



EUROPEAN PARLIAMENT

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Committee on Economic and Monetary Affairs

2009/0064(COD)

23.11.2009

*****I**

DRAFT REPORT

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
(COM(2009)0207 – C7-0040/2009 – 2009/0064(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Jean-Paul Gauzès

Rapporteur for the opinion(*): Evelyn Regner,
Committee on Legal Affairs

(*) Associated committee - Rule 50 of the Rules of Procedure

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend the common position
- *** Assent procedure
majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend the common position
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

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

(COM(2009)0207 – C7-0040/2009 – 2009/0064(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2009)0207),
 - having regard to Article 251(2) and Article 47(2) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C7-0040/2009),
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Legal Affairs (A7-0000/2009),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and the Commission.

Amendment 1

Proposal for a directive– amending act

Recital 5

Text proposed by the Commission

(5) The scope of this Directive should be confined to the management of collective investment undertakings which raise capital from a number of investors with a view to investing it in accordance with a defined investment policy ***on the principle of risk-spreading*** for the benefit of those investors. This Directive should not apply to the ***management of pension funds or*** managers of non-pooled investments such as endowments, sovereign wealth funds or assets *held* on own account by credit institutions, insurance or reinsurance undertakings. ***This Directive should***

Amendment

(5) The scope of this Directive should be confined to the management of collective investment undertakings which raise capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors. This Directive should not apply to the managers of non-pooled investments such as endowments, sovereign wealth funds, ***central banks*** or assets *held* on own account by credit institutions, ***pension funds, or*** insurance or reinsurance undertakings. ***In order to benefit from the exemptions provided for***

neither apply to actively managed investments in the form of securities, such as certificates, managed futures, or index-linked bonds. It should, however, cover managers of all collective investment undertakings which are not required to be authorised as UCITS. Investment firms authorised under Directive 2004/39/EC on Markets in Financial Instruments should not be required to obtain an authorisation under this Directive in order to provide investment services in respect of AIF. Investment firms can however only provide investment services in respect of AIF, if and to the extent the units or shares thereof can be marketed in accordance with this Directive.

in this Directive, AIFM concerned should comply with the conditions of those exemptions on a continuous basis. This Directive should, however, cover managers of all collective investment undertakings which are not required to be authorised as UCITS. Investment firms authorised under Directive 2004/39/EC on Markets in Financial Instruments should not be required to obtain an authorisation under this Directive in order to provide investment services in respect of AIF. Investment firms can however only provide investment services in respect of AIF, if and to the extent the units or shares thereof can be marketed in accordance with this Directive.

Or. en

Justification

Exemptions should be limited in order to achieve a level playing field.

Amendment 2

Proposal for a directive— amending act Recital 6

Text proposed by the Commission

Amendment

(6) In order to avoid imposing excessive or disproportionate requirements, this Directive provides for an exemption for AIFM where the cumulative AIF under management fall below a threshold of EUR 100 million. The activities of the AIFM concerned are unlikely to have significant consequences for financial stability or market efficiency. For AIFM which only manage unleveraged AIF and do not grant investors redemption rights during a period of five years a specific threshold of EUR 500 million applies. This specific threshold is justified by the fact that managers of unleveraged funds, specialised in long term investments, are

deleted

even less likely to cause systemic risks. Furthermore, the five years lock-up of investors eliminates liquidity risks. AIFM which are exempt from this Directive should continue to be subject to any relevant national legislation. They should however be allowed to be treated as AIFM subject to the opt-in procedure foreseen by this Directive.

Or. en

Amendment 3

Proposal for a directive– amending act Recital 7

Text proposed by the Commission

(7) This Directive aims at providing a harmonised and stringent regulatory and supervisory framework for the activities of AIFM. Authorisation in accordance with this Directive should cover the services of management and administration of AIF throughout the Community. In addition, authorised AIFM should be entitled to market AIF in the Community to professional investors, subject to a notification procedure.

Amendment

(7) This Directive aims at providing a harmonised and stringent regulatory and supervisory framework for the activities of AIFM. Authorisation in accordance with this Directive should cover the services of management and administration of AIF throughout the Community. In addition, authorised AIFM should be entitled to market AIF **domiciled in the Community throughout** the Community to professional investors, subject to a notification procedure.

Or. en

Amendment 4

Proposal for a directive– amending act Recital 9

Text proposed by the Commission

(9) Without prejudice to the application of other instruments of Community law, Member States may impose stricter

Amendment

(9) Without prejudice to the application of other instruments of Community law, Member States may impose stricter

requirements on AIFM whenever AIFM market an AIF solely to retail investors or whenever AIFM market the same AIF both to professional and retail investors, irrespective of whether units or shares of this AIF are marketed on a domestic or cross-border basis. These two exceptions enable Member States to impose additional safeguards which they deem necessary for the protection of retail investors. This takes account of the fact that AIF are often illiquid and subject to high risk of substantial capital loss. Investment strategies in relation to AIF are generally not adapted to the investment profile or needs of retail investors. They are more suitable for professional investors and investors having a sufficiently large investment portfolio so as to be able to absorb the higher risks of loss associated with these investments. Nevertheless, Member States may allow the marketing of ***all or*** certain types of AIF managed by AIFM to retail investors on their territory. Against the background of paragraphs 4 and 5 of Article 19 of Directive 2004/39/EC, Member States should continue to ensure that appropriate provision is made whenever they permit the marketing of AIF to retail investors. Investment firms authorised in accordance with Directive 2004/39/EC which provide investment services to retail clients have to take into account these additional safeguards when assessing whether a certain AIF is suitable or appropriate for an individual retail client. Where a Member State allows the marketing of AIF to retail investors on its territory, this possibility should be available regardless of the Member State where the AIFM is established, and any additional provisions should apply on a non-discriminatory basis.

requirements on AIFM whenever AIFM market an AIF solely to retail investors or whenever AIFM market the same AIF both to professional and retail investors, irrespective of whether units or shares of this AIF are marketed on a domestic or cross-border basis. These two exceptions enable Member States to impose additional safeguards which they deem necessary for the protection of retail investors. This takes account of the fact that AIF are often illiquid and subject to high risk of substantial capital loss. Investment strategies in relation to AIF are generally not adapted to the investment profile or needs of retail investors. They are more suitable for professional investors and investors having a sufficiently large investment portfolio so as to be able to absorb the higher risks of loss associated with these investments. Nevertheless, 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 AIFs, which do not benefit from the European marketing passport under this Directive, and feeders that invest in master AIF, which do not benefit from the European marketing passport under this Directive.*** Against the background of paragraphs 4 and 5 of Article 19 of Directive 2004/39/EC, Member States should continue to ensure that appropriate provision is made whenever they permit the marketing of AIF to retail investors. Investment firms authorised in accordance with Directive 2004/39/EC which provide investment services to retail clients have to take into account these additional safeguards when assessing whether a certain AIF is suitable or appropriate for an individual retail client. Where a Member State allows the marketing of AIF to retail investors on its territory, this possibility should be available regardless of the Member State where the AIFM is

established, and any additional provisions should apply on a non-discriminatory basis.

Or. en

Amendment 5

Proposal for a directive– amending act Recital 10 a (new)

Text proposed by the Commission

Amendment

(10a) In accordance with the principle of proportionality and recognising the substantial overlap between the authorisation requirements laid down in Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) ¹ and those laid down in this Directive, managers authorised under either that Directive or this Directive should be entitled to be authorised under the other Directive, subject only to complying with any relevant additional requirements for the new authorisation. In that respect, cross-references concerning documents should be possible, provided that information contained in those documents have remained unchanged. Directive 2009/65/EC should be amended to achieve the same result.

¹ OJ L 302, 17.11.2009, p. 32.

Or. en

Justification

This aims to simplify and fasten the process and to avoid duplication of work and costs.

Amendment 6

Proposal for a directive– amending act Recital 11

Text proposed by the Commission

(11) It is necessary to provide for the application of minimum capital requirements to ensure the continuity and the regularity of the management services provided by the AIFM. The ongoing capital requirements should cover the potential exposure of AIFM to professional liability in respect of all their activities, including management services provided under delegation or on the basis of a mandate.

Amendment

(11) It is necessary to provide for the application of minimum capital requirements to ensure the continuity and the regularity of the management services provided by the AIFM. The ongoing capital requirements should cover the potential exposure of AIFM to professional liability in respect of all their activities, including management services provided under delegation or on the basis of a mandate. ***The own funds requirement should therefore be subject to the same ceiling as that set by Directive 2009/65/EC. In addition, own funds should be invested in liquid assets or assets readily convertible to cash in the short term and should not include speculative positions.***

Or. en

Justification

Partial alignment UCITS Recital 9.

Amendment 7

Proposal for a directive– amending act Recital 12 a (new)

Text proposed by the Commission

Amendment

(12a) The Leaders' statement following the G-20 Summit in Pittsburgh on 24 and-25 September 2009 set out the international consensus concerning remuneration of staff in banks and other systemically important financial services firms. Those principles should apply to AIFM which fall within the scope of this

Directive. The Commission should elaborate implementing measures to that end.

Or. en

Amendment 8

Proposal for a directive— amending act Recital 12 b (new)

Text proposed by the Commission

Amendment

(12b)The Commission should ensure that the requirements concerning depositaries set out in this Directive are applied to UCITS depositaries and should for this purpose revise Directive 2009/65/EC accordingly at the latest by the date of this Directive entering into force.

Or. en

Justification

In order to ensure the cross-sectoral consistency.

Amendment 9

Proposal for a directive— amending act Recital 13

Text proposed by the Commission

Amendment

(13) Reliable and objective asset valuation is crucial for the protection of investor interests. Different AIFM employ different methodologies and systems for valuing assets, depending on the assets and markets in which they predominantly invest. It is appropriate to recognise these differences ***but to, nevertheless, require the valuation of assets to be undertaken by an entity which is independent of the AIFM.***

(13) Reliable and objective asset valuation is crucial for the protection of investor interests. Different AIFM employ different methodologies and systems for valuing assets, depending on the assets and markets in which they predominantly invest. It is appropriate to recognise these differences. ***The process for valuation of assets and calculation of the net asset value (NAV) should be independent from the management functions of the AIFM.***

Where relevant, valuation of assets and calculation of the NAV may be delegated by the AIFM to a third party.

Or. en

Amendment 10

Proposal for a directive— amending act Recital 14

Text proposed by the Commission

(14) AIFM may delegate **responsibility for** the performance of its functions in accordance with this Directive. AIFM should remain responsible for the proper performance of their functions and compliance with the rules set out in this Directive.

Amendment

(14) AIFM may delegate the performance of **some of** its functions in accordance with this Directive. AIFM should remain responsible for the proper performance of their functions and compliance with the rules set out in this Directive.

