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A7-0171/ 001-001

AMENDMENT 001-001

by the Committee on Economic and Monetary Affairs

Report

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Alternative investment fund managers

A7-0171/2010

Proposal for a directive (COM(2009)0207 – C7-0040/2009 – 2009/0064(COD))

AMENDMENTS BY PARLIAMENT*

to the Commission proposal for a

DIRECTIVE 2010/... OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on Alternative Investment Fund Managers and amending *Directives 2003/6/EC, 2004/39/EC, 2006/48/EC and 2009/65/EC*

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the European Central Bank²,

Acting in accordance with the ordinary legislative procedure³,

* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol **■**.

¹ Opinion of 29 April 2010 (not yet published in the Official Journal).

² OJ C 272, 13.11.2009, p. 1.

³ Position of the European Parliament of

Whereas:

- (1) Managers of alternative investment funds (AIFM) are responsible for the management of a significant amount of invested assets in Europe, account for significant amounts of trading in markets for financial instruments, and can exercise an important influence on markets and companies in which they invest.
- (2) The impact of AIFM on the markets in which they operate is *significant*, but recent financial difficulties have underlined how activities of AIFM may also serve to spread or amplify risks through the financial system, *notably via their prime broker counterparts, and the economy*. Uncoordinated national responses to these risks make *their* efficient management █ difficult. *Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions¹ and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions² thus need to take into account the potential systemic risk arising from exposure to alternative investment funds (AIF)*. This Directive █ aims at establishing common requirements governing the authorisation and supervision of AIFM in order to provide a coherent approach to the related risks and their impact on investors and markets in the *Union*. *As a matter of principle, there should be regulation in view of long-term sustainable growth and to promote social cohesion. Such regulation should address consumer and investor protection, market integrity and stability and it should prevent systemic risk and tackle social externalities*.
- (3) Recent difficulties in financial markets have underlined that many AIFM strategies are vulnerable to some or several important risks in relation to investors, other market participants and markets. In order to provide comprehensive and common arrangements for supervision, it is necessary to establish a framework capable of addressing those risks taking into account the diverse range of investment strategies and techniques employed by AIFM. Consequently, this Directive should apply to AIFM managing and marketing all types of funds which are not covered by *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 the undertakings for collective investment in transferable securities (UCITS) (recast)³, irrespective of the legal or contractual manner in which the AIFM is entrusted with this responsibility. AIFM should not be entitled to manage UCITS within the meaning of *Directive 2009/65/EC* on the basis of authorisation under this Directive.
 - (3a) *The purpose of this Directive should also be to create incentives towards the relocation of off-shore funds in the Union, bringing not only regulatory and investor protection advantages but also allowing for a proper taxation of revenues, at manager, fund and investor level.*
 - (3b) *This Directive follows the agreement reached at the September 2009 G-20 summit in Pittsburgh that all players, markets and products shall be appropriately regulated.*

¹ OJ L 177, 30.6.2006, p. 1.

² OJ L 177, 30.6.2006, p. 201.

³ OJ L 302, 17.11.2009, p. 32.

- (4) ***This Directive lays down requirements regarding the way in which AIFM should manage [AIF] under their responsibility. In certain cases those requirements may have an indirect impact on AIF.***
- (4a) ***This Directive should provide for a single AIFM for each AIF managed within the scope of the Directive, which should be responsible for compliance with the requirements of this Directive. The AIFM should be an external manager, namely a legal person appointed by or acting on behalf of the AIF. Alternatively, if the AIF is self-managed, namely established in such a way that the management decisions are taken by the governing body of the AIF and no external entity is designated, the AIF should itself qualify as the AIFM. In that last case, the AIF should therefore comply with all requirements for AIFM under this Directive and be authorised as such. In addition, a self-managed AIF should not be authorised as the external manager of one or more other AIF.***
- (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 ***or discretionary*** investment policy for the benefit of those investors. ***This Directive should cover managers of all collective investment undertakings which are not required to be authorised as UCITS. However, there are AIFM which should not be required to comply with inappropriate provisions in relation to certain AIF, because of the special nature and characteristics of such AIF. Finally, proportionality requires that AIFM managing certain AIF be subject only to specified provisions of this Directive, or to requirements appropriately modified to introduce proportionality. The Directive should not, however, be circumvented in cases involving, for example, the artificial splitting of funds managed by the same AIFM. In order to take into account the developments of the financial markets, the European markets and Securities Authority established by Regulation (EU) No .../2010¹ (ESMA) should periodically review criteria to be met in order to benefit from this lighter regime.*** This Directive should not apply to managers [] of non-pooled investments such as endowments, sovereign wealth funds, ***central banks or*** credit institutions, ***institutions for occupational retirement provision or those institutions exclusively managing funds for occupational retirement provisions, or*** insurance or reinsurance undertakings ***for assets held on own account, or an undertaking which principally acts as an holding entity for a group of subsidiary undertakings and which owns strategic stakes in undertakings with a view to long-term holding rather than for the purpose of generating returns through divestment within a defined time-frame, to be regarded as a collective undertaking.*** Investment firms authorised under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments² ***and credit institutions under Directive 2006/48/EC*** should not be required to obtain an authorisation under this Directive in order to provide investment services in respect of AIF. Investment firms ***and credit institutions under Directive 2006/48/EC*** should, however, ***be able to*** provide ***only*** investment services in respect of AIF, if and to the extent the units or shares thereof can be marketed in accordance with this Directive.

¹ ***OJ L ...***

² OJ L 145, 30.4.2004, p. 1.

- (6) In order to avoid imposing excessive or disproportionate requirements, this Directive provides for **various exemptions** for **certain AIFM** . The activities of the AIFM concerned are unlikely to have significant consequences for financial stability or market efficiency. 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.
- (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 **Union**. In addition, authorised AIFM should be entitled to market AIF **established in the Union throughout the Union** to professional investors, subject to a notification procedure.
- (8) This Directive does not regulate AIF and therefore does not prevent Member States from adopting or from continuing to apply additional requirements in respect of AIF established on their territory. The fact that a Member State may impose additional requirements on AIF **established** on its territory should not prevent the exercise of rights of AIFM authorised in other Member States in accordance with this Directive to market to professional investors AIF **established** outside the Member State imposing additional requirements and which are therefore not subject to and do not need to comply with those additional requirements.
- (9) Without prejudice to the application of other instruments of **Union** 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 certain types of AIF managed by AIFM to retail investors on their territory, **excluding funds of funds with an underlying investment of more than 30 % in AIF and feeders that invest in master AIF, which should not benefit from the European marketing passport under this Directive.. Consideration should, however, be given by the Union institutions and, in particular, by the Commission to whether a specific Union framework should be proposed to define common rules for the distribution of AIF to retail investors in the Union.** 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.

- (9a) *This Directive should not prevent or restrict investors from disposing of units or shares which they hold in AIF on the capital market. Any offering or placement of such units or shares at the initiative of the AIFM managing such AIF should be treated as marketing by such AIFM for the purposes of this Directive.*
- (10) In order to ensure a high level of protection of clients of investment firms within the meaning of Directive 2004/39/EC, AIF should not be considered as non-complex financial instruments for the purposes of that Directive. That Directive should therefore be amended accordingly.
- (10a) *In accordance with the principle of proportionality and recognising the substantial overlap between the authorisation requirements laid down in Directive 2009/65/EC and those laid down in this Directive, managers authorised under Directive 2009/65/EC or under this Directive should be entitled to be authorised under the other directive, subject only to complying with any relevant additional requirements for such authorisation. In that respect, cross-referencing concerning documents should be possible, provided that the information contained in those documents remains unchanged. Directive 2009/65/EC should be therefore amended to achieve that result.*
- (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.*
- (12) It is necessary to ensure that AIFM operate subject to robust governance controls. AIFM should be managed and organised so as to minimise conflicts of interest. Recent developments underline the crucial need to separate asset safe-keeping and management functions, and segregate investor assets from those of the manager. To this end, the AIFM *should appoint or ensure the appointment of a depositary, which is separate from the AIFM, and entrust it with the booking of investor money on a segregated account, the safe-keeping of financial instruments and the verification of whether the AIF or the AIFM on behalf of the AIF has obtained ownership of all other assets. To facilitate speedy and effective restitution of investor assets, the depositary should be liable to the AIFM, to the AIF and to the investors of the AIF collectively except in cases where such losses arise as a result of 'force majeure'. In this context, 'force majeure' means unforeseeable external events, causing losses beyond the control of the depositary, whose consequences could not have been avoided in spite of proper adherence to the due diligence requirements laid down in this Directive.*
- (12-a) *The depositary's liability should not be affected by its transfer to an authorised third party. However, in cases where the depositary is prevented by the law of a third country or as a result of an unforeseeable external event, the depositary should be able to discharge its liability, subject to approval of the competent authority of the Member State. Such discharge of liability should take place only once.*

