)

2. When an external valuer (...) is used (...), the AIFM must be able to demonstrate that the third party is qualified and capable of undertaking the functions in question, that it was selected with due care and that the AIFM is in a position to monitor effectively at any time the activity of the external valuer. The use of an external valuer should not prevent the effectiveness of supervision of the AIFM, and, in particular, it must not prevent the AIFM from acting, or the AIF from being managed, in the best interests of its investors.

**2.a The external valuer shall be subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct and shall be able to furnish sufficient professional guarantees to be able to effectively perform the relevant valuation function. The external valuer shall have a professional indemnity insurance which must be appropriate to the valuation function in question and any potential liability arising there from. The appointment of the external valuer shall be notified to the competent authorities to the AIFM home Member State which may require that other external valuer be appointed instead, if the conditions laid down in subparagraph 1 and 2 are not or no longer met.**

**The external valuer shall exercise the valuation function with due skill, care and diligence.**

**The external valuer shall be liable to the AIFM, the AIF or the investors of the AIF for any losses suffered by them as a result of its failure to perform its obligations pursuant to this Article.**

**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 external valuer, the AIFM and the investors.**

**2.a. When the evaluation function is not independent (...), the competent authorities of the home Member State may require the AIFM to have its valuation procedures and/or valuations verified by an external valuer or, where appropriate, an auditor. (...)**

3. The rules applicable to the valuation of assets and the calculation of the net asset value per share or unit (...) of the AIF shall be laid down in the law of the country where the AIF is (...) established and/or in the AIF rules or instruments of incorporation.

4. The Commission shall adopt implementing measures further specifying the criteria (...) concerning the procedures for the proper valuation of the assets and shares or units of AIF and the appropriate level of (...) independence of the valuation function. Such measures shall also specify the frequency of valuation carried out by open-ended funds which is appropriate given the underlying assets held by the fund and its issuance and redemption policy. The Commission shall also adopt implementing measures further specifying **when the valuation function is not independent as referred to in paragraph 2a and the professional guarantees the external valuer must be able to furnish to effectively perform the valuation function** the criteria when there is a need for external verification as referred to in paragraph 2a.

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 17*

#### *Depositary*

1. For each AIF established in the Community it manages, the AIFM shall ensure that a depositary is appointed to fulfil, where relevant, the following (...) depositary functions:
- (a) (...) ensure that all payments made by or on behalf of investors (...) upon the subscription of shares or units (...) 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 (...) booked (...) on behalf of the AIF (...) in (...) segregated accounts;
  - (b) safe-keep any financial instruments which belong to the AIF, namely;
    - (i) hold in custody all financial instruments that can be kept and ensure that these are registered in the depositary's books within segregated accounts opened in the name of AIF, so that in the event of the depositary's default they can be clearly identified as belonging to a given AIF;

- (ii) maintain the records necessary to verify the ownership of financial instruments that cannot be kept based on the information provided by the AIFM and external evidence of transactions made;
- (bb) ensure that the financial instruments referred to in point b(i) of this paragraph may not be re-used without the prior consent of the AIFM, and such consent has not been withdrawn.
- (c) verify whether the AIF or the AIFM on behalf of the AIF (...) holds an ownership (...) interest in all other assets the AIF invests in, based on internal and external evidence of ownership.

Any appointment of a depositary shall be subject to approval from the competent authorities of the home Member State of the AIF or in case where the AIF is not regulated the competent authorities of the home Member State of the AIFM.

1a. In addition to the tasks referred to in paragraph 1, the depositary shall, where relevant, 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) 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;

**(ba) the AIFM complies with its obligations under article 16;**

- (c) in transactions involving the AIF's assets any consideration is remitted to it within the usual time limits;
- (d) no AIFM instructions to the depositary which conflict with the applicable national law or the AIF rules or instruments of incorporation are carried out;
- (e) an AIF's income is applied in accordance with the applicable national law and the AIF rules.

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 (...) in the interest of the AIF or the investors of the AIF (...).
3. The depositary shall be either:
- (a) a credit institution having its registered office in the Community and (...) authorised in accordance with Directive 2006/48/EC (...); or
- (b) an investment firm authorised in accordance with Directive 2004/39/EC to also provide the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with Section B(1) of Annex I to that Directive, having its registered office in the Community **and subject to capital adequacy requirements according to Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions; or**
- (c) (...) **Other categories already determined by Member States under paragraph 3 of article 23 of Directive 2009/65/EC.**

In addition to the provisions in points (a), (b) and (c) of the first subparagraph, for AIF which have no assets which can be safe-kept in accordance with point (b)(i) of paragraph 1 or which are derivatives, the depositary may be an entity 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.

4. (...) The depositary may delegate to third parties the (...) tasks referred to in points (b) and (c) of paragraph 1 (...). The third party may in turn sub-delegate these tasks. The depositary shall not delegate tasks with the intention of avoiding the requirements of this Directive. The depositary may delegate custody tasks according to point (b)(i) of paragraph 1 to a third party only if it can demonstrate that there is an objective reason for the delegation.

When the depositary delegates the task of being custodian of financial instruments according to point (b)(i) of paragraph 1, 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 and complexity of the financial instruments of the AIF which it holds in custody;

(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 prior consent of the AIFM and the depositary and such consent has not been withdrawn; in cases of sub-delegation the required prior consent must be given by the depositary.