Or. en

Amendment 11

Proposal for a directive— amending act Recital 15

Text proposed by the Commission

(15) Given that AIFM employing high levels of leverage in their investment strategies may, under certain conditions, contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFM using certain techniques giving rise to particular risks. The information needed to detect, monitor and respond to those risks has not been collected in a consistent way throughout the Community, and shared across Member States so as to identify potential sources of risk to the stability of financial markets in the Community. To remedy this situation,

Amendment

(15) Given that AIFM employing high levels of leverage in their investment strategies may, under certain conditions, contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFM using certain techniques giving rise to particular risks. The information needed to detect, monitor and respond to those risks has not been collected in a consistent way throughout the Community, and shared across Member States so as to identify potential sources of risk to the stability of financial markets in the Community. To remedy this situation,

special requirements should apply to AIFM, which consistently use high levels of leverage in their investment strategies. Those AIFM should be obliged to disclose information regarding their use and sources of leverage. That information should be aggregated and shared with other authorities in the Community, so as to facilitate a collective analysis of the impact of the leverage of those AIFM on the financial system in the Community, as well as a common response.

special requirements should apply to AIFM, which consistently use high levels of leverage in their investment strategies. Those AIFM should be obliged to ***set leverage limits in respect of each AIF it manages and to*** disclose information regarding their use and sources of leverage. That information should be aggregated and shared with other authorities in the Community, so as to facilitate a collective analysis of the impact of the leverage of those AIFM on the financial system in the Community, as well as a common response. ***Competent authorities should pass such information to the European Systemic Risk Board (ESRB) established under Regulation (EC) No .../2009 (ESRB Regulation) and to the European Securities and Markets Authority established under Regulation (EC) No .../2009 (ESMA Regulation) for use by these bodies in the performance of their duties.***

Or. en

Amendment 12

Proposal for a directive— amending act Recital 16

Text proposed by the Commission

(16) Activities of AIFM based on the use of high levels of leverage could be detrimental to the stability and efficient functioning of financial markets. It is considered necessary to allow the Commission to impose limits on the level of leverage that AIFM could use, in particular in those cases where AIFM employ high levels of leverage on a systematic basis. The limits to the maximum amount of leverage should take into account aspects related to the source of leverage and the strategies employed by

Amendment

(16) Activities of AIFM based on the use of high levels of leverage could be detrimental to the stability and efficient functioning of financial markets. It is considered necessary to allow the Commission to impose limits ***in exceptional circumstances*** on the level of leverage that AIFM could use ***and*** in particular in those cases where AIFM employ high levels of leverage on a systematic basis. The limits to the maximum amount of leverage should take into account aspects related to the source of

the AIFM. They should also take into account the essentially dynamic nature of the management of leverage by most AIFM using a high level of leverage. In this respect the limits to leverage could for example either consist in a threshold that should not be breached at any point in time or a limit on the average leverage employed during a given period (i.e. monthly or quarterly).

leverage and the strategies employed by the AIFM. They should also take into account the essentially dynamic nature of the management of leverage by most AIFM using a high level of leverage. In this respect the limits to leverage could for example either consist in a threshold that should not be breached at any point in time or a limit on the average leverage employed during a given period (i.e. monthly or quarterly). ***The Commission should take into account the views of the European Systemic Risk Board when exercising its power to set limits to leverage.***

Or. en

Amendment 13

Proposal for a directive— amending act Recital 16 a (new)

Text proposed by the Commission

Amendment

(16a) Short selling plays an important role in the functioning of the financial markets and is a legitimate investment technique. Nevertheless, there is a concern that, notably in extreme market conditions, short selling may contribute to market disorder. Therefore, short selling should operate in a harmonised regulatory framework to reduce the potential destabilising effect that it may cause.

Or. en

Amendment 14

Proposal for a directive— amending act Recital 17

Text proposed by the Commission

(17) It is necessary to ensure that an AIFM provides all companies over which it can exercise a controlling or dominant influence with the information necessary for the company to assess how this controlling influence in the short to medium term impacts the company's economic and social situation. To this end, particular requirements should apply to AIFM managing AIF which are in a position to exercise controlling influence over a *listed or* non-listed company, in particular to notify the existence of this position and to disclose information to the company and all its other shareholders about the intentions of the AIFM with regard to the future business development and other planned changes of the controlled company. In order to ensure transparency regarding the controlled company, enhanced reporting requirements should apply. The annual reports of the relevant AIF should be supplemented with information that is specific to the type of investment and the controlled company.

Amendment

(17) It is necessary to ensure that an AIFM provides all companies over which it can exercise a controlling or dominant influence with the information necessary for the company to assess how this controlling influence in the short to medium term impacts the company's economic and social situation. ***When AIFM are managing AIF which are in a position to exercise controlling influence in an issuer whose shares are admitted to trading on a regulated market, information shall be disclosed according to Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids¹ and Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market². In order to guarantee a level playing field between the issuers and non-listed companies, which AIFM invest in, the requirements of this Directive should thus apply to AIFM, which are managing AIF which are in a position to exercise controlling influence in an issuer whose shares are admitted to trading on a regulated market, only if and to the extent that they exceed already existing provisions of EU law, applicable to issuers.*** To this end, particular requirements should apply to AIFM managing AIF which are in a position to exercise controlling influence over a non-listed company, in particular to notify the existence of this position and to disclose information to the company and all its other shareholders about the intentions of

the AIFM with regard to the future business development and other planned changes of the controlled company. In order to ensure transparency regarding the controlled company, enhanced reporting requirements should apply. The annual reports of the relevant AIF should be supplemented with information that is specific to the type of investment and the controlled company.

¹ OJ L 142, 30.4.2004, p. 12.

² OJ L 390, 31.12.2004, p. 38.

Or. en

Justification

This principle is complementary with Recital 17a (new) and is reflected in changes to Articles 26 to 30.

Amendment 15

Proposal for a directive– amending act Recital 17 a (new)

Text proposed by the Commission

Amendment

(17a) It is necessary to ensure that portfolio companies are not subject to more stringent requirements than any other issuer or non-listed company receiving private investment other than the investment provided by an AIFM.

For this purpose, the Commission should conduct a review of relevant company law legislation as well as of relevant financial sector directives at the latest by the date of this Directive entering into force and make necessary changes in the form of legislative amendments, which should ensure such level playing field between portfolio and other companies.

Or. en

Justification

Amendment 16

**Proposal for a directive– amending act
Recital 17 b (new)**

Text proposed by the Commission

Amendment

(17b) This Directive should not be too burdensome for small AIFs which do not pose systemic risk and do not endanger integrity of the markets. One of the tools by which to achieve that objective is the proper application of the proportionality principle. That principle should apply both to the requirements imposed on the AIFMs, AIFs, depositories and valuers, as well as on the exercise of supervisory powers. All measures in this Directive, including implementing measures, should thus incorporate the principle of proportionality to reflect the nature, scale and complexity of their business.

Or. en

Justification

Definition of Proportionality is taken (with adaptation) from Solvency II Directive.

Amendment 17

**Proposal for a directive– amending act
Recital 19**

Text proposed by the Commission

Amendment

(19) AIFM should also be able to market AIF domiciled in third countries to professional investors both in the home Member State of the AIFM and in other Member States. That right should be subject to notification procedures and the

(19) Any European investor should be free to invest on its own initiative, in a third country fund in accordance with the existing national private placement regimes. However, in such a case, transparency of the fund and effective

existence of a tax agreement with the third country concerned which ensures an efficient exchange of information with the tax authorities in the domicile of the Community investors. Given the fact that such AIF and the third country in which they are domiciled have to meet additional requirements, some of which first have to be laid down in implementing measures, the rights granted under the Directive to market AIF domiciled in third countries to professional investors should only become effective three years after the transposition period. In the meantime Member States may allow or continue to allow AIFM to market AIF domiciled in third countries to professional investors on their territory subject to national law. During this period of three years, AIFM can however not market such AIF to professional investors in other Member States on the basis of rights granted under this Directive.

monitoring of potential systemic risk should be ensured. To this end, if the AIFM is domiciled in a third country, the competent authority of the Member State in which the relevant AIF is marketed should have an agreement for cooperation and exchange of information concerning systemic risk with the competent authority in that third country. In addition, to complete the internal market, AIF domiciled in Europe and managed by a European-based AIFM should benefit from a European marketing passport under this Directive. As UCITS benefit from the UCITS brand, so also should an AIF domiciled in the Community benefit from such a European brand, offering the investors the standards as set by this Directive, reinforced by the requirement that the depository and the AIF should be domiciled in the same Member State. These provisions should not be circumvented through master-feeder structures. Therefore, when a feeder AIF invests in a master fund which would not benefit from the European marketing passport under this Directive, this feeder AIF should not benefit from the European passport either. These provisions should also not be circumvented through funds of funds structures. Therefore where such AIF invests over 30% in AIFs, which would not benefit from the European passport, such funds of funds AIF should not benefit from the European passport either.

Or. en

Amendment 18

Proposal for a directive— amending act Recital 20

Text proposed by the Commission

(20) It is appropriate to allow the AIFM to delegate administrative tasks to an entity established in a third country provided that necessary safeguards are in place. Similarly, a depositary may delegate its depositary tasks in respect of AIF domiciled in a third country to a depositary domiciled in that third country, provided that the legislation of that third country ensures a level of protection of investor interests which is equivalent to that in the Community. Under certain conditions, it should also be possible for the AIFM to appoint an independent valuator established in a third country.

Amendment

(20) It is appropriate to allow the AIFM to delegate administrative tasks to an entity established in a third country provided that necessary safeguards are in place. Similarly, a depositary may delegate ***some of*** its depositary tasks in respect of AIF domiciled in a third country to a depositary domiciled in that third country, provided that the legislation of that third country ensures a level of protection of investor interests which is equivalent to that in the Community. Under certain conditions, it should also be possible for the AIFM to appoint an independent valuator established in a third country.

Or. en

Amendment 19

Proposal for a directive— amending act Recital 21

Text proposed by the Commission

(21) Subject to the existence of an equivalent regulatory framework in a third country, as well as of effective access for AIFM established in the Community to the market of that third country, Member States should be allowed to authorise AIFM in accordance with the provisions of this Directive, without requiring that it has a registered office in the Community, after a period of three years as from the end of the transposition period. This period takes account of the fact that such AIFM and the third country in which they are domiciled have to meet

Amendment

deleted

additional requirements some of which first have to be laid down by implementing measures.