- (12a) The Leaders' statement following the September 2009 G-20 Summit in Pittsburgh set out the international consensus concerning remuneration of staff in banks and other systemically important financial services firms. In order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals, there should be an express obligation for AIFM to establish and maintain, for those categories of staff whose professional activities have a material impact on their risk profile or the risk profiles of AIF they manage, remuneration policies and practices that are consistent with effective risk management. Those categories of staff should at least include senior management, risk takers and control functions. The Commission should be empowered to adopt delegated acts, in accordance with Article 290 of the Treaty on the Functioning of the European Union, to set guidelines on sound remuneration policies after consulting ESMA. It is important to ensure appropriate coherence between provisions on sound remuneration for AIFM and those for credit institutions and investment firms. Such binding guidance should therefore ensure compliance with the provisions on remuneration set out in Directives 2006/48/EC and 2006/49/EC.*
- (12b) In order to avoid excessive risk taking and provide for a better alignment of interest, AIFM should commit some of their own money in the AIF they manage provided that the characteristics of these AIF do not prevent such a commitment.*
- (12c) The Commission should put forward an appropriate horizontal legislative proposal that clarifies the responsibilities and liabilities of a depositary and governs the right of a depositary in one Member State to provide its services in another Member State (passport). That legislative proposal should replace the relevant depositary requirements of this Directive.*
- (12d) The Commission should ensure that the requirements concerning depositaries set out in this Directive are applied to UCITS depositaries and should for that purpose revise Directive 2009/65/EC accordingly by the date of entry into force of this Directive.*
- (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 should be functionally independent from the management functions of the AIFM. Where relevant, AIFM should be able to delegate the valuation of assets and the calculation of the net asset value to a third party.***
- (14) AIFM may delegate responsibility for the performance of ***some of their*** 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.
- (15) Given that AIFM employing 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 ***Union***, and shared across Member States so as to identify potential sources of risk to the stability of financial markets in the ***Union***. To remedy this situation, special requirements should apply to ***those*** AIFM which

use leverage in their investment strategies. Those AIFM should be obliged to *set leverage limits in respect of each AIF they manage and to disclose information regarding their use and sources of leverage. The information disclosed should be transmitted to ESMA 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. The competent authorities should also pass such information to the European Systemic Risk Board established under Regulation (EU) No .../2010 of the European Parliament and of the Council of ...* * (ESRB) for use in the performance of its duties. It is considered necessary to allow ESMA, on the basis of that information, and after taking into account the advice of the ESRB, to determine whether the leverage employed by an AIFM poses a substantial risk to the stability and integrity of the financial system and to specify the remedial measures to be taken (including limits to the level of leverage which that AIFM can employ). ESMA should immediately inform the Commission and the competent authorities concerned of any such determination. The competent authority of the home Member State of any AIFM which is the subject of such a determination should implement the decisions of ESMA.

(15a) In view of the general objective of financial stability and containment of systemic risk, particular attention should be paid to financial institutions such as lending institutions and prime brokers which are key partners to the AIF and are active in the building risk processes. Those institutions should, in addition to complying with disclosure requirements towards competent authorities, also be subject to specific capital requirements considering the risk they incur, depending on their links with AIF. In addition, prime-brokers and other lenders to AIFM and AIF should comply with all applicable laws, notably Directive 2006/48/EC and Directive 2006/49/EC, in the case of prudential regulation. Moreover, the conflict of interest arising when those institutions run AIF themselves in parallel to providing services to their customers should be addressed in the appropriate legislative texts as a matter of urgency. To that end, specific coordination should be put in place between ESMA and the European Supervisory Authority (Banking) established under Regulation (EU) No.../2010 of the European Parliament and of the Council of ... * (EBA) to keep track of the level of financing provided to such AIFM by financial institutions involved in these activities.

I

(16a) Short selling is a widespread market practice extensively used by AIFM and other market participants. Although it may sometimes perform a useful role in keeping markets liquid, it also makes them more volatile and plays a part in destabilising them because of its pro-cyclical effect. Notably in extreme market conditions, short selling may contribute to market disorder. The part played by short selling in accelerating a market downturn has long been documented whenever a financial market crisis occurs. In addition, short selling can encourage the spread of false rumours with a view to making a profit on a falling market. As the orderly operation and integrity of markets is vital to restoring the confidence of long-term investors, who are vital to finance the economy, and as the integration of financial markets demands common practices within the Union in order to avoid forum shopping, short selling should operate in a

* OJ: Please insert number of the regulation in COM(2009)0499.

* OJ: Please insert number of the regulation in COM(2009)0501.

harmonised regulatory framework to reduce the potential destabilising effect that it may cause. For this purpose, the Commission should propose a horizontal measure at Union level that ensures a level playing field between AIFM and other users of short selling and that bans naked short selling in the Union. In that respect, Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)¹ should be amended and should prohibit naked short selling.

- (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 should be disclosed in accordance with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids² 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 market³. 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 Union 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.

- (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 AIF. While transparency in corporate law is needed, any discrimination such as the imposition of an obligation to make specific disclosure of the portfolio company's strategy and development plan based on ownership of the company would affect fair competition and endanger the financing of innovation in the European Union. It may also affect the rights of other shareholders. To that end, the Commission should conduct a review of all relevant company law legislation as well as of relevant financial sector directives at the latest by the date of entry into force of this Directive, and should make necessary changes in the form of a legislative proposal, including any appropriate amendments needed to this Directive. The Commission's report and associated proposal should ensure a level playing-field between portfolio companies and other companies. In its report and proposal, the*

¹ OJ L 96, 12.4.2003, p. 16.

² OJ L 142, 30.4.2004, p. 12.

³ OJ L 390, 31.12.2004, p. 38.

Commission should take into account the protection of shareholders' rights as well as the need for an international level playing-field and European competitiveness regarding the financing of innovation and developing technologies.

- (17b) In order to avoid potential asset-stripping, the net assets of a target company controlled by an AIF should comply with the provisions of the capital adequacy regime under the Second Company Law Directive¹.***
- (18) Many AIFM currently manage AIF *established* in a third country. It is appropriate to allow authorised AIFM to manage AIF *established* in a third country, subject to appropriate arrangements that ensure the sound administration of those AIF and the effective safe-keeping of assets invested by *Union* investors.
- (19) AIFM should also be able to market AIF *established* in a third country 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 satisfaction of requirements concerning the third country. Where the AIFM is also established in a third country, then it should be required to comply with this Directive, so that it is subject to the same obligations as AIFM established in the Union, when receiving the same rights* under this Directive.
- (20) *For assets located in a third country and under certain conditions* it is appropriate to allow the AIFM to delegate administrative tasks to an entity established in that third country provided that necessary safeguards are in place. Similarly, a depositary may delegate *some of* its depositary tasks in respect of AIF *established* in a third country to a depositary *established* 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 *Union. In addition, AIFM should be able to exercise due care, skill and diligence in the selection, appointment and periodic review of that third party and of its arrangements in respect of the matters delegated to it.* It should also be possible for ■ AIFM to appoint a *legally or functionally* independent valuator established in a third country.
- (21) *A basic principle of this Directive should be that an AIFM established in a third country should benefit from the rights conferred under this Directive (such as to market shares and units in AIF throughout the Union under a visa) only where it is subject to the obligations of this Directive. This should ensure competitive equality with AIFM established in the Union (the level playing field issue). This Directive should therefore establish a means for AIFM established in a third country to be authorised under this Directive. In order to meet practical and national sovereignty concerns, this Directive should therefore require AIFM established in a third country voluntarily to agree to comply with this Directive. To ensure that such compliance is enforced, this Directive should establish a means by which the supervisor of that AIFM, in conjunction with ESMA and the relevant Union competent authorities, enforces compliance with this Directive.*

¹ *Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 1).*

(21a) Consideration should be given by the Commission to develop a European Union private placement regime.

(21b) This Directive should not affect the current situation, whereby a professional investor established in the Union may invest in AIF established in the Union at its own initiative, regardless where the AIFM is established.

(22) It is necessary to clarify the powers and duties of *the* competent authorities responsible for implementing this Directive, and to strengthen the mechanisms needed to ensure the necessary level of cross-border supervisory cooperation. **This Directive should give a coordinating role to ESMA and the power to issue guidelines to the competent authorities on supervision and enforcement of this Directive.**

(22a) Consistent with the new supervisory architecture proposed for the Union, this Directive should give ESMA direct powers of supervision and power to intervene in markets under certain circumstances, to set leverage levels under certain circumstances and to resolve disputes between the competent authorities.

(23) The relative importance of the activities of AIFM in some financial markets, especially in those cases where the AIF they manage do not have a material interest in the underlying products or instruments from which those markets derive, could, under some circumstances, hinder the efficient functioning of those markets. For example it could make those markets excessively volatile or affect the correct pricing of the instruments traded in them. It is therefore considered necessary to make sure the competent authorities **and ESMA** enjoy the powers necessary to monitor the activities of AIFM in those markets and to intervene in those circumstances where it would be necessary to protect their orderly functioning.

(24) Member States should lay down rules, **following guidelines established by ESMA**, on sanctions applicable to infringements of the provisions of this Directive and ensure that they are implemented. The sanctions should be effective, proportionate and dissuasive.

(25) Any exchange or transmission of information between **ESMA, the ESRB, the** competent authorities, other authorities, bodies or persons should be **effected** in accordance with the rules on transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹.

█
(27) █ The Commission should be empowered to adopt **delegated acts in accordance with Article 290 of the Treaty, in particular those** necessary for the implementation of this Directive. █

¹ OJ L 281, 23.11.1995, p. 31.

- (29) Since the objectives of *this Directive*, namely to ensure a high level of consumer and investor protection by laying down a common framework for the authorisation and supervision of AIFM, cannot be sufficiently achieved by the Member States, as evidenced by the deficiencies of existing nationally based regulation and oversight of these actors, and can therefore, be better achieved at *Union* level, the *Union* may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the *Treaty on European Union*. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

General provisions

Article 1

Subject matter

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

Article 2

Scope

1. This Directive shall apply to ■ AIFM established in the *Union that* provide management services to one or more alternative investment funds (AIF) irrespective of:
 - (a) whether the AIF is *established in the Union or in a third country*;
 - (b) whether the AIFM provides its services directly or by delegation;
 - (c) whether the AIF belongs to the open-ended or closed-ended type;
 - (ca) *whether the AIF is constituted under contract law or trust law, under statute or under any other legal form*;
 - (d) the legal structure of the ■ AIFM.
- 1a. *In cases where the law under which AIF are organised requires the establishment of a board of directors or any other governing body and AIF do not designate an AIFM, the AIF shall itself qualify as the AIFM for the purposes of this Directive.*
- 1b. *This Directive shall not prevent or restrict investors from disposing of units or shares which they hold in AIF on the capital market. Any offering or placement of such units*

or shares at the initiative of the AIFM managing such AIF shall be treated as marketing by such AIFM for the purposes of this Directive.