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 held in custody according to point (b)(i) of paragraph 1, the depositary shall return financial instruments of the identical type or the corresponding amount to the AIF or the investors of the AIF without undue delay. This liability shall not be affected by a delegation to a sub-custodian in accordance with paragraph 4.

However, in the case of loss of financial instruments held by a sub-custodian, 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 and (...) that is reasonable to contract such a discharge. This contract should clearly establish the reasons for the discharge, the parties assuming the liability and the conditions under which this liability is assumed.

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 (...) paragraphs 1, 1a, 2a, 4 and 4a. The depositary's liability shall not be affected by any delegation referred to in paragraph 4.

(...)

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.

7. Liability under paragraphs 4b and 5 shall not apply in cases of 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.

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. The appointed depositary shall be established in the home Member State of the AIF.]

10. The Commission shall adopt implementing measures further specifying:

(a) the modalities for the segregation of payments in different accounts;

(b) the notions of safe-keeping and custody, including the modalities for the segregation of financial instruments in different accounts, the determination of when financial instruments can be kept (...), when there is a loss of financial instruments or where there are other losses;

(c) the supervisory duties of depositaries;

(d) the conditions for delegation, including the due diligence duties of depositaries, and the determination of when there are objective reasons for delegation, the need for cooperation arrangements with other jurisdictions and the conditions under which a depositary may **reasonably** discharge itself of liability in accordance with paragraph 4b second subparagraph;

**(da) the conditions for sub-delegation;**

(e) the conditions for approval 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).

## SECTION 4: DELEGATION OF AIFM FUNCTIONS

### *Article 18*

#### *Delegation*

1. AIFM which intend to delegate to third parties the task of carrying out on their behalf one or more of their own (...) functions must notify the competent authorities of the home Member State before the delegation arrangements become effective.

The following conditions have to be complied with:

- (a) (...) the persons who effectively conduct the business of the third party must be of sufficiently good repute and sufficiently experienced;
- (b) where the delegation concerns the portfolio management or the risk management, the mandate (...) must (...) be given only to undertakings which are authorised or registered for the purpose of asset management and subject to supervision (...); where this condition cannot be satisfied, delegation may only be given on the condition of prior (...)approval by the competent authorities of the home Member State;
- (ba) where the delegation concerns the portfolio management or the risk management and is given to a third-country undertaking, in addition to the requirements in point (b), co-operation between the competent authorities of the home Member State and the supervisory authority of the undertaking shall be ensured;
- (c) the delegation shall not prevent the effectiveness of supervision of the AIFM, and, in particular, it must not prevent the AIFM from acting, or the AIF from being managed, in the best interests of the AIF or its investors;
- (d) the AIFM must be able to demonstrate that the third party is qualified and capable of undertaking the functions in question, that it was selected with due care and that the AIFM is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the third party and to withdraw the delegation with immediate effect when this is in the interest of investors.

No delegation of portfolio management or risk management shall be given to the depository or to a delegate of the depository (...) nor (...) to any (...) other undertaking whose interests may conflict with those of the AIFM or the investors of the AIF (...) unless those conflicts can be managed.

The AIFM shall review the services provided by each third party on an ongoing basis.

2. The liability of the AIFM shall not be affected by delegation by the AIFM of any functions to third parties. The AIFM shall not delegate its functions to the extent that it becomes a letter-box entity. (...)
3. The third party may (...) sub-delegate any of the functions delegated to it as long as the conditions in paragraph 1 are fulfilled and the AIFM is informed.
4. The Commission shall adopt implementing measures further specifying the following:
  - (a) the conditions for fulfilling the requirements set out in (...) paragraph 1;
  - (b) the conditions under which the manager has delegated its functions to the extent that it becomes a letter-box entity and therefore could no longer be considered to be the manager of the AIF as set out in paragraph 2.

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).

## Chapter IV

# Transparency requirements

### *Article 19*

#### *Annual report*

1. An AIFM shall, for each of the AIF it manages, make available an annual report for each financial year no later than four months following the end of the financial year. The annual report shall be (...) provided to investors on request. (...) The annual report shall be made available to the competent authorities of the home Member States of the AIF and the AIFM. (...)

Where the AIF is required to make public an annual financial report in accordance with Directive 2004/109/EC only such additional information referred to in points (a) to (e) of paragraph 2 needs to be provided to investors on request, either separately or as an additional part of the annual financial report. In the latter case the annual financial report shall be made public no later than four months following the end of the financial year.

2. The annual report shall at least contain the following:
  - (a) a balance-sheet or a statement of assets and liabilities;
  - (b) an income and expenditure account for the financial year;
  - (c) a report on the activities of the financial year;
  - (d) the total amount of remuneration for the financial year, split into fixed and variable remuneration paid by the AIFM, and number of beneficiaries, and, where relevant, carried interests paid by the AIF;
  - (e) the aggregate amount of remuneration broken down by senior management and members of staff whose actions have a material impact on the risk profile of the AIF.