Or. en

Amendment 20

Proposal for a directive— amending act Recital 27

Text proposed by the Commission

(27) In particular the Commission should be empowered to adopt the measures necessary for the implementation of this Directive. In this respect, the Commission should be able to adopt measures determining the procedures under which AIFM managing portfolios of AIF whose assets under management do not exceed the threshold set out in this Directive may exercise their right to be treated as AIFM covered by this Directive. These measures are also designed to specify the criteria to be used by competent authorities to assess whether AIFM comply with their obligations as regards their conduct of business, the type of conflicts of interests AIFM have to identify, as well as the reasonable steps AIFM are expected to take in terms of internal and organizational procedures in order to identify, prevent, manage and disclose conflicts of interest. They are designed to specify the risk management requirements to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages as well as any arrangements needed to enable AIFM to manage the particular risks associated with short selling transactions, including any relevant restrictions that might be needed to protect the AIF from undue risk exposures. They are designed to specify the liquidity management requirements of this Directive

Amendment

(27) In particular the Commission should be empowered to adopt the measures necessary for the implementation of this Directive. In this respect, the Commission should be able to adopt measures determining the procedures under which AIFM managing portfolios of AIF whose assets under management do not exceed the threshold set out in this Directive may exercise their right to be treated as AIFM covered by this Directive. These measures are also designed to specify the criteria to be used by competent authorities to assess whether AIFM comply with their obligations as regards their conduct of business, the type of conflicts of interests AIFM have to identify, as well as the reasonable steps AIFM are expected to take in terms of internal and organizational procedures in order to identify, prevent, manage and disclose conflicts of interest. They are designed to specify the risk management requirements to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages as well as any arrangements needed to enable AIFM to manage the particular risks associated with short selling transactions, including any relevant restrictions that might be needed to protect the AIF from undue risk exposures. They are designed to specify the liquidity management requirements of this Directive

and in particular the minimum liquidity requirements for AIF. They are designed to specify the requirements that originators of securitisation instruments have to meet in order for an AIFM to be allowed to invest in such instruments issued after 1 January 2011. They are as well designed to specify the requirements that AIFM have to comply with when investing in such securitisation instruments. They are designed to specify ***the criteria under which a valuator can be considered independent in the meaning of this Directive. They are designed to specify the conditions under which the delegation of AIFM functions should be approved and*** the conditions under which the manager could no longer be considered to be the manager of the AIF in case of excessive delegation. They are designed to specify the content and format of the annual report that AIFM have to make available for each AIF they manage and to specify the disclosure obligations of AIFM to investors and reporting requirements to competent authorities as well as their frequency. They are designed to specify the disclosure requirements imposed on AIFM as regards leverage and the frequency of reporting to competent authorities and of disclosure to investors. They are designed to setting limits to the level of leverage AIFM can employ when managing AIF. They are designed to determine the detailed content and the way AIFM acquiring controlling influence in issuers and non-listed companies should fulfil their information obligation towards issuers and non-listed companies and their respective shareholders and representatives of employees, including the information to be provided in the annual reports of the AIF they manage. They are designed to specify the types of restrictions or conditions that can be imposed on the marketing of AIF to professional investor in the home Member State of the AIFM. They are designed to specify general criteria for assessing

and in particular the minimum liquidity requirements for AIF. They are designed to specify the requirements that originators of securitisation instruments have to meet in order for an AIFM to be allowed to invest in such instruments issued after 1 January 2011. They are as well designed to specify the requirements that AIFM have to comply with when investing in such securitisation instruments. They are designed to specify the conditions under which the manager could no longer be considered to be the manager of the AIF in case of excessive delegation. They are designed to specify the content and format of the annual report that AIFM have to make available for each AIF they manage and to specify the disclosure obligations of AIFM to investors and reporting requirements to competent authorities as well as their frequency. They are designed to specify the disclosure requirements imposed on AIFM as regards leverage and the frequency of reporting to competent authorities and of disclosure to investors. They are designed to setting limits to the level of leverage AIFM can employ when managing AIF. They are designed to determine the detailed content and the way AIFM acquiring controlling influence in issuers and non-listed companies should fulfil their information obligation towards issuers and non-listed companies and their respective shareholders and representatives of employees, including the information to be provided in the annual reports of the AIF they manage. They are designed to specify the types of restrictions or conditions that can be imposed on the marketing of AIF to professional investor in the home Member State of the AIFM. They are designed to specify general criteria for assessing equivalence of valuation standards of third countries where the valuator is established in a third country, the equivalence of legislation of third countries regarding depositaries and, for the purpose of the authorisation of

equivalence of valuation standards of third countries where the valuator is established in a third country, the equivalence of legislation of third countries regarding depositaries and, for the purpose of the authorisation of AIFM established in third countries, the equivalence of prudential regulation and ongoing supervision. ***They are designed to specify general criteria for assessing whether third countries grant Community AIFM effective market access comparable to that granted by the Community to AIFM from third countries.*** They are designed to specify the modalities, content and frequency of exchange of information regarding AIFM between the competent authorities of the home Member State of the AIFM and other competent authorities where the AIFM individually or collectively with other AIFM may have an impact on the stability of systemically relevant financial institutions and the orderly functioning of markets. They are designed to specify the procedures for on-the-spot verifications and investigations.

AIFM established in third countries, the equivalence of prudential regulation and ongoing supervision. They are designed to specify the modalities, content and frequency of exchange of information regarding AIFM between the competent authorities of the home Member State of the AIFM and other competent authorities where the AIFM individually or collectively with other AIFM may have an impact on the stability of systemically relevant financial institutions and the orderly functioning of markets. They are designed to specify the procedures for onthespot verifications and investigations.

Or. en

Amendment 21

Proposal for a directive– amending act Recital 28

Text proposed by the Commission

(28) Since those measures are of general scope and are designed to amend non-essential elements of this Directive, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC. Measures not falling under the above category should be subject to the regulatory procedure

Amendment

(28) Since those measures are of general scope and are designed to amend non-essential elements of this Directive, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC. Measures not falling under the above category should be subject to the regulatory procedure

provided in Article 5 of that Decision.
Those measures are designed to state that the fund valuation standards of a specific third country are equivalent to those applicable in the Community where the valuator is established in a third country. They are designed to state that the legislation on depositaries of a specific third country is equivalent to this Directive. They are designed to state that the legislation on prudential regulation and ongoing supervision of AIFM in a specific third country is equivalent to this Directive. ***They are designed to state whether a specific third country grants Community AIFM effective market access comparable to that granted by the Community to AIFM from that third country.*** They are designed to specify standard models for notification and attestations and to specify the procedure for the exchange of information between competent authorities.

provided in Article 5 of that Decision.
Those measures are designed to state that the fund valuation standards of a specific third country are equivalent to those applicable in the Community where the valuator is established in a third country. They are designed to state that the legislation on depositaries of a specific third country is equivalent to this Directive. They are designed to state that the legislation on prudential regulation and ongoing supervision of AIFM in a specific third country is equivalent to this Directive. They are designed to specify standard models for notification and attestations and to specify the procedure for the exchange of information between competent authorities.

Or. en

Amendment 22

Proposal for a directive– amending act Article 1

Text proposed by the Commission

This Directive lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFM).

Amendment

This Directive lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFM) ***established in the Community.***

Or. en

Amendment 23

Proposal for a directive– amending act

Article 2 – paragraph 1 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

In cases where the law under which the AIF is organised requires the establishment of a board of directors or any other governing body and the AIF designates an entity to perform the substance of the management services, then this entity shall be considered as the AIFM under this directive.

Or. en

Justification

Defining AIFM under the scope of this Directive in terms of different governance structures..

Amendment 24

Proposal for a directive– amending act

Article 2 – paragraph 2 – point a

Text proposed by the Commission

Amendment

(a) AIFM which either directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIF whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of 100 million Euro or 500 millions euros when the portfolio of AIF consists of AIF that are not leveraged and with no redemption rights exercisable during a period of 5 years following the date of constitution of each AIF;

deleted

Or. en

Amendment 25

Proposal for a directive– amending act Article 2 – paragraph 2 – point b

Text proposed by the Commission

Amendment

(b) AIFM established in the Community which do not provide management services to AIF domiciled in the Community and do not market AIF in the Community;

deleted

Or. en

Amendment 26

Proposal for a directive– amending act Article 2 – paragraph 2 – point c

Text proposed by the Commission

Amendment

(c) UCITS or their management or investment companies authorised in accordance with Directive 2009/.../EC [the UCITS Directive];

(c) UCITS or their management or investment companies authorised in accordance with Directive 2009/65/EC in so far as those management or investment companies do not manage AIF;

Or. en

Amendment 27

Proposal for a directive– amending act Article 2 – paragraph 2 – point d

Text proposed by the Commission

Amendment

(d) credit institutions which are covered by Directive 2006/48/EC of the European Parliament and the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions

deleted

(recast);

Or. en

Amendment 28

Proposal for a directive– amending act Article 2 – paragraph 2 – point e

Text proposed by the Commission

Amendment

*(e) institutions which are covered by
Directive 2003/41/EC of the European
Parliament and the Council of 3 June
2003 on the activities and supervision of
institutions for occupational retirement
provision;* *deleted*

Or. en

Amendment 29

Proposal for a directive– amending act Article 2 – paragraph 2 – point f

Text proposed by the Commission

Amendment

*(f) institutions which are covered by the
First Council Directive 73/239/EEC of 24
July 1973 on the coordination of laws,
regulations and administrative provisions
relating to the taking-up and pursuit of
the business of direct insurance other
than life assurance, Directive 2002/83/EC
of the European Parliament and of the
Council of 5 November 2002 concerning
life assurance and Directive 2005/68/EC
of the European Parliament and Council
of 16 November 2005 on reinsurance and
amending Council Directives
73/239/EEC, 92/49/EEC as well as
Directives 98/78/EC and 2002/83/EC;* *deleted*

Or. en

Amendment 30

Proposal for a directive– amending act Article 2 – paragraph 2 – point f a (new)

Text proposed by the Commission

Amendment

(fa) credit institutions, institutions for occupational retirement provision, insurance and reinsurance companies or any other AIFM in so far as they invest solely on their own account;

Or. en

Amendment 31

Proposal for a directive– amending act Article 2 – paragraph 2 – point g

Text proposed by the Commission

Amendment

(g) supranational institutions, such as the World Bank, the IMF, the ECB, the EIB, the EIF, other supranational institutions and similar international organisations, in case such institutions or organisations manage one or several AIFs.

(g) supranational institutions, such as the World Bank, the IMF, the ECB, the EIB, the EIF, other supranational institutions and similar international organisations, in case such institutions or organisations manage one or several AIFs, ***in so far as those AIF act in the public interest.***

Or. en

Amendment 32

Proposal for a directive– amending act Article 2 – paragraph 2 – point g a (new)

Text proposed by the Commission

Amendment

(ga) central banks.

Or. en

Amendment 33

Proposal for a directive— amending act Article 2 – paragraph 3

Text proposed by the Commission

Amendment

3. Member States shall ensure that AIFM not reaching the threshold set out in paragraph 2(a) are entitled to be treated as AIFM falling under the scope of this Directive. *deleted*

Or. en

Justification

Amendment 34

Proposal for a directive— amending act Article 2 – paragraph 4

Text proposed by the Commission

Amendment

4. The Commission shall adopt implementing measures with a view to determining the procedures under which AIFM managing portfolios of AIF whose assets under management do not exceed the threshold set out in paragraph 2(a) may exercise their right under paragraph 3. *deleted*

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

Or. en

Amendment 35

Proposal for a directive— amending act Article 3 – point b

Text proposed by the Commission

(b) 'manager of alternative investment funds ' or AIFM means *any* legal **or natural** person whose **regular** business is to manage one or several AIF;

Amendment

(b) 'manager of alternative investment funds ' or AIFM means *a* legal person whose business is to manage one or several AIF **and who is responsible for such activity**;

Or. en

Amendment 36

Proposal for a directive— amending act Article 3 – point c

Text proposed by the Commission

(c) '*Valuator*' means *any* legal or **natural** person **or company** valuing the assets or establishing the value of the shares or units of an AIF;

Amendment

(c) '*valuator*' means *a* legal person **authorised and supervised by a competent authority**, valuing the assets or establishing the value of the shares or units of an AIF;

Or. en

Amendment 37

Proposal for a directive— amending act Article 3 – point d

Text proposed by the Commission

(d) 'management services' means the **activities of managing and administering one or more AIF on behalf of one or more investors**;

Amendment

(d) 'management services' means the **functions as defined in the Annex**;

Or. en

Justification

This Annex is UCITS IV.