- 1c.** AIFM authorised in accordance with this Directive to provide management services to one or more AIF *are* also entitled to market shares or units of these AIF to professional investors in the **Union** subject to the conditions laid down in Chapter VI and, where relevant, *to* Article 35.

- 3.** Member States shall ensure that AIFM *benefitting from the exemptions set out in Articles 2-a and 2a* are entitled to be treated as AIFM falling under the scope of this Directive.

Article 2-a

Exemptions

This Directive shall not apply to any of the following:

- (a) 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;*
- (b) credit institutions, institutions for occupational retirement provision, institutions exclusively managing funds for occupational retirement provisions, insurance and reinsurance companies or any other regulated institution in so far as they invest solely on their own account;*
- (c) 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;*
- (d) central banks;*
- (e) AIFM which are holding companies having their shares traded on a Union regulated market and which do not grant to their shareholders any redemption or repurchase rights.*

Article 2a

Specific or partial exemptions

- 1.** *AIFM meeting the following criteria need only comply with Chapter II (authorisation), Article 9 (general principles - ethic) and Articles 21, 24 and 25 (reporting obligations to competent authorities):*

- (a) *AIFM which provide management services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;*
- (b) *AIFM in respect of AIF with up to three professional investors, which are not other AIF or UCITS themselves;*
- (c) *AIFM in the form of national, regional and local governments and bodies or institutions which manage funds supporting social security and pension systems;*
- (d) *AIFM in the form of self-managed AIF which have legal personality, do not grant their shareholders any redemption or repurchase rights, invest predominantly in transferable securities and have their shares traded on a regulated market in the Union;*
- (e) *AIFM which manage employee participation schemes.*

AIFM falling within the scope of this paragraph shall not use the procedure set out in Article 33 for marketing the units or shares of an AIF it manages to professional investors in another Member State.

2. *For non-systemically relevant AIFM, only Chapter II (authorisation) Articles 9 and 10 (ethic and prevention of conflict of interest), Articles 19 to 20 (transparency requirements), Articles 21, 24 and 25 (reporting obligations to competent authorities), Article 11 (risk management), Article 14 (capital) and Chapter VIII (Supervision) of this Directive apply.*
3. *Where the AIF concerned is a real estate fund in relation to Article 16, periodical valuation is optional. The frequency with which the valuation is performed shall be in compliance with the rules of the AIF. Article 17 (depository) shall not apply in relation to such AIF.*
4. *AIFM need only comply with this Directive in relation to each private equity AIF that they manage as follows:*
 - (a) *Chapter II (authorisation) Articles 9 and 10 (ethics and prevention of conflict of interest), Article 18 (delegation), Articles 19 to 20 (annual report and disclosure to investors), Chapter V (obligations of AIFM managing specific types of AIF), Chapter VII (third countries) and Chapter VIII (supervision) shall apply;*
 - (b) *as a derogation from Article 16, periodical valuation shall be optional but the frequency of such valuation shall be in compliance with the rules of the AIF and valuation shall, in any event, take place each time shares or units in the private equity AIF are issued or redeemed ;*
 - (c) *article 17 shall not apply.*

Paragraphs 1, 2 and 3 shall not apply to AIFM managing a private equity AIF.

5. *Chapter V shall apply to AIFM falling within the scope of this Article.*

6. ***The competent authorities of the Member States shall establish a list of the AIFM covered by this Article. The list shall be communicated to the European Commission and ESMA.***
7. ***ESMA shall periodically review whether the competent authorities ensure that an AIFM within the scope of this Article continues to fall within that scope on an on-going basis.***

Article 3

Definitions

For the purpose of this Directive, the following definitions shall apply:

- (a) 'alternative investment funds' or 'AIF' means any collective investment undertaking, including investment compartments thereof whose object is the collective investment in assets ***and leveraged managed accounts*** and which do not require authorisation pursuant to Article 5 of ***Directive 2009/65/EC***;
- (b) 'manager of alternative investment funds' or 'AIFM' means a legal or natural person whose ***business is to manage one or several AIF which is responsible for the compliance with the requirements of this Directive and which, depending on the legal form of the AIF concerned, may be either the AIF itself or an external entity***;
- (c) 'valuator' means ***a legal person or a functionally independent service of the AIFM which is authorised and supervised by a competent authority***, valuing the assets or establishing the value of the shares or units of an AIF;
- (d) 'management services' means the ***functions defined in Annex Ia***;
- (e) 'marketing' means ***an offering or placement, at the initiative of an AIFM or of an intermediary responsible for distribution, of units or shares in an AIF that that AIFM manages to or with investors established in the Union***;
- (f) 'professional investor' means an investor within the meaning of Annex II of Directive 2004/39/EC;
- (g) 'retail investor' means an investor who is not a professional investor;
- (h) 'home Member State' means the Member State in which the AIFM has been authorised pursuant to Article 6;
- (i) 'host Member State' means a Member State, other than the home Member State, within the territory of which AIFM provide management services to AIF or markets shares or units thereof;
- (j) 'competent authorities' means the national authorities which are empowered by law or regulation to supervise AIFM;

- (k) 'financial instrument' means an instrument ■ specified in Annex I, Section C of Directive 2004/39/EC;
- (l) 'leverage' means any method by which the AIFM increases the exposure of an AIF it manages to ■ particular *investments* whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means, *including leverage used by funds or other legal entities controlled by the AIF, alone or jointly with other AIF and which increases the financial debt supported by the AIF*;
- (m) 'qualifying holding' means any direct or indirect holding in an AIFM which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists. For this purpose the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC ■ shall be taken into account;
- (n) 'issuer' means any issuer of shares *established* in the *Union* within the meaning of Article 2(1)(d) of Directive 2004/109/EC;
- (o) 'representatives of employees' means representatives of employees as defined by Article 2(e) of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community¹;
- (oa) *'safe-keeping' means control or possession of the assets concerned on behalf of the owner as custodian or depositary;*
- (ob) *'depository' means an institution entrusted with the duties set out in Article 17;*
- (oc) *'own funds' means own funds as referred to in Title V, Chapter 2, Section 1 of Directive 2006/48/EC;*
- (od) *'prime broker' means a 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;*
- (oe) *'short selling' means the sale of a security that the seller does not own and any sale that is completed by the delivery of a security borrowed by, or for the account of, the seller;*
- (of) *'naked short selling' means the short sale of a security when the seller has not borrowed, or entered into an agreement to borrow, before or at the time of submitting the short sale order, the security it is due to deliver to the purchaser;*
- (og) *'non-systemically relevant AIFM' means AIFM which either directly or indirectly through a company with which the AIFM are linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIF that are not leveraged and whose individual assets under management do not exceed EUR 100 million and in total do not exceed a threshold of EUR 250 million and with no*

¹ OJ L 80, 23.3.2002, p. 29.

redemption rights exercisable during a period of five years following the date of constitution of each AIF;

- (oh) 'industrial holding company' means a company with shareholdings in one or more other companies the business purpose of which is to carry out an industrial business strategy through its subsidiaries or associated companies and which is not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies;*
- (oi) 'non-listed company' means any company established in the Union, the shares of which are not admitted to trading on a regulated market within the meaning of Article 4(1)(14) of Directive 2004/39/EC;*
- (oj) 'real estate AIF' means AIF, whose investment policy is to invest in real estate or assets linked to real estate;*
- (ok) 'private equity AIF' means AIF, including closed-end funds and funds of funds, the policy of which is to invest in equity and equity-related securities of, principally, private companies and businesses in order to finance venture capital, growth plans and buyouts;*
- (ol) 'target company' means an issuer or non-listed company that is the object of a takeover from an investor gaining a controlling influence;*
- (om) 'leveraged managed account' means an investment account which is managed by a third party, where that third party has the authority to effect transactions without prior approval from the holder and in respect of which leverage is used in connection with such transactions;*
- (on) 'group' means, with respect to any person or entity, any person controlling, controlled by, or under common control with, such person or entity.*

Chapter II

Authorisation of AIFM

Article 4

Requirements for authorisation

1. Member States shall ensure that no AIFM covered by this Directive provides management services to any AIF or markets shares or units thereof without prior authorisation.

Member States shall require that AIFM authorised in its territory comply with the conditions for initial authorisation established in this Directive at all times.

Entities which are neither authorised in accordance with this Directive nor, in case of AIFM not covered by this Directive, in accordance with the national law of a Member

State, shall not be allowed to provide management services to AIF or market units or shares thereof within the *Union*.

2. AIFM may be authorised to provide management services either for all or certain types of AIF.

Depending on their legal form, AIF may be self-managed or may appoint an external manager as AIFM. Where AIF are legal persons and have not designated an external manager as AIFM, the AIF shall itself qualify as the AIFM.

If the AIFM holds authorisation pursuant to this Directive or a management or investment company holds an authorisation pursuant to Directive 2009/65/EC, the 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, unless such information has changed.

An AIFM may hold an authorisation pursuant to this Directive and be authorised as a management or investment company pursuant to *Directive 2009/65/EC*.

3. *In addition to management services, Member States may authorise AIFM to provide the following services:*

(a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision¹, in accordance with mandates given by investors on a discretionary, client-by-client basis;

(b) investment advice or safe-keeping and administration in relation to units of AIF, as non-core services.

AIFM shall not be authorised under this Directive to provide only the services referred to in this paragraph or to provide only the activities referred to in points 2 and 3 of Annex Ia. Those activities shall represent a minor part of the AIFM turnover.