3. The accounting information given in the annual report shall be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC<sup>1</sup>. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

By way of derogation from the first subparagraph, Member States may permit AIFM managing AIF established outside the Community to subject the annual reports of those AIF to an audit meeting international accounting standards in force in the country where the AIF is established and audited by an authorised accountant.

4. The Commission shall adopt implementing measures further specifying the content (...) of the annual report. These measures shall be adapted to the type of AIF (...) to which they apply.

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 20*

##### *Disclosure to investors*

1. AIFM shall make available to (...) AIF investors (...) the following information before they invest in the AIF, as well as any changes thereof:
  - (a) a description of the investment strategy and objectives of the AIF, (...) the types of assets which the AIF may (...) invest in and of the techniques it may employ and of all associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks and of any restrictions to the use of leverage;

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<sup>1</sup> OJ L 157, 9.6.2006, p. 87.

- (b) a description of the procedures by which the AIF may change its investment strategy or investment policy, or both;
- (c) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, applicable law and on the existence, or not, of any legal instruments providing for the recognition and enforcement of judgments on the territory where the AIF (...) is established (...);
- (d) the identity of the AIFM, the AIF's depositary, (...) auditor and any other service providers and a description of their duties and the investors' rights (...);
- (e) a description of any delegated management or depositary function, **the identification of the delegatee** (...) **and any conflicts of interest that may arise from such delegations**;
- (f) a description of the AIF's valuation procedure and(...) of the pricing methodology (...) for valuing assets, including the methods used in valuing hard-to-value assets, **according to article 16**;
- (g) a description of the AIF's liquidity risk management, including the redemption rights both in normal and exceptional circumstances, existing redemption arrangements with investors, and how the AIFM ensures a fair treatment of investors;
- (h) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;
- (i) whenever an investor obtains a preferential treatment or the right to obtain preferential treatment, (...) a description of that preferential treatment;
- (j) **(...)**the latest annual report **referred to in article 19**:(...)
- (k) (...)
- (l) procedure and conditions of issue and sale of units or shares;

(m) (...)the latest net asset value of the AIF or (...)the latest market price of the unit or share of the AIF, **according to article 16:**

(n) where available, the historical performance of the AIF.

1a. The AIFM shall inform the investors before they invest in the AIF of any arrangements made by the depositary to contractually discharge itself of the liability in accordance with Article 17(4b) second subparagraph. The AIFM shall also inform investors of any changes with respect to depositary liability without delay.

1b. Where the AIF is required to publish a prospectus in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC<sup>1</sup> or in accordance with national law, only such information referred to in points (a) to (n) of paragraph 1 **and paragraph 1a** which is in addition to that contained in the prospectus need to be disclosed separately or as additional information in the prospectus.

2. For each AIF an AIFM manages, it shall periodically disclose to investors:

- (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the AIF;
- (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage these risks.

3. AIFM managing one or more AIF employing leverage on a systematic basis shall for each such AIF:

- (a) disclose(...) the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of the re-use of collateral or any guarantee granted under the leveraging arrangement;

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<sup>1</sup> OJ L 345, 31.12.2003, p. 64.

(b) disclose periodically the total amount of leverage employed by that AIF.

4(...). The Commission shall adopt implementing measures further specifying the disclosure obligations of AIFM and the frequency of the disclosure referred to in paragraphs 2 and 3. These measures shall be adapted to the type of AIFM to which they apply.

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 21*

##### *Reporting obligations to competent authorities*

1. AIFM shall regularly report to the competent authorities of its home Member State on the principal markets and instruments in which it trades on behalf of the AIF it manages.

It shall provide aggregated information on the main instruments in which it is trading, markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of each of the AIF it manages.

2. For each AIF an AIFM manages, it shall (...) provide(...) the following to the competent authorities of its home Member State:

- (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the AIF;
- (c) the actual risk profile of the AIF and the risk management tools employed by the AIFM to manage the (...) market risk, liquidity risk, counterparty risk and other risks including operational risk;
- (d) the main categories of assets in which the AIF invested;
- (e) where relevant, the use of short selling (...):

(f) the results of the stress tests performed according to Article 11(3)(b) and Article 12(1) second subparagraph.

3. For each of the AIF it manages the AIFM shall provide (...) the following documents to the competent authorities of its home Member State:

(a) an annual report of each AIF managed by the AIFM for each financial year, within four months from the end of the periods to which it relates;

(b) a detailed list of all AIF which the AIFM manages for the end of each quarter.

4. AIFM managing one or more AIF employing leverage on a systematic basis shall make available to the competent authorities of its home Member State, information about the overall level of leverage employed by each AIF it manages, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and the extent to which their assets have been reused under leveraging arrangements.

That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIF managed by the AIFM, and the amounts of leverage received from each of those entities for each of the AIF managed by the AIFM.

4a. Member States shall ensure that the competent authorities of the home Member State of an AIFM have access to information on the use of short selling on account of AIF managed by the AIFM for the purposes of identifying the extent to which the use of short selling contributes to the build-up of systemic risk in the financial system or risks of disorderly markets. The competent authorities of the home Member States shall also ensure that such information, (...)in respect of all AIFM that they supervise, is made available **in an adequate manner** to other competent authorities, CESR and the European Systemic Risk Board (ESRB) established by Regulation .../.../EC through the procedures set out in Article 46 on supervisory co-operation.