Amendment 38

Proposal for a directive– amending act Article 3 – point e

Text proposed by the Commission

(e) 'Marketing' means *any* general offering or placement of units or shares in an AIF to or with investors domiciled in the Community, ***regardless of at whose initiative the offer or placement takes place;***

Amendment

(e) 'marketing' means *a* general offering or placement, ***at the initiative of an AIFM or of an intermediary responsible for distribution,*** of units or shares in an AIF to or with investors domiciled in the Community

Or. en

Amendment 39

Proposal for a directive– amending act Article 3 – point n a (new)

Text proposed by the Commission

Amendment

(na) 'non-listed company' means any company domiciled in the Community whose shares are not admitted to trading on a regulated market within the meaning of Article 4(1), point 14, of Directive 2004/39/EC;

Or. en

Justification

Directive 2004/39/EC = MiFID; Definition of non listed company is taken from the Council text.

Amendment 40

Proposal for a directive– amending act Article 3 – point o a (new)

Text proposed by the Commission

Amendment

(oa) 'safe-keeping' means control or possession of the assets concerned on behalf of the owner as custodian or depository;

Or. en

Justification

Amendment 41

Proposal for a directive– amending act Article 3 – point o b (new)

Text proposed by the Commission

Amendment

(ob) 'depository' means an institution entrusted with the duties set out in Article 17;

Or. en

Justification

Definition of depository comes from UCITS IV.

Amendment 42

Proposal for a directive– amending act Article 3 – point o c (new)

Text proposed by the Commission

Amendment

(oc) 'own funds' means own funds as referred to in Title V, Chapter 2, Section 1 of Directive 2006/48/EC;

Justification

Definition of own funds comes from UCITS IV and establishes the link to CRD (banking capital requirements directive).

Amendment 43

Proposal for a directive– amending act
Article 3 – point o d (new)

Text proposed by the Commission

Amendment

(od) 'prime broker' means bank or regulated securities firm offering services including brokerage, financing, clearing and settlement of trades, custodial services, risk management and operational support facilities, consulting services and research.

Or. en

Justification

Cf. ECB report 2005 page 18.

Amendment 44

Proposal for a directive– amending act
Article 4 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

A Member State shall require that an AIFM authorised in its territory complies with the conditions for initial authorisation established in this Directive at all times.

Or. en

Justification

Inspiration MIFID Art 16.1

Amendment 45

Proposal for a directive– amending act Article 4 – paragraph 2 – subparagraph 2

Text proposed by the Commission

An AIFM may hold an authorisation pursuant to this Directive ***and be authorised as a*** management or ***investment company pursuant to Directive 2009/.../EC – [UCITS Directive]***

Amendment

If the AIFM holds authorisation pursuant to this Directive ***or a management or investment company holds an*** authorisation pursuant to ***Directive 2009/65/EC, competent authorities shall authorise that AIFM under Directive 2009/65/EC or*** a management or investment company ***under this Directive, subject to fulfilment of relevant additional authorisation requirements.***
For this purpose, the competent authorities shall ask only for information, which has not been submitted for the purpose of the original authorisation, provided that such information has not changed.

Or. en

Amendment 46

Proposal for a directive– amending act Article 5 – subparagraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) information about the domicile of underlying funds, if such AIF is a fund of funds;

Or. en

Amendment 47

Proposal for a directive– amending act Article 5 – subparagraph 1 – point c b (new)

Text proposed by the Commission

Amendment

(cb) information about the domicile of master fund;

Or. en

Amendment 48

Proposal for a directive– amending act Article 6 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Amendment

4. The competent authorities shall inform the applicant, within ***two months*** of the submission of a complete application, whether or not authorisation has been granted.

4. The competent authorities shall inform the applicant, within ***three months*** of the submission of a complete application, whether or not authorisation has been granted. ***In case the competent authorities do not inform the applicant, such lack of response equals rejection of authorisation without a justification.***

Or. en

Amendment 49

Proposal for a directive– amending act Article 6 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. An AIF may only be managed by one AIFM.

Or. en

Amendment 50

Proposal for a directive– amending act Article 9 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. An AIFM shall ensure that the remuneration rules are compatible with the rules applicable to credit institutions and investment firms.

Or. en

Amendment 51

Proposal for a directive– amending act Article 10 – paragraph 1 – subparagraphs 2a to 2c (new)

Text proposed by the Commission

Amendment

The AIFM shall set up and implement sound remuneration policies and practices that are consistent with effective risk management, counter short-term profit motives and are in line with the business objectives and the long-term interests of the AIFM and investors.

The AIFM shall inform Member States' competent authorities about the characteristics of its remuneration policies and practices.

Member States' competent authorities may react and take appropriate corrective measures to offset risks that may result in the failure of an AIFM to implement sound remuneration policies and practices.

Or. en

Justification

The principles should align to those developed by the Financial Stability Board for Sound Compensation Practices (25 September 2009). The Leaders' Statement following the Pittsburgh Summit (24-25 September 2009) fully endorses the implementation standards of the FSB aimed at aligning remuneration with long-term value creation and not excessive risk-

taking.

Amendment 52

Proposal for a directive– amending act Article 10 – paragraph 3 – point b a (new)

Text proposed by the Commission

Amendment

(ba) consistent with its Communication of 30 April 2009 accompanying Commission Recommendation complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies and Commission Recommendation on remuneration policies in the financial services sector (COM(2009)0211), the Community law concerning financial services, the Leaders' Statement following the G-20 Pittsburgh Summit concerning the remuneration of directors and employees of AIFMs and the Financial Stability Board Principles for Sound Compensation Practices.

Or. en

Justification

The principles should align to those developed by the Financial Stability Board for Sound Compensation Practices (25 September 2009).

Amendment 53

Proposal for a directive– amending act Article 11 – paragraph 4

Text proposed by the Commission

Amendment

4. In the case of AIFM which engage in short selling when investing on behalf of one or more AIF, Member States shall ensure that the AIFM operates procedures which provide it with access to the securities or other financial instruments at

4. In the case of AIFM which engage in short selling when investing on behalf of one or more AIF, Member States shall ensure that the AIFM:

the date when the AIFM committed to deliver them, ***and that the AIFM*** implements a risk management procedure which allows the risks associated with the delivery of short sold securities or other financial instruments to be adequately managed.

(a) operates procedures which provide it with access to the securities or other financial instruments at the date when the AIFM committed to deliver them;

(b) implements a risk management procedure which allows the risks associated with the delivery of short sold securities or other financial instruments to be adequately managed;

(ba) regularly discloses information on its significant short positions to the Member States competent authorities.

Or. en

Justification

Measures should include reporting obligations in relation with systemic risk to the competent authorities and ESMA.

Amendment 54

Proposal for a directive– amending act Article 11 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. Each competent authority shall regularly provide to ESMA the information provided to it under paragraph 4(ba). In exceptional circumstances and in order to ensure the stability and integrity of the financial system, on the basis of this information, ESMA may take the decision to restrict short selling activities.

Or. en

Amendment 55

Proposal for a directive— amending act Article 11 – paragraph 5 – point b a (new)

Text proposed by the Commission

Amendment

(ba) the specificities of the reporting regime referred to in paragraph 4 (ba).

Or. en

Amendment 56

Proposal for a directive— amending act Article 14 – subparagraph 2

Text proposed by the Commission

Amendment

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; that additional amount of own funds shall be equal to 0.02 % of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million.

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; that additional amount of own funds shall be equal to 0.02 % of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million ***but the required total of the initial capital and the additional amount must not, however, exceed EUR 10 million.***

Or. en

Justification

Alignment with UCITS Art 7.

Amendment 57

Proposal for a directive– amending act Article 14 – subparagraph 4 – point a

Text proposed by the Commission

(a) any AIF portfolios managed by the AIFM, including AIF for which the AIFM has delegated one or more functions in accordance with Article 18;

Amendment

(a) any AIF portfolios managed by the AIFM, including AIF for which the AIFM has delegated one or more functions in accordance with Article 18 ***but excluding portfolios that it is managing under delegation***;

Or. enJustification

Removes double counting of delegated funds in AIFM capital requirements.

Amendment 58

Proposal for a directive– amending act Article 14 – subparagraph 4 – point b

Text proposed by the Commission

(b) any AIF portfolios that the AIFM is managing under delegation.

Amendment

deleted

Or. enJustification

Removes double counting of delegated funds in AIFM capital requirements.

Amendment 59

Proposal for a directive– amending act Article 14 – subparagraph 4 – point b a (new)

Text proposed by the Commission

Amendment

(ba) other collective investment undertakings (CIS), whether or not coordinated at Community level, managed by the AIFM including CIS for which it has delegated one or more functions but excluding CIS that it is managing under delegation.

Justification

Alignment with UCITS Art 7.

Amendment 60

**Proposal for a directive– amending act
Article 14 – subparagraph 4 a (new)**

Text proposed by the Commission

Amendment

Member States may authorise AIFM not to provide up to 50 % of the additional amount of own funds referred to in the second paragraph if they benefit from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in a Member State, or in a third country where it is subject to prudential rules considered by the competent authorities as equivalent to those laid down in Community law.

The own funds required by this Article shall be invested in liquid assets or assets readily convertible to cash in the short term.

AIFM shall hold professional indemnity insurance against liability arising from professional negligence. The adjustments of the amounts of that insurance should take into account adjustments made in the framework of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation¹.

¹ OJ L 9, 15.1.2003, p. 3.

Justification

Alignment with UCITS Art 7 and with recital 24 and Article 67 of MIFID, which allow professional indemnity insurance as permitted capital.

Amendment 61

Proposal for a directive– amending act Article 16 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. AIFM shall ensure that, for each AIF that it manages, a valuator is appointed ***which is independent of the AIFM*** to establish the value of assets acquired by the AIF and the value of the shares and units of the AIF.

Amendment

1. IFM shall ensure that, for each AIF that it manages, a valuator is appointed to establish the value of assets acquired by the AIF and the value of the shares and units of the AIF.

Or. en

Amendment 62

Proposal for a directive– amending act Article 16 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. AIFM and depository are jointly responsible for proper valuation of AIF assets as well as for the calculation of the net asset value of the AIF. This responsibility shall not be affected by the delegation to third party.

Or. en

Amendment 63

Proposal for a directive– amending act Article 16 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

1b. This Article shall not apply in respect of an AIF which is a private equity fund.

Or. en

Justification

A private equity fund is a fund, which invests in equity securities in companies that are not publicly traded or cease to be publicly traded as a result of the private equity investment. A legislative obligation for regular valuation of private equity funds is inappropriate to their business model and the expectations of their investors.

Amendment 64

Proposal for a directive– amending act Article 16 – paragraph 2

Text proposed by the Commission

2. AIFM shall ensure that the valuator has appropriate and consistent procedures to value the assets of the AIF in accordance with existing applicable valuation standards and rules, in order to reflect the net asset value of the shares or units of the AIF.

Amendment

2. AIFM shall ensure that the valuator has appropriate and consistent procedures to value the assets of the AIF in accordance with existing applicable valuation standards and rules, in order to reflect the net asset value of the shares or units of the AIF. ***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, and within any party appointed to undertake valuation.***

Or. en

Justification

Chinese walls definition is taken from MiFID.