Article 2(2) and Articles 12, 13 and 19 of Directive 2004/39/EC shall apply to the provision by AIFM of the services referred to in this paragraph.

Article 5

Procedure for granting the authorisation

Member States shall require that an AIFM applying for an authorisation shall provide the following to the competent authorities of the Member State where it has its registered office.

¹ *OJ L 235, 23.9.2003, p. 10.*

- (-a) information on the persons effectively conducting the business of the AIFM;**
- (a) information on the identities of the AIFM shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and of the amounts of those holdings;
- (aa) where a self-managed AIF applies for authorisation, the names of the directors, or members of the governing body, of the AIF and details of their background and experience in relation to the business of the AIF;**
- (b) a programme of activity **setting out the organisational structure of the AIFM**, including information on how the AIFM intends to comply with its obligations under Chapters III, IV and, where applicable, V, VI and VII;
- (c) **■** information about the **investment strategies including the AIFM’s policy as regards the use of leverage, and the risk profiles and other** characteristics of the AIF it **manages or** intends to manage, including **information about the** Member States or third countries **in which** they are **established or are expected to be established**;
- (ca) information about where the underlying funds are established if such AIF is a fund of funds;**
- (cb) information about where the master fund is established;**
- (d) the fund rules or instruments of incorporation of each AIF the AIFM intends to manage;
- (e) information on arrangements made for the delegation to third parties of management services functions as referred to in Article 18 and where applicable Article 35;
- (f) information on the arrangements made for the safe-keeping of the assets of AIF, including, where applicable, arrangements made under Article 38;
- (g) **for each AIF the AIFM manages or intends to manage**, any additional information referred to in Article 20(1).

The AIFM **shall** have its head office in the same Member State as its registered office.

Article 5a

Central register

ESMA shall keep a central public register identifying the competent supervisory authority for each AIFM. The register shall be made available in electronic format.

Article 6

Conditions for granting the authorisation

1. The competent authorities of the home Member State shall grant authorisation only if they are satisfied that the AIFM will be able to fulfil the conditions of this Directive.

The competent authority shall not grant authorisation to a self-managed AIF unless the directors, or members of the governing body, of the AIF are of sufficiently good repute and sufficiently experienced, in relation to the type of business carried out by the AIF, to ensure that the requirements of this Directive are complied with.

The competent authorities of the home Member State may consult ESMA if there are difficulties.

The authorisation shall be valid for all Member States.

2. The competent authorities of the home Member State shall refuse authorisation where the effective exercise of their supervisory functions is prevented by any of the following:
 - (a) the law, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the AIFM has close links as defined in Article 4(31) of Directive 2004/39/EC;
 - (b) difficulties ***relating to*** the enforcement of ***that*** law ***and those*** regulations and administrative provisions.
3. The authorisation shall cover any delegation arrangements made by the AIFM and communicated in the application.

The competent authorities of the home Member State may restrict the scope of the authorisation, in particular as regards the type of AIF the AIFM is allowed to manage, as well as the delegation arrangements.

Particular attention shall be paid to the risk classification of the AIF which the AIFM is authorised to manage.

4. The competent authorities shall inform the applicant ***in writing***, within ***three months*** of the submission of a complete application, whether or not authorisation has been granted. ***If the competent authorities do not inform the applicant in writing, the authorisation shall be deemed rejected without a justification.***

■

5. AIFM may start providing management services in the home Member State as soon as the authorisation is granted.
- 5a. ***Without prejudice to Article 18, Member States shall ensure that AIF falling under the scope of this Directive shall have a single AIFM which shall be responsible for compliance with the requirements of this Directive.***

- 5b. *The competent authorities shall inform ESMA, on a quarterly basis and in a consolidated form, of authorisations granted and rejected and in relation to any conditions, changes in scope and withdrawal of authorisations in accordance with this Article and Articles 7 and 8.*

Article 7

Changes in the scope of the authorisation

AIFM shall, before implementation, notify the competent authorities of the home Member State of any **material changes** to the conditions under which the **initial** authorisation has been granted, in particular **material changes in the programme of activity of the AIFM**, of the investment strategy and policy of any AIF managed by it, of the AIF rules or instruments of incorporation and the identity of any further AIF the AIFM intends to manage.

The competent authorities shall, within a month of receipt of that notification, either approve, or impose restrictions, or reject those changes.

Article 8

Withdrawal of the authorisation

The competent authorities may withdraw the authorisation issued to an AIFM where that AIFM:

- (1) has obtained the authorisation by making false statements or by any other **unlawful** means;
- (2) no longer fulfils the conditions under which authorisation was granted;
- (3) has seriously or systematically infringed the provisions transposing this Directive.

Chapter III

Operating conditions for AIFM

SECTION 1: CONDUCT OF BUSINESS

Article 9

General Principles

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

Member States shall require AIFM to set up and implement remuneration policies and practices that comply with the requirements set out in Annex 1b and are consistent with

and promote sound and effective risk management, that do not encourage excessive risk-taking, that counter short-term profit motives, that are consistent with the risk profiles, fund rules or instruments of incorporation of the AIF they manage, and that are in line with the business objectives and the long-term interests of the AIFM and investors.

Those policies and practices shall be comprehensive and proportionate to the nature, scale and complexity of the AIFM's activities and to the AIF it manages.

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

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

1. Member States shall ensure that AIFM **■** provide their management services within the **Union** only if they comply with the provisions of this Directive on an ongoing basis.

The AIFM shall:

- (a) act honestly, with due skill, care and diligence and fairly in conducting its activities;
- (b) act in the best interests of the AIF it manages, the investors *in* those AIF and the integrity of the market; *and*
- (c) ensure that all AIF investors are treated fairly.

No investor may obtain a preferential treatment, unless this is disclosed in the AIF rules or instruments of incorporation.

2. The Commission shall adopt *delegated acts in accordance with Articles 49a, 49b and 49c* specifying the criteria to be used by *the* competent authorities to assess whether AIFM comply with their obligation under paragraph 1.

■

- 2a. *The Commission shall adopt delegated acts in accordance with Articles 49a, 49b and 49c specifying the principles described in Annex Ib and set guidelines on sound remuneration policies after consultation of ESMA. The guidelines shall also take into account the principles on sound remuneration policies set out in the Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector and shall take into account the size of the AIFM and the size of AIF they manage, their internal organisation and the nature, the scope and the complexity of their activities.*

Article 10

Conflicts of interest

1. Member States shall require AIFM to take all reasonable steps to identify conflicts of interest between the AIFM, including their managers, employees or any person directly or indirectly linked to the AIFM by control, and the investors in AIF managed by the AIFM or between one investor and another that arise in the course of managing one or more AIF.

AIFM shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of the AIF and its investors.

AIFM shall segregate within its own operating environment, tasks and responsibilities which may be regarded as incompatible with each other. AIFM shall assess whether its operating conditions may involve any other material conflicts of interest and disclose them to the AIF investors.

2. Where organisational arrangements made by the AIFM to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to investors' interests will be prevented, the AIFM shall clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf, and develop appropriate policies and procedures.
3. The Commission ***shall adopt delegated acts in accordance with Articles 49a, 49b and 49c:***
 - (a) further specifying the types of conflicts of interests as referred to in paragraph 1;
 - (b) specifying the reasonable steps AIFM are expected to take in terms of internal and organisational procedures in order to identify, prevent, manage and disclose conflicts of interest.

■

Article 11

Risk Management

- 1 ■ AIFM shall ensure that the functions of risk management and portfolio management are separated and subject to separate reviews.
2. ■ AIFM shall implement risk management systems in order to measure, monitor ***and manage*** appropriately all risks ***relevant*** to each AIF investment strategy and to which each AIF is or can be exposed ■ .
 - 2a. ***Where AIFM use the services of a prime broker, the terms shall be set out in a written contract. In particular any possibility of transfer and reuse of AIF assets shall be***

provided for in that contract and shall comply with the AIF rules. The contract shall provide that the depositary be informed of the contract. Before investing in the AIF, investors shall be informed of that provision in the contract and of the identity of the prime broker.

In particular investors shall be informed about the transfer of liability to the prime broker that may exist, including where there is loss of financial instruments. In that case, the delay for restitution shall be in accordance with the terms of the contract between the AIFM and the prime broker.

AIFM shall exercise due skill, care and diligence in the selection and appointment of prime brokers with whom a contract is to be concluded.

■

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:
 - (-a) is in possession of or entered into an agreement to borrow the relevant securities or other financial instruments at the time of the submission of the short sale order;*
 - (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;*
 - (c) regularly discloses information on its significant short positions to the competent authorities. In exceptional circumstances, the competent national authority may request AIFM to report all short positions and securities borrowed.*
- 4a. *Each competent authority shall regularly provide ESMA with the information provided to it under paragraph 4(c). In exceptional circumstances or in order to ensure the stability and integrity of the financial system, on the basis of that or other relevant information, ESMA may restrict short selling activities.*
5. The Commission shall adopt *delegated acts in accordance with Articles 49a, 49b and 49c* further specifying ■ :
 - (a) 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;*
 - (b) 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;*
 - (c) the specificities of the reporting regime referred to in paragraph 4a.*

■

Article 12

Liquidity management

1. For each AIF it manages the AIFM shall employ an appropriate liquidity management system and adopt procedures which ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.

The AIFM shall regularly conduct stress tests, both under normal and exceptional liquidity conditions and monitor the liquidity risk of the AIF accordingly. ***The results of these stress tests need to be communicated to the competent authorities.***

2. AIFM shall ensure that, ***for each AIF it manages, the investment strategy, the liquidity profile and the redemption policy are consistent.***
3. The Commission shall adopt ***delegated acts in accordance with Articles 49a, 49b and 49c*** further specifying **█** the liquidity management requirements set out in paragraph 1 **█**.

