

# Procedure file

Basic information	
<p>COD - Ordinary legislative procedure (ex-codecision procedure) <a href="#">2009/0064(COD)</a> Directive</p>	Procedure completed
<p>Alternative Investment Fund Managers</p> <p>Amending Directive 2003/41/EC <a href="#">2000/0260(COD)</a> Amending Directive 2009/65/EC <a href="#">2008/0153(COD)</a> Amending Regulation (EC) No 1060/2009 <a href="#">2008/0217(COD)</a> Amending Regulation (EC) No 1095/2010 <a href="#">2009/0144(COD)</a> Amended by <a href="#">2011/0298(COD)</a> Amended by <a href="#">2011/0360(COD)</a> Amended by <a href="#">2015/0226(COD)</a> Amended by <a href="#">2018/0041(COD)</a> Amended by <a href="#">2020/0268(COD)</a> Amended by <a href="#">2021/0376(COD)</a></p> <p>Subject 2.50.03 Securities and financial markets, stock exchange, CIUTS, investments 2.50.08 Financial services, financial reporting and auditing 2.50.10 Financial supervision 3.45.01 Company law</p>	

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	<b>ECON</b> Economic and Monetary Affairs		21/07/2009
		PPE <a href="#">GAUZÈS Jean-Paul</a>	
	Committee for opinion	Rapporteur for opinion	Appointed
	<b>JURI</b> Legal Affairs (Associated committee)		02/09/2009
		S&D <a href="#">REGNER Evelyn</a>	
Council of the European Union	Council configuration	Meeting	Date
	<a href="#">Transport, Telecommunications and Energy</a>	<a href="#">3093</a>	27/05/2011
	<a href="#">Economic and Financial Affairs ECOFIN</a>	<a href="#">3038</a>	19/10/2010
	<a href="#">Economic and Financial Affairs ECOFIN</a>	<a href="#">3015</a>	18/05/2010
European Commission	Commission DG	Commissioner	
	<a href="#">Financial Stability, Financial Services and Capital Markets Union</a>	BARNIER Michel	

Key events			
30/04/2009	Legislative proposal published	<a href="#">COM(2009)0207</a>	Summary
14/07/2009	Committee referral announced in Parliament, 1st reading		

19/10/2009	Referral to associated committees announced in Parliament		
17/05/2010	Vote in committee, 1st reading		Summary
18/05/2010	Debate in Council	<a href="#">3015</a>	Summary
11/06/2010	Committee report tabled for plenary, 1st reading	<a href="#">A7-0171/2010</a>	
10/11/2010	Debate in Parliament		
11/11/2010	Results of vote in Parliament		
11/11/2010	Decision by Parliament, 1st reading	<a href="#">T7-0393/2010</a>	Summary
27/05/2011	Act adopted by Council after Parliament's 1st reading		
08/06/2011	Final act signed		
08/06/2011	End of procedure in Parliament		
01/07/2011	Final act published in Official Journal		

### Technical information

Procedure reference	2009/0064(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
	<p>Amending Directive 2003/41/EC <a href="#">2000/0260(COD)</a></p> <p>Amending Directive 2009/65/EC <a href="#">2008/0153(COD)</a></p> <p>Amending Regulation (EC) No 1060/2009 <a href="#">2008/0217(COD)</a></p> <p>Amending Regulation (EC) No 1095/2010 <a href="#">2009/0144(COD)</a></p> <p>Amended by <a href="#">2011/0298(COD)</a></p> <p>Amended by <a href="#">2011/0360(COD)</a></p> <p>Amended by <a href="#">2015/0226(COD)</a></p> <p>Amended by <a href="#">2018/0041(COD)</a></p> <p>Amended by <a href="#">2020/0268(COD)</a></p> <p>Amended by <a href="#">2021/0376(COD)</a></p>
Legal basis	Treaty on the Functioning of the EU TFEU 053-p1
Stage reached in procedure	Procedure completed
Committee dossier	ECON/7/00300

### Documentation gateway

Legislative proposal	<a href="#">COM(2009)0207</a>	30/04/2009	EC	Summary
Document attached to the procedure	<a href="#">SEC(2009)0576</a>	30/04/2009	EC	
Document attached to the procedure	<a href="#">SEC(2009)0577</a>	30/04/2009	EC	
European Central Bank: opinion, guideline, report	<a href="#">CON/2009/0081</a> <a href="#">OJ C 272 13.11.2009, p. 0001</a>	16/10/2009	ECB	Summary