Amendment 65

Proposal for a directive– amending act Article 16 – paragraph 4

Text proposed by the Commission

4. The Commission shall adopt implementing measures further specifying ***the criteria under which a valuator can be considered independent in the meaning of paragraph 1.***

Amendment

4. The Commission shall adopt implementing measures further specifying ***which duly authorised and supervised entities are eligible valutors under this Directive. For this purpose, the implementing measures shall set out detailed effective organisational and***

administrative arrangements in order to prevent any conflict of interest from adversely affecting the interests of the clients.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

Or. en

Amendment 66

Proposal for a directive– amending act Article 17 – paragraph 1 – introductory part

Text proposed by the Commission

1. For each AIF it manages, the AIFM shall ensure that a depositary is appointed to fulfil, where relevant, the following tasks:

Amendment

1. For each AIF it manages, the AIFM shall ensure that a ***single*** depositary is appointed to fulfil, where relevant, the following tasks:

Or. en

Amendment 67

Proposal for a directive– amending act Article 17 – paragraph 1 - point b

Text proposed by the Commission

(b) safe-keep any financial instruments which belong to the AIF;

Amendment

(b) safe-keep any financial instruments which belong to the AIF; ***for this purpose, depositary shall ensure the segregation of assets and through opening separate accounts in the name of each AIF;***

Or. en

Amendment 68

Proposal for a directive– amending act
Article 17 – paragraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) ensure that the sale, issue, re-purchase, redemption and cancellation of units effected on behalf of a AIF are carried out in accordance with the applicable national law and the AIF rules;

Or. en

Amendment 69

Proposal for a directive– amending act
Article 17 – paragraph 1 – point c b (new)

Text proposed by the Commission

Amendment

(cb) ensure that the value of units is calculated in accordance with the applicable national law and the AIF rules;

Or. en

Amendment 70

Proposal for a directive– amending act
Article 17 – paragraph 1 – point c c (new)

Text proposed by the Commission

Amendment

(cc) carry out the instructions of the AIFM, unless they conflict with the applicable national law or the AIF rules;

Or. en

Amendment 71

Proposal for a directive– amending act Article 17 – paragraph 1 – point c d (new)

Text proposed by the Commission

Amendment

(cd) ensure that in transactions involving a AIF's assets any consideration is remitted to it within the usual time limits;

Or. en

Amendment 72

Proposal for a directive– amending act Article 17 – paragraph 1 – point c e (new)

Text proposed by the Commission

Amendment

(ce) ensure that an AIF's income is applied in accordance with the applicable national law and the AIF rules.

Or. en

Amendment 73

Proposal for a directive– amending act Article 17 – paragraph 3

Text proposed by the Commission

Amendment

3. The depositary shall be a credit institution having its registered office in the Community and be authorised in accordance with Directive 2006/48/EC of the European Parliament and Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast).

3. The depositary shall be ***either*** a credit institution having its registered office in the Community and be authorised in accordance with Directive 2006/48/EC of the European Parliament and Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), ***or an investment firm authorised in accordance with Directive 2004/39/CE.***

Or. en

Amendment 74

Proposal for a directive— amending act Article 17 – paragraph 3 a(new)

Text proposed by the Commission

Amendment

3a. Where an AIF managed by an authorised AIFM is domiciled in the Community, the depositary shall have its registered office in the Member State where the AIF is domiciled.

Or. en

Amendment 75

Proposal for a directive— amending act Article 17 – paragraph 3 b (new)

Text proposed by the Commission

Amendment

3b. Where a AIF managed by an authorised AIFM is domiciled in a third country, the depositary shall have its registered office in the Community, unless the following conditions are satisfied:

(a) the home Member State competent authorities and those of the third country where the AIF is domiciled have signed cooperation and exchange of information agreements;

(b) the AIF third country is the subject of a decision taken pursuant to paragraph 3d stating that depositaries domiciled in that country are subject to effective prudential regulation and supervision which is equivalent to the provisions laid down in Community law;

(c) the third country is the subject of a decision taken pursuant to paragraph 3d stating that the standards to prevent money laundering and terrorist financing

are equivalent to those laid down in Community law;

(d) the home Member State has signed an agreement with the AIF third country which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters.

Or. en

Justification

Part of the Article 38 of the Commission's proposal.

Amendment 76

Proposal for a directive– amending act
Article 17 – paragraph 3 c (new)

Text proposed by the Commission

Amendment

3c. The Commission shall adopt implementing measures specifying the criteria for assessing the equivalence of the prudential regulation, supervision and standards of third countries as referred to in paragraph 3b.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

Or. en

Justification

Part of the Article 38 of the Commission's proposal.

Amendment 77

Proposal for a directive– amending act Article 17 – paragraph 3 d (new)

Text proposed by the Commission

Amendment

3d. On the basis of the criteria referred to in paragraph 3c, the Commission shall, in accordance with the procedure referred to in Article 49(2), adopt implementing measures, stating that prudential regulation, supervision and standards of a third country concerning depositaries are equivalent to this Directive and stating that the standards to prevent money laundering and terrorist financing are equivalent to those laid down in Community law.

Or. en

Justification

Part of the Article 38 of the Commission's proposal.

Amendment 78

Proposal for a directive– amending act Article 17 – paragraph 4

Text proposed by the Commission

Amendment

4. Depositaries may delegate their tasks ***to other depositaries.***

4. Depositaries may delegate their tasks apart from functions of monitoring and oversight over their subdepositaries. A depositary shall not delegate its functions to the extent that it becomes a letter-box entity.

Or. en

Amendment 79

Proposal for a directive– amending act Article 17 – paragraph 5 – subparagraph 1

Text proposed by the Commission

5. The depositary shall be liable to the AIFM and the investors of the AIF for any losses suffered by them as a result of its failure to perform its obligations pursuant to this Directive.

Amendment

5. The depositary shall be liable to the AIFM and the investors of the AIF for any losses suffered by them as a result of its ***unjustifiable*** failure to perform its obligations pursuant to this Directive ***or its improper performance of them.***

Or. en

Amendment 80

Proposal for a directive– amending act Article 17 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. The depositary's liability towards AIFM and investors shall not be affected by the fact that it has chosen to delegate to an authorised third party, such as a subdepositary, a sub-custodian or a prime broker, a part of its tasks.

In case of any loss of financial instruments which the depositary safe-keeps, as a primary obligation, without prejudice to national law, the depositary shall return the assets to the AIF without delay.

Or. en

Amendment 81

Proposal for a directive– amending act Article 17 – paragraph 5 b (new)

Text proposed by the Commission

Amendment

5b. Where a depositary is legally prevented under the law of the country where the AIFM invests on behalf of the AIF to exercise its custodial functions, its liability towards AIFM and investors may be shifted to the authorised third party that has been entrusted to carry out its custodial tasks. The shift shall be materialised by a contract between the AIFM, the depositary, the third party and the investor.

In case of loss of financial instruments, where a depositary contract exists that allows transfer and re-use of assets, the delay for restitution shall be in accordance with the terms of the contract.

Or. en

Amendment 82

Proposal for a directive– amending act Article 17 – paragraph 5 c (new)

Text proposed by the Commission

Amendment

5c. Where a third country is the subject of the decisions taken pursuant to paragraph 3d, the contract referred to in paragraph 5b shall no be required.

Or. en

Amendment 83

Proposal for a directive– amending act Article 18 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. AIFM which intend to delegate to third parties the task of carrying out on their behalf one or more of their functions shall **request prior authorisation from** the competent authorities of the home Member State for each delegation.

Amendment

1. AIFM which intend to delegate to third parties the task of carrying out on their behalf one or more of their functions shall **inform in advance** the competent authorities of the home Member State for each delegation. **The competent authorities may within one month reject such delegation.**

Or. en

Amendment 84

Proposal for a directive– amending act Article 18 – paragraph 1 – subparagraph 2 – point b

Text proposed by the Commission

(b) where the delegation concerns the portfolio management or the risk management, the third party must also be authorised as an AIFM to manage an AIF of the same type;

Amendment

(b) where the delegation concerns the portfolio management or the risk management **or liquidity management**, the third party must also be authorised as an AIFM to manage an AIF of the same type;

Or. en

Amendment 85

Proposal for a directive– amending act Article 18 – paragraph 1 – subparagraph 2 – point d a (new)

Text proposed by the Commission

Amendment

(da) the AIFM shall inform investors which functions have been delegated and to whom;

Amendment 86

Proposal for a directive— amending act

Article 18 – paragraph 1 –subparagraph 2 a (new)

Text proposed by the Commission

Amendment

The AIFM shall be able to give further instructions to the undertaking to which functions are delegated at any time and shall be able to withdraw the mandate with immediate effect when such withdrawal is in the best interests of investors;

Or. en

Amendment 87

Proposal for a directive— amending act

Article 18 – paragraph 2

Text proposed by the Commission

Amendment

2. In no case shall the AIFM's liability be affected by the fact that the AIFM has delegated functions to a third party, nor shall the AIFM delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF.

2. In no case shall the AIFM's liability be affected by the fact that the AIFM has delegated functions to a third party, nor shall the AIFM delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF ***and to the extent that it becomes a letter-box entity.***

Or. en

Amendment 88

Proposal for a directive– amending act Article 18 – paragraph 4

Text proposed by the Commission

Amendment

***The Commission shall adopt
implementing measures further specifying
the following:***

deleted

***(a) the conditions for approving the
delegation;***

***(b) the conditions under which the
manager could no longer be considered to
be the manager of the AIF as set out in
paragraph 2.***

***Those measures, designed to amend non-
essential elements of this Directive by
supplementing it, shall be adopted in
accordance with the regulatory procedure
with scrutiny referred to in Article 49(3).***

Or. en

Amendment 89

Proposal for a directive– amending act Article 19 – paragraph 2 – point ca (new)

Text proposed by the Commission

Amendment

***(ca) the amounts of remuneration, split
into fixed and variable remuneration,
paid by the AIFM and, where relevant, by
the AIF.***

Or. en

Amendment 90

Proposal for a directive– amending act Article 20 – paragraph 1 – point a a (new)

Text proposed by the Commission

Amendment

(aa) information about the domicile of underlying funds, if such AIF is fund of funds;

Or. en

Amendment 91

Proposal for a directive– amending act Article 20 – paragraph 1 – point a b (new)

Text proposed by the Commission

Amendment

(ab) information about the domicile of any master fund;

Or. en

Amendment 92

Proposal for a directive– amending act Article 21 – paragraph 1

Text proposed by the Commission

Amendment

1. AIFM shall regularly report to the competent authorities of its home Member State on the principal markets and instruments in which it trades on behalf of the AIF it manages.

It shall provide ***aggregated*** information on the main instruments in which it is trading, markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of each of the AIF it manages.

1. AIFM shall regularly report to the competent authorities of its home Member State on the principal markets and instruments in which it trades on behalf of ***each of*** the AIF it manages.

It shall provide information on the main instruments in which it is trading, markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of each of the AIF it manages.

Amendment 93

Proposal for a directive— amending act Article 21 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Where a AIF is marketed in another Member State, the AIFM home Member State competent authority shall transmit the information required by paragraph 3(a) to the AIF host Member State competent authorities.

Or. en

Amendment 94

Proposal for a directive— amending act Article 21 – paragraph 3 b (new)

Text proposed by the Commission

Amendment

3b. Competent authorities of Member States shall transmit to the European Systemic Risk Board (ESRB) and the European Securities and Markets Authority (ESMA) any relevant information necessary for systemic risk supervision. The Commission shall adopt implementing measures further specifying the information to be provided under this paragraph.