█

Article 13

Investment in securitisation positions

In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that repackage loans into tradable securities and **█** originators ***within the meaning of Article 4(41) of Directive 2006/48/EC*** and AIFM that invest in these securities or other financial instruments on behalf of one or more AIF, the Commission shall adopt ***delegated acts in accordance with Articles 49a, 49b and 49c specifying:***

- (a) the requirements that need to be met by the originator in order for an AIFM to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of one or more AIF, including requirements that ensure that the originator retains a net economic interest of not less than 5 %;
- (b) qualitative requirements that must be met by AIFM which invest in these securities or other financial instruments on behalf of one or more AIF.

█

SECTION 2: CAPITAL REQUIREMENTS ***AND LIABILITY INSURANCE***

Article 14

Initial and ongoing capital

- 1. *The initial capital of a self-managed AIF shall be at least EUR 300 000.*
1. *Subject to paragraphs 2 to 4, where an AIFM is appointed as external manager of one or more AIF, the AIFM shall have an initial capital of at least EUR 125 000.*
2. *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 shall not exceed EUR 10 million.***
3. *Irrespective of the amount of the requirements set out in **paragraphs -1, 1 and 2**, the own funds of the AIFM shall never be less than the amount required under Article 21 of Directive 2006/49/EC **■**.*
4. *For the purposes of **paragraphs -1 to 3**, the following portfolios shall be deemed to be the portfolios of the AIFM:*
 - (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 the AIFM is managing under delegation** ;*
 - (b) *other collective investment undertakings, whether or not coordinated at Union level, managed by the AIFM including those for which it has delegated one or more functions but excluding those that the AIFM is managing under delegation.*
5. *Member States may authorise AIFM not to provide up to 50 % of the additional amount of own funds referred to in paragraph 2 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 Union law.*
6. *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.*
7. *The amount invested by AIFM in each AIF they manage, provided that characteristics of the AIF do not prevent such an investment, shall be such that, on an annual basis, the AIFM hold a net economic exposure superior or equal to a specified percentage of the total amount invested by all the investors in that AIF.*
8. *Own funds shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions.*
9. *The Commission shall adopt delegated acts in accordance with Articles 49a, 49b and 49c further defining the specified percentage referred to in paragraph 7.*

¹ OJ L 9, 15.1.2003, p. 3.

SECTION 3: ORGANISATIONAL REQUIREMENTS

Article 15

General principles

AIFM shall, at all times, use adequate and appropriate resources that are necessary for the proper performance of their management activities.

They shall have updated systems, documented internal procedures and regular internal controls of their conduct of business, in order to mitigate and manage the risks associated with their activity.

Article 16

Valuation

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

*AIFM shall ensure that the assets, shares and units of AIF are valued at least **annually**. The AIFM shall also ensure that the shares or units of AIF are valued whenever needed to enable redemption or issuance.*

For each AIF the AIFM shall ensure that independence is embedded into the processes adopted for valuation of assets and calculation of the net asset value of the AIF, including, in the case where the AIFM itself performs the valuation, that appropriate safeguards are in place to prevent conflicts of interest and undue influence upon the employees performing the valuation function.

- 1a. *AIFM are responsible for the proper valuation of AIF assets as well as for the calculation of the net asset value of AIF and the publication of that net asset value. The depository is responsible for verifying the conditions under which the valuation, calculation and publication are done. The liability of AIFM shall not be affected by the fact that it has delegated any of its tasks in relation with the AIF's valuation to a third party. All valuations, whether carried out by the AIFM or by an external valuator, shall be subject to the oversight and monitoring of the AIF's depository.*

Where an external valuator is used, AIFM shall demonstrate that such third party is qualified and capable of undertaking the functions in question, that it was selected with due care and that the AIFM is in a position to monitor effectively at any time the activity of the external valuator. The use of an external valuator shall not prevent the effectiveness of supervision by the AIFM, and, in particular, it shall not prevent the AIFM from acting, or the AIF from being managed, in the best interests of its investors. Where an external valuator is not used, the competent authorities of the

home Member State may require the AIFM to have its valuation procedures and/or valuations verified by an external valuator or, where appropriate, by an auditor.

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.

AIFM shall regularly publish the methodologies used for the valuation of illiquid assets, whether valuation occurs within the AIFM or is delegated to a third party.

3. The rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of the AIF shall be laid down in the law of the country where the AIF is *established* or in the AIF rules or instruments of incorporation.
4. The Commission shall adopt *delegated acts in accordance with Articles 49a, 49b and 49c* further specifying *which duly authorised and supervised entities are eligible valuers under this Directive. Those delegated acts 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.*

The Commission may also adopt delegated acts in accordance with Articles 49a, 49b and 49c further specifying the criteria under which a valuator can be considered functionally independent within the meaning of paragraph 1.



Article 17

Depositary

1. For each AIF it manages, the AIFM shall ensure that a *single* depositary is appointed to fulfil, where relevant, the following *functions*:
 - (a) receive all payments made by investors when subscribing units or shares of an AIF managed by the AIFM and book them on behalf of the AIFM in a segregated account;
 - (b) safe-keep any financial instruments which belong to the AIF, *namely*:
 - (i) *holding in custody all financial instruments that can be held in a Central Securities Depository, that can be credited into securities accounts or that are physically delivered to the depositary. For this purpose, the depositary appointed by the AIFM shall ensure the segregation of assets through the opening of separate accounts in its books in the name of the AIF. Notwithstanding this principle, Member States may allow segregation in so-called ‘omnibus accounts’, provided that each fund’s assets can be clearly identified as belonging to a given AIF at any moment;*

- (ii) *maintain the records to verify the ownership of financial instruments that cannot be held in custody based on the information provided by the AIFM, including external evidence of the existence of the transaction;*
 - (ba) *ensure that the financial instruments referred to in point (b) may not be re-used without prior consent from the AIFM;*
 - (c) verify whether the AIF or the AIFM on behalf of the AIF has obtained the ownership of all other assets the AIF invests in;
 - (ca) *maintain records evidencing ownership of assets of the AIF other than those referred to in points (a) and (b).*
- 1a. *In addition to the functions referred to in paragraph 1, the depositary shall:*
- (a) *ensure that the sale, issue, re-purchase, redemption and cancellation of shares or units of the AIF are carried out in accordance with the applicable national law and the AIF rules or instruments of incorporation;*
 - (b) *ensure that the value of the shares or units of the AIF is calculated in accordance with the applicable national law and the AIF rules or instruments of incorporation;*
 - (c) *carry out the instructions of AIFM, unless they conflict with the applicable national law or AIF rules or instruments of incorporation;*
 - (d) *ensure that in transactions involving the assets of AIF any consideration is remitted to it within the usual time limits;*
 - (e) *ensure that the income of AIF is applied in accordance with the applicable national law and the AIF rules or instruments of incorporation.*

2. An AIFM shall not act as depositary.

The depositary shall act independently and in the interest of AIF investors.

The appointment of the depositary by the AIFM shall be evidenced by a contract in writing. The contract shall regulate the flow of information deemed necessary to allow the depositary to perform the functions set out in this Article and in other laws, regulations or administrative provisions which are relevant for depositaries in the home Member State of the AIF.

3. The depositary shall be *any of the following:*

- (a) a credit institution having its registered office in the **Union** and be authorised in accordance with Directive 2006/48/EC; *or*
- (b) *an investment firm authorised in accordance with Directive 2004/39/EC; or*

- (c) *a legal person which is authorised by the competent authorities of the home Member State of the AIFM to act as a depositary, which is subject to prudential regulation and ongoing supervision, which are of the same quality as the regulation and supervision specified by Directive 2006/48/EC, and which can provide sufficient financial and professional guarantees to be able to perform effectively the relevant depositary functions and meet the commitments inherent to those functions.*
- 3a. *Where an AIF managed by an authorised AIFM is established in the Union, the depositary shall have its registered office in the Member State where the AIF is established.*

Where a AIF managed by an authorised AIFM is established in a third country, the depositary shall have its registered office in the Union, unless the following conditions are satisfied:

- (a) *the competent authorities of the home Member State of the AIFM and those of the third country where the AIF is established have signed cooperation and exchange of information agreements;*
- (b) *the third country where the AIF is established is the subject of a decision taken pursuant to paragraph 3c stating that depositaries established in that country are subject to effective prudential regulation (including minimum capital requirements) and supervision which are to the same effect as the provisions laid down in Union law;*
- (ba) *the depositary shall by contract be liable to the AIFM and the investors of the AIF consistently with paragraphs 5 and 5a and shall agree to comply with paragraphs 4 and 4a;*
- (c) *the third country where the AIF is established is the subject of a decision taken pursuant to paragraph 3c stating that the standards to prevent money laundering and terrorist financing meet the Financial Action Task Force requirements and are to the same effect as the requirements set out in Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing¹;*
- (d) *the home Member State of the AIFM has signed an agreement with the third country where the AIF is established 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;*
- (e) *the depositary shall be a bank or an entity of the same nature as those entities referred to in paragraph 3, which meet the conditions specified in point (c) thereof.*

¹ OJ L 309, 25.11.2005, p. 15.