5. Where necessary for the effective monitoring of systemic risk, the competent authorities of the home Member State may require information in addition to that described in this Article, on a periodic as well as on an adhoc basis.

6(...). The Commission shall adopt implementing measures further specifying the (...) obligations to report and provide information referred to in paragraphs 1 through 5 (...) and their frequency.

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).

# Chapter V

## AIFM managing specific types of AIF

### SECTION 1: AIFM MANAGING LEVERAGED AIF

#### *Article 22*

##### *Scope*

**Deleted**

#### *Article 23*

##### *Disclosure to investors*

**Deleted**

#### *Article 24*

##### *Reporting to competent authorities*

**Deleted**

#### *Article 25*

##### *Use of information by competent authorities, supervisory cooperation and limits to leverage*

1. Member States shall ensure that the competent authorities of the home Member State use the information to be gathered (...) under Article 21 (...) for the purposes of identifying the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system or risks of disorderly markets

2. The competent authorities of the home (...) Member States shall ensure that all information gathered (...) under Article 21 (...), in respect of all AIFM that they (...) supervise (...) **and the information gathered under paragraph 1(a) of article 2a, is (...)** made available to (...) competent authorities of other Member States, CESR and the ESRB through the procedures set out in Article 46 on supervisory co-operation. They (...) shall, without delay, also provide information through this mechanism, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under their (...) responsibility, or AIF managed by this AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institution in other Member States.

3. **Deleted**

3a. Competent authorities shall assess the risks that the use of leverage by an AIFM with respect to the AIF it manages could entail, and when it is deemed necessary (...) in order to ensure the stability and integrity of the financial system, the competent authorities of the home Member State of the AIFM, **after having notified CESR,** (...) shall impose (...) limits to the level of leverage that an AIFM may (...) employ or other restrictions on the management of the AIF with respect to the AIF under its management. (...) **to limit the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system or risks of disorderly markets.** The competent authorities of the home Member State of the AIFM shall duly inform the competent authorities of the home Member State of the AIF (...) and the ESRB of actions taken in this respect, through the procedures set out in Article 46 on supervisory co-operation.

3b. The Commission shall adopt implementing measures setting out principles clarifying the circumstances in which competent authorities would exercise the provisions in paragraph 3a, taking into account different strategies of AIF, different market conditions in which AIF operate and possible pro-cyclical effects following from exercising the provisions.

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).

**SECTION 2: OBLIGATIONS FOR AIFM MANAGING AIF WHICH ACQUIRE CONTROL OF  
NON-LISTED COMPANIES AND ISSUERS**

*Article 26*

*Scope*

1. This section shall apply to the following:
  - (a) AIFM managing one or more AIF which either individually or in aggregation acquires (...) control (...) of a non-listed company (...);
  - (b) AIFM having concluded an agreement with one or more other AIFM which would allow the AIF managed by these AIFM to acquire (...) control of (...) the non-listed company (...).

For the purpose of this section, more than 50 % of the voting rights of a non-listed company shall constitute control.

2. This section shall not apply where (...) the non-listed (...) companies concerned are small and medium enterprises.

For the purposes of this section, small and medium enterprises shall mean companies which, according to their last annual or consolidated accounts, meet at least two of the following three criteria:

- (a) an average number of employees in the Community during the financial year of less (...) than 250 persons (...);
- (b) a total balance sheet not exceeding EUR 43 million; (...)
- (c) an annual net turnover not exceeding EUR 50 million (...).

3. Article 28a shall apply also with regard to control of issuers. For the purposes of that Article, the first and second paragraph of this Article shall apply *mutatis mutandis*.

4. This section shall apply in accordance to the conditions and restrictions relating to Article 6 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>1</sup>.

**5. This section applies without prejudice to the norms adopted by Member States with respect to the acquisition of holdings in issuers and non listed companies in their territories.**

**6. The Commission may adopt implementing measures concerning the adjustment of the figures used in paragraph 2, taking into account developments on financial markets including inflation.**

**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 27*

##### *Notification of the acquisition of control of (...) non-listed companies*

1. Member States shall (...) require that when an AIFM (...) reaches a position to exercise (...) control of (...) a non-listed company, (...) the AIFM notifies the non-listed company and (...) share-holders, the identities and addresses of which are available to the AIFM or can be made available by the non-listed company or a register to which the AIFM has or can get access, the information (...) specified in paragraph 2.

This notification shall be made, as soon as possible, but not later than (...) ten (...) working days the first of which being the day on which the AIFM has reached the position of being able to exercise (...) control (...).

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<sup>1</sup> OJ L 80, 23.3.2002, p. 29.

2. The notification required under paragraph 1 shall contain at least the following information:
- (a) the resulting situation in terms of voting rights;
  - (b) the conditions under which (...) control (...) has been reached, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;
  - (c) the date on which (...) control (...) was reached (...).