Committee draft report		<a href="#">PE430.709</a>	23/11/2009	EP	
Amendments tabled in committee		<a href="#">PE438.424</a>	04/02/2010	EP	
Amendments tabled in committee		<a href="#">PE439.111</a>	12/02/2010	EP	
Amendments tabled in committee		<a href="#">PE439.125</a>	15/02/2010	EP	
Amendments tabled in committee		<a href="#">PE439.132</a>	15/02/2010	EP	
Amendments tabled in committee		<a href="#">PE439.133</a>	16/02/2010	EP	
Amendments tabled in committee		<a href="#">PE439.135</a>	18/02/2010	EP	
Amendments tabled in committee		<a href="#">PE438.497</a>	25/02/2010	EP	
Amendments tabled in committee		<a href="#">PE439.246</a>	25/02/2010	EP	
Amendments tabled in committee		<a href="#">PE439.134</a>	08/03/2010	EP	
Committee opinion	<b>JURI</b>	<a href="#">PE438.149</a>	05/05/2010	EP	
Committee report tabled for plenary, 1st reading/single reading		<a href="#">A7-0171/2010</a>	11/06/2010	EP	
Text adopted by Parliament, 1st reading/single reading		<a href="#">T7-0393/2010</a>	11/11/2010	EP	Summary
Commission response to text adopted in plenary		<a href="#">SP(2011)610</a>	26/01/2011	EC	
Draft final act		<a href="#">00060/2010/LEX</a>	08/06/2011	CSL	
Follow-up document		<a href="#">COM(2015)0383</a>	03/08/2015	EC	
Follow-up document		<a href="#">COM(2020)0232</a>	10/06/2020	EC	
Follow-up document		SWD(2020)0110	10/06/2020	EC	

#### Additional information

National parliaments	<a href="#">IPEX</a>
European Commission	<a href="#">EUR-Lex</a>

#### Final act

[Directive 2011/61](#)  
[OJ L 174 01.07.2011, p. 0001](#) Summary

Final legislative act with provisions for delegated acts

#### Delegated acts

<a href="#">2013/2781(DEA)</a>	Examination of delegated act
<a href="#">2013/3001(DEA)</a>	Examination of delegated act
<a href="#">2014/3022(DEA)</a>	Examination of delegated act
<a href="#">2018/2807(DEA)</a>	Examination of delegated act
<a href="#">2023/2926(DEA)</a>	Examination of delegated act

**PURPOSE:** to establish a secure and harmonised EU framework for monitoring and supervising the risks that Alternative Investment Fund Managers (AIFM) pose to their investors, counterparties, other financial market participants and to financial stability and to permit, subject to compliance with strict requirements, AIFM to provide services and market their funds across the internal market.

**PROPOSED ACT:** Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/??/EC.

**BACKGROUND:** around ?2 trillion in assets are currently managed by AIFM employing a variety of investment techniques, investing in different asset markets and catering to different investor populations. The sector includes hedge funds and private equity, as well as real estate funds, commodity funds, infrastructure funds and other types of institutional fund.

The financial crisis has exposed a series of vulnerabilities in the global financial system. It has highlighted how risks crystallising in one sector can be transmitted rapidly around the financial system, with serious repercussions for all financial market participants and for the stability of the underlying markets.

This proposal forms part of an ambitious Commission programme to extend appropriate regulation and oversight to all actors and activities that embed significant risks. The proposed legislation will introduce harmonised requirements for entities engaged in the management and administration of alternative investment funds (AIFM). The need for closer regulatory engagement with this sector has been highlighted by the [European Parliament](#) and by the High-Level Group on Financial Supervision chaired by Jacques de Larosière. It is also the subject of ongoing discussion at international level, for example through the work of the G20.

It is in recognition of these weaknesses and inefficiencies in the existing regulatory framework that the European Commission has committed to bring forward a proposal for a comprehensive legislative instrument establishing regulatory and supervisory standards for hedge funds, private equity and other systemically important market players.

**IMPACT ASSESSMENT:** the impact assessment covers five policy options:

Option 1: Do nothing;

Option 2: Self-regulation by AIFM industry;

Option 3: Member State action;

Option 4: EU-level action;

Option 5: International-level action.