- 3b. *The Commission shall adopt delegated acts in accordance with Articles 49a, 49b and 49c establishing:*
- (a) *general criteria for assessing whether the standards to prevent money laundering and terrorist financing of third countries as referred to in paragraph 3a(c) meet the Financial Action Task Force requirements and are to the same effect as the requirements set out in Directive 2005/60/EC;*
 - (b) *general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in paragraph 3a(b) are to the same effect as the provisions laid down in Union law and are effectively enforced.*
- 3c. *On the basis of the criteria referred to in paragraph 3b, the Commission shall adopt delegated acts in accordance Articles 49a, 49b and 49c stating:*
- (a) *that the third country's standards to prevent money laundering and terrorist financing meet the Financial Action Task Force requirements and are to the same effect as the requirements set out in Directive 2005/60/EC;*
 - (b) *that the prudential regulation and supervision of a third country are to the same effect as the provisions laid down in Union law and are effectively enforced.*
4. Depositories may delegate their tasks *apart from functions of selection, monitoring and oversight over their sub-depositaries and sub-custodians. A depository shall not delegate its functions to the extent that it becomes a letter-box entity.*
- 4a. *Depositories shall exercise due skill, care and diligence in the selection, appointment, periodic review and ongoing supervision of any third party to whom they have delegated part of their tasks and of its arrangements in respect of the matters delegated to it.*
5. The depository shall be liable to the AIFM and the investors of the AIF for any losses suffered by them as a result of its *intentional or negligent* failure to perform, *or improper performance of*, its obligations pursuant to this Directive *except where such loss arises as a result of force majeure*. In case of any loss of financial instruments which the depository safe-keeps, the depository *may* discharge itself of its liability *only* if it can prove that *the loss has been caused by an external event, that it was not foreseeable and that the depository could not have avoided the loss which has occurred.*

The depository's liability towards AIFM and investors shall not be affected by the fact that it has chosen to undertake a single delegation to an authorised third party, such as a subdepository or a sub-custodian, of a part of its tasks. Therefore, in the event of any loss of financial instruments which the depository safe-keeps, as a primary obligation, without prejudice to national law, the depository shall return the assets to the AIF without undue delay. This requirement shall apply without prejudice to legal proceedings.

Liability to AIF investors may be invoked either directly or indirectly through the AIFM

- 5a. *By way of exception to paragraph 5, where a depositary is legally prevented by the law of the country where the AIFM invests on behalf of the AIF or unable to exercise custodial functions due to an unforeseeable external event to exercise its custodial functions, the depositary may discharge its liability, including for loss of financial instruments, if it can prove that it has performed its due diligence duties as referred to in paragraph 4a. Such discharge of liability may occur only once: there shall be no chain of liability.*

Liability towards the AIFM and investors may be transferred to an authorised third party that has been entrusted to carry out its custodial tasks by written contract between the depositary and the third party.

The contract between the AIFM and the depositary shall provide that the AIFM be informed of any contract between the depositary and a third party before it comes into effect. Before they invest in the AIF, investors shall also be informed of such a contract and of the shared responsibility between the parties involved.

Where a third-country depositary is the subject of the decisions taken pursuant to paragraph 3c, a contract, as referred to in the second subparagraph, shall not be required.

- 5b. *By way of exception to paragraph 5, where the contract between the depositary and a prime broker or a sub-custodian allows for the transfer and reuse of assets in compliance with the AIF rules or instruments of incorporation, the depositary may discharge its own liability if it can prove that it has performed its due diligence duties as referred to in paragraph 4a.*

The contract between the AIFM and the depositary shall provide that the AIFM be informed of a provision allowing the transfer and reuse of assets in accordance with the rules of the AIF before its implementation.

Before they invest in the AIF, investors shall be informed of that clause and updated about the identity of the third party. In particular, investors shall be informed of any transfer of liability to the third party that may exist, including in the event of loss of financial instruments. In that case, the delay for restitution shall be in accordance with the terms of the contract between the depositary and the third party.

- 5c. *The depositary shall make available on request to the competent authorities of its home Member State all information which it has obtained while undertaking its duties and that may be necessary for the competent authorities to supervise the AIFM. If the home Member State of the AIFM is different from that of the depositary, the competent authorities of the home Member State of the depositary shall share the information received without delay with the competent authorities of the home Member State of the AIFM.*

- 5d. *The Commission shall adopt delegated acts in accordance with Articles 49a, 49b and 49c further specifying the duties and responsibilities of depositaries and the conditions under which an AIF depositary may delegate some of its functions to a third party.*

SECTION 4: DELEGATION OF AIFM FUNCTIONS

Article 18

Delegation

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** the competent authorities of the home Member State **in advance** for each delegation. ***The competent authorities may reject such delegation within one month.***

The following conditions **shall** be complied with:

- (a) the third party must be creditworthy and the persons who effectively conduct the business must be of sufficiently good repute and sufficiently experienced;
 - (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;
 - (c) the delegation **must** not prevent the effectiveness of supervision of the AIFM, and in particular it must not prevent the AIFM from acting, or the AIF from being managed, in the best interests of its investors;
 - (d) the AIFM must **be able to** demonstrate that the third party is qualified and capable of undertaking the functions in question, that it was selected with due care and that the AIFM is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the third party and to withdraw the delegation with immediate effect where this is in the interest of investors;
- (da) the AIFM must inform investors of which functions have been delegated and to whom.***

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 where such withdrawal is in the best interests of investors.

No delegation shall be given to the depositary, the valuator, or to any other undertaking whose interests may conflict with those of the AIF or its investors.

■ AIFM shall review the services provided by each third party on an ongoing basis.

2. ■ The ■ liability **of AIFM shall not** be affected by the fact that **they have** 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 **or to the extent that it becomes a letter-box entity.**
3. The third party may not sub-delegate any of the functions delegated to it.

Chapter IV

Transparency requirements

Article 19

Annual report

1. **■** AIFM shall, for each of the AIF *they manage*, make available an annual report for each financial year. The annual report shall be made available to investors and *the* competent authorities no later than four months following the end of the financial year, *or, in circumstances where information is required from third parties, such as the audit of any underlying investments of the AIF, no later than six months following the end of the financial year.*
2. The annual report shall at least contain the following:
 - (a) a balance-sheet or a statement of assets and liabilities;
 - (b) an income and expenditure account for the financial year;
 - (c) a report on the activities of the financial year;

(ca) the information listed in Article 20, to the extent it has changed during the financial year covered by the report;

(cb) the amounts of remuneration, split into fixed and variable remuneration, paid by the AIFM and, where relevant, by the AIF.
3. The accounting information given in the annual report shall be *prepared in accordance with the accounting standards or principles required by the applicable AIF rules or instruments of incorporation or formation and* audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts **■**¹. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.
4. The Commission shall adopt *delegated acts in accordance with Articles 49a, 49b and 49c* further specifying the content and format of the annual report. *Those acts* shall be *appropriate and proportionate and shall be* adapted to the type of AIFM to which they apply *and the AIF to which the report relates.*

¹ OJ L 157, 9.6.2006, p. 87.

Article 20

Disclosure to investors

1. AIFM shall ensure that AIF investors receive the following information before they invest in the AIF, as well as any changes thereof:
 - (a) a description of the investment strategy and objectives of the AIF, **the type of assets which the AIF can invest in and of the techniques it may employ and of all associated risks, of any asset re-use and transfer arrangements and of custody arrangements if appropriate**, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted, **the maximum level of leverage** and the associated risks and of any restrictions to the use of leverage **as well as the total amount of leverage, on a periodic basis**;
 - (aa) information about where the underlying funds are established if such AIF is a fund of funds;*
 - (ab) information about where the master fund is established;*
 - (b) a description of the procedures by which the AIF may change its investment strategy or investment policy, or both;
 - (c) a description of the legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, applicable law and on the existence, or not, of any legal instruments providing for the recognition and enforcement of judgments on the territory where the fund is **established**;
 - (d) the identity of the AIF's depositary, valuator, auditor and any other service providers and a description of their duties and the investors' rights should any failure arise;
 - (e) a description of any delegated management **or valuation function** or depositary **task** and the identity of the third party to whom that function **or task** has been delegated, **including AIF's sub-custodians and prime brokers, a description of their duties and responsibilities and a description of residual risks that investors may be exposed to in exceptional circumstances related to unforeseeable events out of the control of the depositary and of the AIFM**;
 - (f) a description of the AIF's valuation procedure and, where applicable, of the pricing models for valuing assets, including the methods used in valuing hard-to-value assets;
 - (g) a description of the AIF's liquidity risk management, including the redemption rights both in normal and exceptional circumstances, existing redemption arrangements with investors, and how the AIFM ensures a fair treatment of investors;

- (h) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;
 - (i) whenever an investor obtains a preferential treatment or the right to obtain preferential treatment, the identity of the investor and a description of that preferential treatment, **and whether there is any connection between the AIFM and that investor**;
 - (j) the latest annual report;
 - (ja) a description of the past performance of the AIF from its inception to the most recent assessment;**
 - (jb) information about the correlation of the applied investment approach vis-à-vis traditional investment strategies (such as stocks or bonds);**
 - (jc) any modification of the liability regime stated in Article 17(5) as a result of a contractual arrangement between the AIFM and the depositary;**
 - (jd) a detailed description of the source, maturity and amount of funds raised by the AIF, including the share directly or indirectly contributed by the AIFM managing the AIF and its representatives, directors and employees.**
2. For each AIF an AIFM manages, it shall periodically disclose to investors:
- (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
 - (b) any new arrangements for managing the liquidity of the AIF;
 - (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage these risks.
3. The Commission shall adopt **delegated acts in accordance with Articles 49a, 49b and 49c** further specifying the disclosure obligations of AIFM and the frequency of the disclosure referred to in paragraph 2. **Those delegated acts** shall be adapted to the type of AIFM to which they apply.



Article 21

Reporting obligations to competent authorities

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.

