

Alternative Investment Fund Managers

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The Committee Economic and Monetary Affairs adopted the report drawn up by Jean-Paul GAUZES (EPP, FR) on the proposal for a directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/.../EC. It recommended that the European Parliament's position at first reading under the ordinary legislative procedure (formerly known as the codecision procedure) should be to amend the Commission proposal as follows:

Scope: Members state that the Directive shall apply to AIFM established in the Union that provide management services to one or more alternative investment funds (AIF) irrespective of whether the AIF is established in the Union or in a third country. They also note that the Directive shall not prevent or restrict investors from disposing of units or shares which they hold in AIF on the capital market. Any offering or placement of such units or shares at the initiative of the AIFM managing such AIF shall be treated as marketing by such AIFM for the purposes of the Directive.

The report **removes the thresholds** providing exemption from the directive's scope and replacing them with a proportionality rule. It states that the Directive should cover managers of all collective investment undertakings which are not required to be authorised as UCITS. However, there are AIFM which should not be required to comply with inappropriate provisions in relation to certain AIF, because of the special nature and characteristics of such AIF. Furthermore, proportionality requires that AIFM managing certain AIF be subject only to specified provisions of the Directive, or to requirements appropriately modified to introduce proportionality. The Directive should not, however, be circumvented in cases involving the artificial splitting of funds managed by the same AIFM.

Authorisation of managers: to obtain authorisation, AIFMs will be required to hold a minimum level of capital in the form of liquid or short-term assets. The report states that in accordance with the principle of proportionality and recognising the substantial overlap between the authorisation requirements laid down in Directive 2009/65/EC and those laid down in this Directive, managers authorised under Directive 2009/65/EC or under this Directive should be entitled to be authorised under the other directive, subject only to complying with any relevant additional requirements for such authorisation. In that respect, cross-referencing concerning documents should be possible, provided that the information contained in those documents remains unchanged. Directive 2009/65/EC should be therefore amended to achieve that result.

Marketing of the funds and relations with third countries: once they have been authorised, AIFMs should be able to manage and market their funds established in the Union to professional investors throughout the territory of the Union. Such a European passport should make it possible for any fund established inside the Union and managed by an authorised manager in its home Member State to be marketed, subject to a simple notification procedure, in all Member States. Funds established in the Union would thus benefit from a European label, distinct from any UCITS label.

With regard to third-country AIFMs and third-country funds, the text provides that an AIFM established in a third country may provide management services on the territory of a Member State **provided that certain conditions are satisfied by the third country** where the AIFM is established (anti-money laundering standards, agreement for effective exchange of information for tax matters with that Member State, reciprocity of market access) and by the AIFM and its competent authority (agreements between the AIFM and the European Securities and Market Authority (ESMA) and between the competent authority of the AIFM and ESMA).

In addition, AIFMs authorised in the Union or, subject to the conditions described previously, established in a third country, may market units or shares of an AIF established in a third country to professional investors on the territory of a Member State provided that certain conditions are satisfied by the third country where the AIF is established (anti-money laundering standards, agreement for effective exchange of information for tax matters with that Member State, reciprocity of market access) and by the supervisor of the AIF (cooperation agreement between the supervisor of the AIF and the competent authority of that Member State).

Lastly, the report states that Member States may allow the marketing of certain types of AIF managed by AIFM to retail investors on their territory, excluding funds of funds with an underlying investment of more than 30 % in AIF and feeders that invest in master AIF, which should not benefit from the European marketing passport under the Directive.. Consideration should, however, be given by the Union institutions and, in particular, by the Commission to whether a specific Union framework should be proposed to define common rules for the distribution of AIF to retail investors in the Union.

The depositary: the AIFM Directive proposes arrangements applicable to the depositaries of AIF. The committee has inserted provisions relating to the definition of the depositary, its location, its role, its functions, the conditions for delegating some of its functions, and its responsibility.

With regard to location, the text states that where an AIF managed by an authorised AIFM is established in the Union, the depositary shall have its registered office in the Member State where the AIF is established.

Where a AIF managed by an authorised AIFM is established in a third country, the depositary shall have its registered office in the Union, unless a series of specified conditions are satisfied, inter alia, that the competent authorities of the home Member State of the AIFM and those of the third country where the AIF is established have signed cooperation and exchange of information agreements; that there are the same standards of provisions on terrorist financing and money laundering; and that the third country where the AIF is established is the subject of a decision stating that depositaries are subject to effective prudential regulation (including minimum capital requirements) and supervision which are to the same effect as the provisions laid down in Union law

The report states that, in order to facilitate speedy and effective restitution of investor assets, the depositary should be liable to the AIFM, to the AIF and to the investors of the AIF collectively except in cases where such losses arise as a result of 'force majeure'. The depositary's liability should not be affected by its transfer to an authorised third party. However, in cases where the depositary is prevented by the law of a third country or as a result of an unforeseeable external event, the depositary should be able to discharge its liability, subject to approval of the competent authority of the Member State. Such discharge of liability should take place only once: there shall be no chain of liability.

Members add that the Commission should put forward an appropriate horizontal legislative proposal that clarifies the responsibilities and liabilities of a depositary and governs the right of a depositary in one Member State to provide its services in another Member State (passport). That legislative proposal should replace the relevant depositary requirements of this Directive.

The Commission should ensure that the requirements concerning depositaries set out in the Directive are applied to UCITS depositaries and should for that purpose revise Directive 2009/65/EC accordingly by the date of entry into force of the Directive.