The Commission concludes that, in comparison with industry and national action, EU-level action has clear advantages, both in terms of effective risk monitoring and control and in providing a secure framework for pan-European AIF distribution. There is a risk that such an approach would not take adequate account of the international dimension. However, international-level agreements would take considerable time to conclude and would likely be limited to broad principles. EU-level action is therefore the preferred option.

**CONTENT:** this proposal focuses on those activities that are specific or inherent to the AIFM sector and hence need to be addressed by targeted requirements. A number of the concerns that are commonly expressed about the activities of AIFM are linked to behaviours (e.g., short-selling, use of stock borrowing or other instruments to build a stake in company) which are not unique to this category of financial market participant. To be fully effective and coherent, these concerns must be addressed by comprehensive measures which apply to all market participants who engage in the relevant activities. This proposal is therefore designed to address matters that call for provisions specific to AIFM and their business.

**Scope and definitions:** in order to ensure that all AIFM operating in the European Union are subject to effective supervision and oversight, the proposed Directive introduces a legally binding authorisation and supervisory regime for all AIFM managing AIF in the European Union. The regime will apply irrespective of the legal domicile of the AIF managed.

**Operating conditions and initial authorisation:** to operate in the European Union, all AIFM will be required to obtain authorisation from the competent authority of their home Member State. All AIFM operating on European soil will be required to demonstrate that they are suitably qualified to provide AIF management services and will be required to provide detailed information on the planned activity of the AIFM, the identity and characteristics of the AIF managed, the governance of the AIFM, arrangements for the valuation and safe-keeping of assets and the systems of regulatory reporting, where required. The AIFM will also be required to hold and retain a minimum level of capital.

**Treatment of investors:** the proposed Directive requires AIFM to provide to their investors a clear description of the investment policy, including descriptions of the type of assets and the use of leverage; redemption policy in normal and exceptional circumstances; valuation, custody, administration and risk management procedures; and fees, charges and expenses associated with the investment.

**Disclosure to regulators:** to support the effective macro-prudential oversight of AIFM activities, the AIFM will also be required to report to the competent authority on a regular basis on the principal markets and instruments in which it trades, its principal exposures, performance data and concentrations of risk.

**Specific requirements for AIFM managing leveraged AIF:** the proposal: (i) empowers the Commission to set leverage limits through comitology procedures where this is required to ensure the stability and integrity of the financial system; (ii) grants additional emergency powers to the national authorities to restrict the use of leverage in respect of individual managers and funds in exceptional circumstances; (iii) foresees that AIFM employing leverage on a systematic basis above a defined threshold will be required to disclose aggregate leverage in all forms, and the main sources of leverage to the home authority of the AIFM.

**Specific requirements for AIFM acquiring controlling stakes in companies:** the proposal: (i) provides for disclosures of information to other shareholders and the representatives of employees of the portfolio company in which the AIFM acquired a controlling interest; (ii) foresees that the AIFM issues annual disclosure on the investment strategy and objectives of its fund when acquiring control of companies, and general disclosures about the performance of the portfolio company following acquisition of control.

**Rights of AIFM under the Directive:** in order to facilitate the development of the single market, an AIFM authorised in its home Member State will be entitled to market its funds to professional investors on the territory of any Member State. Member States will not be permitted to impose additional requirements on AIFM domiciled in another Member State insofar as marketing to professional investors is concerned.

Third country aspects: the proposed Directive permits AIFM to market AIF located in third country domiciles subject to strict controls on the performance of key functions by service providers in those jurisdictions. The rights granted under the Directive to market such AIF to professional investors will only become effective three years after the transposition period.

Supervisory cooperation information sharing and mediation: In order to ensure the secure functioning of the AIFM sector, competent authorities of the Member States will be required to cooperate whenever necessary so as to achieve the aims of the Directive. Given the cross-border nature of risks arising in the AIFM sector, a prerequisite for effective macro-prudential oversight will be the timely sharing of relevant macroprudential data at the European, or even global, level.

BUDGETARY IMPLICATION: the proposal has no implications for the Community budget.

## Alternative Investment Fund Managers

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OPINION OF THE EUROPEAN CENTRAL BANK on a 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.

The ECB supports the intention to provide a harmonised regulatory and supervisory framework for the activities of alternative investment fund managers (AIFMs) in the European Union. It urges the Commission of the European Communities to continue the dialogue with its international partners, in particular the United States, to ensure a globally coherent regulatory and supervisory framework.