2. For each AIF an AIFM manages, it shall periodically report the following to the competent authorities of its home Member State:
 - (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
 - (b) any new arrangements for managing the liquidity of the AIF;
 - (c) the actual risk profile of the AIF, and the risk management tools employed by the AIFM to manage these risks;
 - (ca) the overall level of leverage employed by each AIF it manages, a breakdown between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and, where known, the extent to which the assets of the AIF have been re-used under leveraging arrangements. That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIF managed by the AIFM, and the amounts of leverage received from each of those entities for each of the AIF managed by the AIFM;**
 - (d) the main categories of assets in which the AIF invested;
 - (e) where relevant, the use of short selling during the reporting period;
 - (ea) the structure of fees and the amounts paid to the AIFM;**
 - (eb) performance data of the AIF, including valuation of assets.**
- 2a. In accordance with the principle of proportionality, the competent authorities may ask AIFM for additional information which they consider may pose systemic risk.**
- 2b. In exceptional circumstances and where required in order to ensure the stability and integrity of the financial system, or to promote long-term sustainable growth, ESMA may impose additional reporting requirements.**
3. For each of the AIF it manages the AIFM shall submit the following documents to the competent authorities of its home Member State:
 - (a) an annual report of each AIF managed by the AIFM for each financial year, within four months from the end of the periods to which it relates **or, in circumstances where information is required from third parties (such as the audit of any underlying investments of the AIF), no later than six months from the end of that period;**
 - (b) a detailed list of all AIF which the AIFM manages for the end of each quarter.

- 3a. *The competent authorities of the home Member State shall forward any relevant information necessary for systemic risk supervision including a synthesis of all information referred to in paragraphs 2 and 3, to ESMA and the ESRB.*
4. The Commission shall adopt *delegated acts in accordance with Articles 49a, 49b and 49c* further specifying the reporting obligations referred to in paragraphs 1, 2 and 3 and their frequency.

Chapter V

Obligations regarding AIFM managing specific types of AIF

SECTION 1: OBLIGATIONS FOR AIFM MANAGING LEVERAGED AIF

Article 22

Scope

This section shall apply only to AIFM which manage one or more AIF employing leverage .

Article 23

Disclosure to investors

AIFM managing one or more AIF employing leverage shall for each such AIF:

- (a) disclose to investors the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of re-use of collateral or any guarantee granted under the leveraging arrangement;
- (b) disclose to investors the total amount of leverage employed by each AIF in the preceding quarter *on a quarterly basis*.

Article 24

Reporting to competent authorities

AIFM managing one or more AIF employing leverage shall regularly provide, to the competent authorities of its home Member State, information about the overall level of leverage employed by each AIF it manages, and a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives.

That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIF managed by the AIFM, and the amounts of leverage received from each of those entities for each of the AIF managed by the AIFM.

Article 25

Use of information by competent authorities, supervisory cooperation and limits to leverage

1. Member States shall ensure that the competent authorities of the home Member State use the information to be reported under Article 24 for the purposes of identifying the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system, risks of disorderly markets *or risks to the long term growth of the economy*.
2. Home Member States shall ensure that all information received under Article 24, in respect of all AIFM that it supervises, are made available to other competent authorities *and ESMA* through the procedure set out in Article 46. *They* shall, without delay, also provide information through this mechanism, and bilaterally to other Member States directly concerned, if an AIFM under its responsibility could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institution in other Member States.
 - 2a. *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.*
 - 2b. *Each competent authority shall ensure that the leverage limits set by an AIFM are reasonable and that the AIFM complies at all times with the leverage limits that that AIFM has set. Each competent authority shall regularly provide to ESMA the information provided to it under Article 24. On the basis of this information, and after taking into account the advice of the ESRB, ESMA may determine that the leverage employed by an AIFM, or by a group of AIFM, poses a substantial risk to the stability*

and integrity of the financial system and may specify the remedial measures to be taken (including limits to the level of leverage, which that AIFM, or that group of AIFMs, can employ). ESMA shall immediately inform the Commission and the competent authorities concerned of any such determination.

In ensuring that the leverage limits set by an AIFM are reasonable each Member State shall ensure that its competent authority takes into consideration the following criteria:

- (a) the extent to which such limits do not increase systemic risk;*
- (b) the exposure of counterparties;*
- (c) the likely impact on the markets on which the AIFM concerned operates;*
- (d) the limit observed in other Member States for similar types of funds;*
- (e) the overall impact of permitted leverage on the economy.*
- (f) in the case of a private equity AIF and an acquisition within the scope of Article 26, the ratio of financial debt used for the acquisition to earnings before interest, taxes, depreciation and amortisation.*

ESMA shall adopt guidelines on minimum requirements that the competent authorities are bound to follow when assessing such criteria.

2c. *In the event that ESMA makes a determination under paragraph 2b the competent authority of the home Member State of any AIFM the subject of such a determination shall implement the decisions of ESMA.*

3. In order to ensure the stability and integrity of the financial system *and promote long-term sustainable growth of the economy*, the Commission shall adopt *delegated acts in accordance with Articles 49a, 49b and 49c setting the parameters under which ESMA may make a determination under paragraph 2b.*

4. **■** Measures taken by *ESMA and* the competent authorities of the home Member States *pursuant to this Article* shall *be* temporary **■** and *shall be consistent* with the *delegated acts* adopted by the Commission pursuant to paragraph 3.

SECTION 2: OBLIGATIONS FOR AIFM MANAGING AIF WHICH ACQUIRE A *SIGNIFICANT INTEREST OR A CONTROLLING INFLUENCE IN COMPANIES*

Article 26

Scope

1. This section shall apply to the following:

- (a) AIFM managing one or more AIF which either individually or in aggregation acquires **controlling influence, for example, when acquiring 10%, 20%, 30% or 50%** or more of the voting rights, **over** an issuer or **over** a non-listed company **established** in the **Union**, as appropriate;
- (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, for example, when acquiring 10 %, 20 %, 30 % or 50 %** or more of the voting rights, **over an** issuer or **over a** non-listed company, as appropriate.

1a. Non-listed companies controlled by AIFM shall comply with relevant Union and national company law on disclosure.

2. This section shall not apply where the **■** non-listed company concerned – **including depended companies - employs fewer than 50 persons.**

2a. This section shall apply in accordance with Article 6 of Directive 2002/14/EC.

Article 27

Notification of the acquisition of **significant and** controlling influence in non-listed companies

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

Member States shall ensure that when an AIFM, acting alone or in concert, comes to hold, through one or several AIF that it manages, 10 %, 20 %, 30 % or 50 % of the voting rights of an issuer or a non-listed company, it shall notify to the issuer or the non-listed company, as appropriate, its employee representatives or, where there are no such representatives, the employees themselves, the competent authority of the AIFM and the competent authority of the Member State where the issuer or the non-listed company is established, the information provided for in paragraph 2.

These notifications shall be made as soon as possible, but not later than **five working** days the first of which being the day on which the AIFM has reached the **relevant threshold.**

- 2. The notification required under paragraph 1 shall contain the following information:
 - (a) the resulting situation in terms of voting rights;
 - (b) the conditions under which the **relevant** threshold has been reached, including information about the **full identification** of the different **AIFM, AIF and** shareholders involved **and of persons acting in concert with them, 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;**

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

Article 27a

Capital adequacy in target companies

In order to avoid potential asset-stripping, the net assets of a target company controlled by an AIF shall comply with the provisions of the capital adequacy regime under the Second Company Law Directive.

Article 28

Disclosure in case of acquisition of controlling influence in issuers or non-listed companies

1. In addition to Article 27, Member States shall ensure that where an AIFM, *acting alone or in concert with other AIFM*, acquires *controlling influence over* an issuer or a non-listed company *excluding closed-end funds*, that AIFM *notifies the* information *referred to* in the second and third subparagraphs *as soon as possible to the competent authority of the AIFM and the competent authority of the Member State where the issuer or the non-listed company is established*, 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.

With regard to issuers, the AIFM shall make available **█** to the issuer concerned, its shareholders and representatives of employees *the information referred to in Article 6(3) of Directive 2004/25/EC*.

With regard to issuers and non-listed companies, the AIFM shall make available:

- (a) *planned significant divestments of assets;*
- (b) the policy for preventing and managing conflicts of interests, in particular between the AIFM and the issuer;
- (c) the policy for external and internal communication of the issuer in particular as regards employees;
- █**
- (d) the identity of the AIFM which either individually or in agreement with other AIFM have reached *a controlling influence*;
- █**
- (f) the policy for preventing and managing conflicts of interests, in particular between the AIFM and the non-listed company;

- (g) *the person or persons authorised to conclude legally binding agreements relating to business strategy and employment policy.*

- 2a. *Where an AIFM, acting alone or in concert, has reached the position of being able to exercise controlling rights, the target company shall inform the representatives of its employees or, where there are no such representatives, the employees themselves, comprehensively and in due time about the take-over, through the submission of all relevant documentation referred to in Article 9(5) of Directive 2004/25/EC as appropriate, if and to the extent to which the conduct of business is not jeopardised.*

Article 29

Specific provisions regarding the annual report of AIF exercising controlling influence in issuers or non-listed companies

1. Member States shall ensure that AIFM include in the annual report provided for in Article 19 for each AIF that they manage, the additional information provided in paragraph 2 of this Article.
2. The AIF annual report shall include the following additional information for each issuer and non-listed company in which the AIF has *a controlling influence*:
 - (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, *research and development efforts*;
 - (b) with regard to financial and other risks, at least financial risks associated with capital structure;
 - (c) with regard to employee matters, turnover, terminations, recruitment, *remuneration policy and other conditions of employment*;
 - (d) statement on significant divestment of assets;
 - (da) *any environment policy*;
 - (db) *any management compensation package*;
 - (dc) *upon sale, the resale price and amount of the profit*;
 - (dd) *any material changes to the locations of the issuer's or private company's places of business once the change has occurred.*
- 2a. In addition, the AIF annual report shall, for each issuer in which *an AIFM exercises a controlling influence within the meaning of Article 28, set out:*

- (a) *the composition and operation of the administrative, management and supervisory bodies and their committees;*
 - (b) *detailed information on the holders of any securities with special control rights and a description of those rights;*
 - (c) *whether the shares are registered or to the bearer, where national law provides for both types, and any provisions relating to the conversion of such shares unless the procedure is laid down by law;*
 - (d) *the amount of the subscribed capital paid up at the time the company is incorporated or is authorised to commence business.*
3. The AIFM shall, for each AIF it manages and for which it is subject to this section, provide the information referred to in paragraph 2 **■** to all representatives of employees of the company concerned referred to in *Article 26(1), to the competent authority of the AIFM and to the competent authority of the Member State where the issuer or the non-listed company is established*, within the period referred to in Article 19(1)

■

Article 30

Specific provisions regarding companies whose shares are no longer admitted to trading on a regulated market

Where, following an acquisition of *a controlling influence, or the securing of a significant influence, over* 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 *one year* from the date of withdrawal from the regulated market.

