

Alternative Investment Fund Managers

2009/0064(COD) - 11/11/2010 - Text adopted by Parliament, 1st reading/single reading

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.