The ECB makes the following remarks:

- all central banks should be expressly excluded from the scope of the proposed directive;
- except for the AIFM's management of its own assets, requirements under the proposed directive should be coherently applied to AIFMs, credit institutions and insurance companies;
- the proposed directive does not specify fit and proper criteria and minimum experience requirements for an AIFM's senior managers and executives. For level playing field reasons, the ECB suggests inserting provisions to this effect in the proposed directive;
- certain provisions in the proposed directive (for example, those related to short selling, securitisation and the acquisition of a controlling influence in companies) are intended to regulate horizontal issues that concern all market participants, and not just AIFMs. The ECB would suggest considering instead introducing such provisions only by means of legislation that maintains the level playing field among various market participants, for instance by inserting such provisions in existing EU legislation applicable across sectors;
- the ECB suggests that an in-depth analysis should be undertaken in order to focus reporting obligations on data that can reasonably be expected to be relevant for monitoring financial stability, to ensure the consistency of data reporting obligations with the legal framework that will establish the European Systemic Risk Board (ESRB) and the European System of Financial Supervisors (ESFS), and to enable these bodies to obtain supervisory information necessary and appropriate to fulfil their respective tasks. While the focused reporting obligations that result from this analysis should be reflected in the proposed directive, further specification would also be possible through comitology;
- due consideration could also be given to aligning certain requirements to report to the competent authorities with those of Regulation ECB/2007/8 of 27 July 2007 concerning statistics on the assets and liabilities of investment funds. Alignment with these reporting requirements and the use of a standardised reporting template for all AIFs covered by the proposed directive would contribute to EU-wide systemic risk assessment;
- the definition of leverage under the proposed directive does not, however, include specific leverage ratio concepts. The ECB is concerned that, without additional clarifications inserted into the text of the proposed directive, it may be difficult to implement the proposed definition. The ECB expects that the ESRB and the ESFS will be consulted on implementing measures to be adopted in this area, including on possible measures refining the concept of leverage;
- the ECB acknowledges that leverage can create important risks for financial stability. Owing to their investment flexibility, AIFMs can play an important role in supporting financial market liquidity, thereby contributing to effective financial market functioning and price discovery. Maintaining this role calls for balanced and appropriately risk-adjusted leverage limits applicable to AIFs that take their full risk profile into account while not excessively hindering their investment flexibility.

## 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 valutors 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 depositary 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 depositary.

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: 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.

## Alternative Investment Fund Managers

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The European Parliament adopted by 513 votes to 92, with 3 abstentions, a legislative resolution 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.

The Parliament adopted its position at first reading under the ordinary legislative procedure (formerly known as the codecision procedure). The amendments adopted in plenary are the result of a compromise reached between the European Parliament and the Council. Parliament amends the Commission's proposal as follows:

Scope: the Directive lays down rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFM) which manage and/ or market such funds in the Union.

Subject to certain exceptions and restrictions, the Directive applies to i) all EU AIFM, which manage one or more alternative investment funds (AIF) irrespective of whether the AIF is an EU AIF or a non-EU AIF; ii) all non-EU AIFM, which manage one or more EU AIF; and iii) all non-EU AIFM, which market one or more AIF in the European Union, irrespective of whether the AIF is an EU AIF or a non-EU AIF.

The Directive does not apply to: i) holdings, as they are defined in the Directive; ii) to the management of pension funds, iii) employee participation or savings schemes, iv) 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, v) to securitisation special purpose vehicles; vi) to insurance contracts and joint ventures.

Derogations: the Directive further provides for a lighter regime for AIFM where the cumulative AIF under management fall below a threshold of EUR 100 million and for AIFM that manage only unleveraged AIF that do not grant investors redemption rights during a period of five years where the cumulative AIF under management fall below a threshold of EUR 500 million. Although the activities of the AIFM concerned are unlikely to have individually significant consequences for financial stability, it could be possible that in aggregation their activities give rise to systemic risks. Consequently, those AIFM should not be subject to full authorisation but to a registration in their home Member States and should, among other requirements, provide their competent authorities with relevant information regarding the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIF they manage.