*Article 28*

*Disclosure in case of acquisition of control of (...) non-listed companies*

1. (...) Member States shall (...) require that (...) when an (...) AIFM (...) (...) reaches a position to exercise (...) control of (...) (...) a non-listed company, (...) the AIFM makes the information set out in the second (...) subparagraph available to (...) the non-listed company, its (...) shareholders, the identities and addresses of which are available to the AIFM or can be made available by the non-listed company or a register to which the AIFM has or can get access to, and representatives of employees or, where there are no such representatives, to the employees themselves.
- (...)
- (...) The AIFM shall make available the following to the (...) company concerned, its shareholders and representatives of employees:
- (d) the identity of the AIFM which either individually or in agreement with other AIFM have reached (...) control (...);
  - (e) (...)
  - (f) the policy for preventing and managing conflicts of interests, in particular between the AIFM and the non-listed company (...).

**(g) the policy for external and internal communication of the non listed company in particular as regards employees<sup>2</sup>. Deleted**

*Article 28a*

*Disclosure of leverage in case of acquisition of control of non-listed companies and issuers*

Member States shall require that when an AIFM (...) reaches a position to exercise control of a non-listed company or an issuer, the AIFM shall without undue delay provide the competent authorities of its home Member State and the investors of the AIF concerned with information on the debt supported directly or indirectly by the non-listed company or the issuer, directly before and immediately after the control has been reached and, **without undue delay, whenever material changes occur (...).**

*Article 29*

*Specific provisions regarding the annual report of AIF exercising control of (...) (...) non-listed companies*

1. Member States shall (...) require that an AIFM includes in the annual report provided for in Article 19 for each AIF (...) **referred to in paragraph 1 of article 26 (...)** the following additional information of **the relevant** (...) non-listed company **where the AIFM reaches a position to exercise control:**
  - (a) (...) the operational and financial developments, in particular a presentation of revenues and earnings, capital structure and a description of, and key factors relating to, the nature of the company's operations and its principal activities, stating the main categories of products sold and/or services performed, and an indication of any significant new products and/or services that have been introduced and, to the extent the development of new products or services has been publicly disclosed, the status of development (...);
  - (b) (...)

(c) (...) the number of employees at the end of the period covered by the report (and changes in such numbers, if material);

(d) statement on significant divestment of assets.

(...)

(...)

2a. An AIFM which is exempted pursuant to Article 2(1a) from the obligation to make available annual reports of one or more AIF it manages shall for each such AIF make available a document containing at least the information specified in paragraph 1 of this Article for each financial year no later than four months following the end of the financial year. The document shall be provided to investors on request. The document shall be made available to the competent authorities of the home Member State of the AIFM.

3. **Deleted**

4. **Deleted**

*Article 30*

*Specific provisions regarding companies whose shares are no longer admitted to trading on a regulated market*

**Deleted**

## 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 of the AIFM*

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 of the AIFM as soon as the conditions laid down in this Article are met.

Where the AIF is a feeder AIF the right to market referred to in the first subparagraph is subject to the condition 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 depositary;**

- (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 of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2. The competent authorities of the home Member State of the AIFM may only prevent the marketing of the AIF if information provided in the notification demonstrates that the AIFM's management of the AIF will not be in accordance with one or more provisions of this Directive.

The competent authorities of the home Member State of the AIFM shall also inform the competent authorities of the home Member State of the AIF that the AIFM may start marketing shares or units of the AIF.

(...)

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 AIF they manage that are established in a third country and of feeder AIF that do not fulfil the requirements referred to in the second subparagraph of paragraph 1

### *Article 32*

#### *Option for Member States to allow the marketing of AIF to retail investors*

1. Without prejudice to other instruments of Community law, Member States may allow AIFM to (...) market (...) to retail investors (...) on their territory shares or units of AIF they manage, irrespective of whether AIF are marketed on a domestic or cross-border basis **or whether they are established in a Member State or a third country.**

In such cases, Member States may (...) impose stricter requirements on AIFM or the AIF than the requirements applicable to AIF marketed to professional investors on their territory. However, Member States may not impose stricter or additional requirements on AIF established in another Member State and marketed on a cross-border basis than on AIF marketed domestically.

2. Member States that permit the marketing of AIF to retail investors on their territory, shall, within one year of the date referred to in Article 54(1) inform the Commission and CESR of:

- (a) the types of AIF which AIFM may market to retail investors on their territory;
- (b) any additional requirements that the Member State imposes for the marketing of AIF to retail investors on their territory.

Member States shall also inform the Commission and CESR of any subsequent changes with regard to the first subparagraph.

### *Article 33*

#### *Conditions for marketing in other Member States than the home Member State of the AIFM*

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 of the AIFM as soon as the conditions laid down in this Article are met. (...)

Where the AIF is a feeder AIF the right to market referred to in the first subparagraph is subject to the condition 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 depositary;**

- (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 of the AIFM 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 to manage AIF with that particular investment strategy (...).
3. Upon transmission of the documentation, the competent authorities of the home Member State of the AIFM shall without delay notify the AIFM about the transmission. The AIFM may start (...) marketing (...) the AIF in the host Member State of the AIFM as of the date of that notification.

The competent authorities of the home Member State of the AIFM shall also inform the competent authorities of the home Member State of the AIF about the notification.

4. Arrangements referred to in point (e) of paragraph 1 shall be subject to the laws and supervision of the host Member State of the AIFM.
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 of the AIFM 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 material 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 of the AIFM shall without delay inform the competent authorities of the host Member State of the AIFM 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.