Or. en

Amendment 95

Proposal for a directive– amending act Article 21 – paragraph 3 c (new)

Text proposed by the Commission

Amendment

3c. In accordance with the principle of proportionality, competent authorities may ask for additional information from AIFM which the competent authorities consider may pose systemic risk.

Or. en

Amendment 96

Proposal for a directive– amending act Article 21 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Amendment

4. The Commission shall adopt implementing measures further specifying the reporting obligations referred to in paragraphs 1, 2 ***and*** 3 and their frequency.

4. The Commission shall adopt implementing measures further specifying the reporting obligations referred to in paragraphs 1, 2, 3 ***and 3a*** and their frequency.

Or. en

Amendment 97

Proposal for a directive– amending act Article 25 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Member States shall ensure that competent authorities of Member States transmit to the European Systemic Risk Board (ESRB) and the European Securities and Markets Authority (ESMA) the information provided under Article 24.

Amendment 98

Proposal for a directive– amending act Article 25 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

2b. Members States shall ensure that an AIFM shall set leverage limits in respect of each AIF it manages taking into account, inter alia:
(a) the type of AIF;
(b) their strategy;
(c) the sources of their leverage;
(d) any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;
(e) the need to limit the exposure to any one counterparty;
(f) the extent to which the leverage is collateralised;
(g) the scale of any assets/ liability mismatch;
(h) the scale, nature and extent of the AIFM's activity in the markets concerned.

Or. en

Amendment 99

Proposal for a directive– amending act Article 25 – paragraph 2 c (new)

Text proposed by the Commission

Amendment

2c. Each competent authority shall regularly provide to ESMA the information provided to it under Article 24(1). On the basis of this information ESMA may determine that the leverage employed by an AIFM poses a substantial

risk to the stability and integrity of the financial system.

Or. en

Amendment 100

Proposal for a directive– amending act Article 25 – paragraph 3 – subparagraph 1

Text proposed by the Commission

3. In order to ensure the stability and integrity of the financial system, the Commission shall adopt implementing measures ***setting*** limits to the level of leverage AIFM can employ. ***These limits should take into account, inter alia, the type of AIF, their strategy and the sources of their leverage.***

Amendment

3. In order to ensure the stability and integrity of the financial system, the Commission shall adopt implementing measures ***entitling the Commission, in the event that ESMA makes a determination under Article 25(2c) and after taking into account the advice of ESRB, in exceptional circumstances and when this is required in order to ensure the stability and integrity of the financial system, to set*** limits to the level of leverage AIFM can employ.

Or. en

Amendment 101

Proposal for a directive– amending act Article 25 – paragraph 4

Text proposed by the Commission

4. ***In exceptional circumstances and when this is required in order to ensure the stability and integrity of the financial system, the competent authorities of the home Member State may impose additional limits to the level of leverage that AIFM can employ.*** Measures taken by the ***competent authorities of the home Member States*** shall have a temporary nature and should comply with the provisions adopted by the Commission

Amendment

4. Measures taken by the ***Commission pursuant to paragraph 3*** shall have a temporary nature and should comply with the provisions adopted by the Commission pursuant to paragraph 3.

pursuant to paragraph 3.

Or. en

Justification

Recitals 15 and 16 give enough reasoning for introducing rules on leverage (systemic risk etc).

Amendment 102

**Proposal for a directive– amending act
Article 26 – paragraph 1 – point a**

Text proposed by the Commission

(a) AIFM managing one or more AIF which either individually or in aggregation acquires **30 % or more of the voting rights** of an issuer or of a non-listed company domiciled in the Community, as appropriate;

Amendment

(a) AIFM managing one or more AIF which either individually or in aggregation acquires **controlling influence** of an issuer or of a non-listed company domiciled in the Community, as appropriate;

Or. en

Justification

30% is changed to "controlling influence" due to consistency with definition of EU company law..

Amendment 103

**Proposal for a directive– amending act
Article 26 – paragraph 1 – point b**

Text proposed by the Commission

(b) AIFM having concluded an agreement with one or more other AIFM which would allow the AIF managed by these AIFM to acquire **30 % or more of the voting rights** of the issuer or the non-listed company, as appropriate.

Amendment

(b) AIFM having concluded an agreement with one or more other AIFM which would allow the AIF managed by these AIFM to acquire **controlling influence** of the issuer or the non-listed company, as appropriate.

Or. en

Justification

30% is changed to "controlling influence" due to consistency with definition of EU company law.

Amendment 104

Proposal for a directive– amending act Article 27 – paragraph 1

Text proposed by the Commission

1. Member States shall ensure that when an AIFM is in a position to exercise **30 % or more of the voting rights of** a non-listed company, such AIFM notifies the non-listed company and all other shareholders the information provided in paragraph 2.

This notification shall be made, as soon as possible, but not later than four trading days the first of which being the day on which the AIFM has reached the position of being able to exercise **30% of the voting rights**.

Amendment

1. Member States shall ensure that when an AIFM is in a position to exercise **controlling influence in** a non-listed company, such AIFM notifies the non-listed company and all other shareholders the information provided in paragraph 2.

This notification shall be made, as soon as possible, but not later than four trading days the first of which being the day on which the AIFM has reached the position of being able to exercise **controlling influence**.

Or. en

Justification

30% is changed to "controlling influence" due to consistency with definition of EU company law.

Amendment 105

Proposal for a directive– amending act Article 27 – paragraph 2 – point b

Text proposed by the Commission

(b) the conditions under which **the 30% threshold** has been reached, including information about the identity of the different shareholders involved;

Amendment

(b) the conditions under which **controlling influence** has been reached, including information about the identity of the different shareholders involved, **any natural person or legal entity entitled to exercise voting rights on their behalf and,**

if applicable, the chain of undertakings through which voting rights are effectively held;

Or. en

Justification

30% is changed to "controlling influence" due to consistency with definition of EU company law.

Amendment 106

**Proposal for a directive– amending act
Article 27 – paragraph 2 – point c**

Text proposed by the Commission

(c) the date on which the **threshold** was reached or exceeded.

Amendment

(c) the date on which the **controlling influence** was reached or exceeded.

Or. en

Justification

Threshold is changed to "controlling influence" due to consistency with definition of EU company law.

Amendment 107

**Proposal for a directive– amending act
Article 28 – paragraph 1 – subparagraph 1**

Text proposed by the Commission

1. In addition to Article 27, Member States shall ensure that where an AIFM acquires **30 % or more of the voting rights** of an issuer or a non-listed company, that AIFM makes the information set out in the second and third subparagraphs available to the issuer, the non-listed company, their respective shareholders and representatives of employees or, where there are no such

Amendment

1. In addition to Article 27, Member States shall ensure that where an AIFM acquires **controlling influence** of an issuer or a non-listed company, that AIFM makes the information set out in the second and third subparagraphs available to the issuer, the non-listed company, their respective shareholders and representatives of employees or, where there are no such

representatives, to the employees themselves.

representatives, to the employees themselves.

Or. en

Justification

30% is changed to "controlling influence" due to consistency with definition of EU company law.

Amendment 108

**Proposal for a directive– amending act
Article 28 – paragraph 1 – subparagraph 2 – point a**

Text proposed by the Commission

Amendment

(a) the information referred to in Article 6(3) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids; *deleted*

Or. en

Justification

It is clear that the issuers need to comply with this Directive. For non listed companies it should not be necessary.

Amendment 109

**Proposal for a directive– amending act
Article 28 – paragraph 1 – subparagraph 2 – point d**

Text proposed by the Commission

Amendment

*(d) the identity of the AIFM which either individually or in agreement with other AIFM have reached **the 30 % threshold**;* *(d) the identity of the AIFM which either individually or in agreement with other AIFM have reached **controlling influence**;*

Or. en

Justification

30% is changed to "controlling influence" due to consistency with definition of EU company law.

Amendment 110

Proposal for a directive– amending act Article 28 – paragraph 2

Text proposed by the Commission

Amendment

**2. The Commission shall adopt
implementing measures determining:**

deleted

*(a) the detailed content of the information
provided under paragraph 1;*

*(b) the way the information shall be
communicated.*

*Those measures, designed to amend non-
essential elements of this Directive by
supplementing it, shall be adopted in
accordance with the regulatory procedure
with scrutiny referred to in Article 49(3).*

Or. en

Justification

*Since requirements are stringent enough at level 1, there is no need for implementing
measures.*

Amendment 111

Proposal for a directive– amending act Article 29 – paragraph 2 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) with regard to ***operational and***
financial developments, presentation of
revenue and earnings by business segment,
statement on the progress of company's
activities and financial affairs, assessment
of expected progress on ***activities and***
financial affairs, report on significant
events in the financial year;

(a) with regard to financial developments,
capital structure, including presentation of
revenue and earnings by business segment,
statement on the progress of company's
financial affairs, assessment of expected
progress on financial affairs, report on
significant events in the financial year;

Or. en

Justification

Restructuring of Art 29-2, so that it is split into financial (capital) related requirements, then organisation (including product) related requirements and followed by other relevant criteria (such as information on employees etc).

Amendment 112

Proposal for a directive– amending act

Article 29 – paragraph 2 – subparagraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) the nature of the company's operations and its principal activities, stating the main categories of products sold and/or services performed, and an indication of any significant new products and/or services that have been introduced and, to the extent the development of new products or services has been publicly disclosed, the status of development;

Or. en

Justification

Restructuring of Art 29-2, so that it is split into financial (capital) related requirements, then organisation (including product) related requirements and followed by other relevant criteria (such as information on employees etc).

Amendment 113

Proposal for a directive – amending act

Article 29 – paragraph 2 – subparagraph 2

Text proposed by the Commission

Amendment

In addition, the AIF annual report shall, for each issuer in which it has acquired a controlling influence, contain the information provided for in point (f) of Article 46a(1) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies and an overview of the capital

deleted

structure as referred to in points (a) and (d) of Article 10(1) of Directive 2004/25/EC.

Or. en

Justification

Overburdening the fund for the investment in companies, which do not comply with these Directives already.

Amendment 114

**Proposal for a directive – amending act
Article 29 – paragraph 4**

Text proposed by the Commission

Amendment

4. The Commission shall adopt implementing measures specifying the detailed content of the information to be provided under paragraphs 1 and 2.

deleted

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

Or. en

Justification

Since requirements are stringent enough at level 1, there is no need for implementing measures.

Amendment 115

**Proposal for a directive – amending act
Article 30**

Text proposed by the Commission

Amendment

Where, following an acquisition of ***30 % or more of the voting rights*** of an issuer, the shares of that issuer are no longer admitted to trading on a regulated market, it shall

Where, following an acquisition of ***controlling influence*** of an issuer, the shares of that issuer are no longer admitted to trading on a regulated market, it shall

nevertheless continue to comply with its obligations under Directive 2004/109/EC for **two years** from the date of withdrawal from the regulated market.

nevertheless continue to comply with its obligations under Directive 2004/109/EC for **one year** from the date of withdrawal from the regulated market.

Or. en

Justification

It is necessary for a company which is taken from the stock exchange to keep the requirements for transparency purposes for at least another year (also in line with the reporting, which spills over into the year after the company changed its status).