Determination of AIFM: 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. If the AIFM is unable to ensure compliance with

requirements of this Directive for which an AIF or another entity on its behalf is responsible, it shall immediately inform the competent authorities of its home Member State and, insofar applicable, the competent authorities of the EU AIF concerned. The competent authorities of the home Member State of the AIFM shall require the AIFM to take the necessary steps to remedy the situation.

If, despite such steps referred to in paragraph 2, the non-compliance persists, and insofar it concerns an EU AIFM or an EU AIF, 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 European Union. If it concerns a non-EU AIFM managing a non-EU AIF, the AIF may no longer be marketed in the European Union. The competent authorities of the home Member State of the AIFM shall immediately inform the competent authorities of the host Member States of the AIFM.

**Authorisation of AIFM:** Member States shall ensure that no AIFM manages one or more AIF unless it has been authorised in accordance with this Directive. An AIFM authorised in accordance with this Directive has to comply with the conditions for authorisation established in this Directive at all times.

Member States shall require that an AIFM applying for an authorisation shall provide the following information relating to the AIFM to the competent authorities of its home Member State.

An AIFM applying for an authorisation shall provide information on the AIF including investment strategies including the types of underlying funds if the AIF is a fund of fund and the AIFM's policy as regards the use of leverage, and the 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.

ESMA shall keep a central public register identifying each AIFM authorised under this Directive, a list of the AIF managed and/or marketed in the European Union by such AIFM and the competent authority for each such AIFM.

**Initial capital and own funds:** Member States shall require that an AIFM which is an internally managed AIF has an initial capital of at least EUR 300 000. Where an AIFM is appointed as external manager of one or more AIF, the AIFM shall have an initial capital of at least EUR 125 000.

Where the value of the portfolios of AIF managed by the AIFM exceeds EUR 250 million, the AIFM shall provide an additional amount of own funds. To cover potential professional liability risks resulting from activities the AIFM may carry out pursuant to this Directive, both internally managed AIF and externally appointed AIFM shall: i) either have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or ii) hold an appropriate professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.

**Remuneration:** the Directive requires the

AIFM to have remuneration policies and practices for those categories of staff 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. These categories of staff include senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers.

The competent authorities of the home Member State of the AIFM, having regard also to the nature of the AIF managed by the AIFM, shall require that the AIFM has sound administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms.

**Evaluation:** the Directive requires that, in all cases, the AIFM to implement valuation procedures resulting in the proper valuation of assets of the AIF. The process for valuation of assets and calculation of the net asset value (NAV) should be functionally independent from the portfolio management of the AIFM. Subject to certain conditions, the AIFM may appoint an external valuer to perform the valuation function.

**Responsibilities and liabilities of a depositary:** the responsibility of a depositary has been strengthened in comparison with the initial positions of the Commission and Council. A depositary should act honestly, fairly, professionally, independently and in the interest of the AIF or, as the case may be, the investors of the AIF.

The depositary should have its registered office or a branch in the same country as the AIF. For a non-EU AIF, the depositary can only be established in this third country if certain additional conditions are met.

The safe-keeping of assets could be delegated to a third party, which in its turn could delegate this function. However, both delegation and sub-delegation should be objectively justified and subject to strict requirements.

The depositary should be liable for the losses suffered by the AIFM, the AIF and the investors. Where the depositary holds assets in custody and those assets are lost, the depositary should be liable, unless it can prove that the loss is the result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

Where the depositary delegates custody tasks and the financial instruments held in custody by a third party are lost, the depositary should be liable. However, provided i) that the depositary is explicitly allowed to discharge itself from its liability subject to the condition precedent of a contractual transfer of such liability to that third party, pursuant to a written contract between the depositary and the AIF, or as the case may be, the AIFM acting on behalf of the AIF, in which such a discharge is objectively justified, and ii) that the third party can indeed be held liable for the loss based on a contract between the depositary and the third party.

**Use of information by competent authorities, supervisory cooperation and limits to leverage:** in order to ensure a proper assessment of the risks induced by the use of leverage by an AIFM with respect to the AIF it manages, it is required that the AIFM demonstrates that the leverage limits for each AIF it manages are reasonable and that this AIFM demonstrates how it complies at all times with those limits.

**Asset stripping:** as sought by the Parliament, the Directive now includes a number of provisions to combat asset stripping. The text states that when

Member States shall require that when an AIF, individually or jointly, acquires control of a non-listed company or an issuer, the AIFM managing such AIF shall before the end of the period expiring 24 months following the acquisition of control of the company by the AIF not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with the Directive.