(...)

#### *Article 34*

#### *Conditions for (...) the management (...) of AIF in other Member States than the home Member State of the AIFM*

1. Member States shall ensure that an authorised AIFM may (...) **pursue the activities for which it has been authorised** in another Member State than the home Member State either (...) through the establishment of a branch or the free provision of services, (...).
2. Any AIFM wishing to (...) **pursue the activities for which it has been authorised in another Member State than the home 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 (...) **operate (...)**;
  - (b) a programme of operations stating in particular the **activities and** services referred **to in article 4a (1) and (3)** 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 (...) host Member State of the AIFM 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 of the AIFM shall, no later than (...) one month 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 pursue those activities (...) (...) to the competent authorities of the host Member State of the AIFM (...). They shall immediately notify the AIFM about the transmission.
- Without prejudice to any requirements for authorisation of the AIF concerned that the host Member State of the AIFM may impose, the AIFM may start the management of AIF through the free provision of services (...) in the host Member State of the AIFM 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 of the AIFM, or failing such communication after two months from the date of transmission of the communication by the competent authorities of the home Member State of the AIFM.
5. The host Member States of the AIFM 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 material 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 authorities of the home Member State of the AIFM shall inform the competent authorities of the host Member State of the AIFM of those changes.

## **Chapter VII**

### **Specific rules in relation to third countries**

#### *Article 34a*

##### Conditions for the management of AIF in third countries

1. Member States shall ensure that an authorised AIFM may only manage an AIF established in a third country where:
  - (a) any relevant legislation in the third country is in line with the standards set by international organisations or the AIFM can demonstrate that the AIF in the third country complies with these standards; and
  - (b) appropriate cooperation arrangements are in place between the competent authorities of the home Member State of the AIFM and the supervisory authority of the third country where the AIF is established.
  
2. The Commission shall adopt implementing measures regarding the standards referred to in paragraph 1(a) and the cooperation arrangements referred to in paragraph 1(b).

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. In order to ensure uniform application of this Article, CESR shall develop guidelines to determine the conditions of application of the implementing measures adopted by the Commission regarding the standards and the cooperation arrangements referred to in paragraph 2.

Article 35

Conditions for the marketing in the Community of AIF domiciled in third countries managed by an AIFM established in a third country

Member States may allow AIFM established in a third country to market to professional investors on their territory shares or units of AIF they manage that are established in a third country subject at least to the following rules:

(a) Compliance with article 19, 20, 21 and Section 2 of Chapter V.

(b) Appropriate cooperation arrangements are in place between the competent authorities of that Member State and the competent authorities of the AIFM which ensure an efficient exchange of information.

The Commission shall, in accordance with the procedure referred to in article 49 (2) adopt implementing measures specifying the obligations referred to in paragraph (a) and the content of the cooperation arrangements which ensure an efficient exchange of information.

Article 36

*Delegation by the AIFM of administrative tasks to an entity established in a third country*

Deleted

Article 37

*Valuator established in a third country*

Deleted

Article 38

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

Deleted

Article 39

*Authorisation of AIFM established in third countries*

Deleted

# 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.

(...)

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 of the AIFM, whether the AIFM carries out the functions referred to in Article 3(1)(d) 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 of the AIFM when an AIFM carries out the functions referred to in Article 3(1)(d) through a branch within the territory of that Member State.
3. The competent authorities of the host Member State may require AIFM carrying out the functions referred to in Article 3(1)(d) in the host Member State, whether this is done through a branch or not, to provide the information necessary for the monitoring of their compliance with the rules under the responsibility of the host Member State of the AIFM that apply to them.

Those requirements shall not be more stringent than those which the same Member State imposes on AIFM authorised in that Member State for the monitoring of their compliance with the same standards.

4. Where the competent authorities of the host Member State ascertain that an AIFM carrying out the functions referred to in Article 3(1)(d) in the host Member State, whether this is done through a branch or not is in breach of one of the rules under their responsibility, those authorities shall require the AIFM concerned to put an end to that breach and inform the competent authorities of the home Member State thereof.
5. If the AIFM concerned refuses to provide the competent authorities of the host Member State with information falling under its responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph 4, the competent authorities of the host Member State shall inform the competent authorities of the home Member State accordingly. The competent authorities of the home Member State shall, at the earliest opportunity, take all appropriate measures to ensure that the AIFM concerned provides the information requested by the competent authorities of the host Member State pursuant to paragraph 3 or puts an end to the breach. The nature of those measures shall be communicated to the competent authorities of the host Member State.
6. If, despite the measures taken by the competent authorities of the home Member State or because such measures prove to be inadequate or are not available in the Member State in question, the AIFM continues to refuse to provide the information requested by the competent authorities of the host Member State pursuant to paragraph 3, or persists in breaching the legal or regulatory provisions, referred to in the same paragraph, in force in the host Member State, the competent authorities of the host Member State may, after informing the competent authorities of the home Member State, take appropriate measures, including those laid down in Articles 41 and 43, to prevent or penalise further irregularities and, insofar as necessary, to prevent that AIFM from initiating any further transactions within its territory. Where the function carried out in the host Member State is the management of AIF, the host Member State may require the AIFM to cease managing those AIF.