Amendment 116

**Proposal for a directive— amending act
Article 31 – paragraph 1**

Text proposed by the Commission

1. An authorised AIFM may market shares or units of AIF to professional investors in the home Member State as soon as the conditions laid down in this Article are met.

Amendment

1. An authorised AIFM may market shares or units of AIF **domiciled in the Community** to professional investors in the home Member State as soon as the conditions laid down in this Article are met.

Or. en

Justification

The purpose is to limit the marketing only to products with EU authorisation / registration.

Amendment 117

**Proposal for a directive— amending act
Article 31 – paragraph 2 – point ba (new)**

Text proposed by the Commission

Amendment

(ba) identification of the depositary of the AIF;

Or. en

Amendment 118

Proposal for a directive– amending act Article 31 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. Subject to national law, the AIFM home Member State may permit AIFM to market on its territory an AIF domiciled outside the Community. Such a possibility requires that the AIFM is domiciled in the Community or that a cooperation agreement and an efficient exchange of all relevant information for monitoring systemic risks exists between:

(a) the competent authorities of the Member State where the AIF is marketed and the third country competent authorities;

(b) the AIFM and its supervisor;

(c) the AIFM's supervisor and ESMA.

Or. en

Amendment 119

Proposal for a directive– amending act Article 32 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Member States shall not allow the marketing of AIF to retail investors in their territory, when such AIF invests more than 30 % in other AIFs, which do not benefit from the European passport.

Or. en

Justification

This provision concerns marketing of AIFs, which are funds of funds.

Amendment 120

Proposal for a directive— amending act Article 33 – paragraph 1 – introductory part

Text proposed by the Commission

1. Where an authorised AIFM intends to market to professional investors the units or shares of an AIF it manages ***in another Member State, it*** shall submit the following documents to the competent authorities of its home Member State:

Amendment

1. Where an authorised AIFM intends to market to professional investors ***of another Member State*** the units or shares of an AIF it manages ***and which is domiciled in the Community, the AIFM*** shall submit the following documents to the competent authorities of its home Member State:

Or. en

Amendment 121

Proposal for a directive— amending act Article 33 – paragraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) identification of the depositary of the AIF;

Or. en

Amendment 122

Proposal for a directive— amending act Article 33 – paragraph 5 – subparagraph 1

Text proposed by the Commission

5. Member States shall ensure that the notification letter and the attestation referred to in ***paragraph 1*** are provided in a language customary in the sphere of international finance.

Amendment

5. Member States shall ensure that the notification letter ***referred to in paragraph 1*** and the attestation referred to in ***paragraph 2*** are provided in a language customary in the sphere of international finance.

Amendment 123

Proposal for a directive– amending act Article 33 – paragraph 8

Text proposed by the Commission

Amendment

8. AIFM may only market shares or units of an AIF domiciled in a third country to professional investors domiciled in another Member State than the home Member State of the AIFM as from the date referred to in the second subparagraph of Article 54(1). **deleted**

Amendment 124

Proposal for a directive– amending act Article 34 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Amendment

4. The competent authorities of the home Member State shall, ***no later than ten working days after the date of receipt*** of the complete documentation, transmit the complete documentation referred to in paragraph 2, and where relevant 3, to the competent authorities of the Member State where the management services will be provided and an attestation that they have authorised the AIFM concerned. They shall immediately notify the AIFM about the transmission.

4. The competent authorities of the home Member State shall, ***within one month of receiving*** the complete documentation, transmit the complete documentation referred to in paragraph 2, and where relevant 3, to the competent authorities of the Member State where the management services will be provided and an attestation that they have authorised the AIFM concerned. They shall immediately notify the AIFM about the transmission.

Justification

Alignment with UCITS Directive Article 18 paragraph 2.

Amendment 125

Proposal for a directive– amending act Article 34 – paragraph 6 a (new)

Text proposed by the Commission

Amendment

6a. 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 responsibilities, 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 home Member State. If necessary, as a last resort, and after informing the competent authorities of the AIFM home Member State, the competent authorities of the Member State where the management services will be provided may take action directly against the AIFM.

Or. en

Justification

Alignment with UCITS Directive Articles 19 and 21.

Amendment 126

Proposal for a directive– amending act Article 35 a (new)

Text proposed by the Commission

Amendment

Article 35 a

Conditions for investing in AIF domiciled in third countries

Professional investors domiciled in a Member State may invest in an AIF domiciled in a third country provided that either the AIF is managed by an AIFM having its registered office in a Member State and authorized in accordance with Article 4, or the third country where the AIF has its registered office has signed an information-sharing cooperation agreement in line with relevant international standards.

Or. en

Amendment 127

Proposal for a directive– amending act Article 38 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Amendment

1. By way of derogation from Article 17(4), in respect of AIF domiciled in a third country Member States shall allow the depositary of that AIF appointed in accordance with Article 17 to delegate the performance of one or more of its functions to a sub-depositary domiciled in the same third country provided that the legislation of that third country is equivalent to the provisions of this Directive and is effectively enforced.

1. By way of derogation from Article 17(4), in respect of AIF domiciled in a third country Member States shall allow the depositary of that AIF appointed in accordance with Article 17 to delegate the performance of one or more of its functions, ***apart from functions of monitoring and oversight***, to a sub-depositary domiciled in the same third country provided that the legislation of that third country is equivalent to the provisions of this Directive and is effectively enforced.

Amendment 128

Proposal for a directive— amending act Article 38 – paragraph 2

Text proposed by the Commission

2. The depositary's liability towards investors shall not be affected by the fact that it has delegated to a third country ***depository*** the performance of all or a part of its tasks.

Amendment

2. The depositary's liability towards investors shall not be affected by the fact that it has delegated to a third country ***sub-depository*** the performance of all or a part of its tasks, ***unless the conditions set out in Article 17(5b) and (5c) are satisfied.***

Or. en

Amendment 129

Proposal for a directive— amending act Article 39

Text proposed by the Commission

Amendment

Article 39

deleted

Authorisation of AIFM established in third countries

1. Member States may authorise, in accordance with this Directive, AIFM established in a third country to market units or shares of an AIF to professional investors in the Community under the conditions of this Directive, provided that:

(a) the third country is the subject of a decision taken pursuant to paragraph 3 (a) stating that its legislation regarding prudential regulation and on-going supervision is equivalent to the provisions of this Directive and is effectively enforced;

(b) the third country is the subject of a decision taken pursuant to paragraph 3

(b) stating that it grants Community AIFM effective market access comparable to that granted by the Community to AIFM from that third country;

(c) the AIFM provides the competent authorities of the Member State in which it applies for authorisation with the information referred to in Articles 5 and 31;

(d) a cooperation-agreement between the competent authorities of that Member State and the supervisor of the AIFM exists which ensures an efficient exchange of all information that are relevant for monitoring the potential implications of the activities of the AIFM for the stability of systemically relevant financial institutions and the orderly functioning of markets in which the AIFM is active.

(e) the third country has signed an agreement with the Member State in which it applies for authorisation which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters.

2. The Commission shall adopt implementing measures aimed at establishing:

(a) general equivalence criteria for the equivalence and effective enforcement of third country legislation on prudential regulation and on-going supervision, based on the requirements laid down in Chapters III, IV and V.

(b) general criteria for assessing whether third countries grant Community AIFM effective market access comparable to that granted by the Community to AIFM from those third countries.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure

with scrutiny referred to in Article 49(3).

3. On the basis of the criteria referred to in paragraph 2, the Commission shall, in accordance with the regulatory procedure referred to in Article 49(2), adopt implementing measures stating:

(a) that the legislation on prudential regulation and ongoing supervision of AIFM in a third country is equivalent to this Directive and effectively enforced;

(b) that a third country grant Community AIFM effective market access at least comparable to that granted by the Community to AIFM from that third country.

Or. en

Amendment 130

**Proposal for a directive– amending act
Article 40 – subparagraph 1 a (new)**

Text proposed by the Commission

Amendment

The competent authorities shall be public authorities or bodies appointed by public authorities.

Or. en

Justification

Alignment UCITS Art 97.2

Amendment 131

**Proposal for a directive– amending act
Article 40 – subparagraph 1 b (new)**

Text proposed by the Commission

Amendment

Member States shall require competent authorities to establish the appropriate

*methods to monitor that AIFMs comply
with their obligations under this Directive.*

Or. en

Justification

Inspiration MIFID Art 16.2

Amendment 132

**Proposal for a directive– amending act
Article 41 – paragraph 2 – introductory part**

Text proposed by the Commission

Amendment

2. The competent authorities shall have at least the following powers *of investigation*:

2. The competent authorities shall have at least the following powers:

Or. en

Amendment 133

**Proposal for a directive– amending act
Article 41 – paragraph 2 – point d**

Text proposed by the Commission

Amendment

(d) require records of telephone and data traffic.

(d) require *existing* telephone and *existing* data traffic *records*;

Or. en

Amendment 134

**Proposal for a directive– amending act
Article 41 – paragraph 2 – points d a to d h (new)**

Text proposed by the Commission

Amendment

*(da) impose a temporary prohibition of
professional activity;*

(db) take appropriate measures to ensure

that AIFMs and depositaries continue to comply with the relevant legislation;

(dc) refer matters for criminal prosecution to the competent jurisdictions;

(dd) impose the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;

(de) request the freezing or the sequestration of assets;

(df) require AIFM, depositaries or auditors to provide information;

(dg) impose the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;

(dh) withdraw the authorisation granted to an AIFM or a depositary.

Or. en

Justification

Alignment with UCITS Art 98 and MIFID Art 50

Amendment 135

Proposal for a directive– amending act Article 42

Text proposed by the Commission

Amendment

Article 42

deleted

Supervisory powers

1. The home Member State shall ensure that the competent authorities may take the following measures:

(a) impose a temporary prohibition of professional activity;

(b) take appropriate measures to ensure that AIFM continue to comply with the relevant legislation;

(c) refer matters for criminal prosecution

to the competent jurisdictions.

2. Member States shall ensure that the competent authorities have the powers necessary to take all measures required in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIF in the market for a financial instrument could jeopardise the orderly functioning of that market.

Or. en

Amendment 136

Proposal for a directive– amending act Article 46 – paragraph 1

Text proposed by the Commission

1. The competent authorities responsible for the authorisation and supervision of AIFM under this Directive shall communicate information to the competent authorities of other Member States where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFM or AIFM collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFM are active. ***The Committee of European Securities Regulators (CESR) established by Commission Decision 2009/77/EC of 23 January 2009¹*** shall also be informed and shall forward this information to the competent authorities of the other Member States.

¹ ***OJL 25, 29.01.2009, p. 18.***

Amendment

1. The competent authorities responsible for the authorisation and supervision of AIFM under this Directive shall communicate information to the competent authorities of other Member States where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFM or AIFM collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFM are active. ***The ESRB and the ESMA*** shall also be informed and shall forward this information to the competent authorities of the other Member States.

Or. en

Amendment 137

Proposal for a directive – amending act Article 53 a (new)

Text proposed by the Commission

Amendment

Article 53a

For the Commission to ensure that the requirements concerning depositaries set out in this Directive are applied to depositaries in respect of Directive 2009/65/EC, Articles 22 to 26 and Articles 32 to 36 of the Directive 2009/65/EC shall be amended as follows: (...)