Parliament was also able to insert a provision regarding important information and disclosure requirements to investors in private equity, particularly regarding information to shareholders, employees and their representatives on the strategy foreseen for the company.

Marketing of funds: the Directive also defines the conditions under which an authorised EU AIFM may market shares or units of any EU AIF that it manages to professional investors in the EU. Such marketing by EU AIFM is only allowed insofar as the AIFM complies with the provisions of this Directive and occurs with a passport.

Specific rules regarding third countries:

- After the entry into force of a delegated act adopted by the Commission which, in principle, occur two years after the final transposition date of this Directive, authorised EU AIFM intending to market non-EU AIF to professional investors in their home Member State and/or in other Member States should be allowed to do so with a passport insofar as they comply with all the provisions of this Directive. That right shall be subject to notification procedures and the fulfilment of conditions in relation to the third country of the non-EU AIF.

- During a transitional period, which will in principle, depending on the advice given by ESMA in this regard, be terminated by a delegated act three years after the entry into force of the delegated act pursuant to which the European passport has become applicable, EU AIFM intending to market non-EU AIF within the territory of certain Member States of the European Union, but without a passport, may also be permitted to do this by the relevant Member States, but only insofar as they comply with all the provisions of the Directive with the exception of the depositary requirements. However, such AIFM must ensure that one or more entities are appointed to carry out the duties of the depositary and appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards should be in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country of the non-EU AIF in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member State to carry out their duties according to this Directive. The cooperation arrangements should not be used as a barrier to impede third-country funds from being marketed in a member State. Further, the third country where the non-EU AIF is established may not be listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

- After the entry into force of a delegated act adopted by the Commission in this regard, which will in principle, occur two years after the final transposition date of this Directive, a basic principle of this Directive shall be that a non-EU AIFM established in a third country should benefit from the rights conferred under this Directive (such as to market shares and units in AIF throughout the European Union with a passport) but only where it is subject to the obligations of this Directive.

Therefore, where a non-EU AIFM intends to manage EU AIF and/or market AIF in the territory of the European Union with a passport, it should also be required to comply with all the provisions of this Directive, so that it is subject to the same obligations as AIFM established in the Union.

Powers and competences of the ESMA: ESMA may 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 by the competent authorities imposed by this Directive. ESMA shall further have the powers necessary to carry out the tasks attributed to it by this Directive. The obligation of professional secrecy shall apply to all persons who work or who have worked for ESMA, and for the competent authorities or for any other person to whom ESMA has delegated tasks, including auditors and experts contracted by ESMA.

ESMA shall produce an annual report on the application of administrative measures and imposition of sanctions in case of breaches of the provisions adopted in the implementation of this Directive in the different Member States. Competent authorities shall provide ESMA with the necessary information for this purpose.

Review: four years after the ultimate transposition date of the Directive, the Commission shall review the application and the scope of the Directive taking into account the objectives of this Directive and shall assess whether or not the European harmonised approach has caused any ongoing major market disruption and whether or not it functions effectively in light of the principles of the internal market and of a level playing field.

## Alternative Investment Fund Managers

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**PURPOSE:** to introduce harmonised EU rules for entities engaged in the management of alternative investment funds, such as hedge funds and private equity firms.

**LEGISLATIVE ACT:** Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

**CONTENT:** adoption of the text follows an agreement reached with the European Parliament at first reading. The directive is aimed at:

- establishing common requirements for the authorisation and supervision of alternative investment fund managers (AIFM) in order to provide a coherent approach to the related risks and their impact on investors and markets in the EU;
- allowing AIFM to provide services and market EU funds throughout the EU single market, subject to compliance with strict requirements.

The directive is intended to fulfil commitments made by the EU at the G-20, in the wake of the global financial crisis, as well as the European Council's pledge to regulate all players in the market that might pose a risk to financial stability.

The Directive does not apply to: (i) holdings, as they are defined in the Directive; (ii) to the management of pension funds, (iii) employee participation or savings schemes, (iv) 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, (v) to securitisation special purpose vehicles; (vi) to insurance contracts and joint ventures.