*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 (...) the following powers (...):
  - (a) have access to any document in any form and to receive a copy of it;
  - (b) require information from any person related to the activities of the AIFM or the AIF 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 (...) 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;

[(ia) require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;]

(j) 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.

3. 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 42*

##### *Supervisory powers*

#### **Deleted**

#### *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 authorities 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 (...) 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 (...) 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 six months of the submission of the application.

**SECTION 2**  
**CO-OPERATION BETWEEN DIFFERENT COMPETENT AUTHORITIES**

*Article 45*  
*Obligation to co-operate*

1. The competent authorities of the Member States, **including the competent authorities of the AIF,** shall co-operate with each other whenever necessary for the purpose of carrying out their duties under this Directive or of exercising their powers under this Directive or under national law.
2. Member States shall facilitate the co-operation provided for in this section.
3. Competent authorities shall use their powers for the purpose of co-operation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in that Member State.

4. The competent authorities of the Member States shall immediately supply one another with the information required for the purposes of carrying out their duties under this Directive.
- 4a. Where the competent authorities of one Member State has good reason to suspect that acts contrary to the provisions of this Directive, are being or have been carried out by AIFM not subject to supervision of those competent authorities on the territory of another Member State, it shall notify the competent authorities of the other Member State thereof in as specific a manner as possible. The recipient authorities shall take appropriate action, shall inform the notifying competent authorities of the outcome of that action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the notifying competent authority.
- 4b. Competent authorities may bring to the attention of CESR where a request to exchange information according to paragraph 4 has been rejected or has not been acted upon within a reasonable time.
5. The Commission shall, in accordance with the procedure referred to in Article 49(2), adopt implementing measures relating to the procedures for exchange of information between 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, **including the competent authorities of the AIF**, 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. (...) CESR (...) shall also be informed and shall forward this information to the competent authorities of the other Member States.

2. (...) Subject to the conditions laid down in Article 15 of Regulation .../.../EC, aggregated information relating to the activities of AIFM under its responsibility shall be communicated (...) by the competent authorities of the AIFM to (...) the ESRB.
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).

#### *Article 47*

##### *Co-operation in supervisory activities*

1. The competent authorities of one Member State **including the competent authority of the AIF**, may request the co-operation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation on the territory of the latter within the framework of their powers pursuant to this Directive.

Where the competent authorities receive a request with respect to an on-the-spot verification or an investigation, it shall perform one of the following:

- (a) carry out the verification or investigation itself;
  - (b) allow the requesting authority to carry out the verification or investigation;
  - (c) allow auditors or experts to carry out the verification or investigation.
2. In the case referred to in paragraph 1(a) the competent authorities of the Member State which has requested co-operation, may (...) request that members of its own personnel assist the personnel carrying out the verification or investigation. The verification or investigation shall, however, be the subject of the overall control of the Member State on whose territory it is conducted.

In the case referred to in paragraph 1(b) the competent authorities of the Member State on whose territory the verification or investigation is carried out may request that members of its own personnel assist the personnel carrying out the verification or investigation.

3. Competent authorities may refuse to exchange information or to act on a request for co-operation in carrying out an investigation or on-the-spot verification only in the following cases:
  - (a) an investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public order of the Member State addressed;
  - (b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;
  - (c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

The competent authorities shall inform the requesting competent authorities of any decision taken under the first subparagraph, stating the reasons therefore.

3a. Competent authorities may bring to the attention of CESR situations where a request:

- (a) to carry out an investigation or on-the-spot verification according to paragraph 1 has been rejected or has not been acted on within a reasonable time; or
- (b) for authorisation for its officials to accompany those of the competent authorities of the other Member State has been rejected or has not been acted upon within a reasonable time.

4. The Commission shall adopt implementing measures concerning procedures for on-the-spot verifications and investigations.

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 48*

*Mediation*

1. (...) CESR (...) shall establish a mediation mechanism.
2. In case of disagreement between competent authorities on an assessment, action or omission of one of the competent authorities concerned under this Directive, competent authorities shall refer the matter to (...) CESR, where discussion will take place in order to reach a rapid and effective solution. The competent authorities shall duly consider the advice of (...) CESR.

## **Chapter IX**

### **Transitional and final provisions**

*Article 49*

*Committee*

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee<sup>26</sup>.
2. Where reference is made to this paragraph, Articles 5 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

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<sup>26</sup> OJ L 191, 13.7.2001, p. 45.

## Article 49a

### Disclosure of derogations

**Where a Member State makes use of a derogation provided by this Directive it shall inform the Commission thereof as well as of any subsequent changes. The Commission shall make the information public on a web-site or other easily accessible means.**

## *Article 50*

### *Review*

Before (...) three years after (...) [...<sup>(\*)</sup>], the Commission shall, on the basis of public consultation and in the light of the discussions with competent authorities, review the application and the scope of this Directive. **With respect to paragraph 4 of article 51, the review should be carried out two years after the date of implementation.**

This review shall also take due account of developments at international level and discussions with third countries and international organisations.

It shall submit a report to the European Parliament and the Council together with appropriate proposals.