The valuator: the proposal lays down rules applicable to AIF valuers and contains provisions on fund valuation and the determination of the value of a fund's assets and shares. The report specifies that the AIFM shall ensure that, for each AIF that it manages, a valuator is appointed which is legally

or functionally independent from the AIFM to establish the value of assets acquired by the AIF and the value of the shares and units of the AIF. AIFM shall ensure that the assets, shares and units of AIF are valued at least annually.

For each AIF the AIFM shall ensure that independence is embedded into the processes adopted for valuation of assets and calculation of the net asset value of the AIF, including, in the case where the AIFM itself performs the valuation, that appropriate safeguards are in place to prevent conflicts of interest and undue influence upon the employees performing the valuation function.

AIFM are responsible for the proper valuation of AIF assets as well as for the calculation of the net asset value of AIF and the publication of that net asset value. The depository is responsible for verifying the conditions under which the valuation, calculation and publication are done. The liability of AIFM shall not be affected by the fact that it has delegated any of its tasks in relation with the AIF's valuation to a third party. All valuations, whether carried out by the AIFM or by an external valuator, shall be subject to the oversight and monitoring of the AIF's depository.

The use of leverage: the report states that an AIFM must set leverage limits in respect of each AIF it manages taking into account a number of factors such as the type of AIF, their strategy; and competent authority shall ensure that the leverage limits set by an AIFM are reasonable as defined under the Directive, and that the AIFM complies at all times with the leverage limits that that AIFM has set. Each competent authority shall regularly provide to ESMA the information provided to it. On the basis of this information, and after taking into account the advice of the ESRB, ESMA may determine that the leverage employed by an AIFM, or by a group of AIFM, poses a substantial risk to the stability and integrity of the financial system and may specify the remedial measures to be taken (including limits to the level of leverage, which that AIFM, or that group of AIFMs, can employ).

Short selling: short selling is a widespread market practice extensively used by AIFM and other market participants. Although it may sometimes perform a useful role in keeping markets liquid, it also makes them more volatile and plays a part in destabilising them because of its pro-cyclical effect. Notably in extreme market conditions, short selling may contribute to market disorder. The part played by short selling in accelerating a market downturn has long been documented whenever a financial market crisis occurs. In addition, short selling can encourage the spread of false rumours with a view to making a profit on a falling market. As the orderly operation and integrity of markets is vital to restoring the confidence of long-term investors, who are vital to finance the economy, and as the integration of financial markets demands common practices within the Union in order to avoid forum shopping, short selling should operate in a harmonised regulatory framework to reduce the potential destabilising effect that it may cause.

The report provides that in order to regulate short sales and prohibit naked short sales of equity securities, including securities giving access to the shares of an issuer, the Commission shall adopt delegated acts laying down the requirements in certain areas laid down in the text. These include the compulsory reporting of net short positions, including derivatives, by any person to the competent authority of the Member State, of the most relevant market in terms of liquidity and of the Member State in which the issuer is incorporated, when certain thresholds are crossed, and public disclosure of such reporting when certain other thresholds are crossed.

Reporting obligations: ESMA shall define and regularly review guidelines for the competent authorities of the Member States on the exercise of their authorisation powers and on the reporting obligations imposed by this Directive.

Supervision: the text states that consistent with the new supervisory architecture proposed for the Union, the Directive gives ESMA direct powers of supervision and power to intervene in markets under certain circumstances, to set leverage levels under certain circumstances and to resolve disputes between the competent authorities.

Powers of Member States: the competent authorities of the AIFM's home Member State shall be responsible for supervising the adequacy of the arrangements and organisation of the AIFM so that it is in a position to comply with the obligations and rules which relate to the constitution and functioning of all AIF it manages. The competent authorities of the Member State where the management services will be provided shall be responsible for supervising the compliance of the AIFM with the rules of that Member State which relate to the constitution and functioning of AIF, including arrangements made for marketing.

To remedy any breach of rules under their responsibility, the competent authorities of the Member State where the management services will be provided shall be able to rely on the cooperation of the competent authorities of the AIFM's home Member State. If necessary, as a last resort, and after informing the competent authorities of the AIFM's home Member State, the competent authorities of the Member State where the management services will be provided may take action directly against the AIFM.

Executive remuneration: the G20's Pittsburgh Declaration of 25 September 2009 marked an international agreement on the remuneration of executives of banks and other financial institutions. The committee proposes applying these principles to the AIFM. The report notes that in order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals, there should be an express obligation for AIFM to establish and maintain, for those categories of staff whose professional activities have a material impact on their risk profile or the risk profiles of AIF they manage, remuneration policies and practices that are consistent with effective risk management. Those categories of staff should at least include senior management, risk takers and control functions. The Commission is empowered to adopt delegated acts, in accordance with Article 290 of the Treaty on the Functioning of the European Union, to set guidelines on sound remuneration policies after consulting ESMA. It is important to ensure appropriate coherence between provisions on sound remuneration for AIFM and those for credit institutions and investment firms. Such binding guidance should therefore ensure compliance with the provisions on remuneration set out in Directives 2006/48/EC and 2006/49/EC.

ESMA: consistent with the new supervisory architecture proposed for the Union, this Directive should give ESMA direct powers of supervision and power to intervene in markets under certain circumstances, to set leverage levels under certain circumstances and to resolve disputes between the competent authorities.