Or. en

Justification

In order to ensure the cross-sector consistency.

Amendment 138

Proposal for a directive– amending act Annex

Text proposed by the Commission

Amendment

ANNEX

Functions included in the activity of collective portfolio management:

– Investment management.

– Administration:

(a) legal and fund management accounting services;

(b) customer inquiries;

(c) valuation and pricing (including tax returns);

(d) regulatory compliance monitoring;

(e) maintenance of unit-holder register;

(f) distribution of income;

- (g) unit issues and redemptions;*
- (h) contract settlements (including certificate dispatch);*
- (i) record keeping.*
- Marketing.*

Or. en

EXPOSÉ DES MOTIFS

Introduction

Les gestionnaires de fonds d'investissement alternatifs, qui représentent près de 1000 milliards¹ de dollars d'actifs (à comparer à mi-2008, 2000 milliards) jouent un rôle important dans le financement de l'économie européenne. Cette activité recouvre des acteurs et des produits très différents: fonds alternatifs, fonds de capital-investissement, fonds immobiliers, fonds de matières premières, etc. La réglementation envisagée doit toutefois tenir compte des spécificités au regard du risque systémique notamment en ce qui concerne les fonds de capital-investissement.

Même si ces fonds ne sont pas directement à l'origine de la crise financière, leur gestion ne doit pas échapper à l'impératif de régulation de l'ensemble des acteurs des services financiers.

La crise financière montre que les dysfonctionnements du système financier mondial ont pour origine d'une part une trop forte exposition aux risques des acteurs présentant une importance systémique et d'autre part la faiblesse des systèmes de gestion de ces risques.

C'est dans ce contexte que la Commission européenne a publié le 30 avril 2009 une proposition de directive sur les gestionnaires de fonds d'investissement alternatifs (AIFM) visant à encadrer l'ensemble des fonds d'investissement alternatifs (AIF) autres que les fonds réglementés par la directive OPCVM.

Cette proposition fait suite à une série de travaux du Parlement européen relatifs à la gestion d'actifs: rapport d'initiative sur les fonds d'investissement (2001), gestion d'actifs I (2006), gestion d'actifs II (2007), fonds d'investissement et capital-investissement (2008) et transparence des investisseurs institutionnels (2008).

La proposition visant à remplacer les réglementations nationales relatives aux AIF et AIFM par une réglementation européenne a pour objectif une plus grande stabilité du système financier, une meilleure protection des investisseurs et la création d'un marché intérieur européen des fonds d'investissement alternatifs.

La mise en œuvre de ces objectifs, que nous approuvons, doit préserver l'équilibre entre d'une part les spécificités, la vitalité et la créativité de cette industrie financière et, d'autre part, les impératifs d'une régulation efficace et d'une supervision adéquate.

1 - Le champ d'application de la directive et l'autorisation des gestionnaires

Votre rapporteur approuve la proposition qui prévoit que tous les gestionnaires de fonds alternatifs établis et opérant dans la Communauté, sauf exceptions dûment précisées, et qui gèrent des fonds alternatifs quelle que soit leur domiciliation, devront être agréés et faire l'objet d'une supervision. Il est effectivement nécessaire de formuler des exigences en termes de moyens financiers, techniques et humains, d'organisation et de règles de conduite pour

¹ BCE - Financial stability review - Juin 2009

encadrer les gestionnaires ainsi que les autres acteurs concernés tels le dépositaire et l'évaluateur.

Afin de conserver un "level playing field" entre les différents acteurs qui gèrent les fonds alternatifs et éviter le contournement des exigences de la directive, notamment via les produits structurés ("wrappers"), votre rapporteur propose de limiter les exemptions à l'application de la directive.

Ainsi il est suggéré de supprimer les seuils qui feraient sortir du champ d'application de la directive et d'y substituer un principe de proportionnalité. Il est en effet important de veiller à ce que les règles mises en place permettent, par leur généralité d'application, une meilleure transparence sur la gestion des fonds eux-mêmes.

Pour être agréé, le gestionnaire doit disposer d'un minimum de fonds propres sous forme d'actifs liquides ou mobilisables à court terme. Votre rapporteur propose d'aligner ces montants sur ceux de la directive OPCVM.

2 - La commercialisation des fonds et les relations avec les pays tiers

Une fois agréés, les gestionnaires ont la faculté de gérer et de commercialiser leurs fonds domiciliés en Europe auprès d'investisseurs professionnels sur tout le territoire de la Communauté. Ce passeport européen permet la commercialisation de tout fonds domicilié à l'intérieur de la Communauté et géré par un gestionnaire agréé dans son Etat membre d'origine, d'être commercialisé, sous réserve d'une simple procédure de notification dans les autres Etats Membres. Les fonds domiciliés en Europe bénéficieraient ainsi d'un label européen, distinct du label OPCVM.

Pour autant votre rapporteur ne ferme pas la porte aux fonds de pays tiers puisque chaque Etat membre conserve la liberté via les régimes de placement privés nationaux d'autoriser la libre circulation sur son territoire de fonds alternatifs domiciliés hors UE.

Par ailleurs, il apparaît opportun de modifier la définition de la commercialisation afin de donner aux investisseurs professionnels la liberté de choisir les fonds dans lesquels ils souhaitent investir y compris les fonds hors communauté. Cette possibilité est offerte sous réserve de l'établissement de l'AIFM sur le territoire européen ou de l'existence d'un accord de coopération et d'échange d'information, notamment sur les risques systémiques. Cet accord serait pris d'une part entre les autorités compétentes du pays tiers et de l'Etat membre où l'AIF est commercialisé et d'autre part entre l'AIFM et son superviseur et entre ce dernier et l'ESMA.

Enfin, dans le but de protéger les investisseurs de détail, ces derniers ne devraient pas pouvoir investir dans des structures master-feeder lorsque le master est un AIF localisé dans un pays tiers ni dans des fonds de fonds investis à plus de 30 % dans des fonds de pays tiers.

3 - Le dépositaire

La directive AIFM propose un régime applicable aux dépositaires des AIF.

Afin d'assurer la cohérence sectorielle, il convient d'aligner les exigences de cette directive avec les dispositions de la directive UCITS.

Votre rapporteur introduit des précisions quant à la définition du dépositaire, sa localisation, son rôle, ses fonctions, les conditions de délégation de certaines de ses fonctions et sa responsabilité.

Il prévoit que le dépositaire soit dans le même pays que le fonds lorsque le fonds est domicilié dans l'Union européenne. Il ne prévoit pas de passeport dépositaire.

Lorsque le fonds est domicilié dans un pays tiers, le dépositaire doit être localisé dans l'Union européenne sauf s'il existe un accord de coopération et d'échanges d'informations entre les superviseurs qui permettent de s'assurer que les réglementations sont équivalentes et que la supervision pourra y être exercée dans les conditions requises dans la Communauté.

Le dépositaire est responsable à l'égard de l'investisseur et du gestionnaire. Lorsque le dépositaire est empêché juridiquement d'exercer la totalité de sa fonction en raison de la législation du pays dans lequel le fonds investit, un contrat entre la société de gestion, l'investisseur, le dépositaire et le sous-dépositaire doit être conclu afin de transférer partiellement la responsabilité au sous-dépositaire.

4 - L'évaluateur

La proposition de directive édicte un régime applicable aux évaluateurs des AIF et contient des dispositions relatives à l'évaluation des fonds et à la détermination de la valeur des actifs d'un fonds et de ses parts.

L'indépendance organique de l'évaluateur ne doit pas être une exigence mais une possibilité laissée à l'appréciation des parties.

En revanche, des modalités d'organisation doivent garantir l'indépendance de cette fonction lorsque l'évaluation est interne à l'AIFM ("China wall").

Enfin, il n'est pas prévu d'instaurer une évaluation systématique pour les activités de capital-investissement.

5 - Le recours à l'effet de levier

Votre rapporteur propose que les gestionnaires définissent ex ante les limites à l'effet de levier qu'ils emploieront pour chaque AIF qu'ils gèrent. Pour fixer ces limites, il convient de définir quelques principes qui les encadreront. Les gestionnaires sont tenus d'informer les superviseurs nationaux des limites qu'ils ont arrêtées.

En cas de circonstances exceptionnelles, l'ESMA (European securities and market authority) aurait le pouvoir de fixer, pour l'effet de levier utilisable, des limites plus strictes que celles annoncées par le gestionnaire.

6 - La vente à découvert

La vente à découvert est une technique utile à la liquidité et au dynamisme des marchés financiers. Il n'est donc pas question de l'interdire.

Cependant, dans la mesure où cette technique peut contribuer à amplifier le risque systémique, il convient de l'encadrer par quelques règles simples qui permettent d'assurer la stabilité financière et l'intégrité des marchés.

7 - Les obligations d'information

La communication d'informations à l'attention du superviseur et de l'investisseur est un élément clé pour atteindre les objectifs de la directive. Il convient toutefois de distinguer entre les informations destinées au superviseur et celles nécessaires à l'investisseur. Rien ne s'oppose à ce que la transparence à l'égard du superviseur soit totale.

S'agissant des fonds de capital-investissement, il importe de ne pas imposer une information sur l'entreprise cible qui excède celle que doivent donner légalement les entreprises de même nature.

8 - Le contrôle de sociétés par un fonds de capital-investissement

Les règles particulières s'attachant à la prise de contrôle d'une entité par un fonds de capital-investissement doivent s'appliquer en tenant compte non pas d'un taux de détention mais de l'exercice effectif du contrôle de la société selon les critères habituels dans le domaine du droit des sociétés.

9 - La supervision

Votre rapporteur a pris en considération la nouvelle architecture européenne de supervision dont les textes sont actuellement en cours d'examen avec pour objectif d'assurer une plus grande stabilité financière et de limiter les risques systémiques.

L'ESRB (European systemic risk board) et l'ESMA ont un rôle important à jouer.

10 - Les pouvoirs des Etats membres

Il est essentiel que les autorités compétentes de l'"Etat membre d'origine" dans lequel le gestionnaire a été agréé et de l'"Etat membre d'accueil" sur le territoire duquel le gestionnaire fournit ses services de gestion ou de commercialisation, bénéficient de pouvoirs de supervision.

11 - La rémunération des dirigeants

La déclaration du G20 de Pittsburgh du 25 septembre 2009 a marqué un accord international au sujet de la rémunération des dirigeants des banques et autres institutions financières.

Votre rapporteur propose d'appliquer ces principes aux AIFM.

12 - La procédure Lamfalussy

La directive AIFM fait l'objet de la procédure Lamfalussy: elle énonce des principes directeurs (mesures de niveau 1) et prévoit des mesures d'exécution (mesures de niveau 2) qui peuvent être introduites par la Commission européenne selon la procédure de comitologie.

Votre rapporteur a recherché un meilleur équilibre entre les mesures qui relèvent de ces différents niveaux.

13 - L'interaction et la cohérence avec les autres textes

Différentes thématiques de la proposition de directive AIFM sont également traitées dans d'autres textes tels que MIFID, OPCVM, CRD, etc. Dans un souci de cohérence, il convient de les prendre en considération. Pour limiter le plus possible les divergences d'interprétation, des dispositions traitant de sujets communs, il est suggéré de reprendre, chaque fois que cela est utile, la rédaction utilisée dans les directives connexes.