## *Article 51*

### *Transitional provision*

1. AIFM established in the Community and operating in the Community before (...) [...<sup>(\*)</sup>] shall adopt all necessary measures to comply with this Directive and shall submit an application for authorisation within one year of (...) that date(...).
2. AIFM insofar as they manage AIF of the closed-ended type before [...<sup>(\*)</sup>] which do not make any additional investments after [...<sup>(\*)</sup>] may however continue to manage such AIF without authorisation under this Directive until [...<sup>(\*)</sup>].

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<sup>(\*)</sup> 24 months after the entry into force of this Directive.

<sup>(\*)</sup> 24 months after the entry into force of this Directive.

<sup>(\*)</sup> 24 months after the entry into force of this Directive.

<sup>(\*)</sup> 24 months after the entry into force of this Directive.

3. Articles 31 to 33 of this Directive shall not apply to the marketing of shares or units of AIF that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC before [...<sup>(\*)</sup>] as long as this prospectus is valid.

4. **The competent authorities of the home Member State of the AIF or in case where the AIF is not regulated the competent authorities of the home Member State of the AIFM may allow institutions referred to in article 17.3.a) and established in another Member State to be appointed as a depositary until [4 years after the date of implementation].**

*Article 51a<sup>1</sup>*

*Amendment of Directive 2003/41/EC*

Directive 2003/41/EC shall be amended as follows:

1. Article 2(2)(b) shall be replaced by the following:

‘(b) institutions which are covered by Directive 73/239/EEC, Directive 85/611/EEC, Directive 93/22/EEC, Directive 2000/12/EC, Directive 2002/83/EC and .../.../EC [AIFM Directive];’

2. Article 19(1) shall be replaced by the following:

‘1. Member States shall not restrict institutions from appointing, for the management of the investment portfolio, investment managers established in another Member State and duly authorised for this activity, in accordance with Directives 85/611/EEC, 93/22/EEC, 2000/12/EC, 2002/83/EC and .../.../EC [AIFM Directive], as well as those referred to in Article 2(1) of this Directive.’

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<sup>(\*)</sup> xx months after the entry into force of this Directive.

<sup>(\*)</sup> 24 months after the entry into force of this Directive.

<sup>1</sup> OJ L 235, 23.9.2003, p. 10.

*Article 52*  
*Amendment of Directive 2004/39/EC*

**Deleted.**

*Article 53*  
*Amendment of Directive 2009/65/EC<sup>d</sup>*

Directive 2009/65/EC shall be amended as follows:

1. at the end of Article 7(1) the following paragraph shall be inserted:

‘For the purposes of point (a) of the first subparagraph, Member states may authorise a management company which is also an AIFM as defined in Article 3(1)(b) of Directive [...] of the European parliament and of the council on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC which does not reach the threshold of EUR 500 million set out in Article 2a(1)(a) of that Directive, not to include in the calculation of the additional amount of own funds referred to in point (i) of point (a) of the first subparagraph AIF that fulfil the criteria of the first subparagraph of Article 6a(3) of Directive [...] managed by the management company.

2. The following new Article 50a shall be inserted:

‘In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that ‘repackage’ loans into tradable securities and other financial instruments (originators) and UCITS that invest in these securities or other financial instruments, the Commission shall adopt implementing measures laying down the requirements in the following areas:

- (a) the requirements that need to be met by the originator in order for a UCITS to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011, including requirements that ensure that the originator retains a net economic interest of not less than 5 per cent;
- (b) qualitative requirements that must be met by UCITS which invest in these securities or other financial instruments.

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<sup>1</sup> OJ L 302, 17.11.2009, p. 32.

Those measures, designed to amend this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article (...) 112(2).<sup>7</sup>

*Article 54*

*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [...<sup>(\*)</sup>] at the latest. (...)

(...)

When Member States adopt the provisions referred to in the first subparagraph, these provisions shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.

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 55*

*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 56*

*Addressees*

This Directive is addressed to the Member States.

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<sup>(\*)</sup> 24 months after the entry into force of this Directive.

## ANNEX I

### Functions which AIFM may perform:

- 1. Investment management:
  - (a) portfolio management;
  - (b) risk management.
- 2. Administration:
  - (a) legal and fund management accounting services;
  - (b) customer inquiries;
  - (c) valuation and pricing (including tax returns);
  - (d) regulatory compliance monitoring;
  - (e) maintenance of unit-/shareholder register;
  - (f) distribution of income;
  - (g) unit/shares issues and redemptions;
  - (h) contract settlements (including certificate dispatch);
  - (i) record keeping.
- 3. Marketing.

## ANNEX II

### REMUNERATION POLICIES

1. When establishing and applying the 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, AIFM shall 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 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 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 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 appropriate to the life-cycle of the AIF managed by the AIFM 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 redemption policy of the AIF it manages and their investment 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 relevant types of current and future risks;
- (l) a substantial portion[, which is at least 40 %] of the variable remuneration component is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF 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;]
- (m) 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;

(n) 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).

Paragraph 1 shall not apply to returns to employees from their investments in AIF managed by the AIFM nor to remuneration paid in connection with the liquidation of an AIF. Point (l) of paragraph 1 shall not apply in respect of variable remuneration linked directly to fees earned by the AIFM which cannot be clawed back.]

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.