

Amendments to the Alternative Investment Fund Managers Directive (AIFMD) and to the Directive relating to undertakings for collective investment in transferable securities (UCITS)

2021/0376(COD) - 02/02/2023 - Committee report tabled for plenary, 1st reading/single reading

The Committee on Economic and Monetary Affairs adopted the report by Isabel BENJUMEA BENJUMEA (EPP, ES) on the proposal for a directive of the European Parliament and of the Council amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds.

The committee responsible recommended that the European Parliament's position adopted at first reading under the ordinary legislative procedure should amend the proposal as follows:

Concept of professional investor

Members include the definition of ‘professional investor’ to mean an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2014/65/EC.

Application for authorisation

The report proposed that Member States should require that alternative investment fund managers applying for an authorisation should provide additional information relating to the AIFM to the competent authorities of its home Member State such as, *inter alia*:

- the legal name and relevant legal identifier of the AIFM, the AIF and its investment strategy as well as of each delegate, its jurisdiction of establishment and, where relevant, its supervisory authority;
- a brief description of the delegated risk and portfolio management functions, including whether each such delegation amounts to a partial or full delegation;

An AIFM should report to the competent authority any material changes that may affect the scope of the authorisation by that authority and in particular any modification on the arrangements of the delegation and sub-delegation to third parties provided at the time of authorisation.

AIFs marketed to retail investors

Members added the obligation for an AIFM managing an AIF marketed to retail investors to ensure that at least one member of its governing body is a non-executive director who is independent in character and judgment and has sufficient expertise and experience to be able to make judgments on whether the AIFM is managing AIFs in the best interest of investors. Such a non-executive director should contribute to ensuring that the AIFM complies with the requirements regarding conflicts of interests and acting in the best interests of the AIFs and their investors.

Conflicts of interest

Where an AIFM intends to manage an AIF on behalf of a third-party, including but not limited to under a mandate or under a delegation, and where the third-party is to have significant control over the AIF's design, distribution and management, the AIFM should employ heightened scrutiny of the potential for conflicts of interest. AIFMs engaging in such a relationship should submit detailed explanations and evidence to the competent authorities of their home Member State. In particular, they should specify how they prevent systematic conflicts of interest or any other material conflicts of interest arising from the relationship, how any existing or potential conflicts are effectively managed in the best interest of investors and how this is clearly and comprehensively disclosed to investors.

Undue costs

For the purpose of fair treatment amongst investors, the report states that ESMA should submit a report to the Parliament and the Council (i) assessing the costs charged by AIFMs to investors in UCITS, and the reasons for costs levels and differences between them, (ii) proposing criteria for assessing whether the level of such costs is appropriate, in particular when compared to the level of costs in other jurisdictions worldwide; (ii) proposing, if needed, options for action by competent authorities or by legislators in respect of inappropriate or undue levels of such costs. Such a report should be submitted 18 months following the entry into force of the directive.

Risk management

Members provide that AIFMs managing loan origination AIFs but also AIFs acquiring loans should have effective policies, procedures and processes for assessing credit risk and administering and monitoring their credit portfolios, except if such loans are shareholder loans that do not exceed in aggregate 150% of the capital of the AIF.

EU depositary

The home Member State of an AIF may entitle its national competent authorities to allow, following a case-by-case assessment, institutions and established in another Member State to be appointed as a depositary, provided that the following conditions are fulfilled:

- the competent authorities must have received a motivated request by the AIFM which should demonstrate the lack of the relevant depositary services able to meet the needs of the AIF having regard to its operational strategy; and
- the national depositary market of the home Member State of the AIF should fulfil at least one of the following conditions: (i) such market consists of fewer than 7 depositaries providing depositary services to EU AIFs and managed by an EU AIFMs and where no depositary has AIF assets under custody which exceed EUR 1 billion or the equivalent in any other currency (such threshold shall excluded depositaries; or (ii) the aggregate amount in such market of assets safekept on behalf of EU AIFs and managed by an EU AIFMs does not exceed the amount of EUR 60 billion or the equivalent in any other currency.