The main features of the directive are as follows:

**Authorisations:** to operate in the EU, fund managers will be required under the directive to obtain authorisation from the competent authority of their home member state. Once authorised, an AIFM will be entitled to market funds established in the EU to professional investors in any member state. To obtain authorisation, AIFM will have to hold a minimum level of capital in the form of liquid or short-term assets.

**Depositary:** AIFM will be required to ensure that the funds they manage appoint an independent depositary responsible for overseeing the fund's activities and ensuring that the fund's assets are appropriately protected. The depositary will be liable to the investor and the manager. It should be located in the same country as the fund if the fund is established in the EU. If the fund is established in a third country, the depositary should be located in the EU, unless a cooperation and information exchange agreement exists between the supervisors ensuring that regulations are equivalent and supervision can be carried out in accordance with requirements in the EU.

**Risk management and prudential oversight:** AIFM will be required to satisfy the competent authority of the robustness of their internal arrangements with respect to risk management, including liquidity risks. To support macro-prudential oversight, they will be required to disclose on a regular basis the principal markets and instruments in which they trade, their principal exposures and concentrations of risk.

**Treatment of investors:** in order to encourage diligence amongst their investors, AIFM will be required to provide a clear description of their investment policy, including descriptions of the types of assets and the use of leverage.

**Leveraged funds:** the directive introduces specific requirements with regard to leverage, i.e. the use of debt to finance investment. Competent authorities will be empowered to set limits to leverage in order to ensure the stability of the financial system. AIFM employing leverage on a systematic basis will be required to disclose aggregate leverage and the main sources of leverage, and competent authorities will be required to share relevant information with other competent authorities.

**AIFM acquiring controlling stakes in companies:** the directive introduces specific requirements for AIFM acquiring controlling stakes in companies, in particular the disclosure of information to other shareholders and to representatives of employees of the portfolio company. It however avoids extending such requirements to acquisitions of SMEs, so as to avoid hampering start-up or venture capital.

**Passport:** the directive introduces a single market framework that will allow AIFM to "passport" their services in different member states on the basis of a single authorisation. Once an AIFM is authorised in one member state and complies with the rules of the directive, the fund manager will be entitled upon notification to manage or market funds to professional investors throughout the EU.

**Funds and managers located in third countries:** following a two-year transition period and subject to conditions set out in the directive, the "passport" will be extended to the marketing of non-EU funds, managed either by EU AIFM or by AIFM based outside the EU. In accordance with the principle of "same rights, same obligations", this approach will ensure a level playing field and a consistently high level of transparency and protection of European investors. The phased introduction of the third country passports will allow European supervisors to ensure that the appropriate controls and cooperation arrangements necessary for the effective supervision of non-EU AIFM are working effectively. Before the third country passport is introduced, and for a period of three years thereafter, national regimes will remain available subject to certain harmonised safeguards. Once this period has elapsed, and on the basis of conditions set out in the directive, a decision will be taken to eliminate the national regimes. At this point, all AIFM active in the EU will be subject to the same high standards and enjoy the same rights.

**Optional exemptions for smaller funds:** the directive gives member states the option not to apply the directive to smaller AIFM, namely funds with managed assets below EUR 100 million if they use leverage, and with assets below EUR 500 million if they do not. Smaller funds will however be subject to minimum registration and reporting requirements.

**Powers and competences of the ESMA:** ESMA may 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 by the competent authorities imposed by this Directive. ESMA shall further have the powers necessary to carry out the tasks attributed to it by this Directive.

**Review:** by 22 July 2017, the Commission shall, on the basis of public consultation and in the light of the discussions with competent authorities, start a review on the application and the scope of this Directive. That review shall analyse the experience acquired in applying this Directive, its impact on investors, AIFs or AIFMs, in the Union and in third countries, and the degree to which the objectives of this Directive have been achieved.

**ENTRY INTO FORCE:** 21/07/2011.

**TRANSPOSITION:** 22/07/2013.

**DELEGATED ACTS:** the powers to adopt delegated acts referred to in Articles 3, 4, 9, 12, 14 to 25, 34 to 37, 40, 42, 53, 67 and 68 shall be conferred on the Commission for a period of 4 years from 21 July 2011. The Commission shall draw up a report in respect of the delegated powers no later than 6 months before the end of the 4-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it. The European Parliament and the Council may object to a delegated act within a period of 3 months from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by 3 months. If either the European Parliament or the Council objects to the adopted delegated act, it shall not enter into force.