

Alternative Investment Fund Managers

2009/0064(COD) - 08/06/2011 - Final act

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.

Depository: AIFM will be required to ensure that the funds they manage appoint an independent depository responsible for overseeing the fund's activities and ensuring that the fund's assets are appropriately protected. The depository 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 depository 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.