Chapter VI

Provision of management and marketing services by AIFM

Article 31

Marketing of shares or units of AIF in the home Member State

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.
2. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each AIF that it intends to market.

That notification shall comprise the following:

- (a) identification of the AIF it intends to market and information on where the AIF are **established**;
 - (b) the AIF rules or instruments of incorporation;
 - (ba) identification of the depositary of the AIF;**
 - (c) a description of, or any information on the AIF available to investors;
 - (d) information on the arrangements established to prevent units or shares of that AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of its AIF.
3. No later than **20 working days** after receipt of a complete notification pursuant to paragraph 2, the competent authorities of the home Member State shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2.

Subject to the **delegated acts** referred to in the third subparagraph, the competent authorities may impose restrictions or conditions on the marketing of AIF pursuant to this Article.

The Commission shall adopt **delegated acts in accordance with Articles 49a, 49b and 49c** specifying the types of restrictions or conditions that can be imposed on the marketing of AIF pursuant to the second subparagraph of this paragraph. ■

- 4. Without prejudice to Article 32(1), Member States shall ensure that AIF managed by AIFM are only marketed to professional investors.
- 4a. Subject to Chapter VII, this Article shall apply whether the AIF is established in the Union or in a third country.**

Article 32

Option for Member States to allow the marketing of AIF to retail investors

- 1. Member States may allow the marketing of AIF to retail investors in their territory.
- Member States may for that purpose impose stricter requirements on AIFM or the AIF. **ESMA shall for that purpose issue guidelines.**
- 1a. Member States shall not allow the marketing of AIF to retail investors in their territory, when an AIF invests more than 30 % in other AIF which do not benefit from the European marketing passport.**
 - 2. Member States that permit the marketing of AIF to retail investors on their territory, shall, within one year of the date referred to in Article 54(1) inform the Commission **and ESMA** of:

- (a) the types of AIF which AIFM may market to retail investors on their territory;
- (b) any additional requirements that the Member State imposes for the marketing of AIF to retail investors on their territory *in accordance with the guidelines of ESMA referred to in paragraph 1.*

Member States shall also inform the Commission *and ESMA* of any subsequent changes with regard to the first subparagraph.

Article 33

Conditions for marketing in other Member States

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:
 - (a) a notification letter, including a programme of operations identifying the AIF it intends to market and information on where the AIF are *established*;
 - (b) the AIF rules or instruments of incorporation;
 - (ba) the identity of the depositary of the AIF;*
 - (c) a description of, or any information on the AIF available to investors;
 - (d) the indication of the Member State in which it intends to market the units or shares of an AIF *it manages* to professional investors;
 - (e) arrangements made for the marketing of AIF and, where relevant, information on the arrangements established to prevent units or shares of that AIF from being marketed to retail investors.
2. The competent authorities of the home Member State shall, no later than **20** working days after the date of receipt of the complete documentation, transmit the complete documentation referred to in paragraph 1 to the competent authorities of the Member State where the AIF will be marketed. They shall enclose an attestation that the AIFM concerned is authorised.
3. Upon transmission of the documentation, the competent authorities of the home Member State shall without delay notify the AIFM *of* the transmission. The AIFM may start the marketing of AIF in the host Member State as of the date of that notification.
4. Arrangements referred to in *paragraph 1(e)* shall be subject to the laws and supervision of the host Member State.

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.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 2 is accepted by their competent authorities.

6. In the event of a change in any of the particulars communicated in accordance with paragraph 2, an AIFM shall give written notice of that change to the competent authorities of its home Member State at least one month before implementing the change.

The competent authorities of the home Member State shall without delay inform the competent authorities of the host Member State of those changes.

7. The Commission shall ■ adopt *delegated acts* in accordance with *Articles 49a, 49b and 49c* specifying the following:

- (a) the form and content of a standard model of the notification letter;
- (b) the form and content of a standard model of attestation.

8. *Subject to Chapter VII, this Article shall apply whether the AIF is established in the Union or in a third country.*

Article 34

Conditions for providing management services in other Member States

1. Member States shall ensure that an authorised AIFM may provide management services in relation to an AIF *established* in another Member State either directly or via the establishment of a branch, provided that the AIFM is authorised to manage that type of AIF.
2. Any AIFM wishing to provide management services in relation to an AIF *established* in another Member State for the first time shall communicate the following information to the competent authorities of its home Member State:
 - (a) the Member State in which it intends to provide management services directly or establish a branch;
 - (b) a programme of operations stating in particular the services which it intends to perform and identifying the AIF it intends to manage.
3. If the AIFM intends to establish a branch, it shall provide, in addition to *the documentation referred to in* paragraph 2, the following information:
 - (a) the organisational structure of the branch;
 - (b) the address in the home Member State from which documents may be obtained;

- (c) the names of *the* persons responsible for the management of the branch.
4. The competent authorities of the home Member State shall, ***within one month*** of receipt of the complete documentation, transmit the complete documentation referred to in paragraph 2, and, where relevant ***paragraph 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 *of* the transmission.

Upon receipt of the transmission notification the AIFM may start to provide its services in the host Member State.

5. The host Member States shall not impose any additional requirements on the AIFM concerned in respect of the matters covered by this Directive.
6. In the event of a change in any of the particulars communicated in accordance with paragraph 2, and, where relevant ***paragraph 3***, an AIFM shall give written notice of that change to the competent authorities of its home Member State at least one month before implementing the change.

The competent authority of the home Member State shall inform the competent authority of the host Member State of those changes.

- 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 responsibility, the competent authorities of the Member State where the management services will be provided shall be able to rely on the cooperation of the competent authorities of the AIFM's home Member State. If necessary, as a last resort, and after informing the competent authorities of the AIFM's home Member State, the competent authorities of the Member State where the management services will be provided may take action directly against the AIFM.

Chapter VII

Specific rules in relation to third countries

Article 35

Conditions for the marketing in the ***Union*** of AIF ***established*** in ***a third country***

1. An AIFM *authorised in the Union or, subject to paragraph 2, an AIFM established in a third country* may only market shares or units of an AIF *established in a third country* to professional investors *established in the Union* if all of the following conditions are satisfied:
 - (a) *a cooperation agreement between the competent authorities of that Member State and the supervisor of the AIF ensures an efficient exchange of all information that are relevant for monitoring the potential implications of the activities of the AIF;*
 - (b) *the third country is the subject of a decision by the Commission stating that the standards to prevent money laundering and terrorist financing meet the Financial Action Task Force requirements and are to the same effect as the requirements set out in Directive 2005/60/EC;*
 - (c) *the third country has signed an agreement with the Member State in which it applies for authorisation and with each other Member State in which those shares or units are proposed to be marketed, which fully comply with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters; and*
 - (d) *the third country is the subject of a decision by the Commission stating that it grants AIFM established in the Union effective market access comparable to that granted by the Union to AIFM from that third country.*
2. *An AIFM established in a third country may market shares or units of an AIF established in a third country under this Article only if it complies with Article 39a.*
 - 2a. *Without prejudice to other applicable anti-money laundering reporting rules, suspicious transaction reports to be made pursuant to Directive 2005/60/EC in connection to direct or indirect investments in AIF established in third countries by investors residing in the Union shall be made in the Member State where this investor is resident.*
3. *The Commission shall adopt delegated acts in accordance with Articles 49a, 49b and 49c establishing:*
 - (a) *general criteria for assessing whether the standards to prevent money laundering and terrorist financing of third countries as referred to in paragraph 1 meet the Financial Action Task Force requirements and are to the same effect as the requirements set out in Directive 2005/60/EC;*
 - (b) *general criteria for assessing whether third countries grant Union AIFM effective market access comparable to that granted by the Union to AIFM from those third countries.*
4. *On the basis of the criteria referred to in paragraph 3, the Commission shall adopt delegated acts in accordance Articles 49a, 49b and 49c stating:*

- (a) *that the third country's standards to prevent money laundering and terrorist financing meet the Financial Action Task Force requirements and are to the same effect as the requirements set out in Directive 2005/60/EC;*
- (b) *that a third country grant Union AIFM effective market access at least comparable to that granted by the Union to AIFM from that third country.*

Article 35a

Conditions for investment in AIF established in a third country

1. *A professional investor established in the Union may invest in shares or units of an AIF established in a third country only if all of the conditions in Article 35 are satisfied in relation to that third country.*
2. *A professional investor established in the Union shall not invest in shares or units of an AIF established in a third country if any of the conditions in Article 35 are not satisfied in relation to that third country.*

Any rules on measures and sanctions made pursuant to Article 43 shall apply to infringements by investors of these provisions.

3. *The Commission shall, after consulting ESMA, assess which third countries satisfy the conditions referred to in paragraph 1.*

Article 36

Delegation by the AIFM of administrative tasks to an entity established in a third country

Member States shall **■** allow an AIFM to delegate administrative services to entities established in a third country *only where* all of the following conditions are met:

- (-a) the assets concerned are located in a third country;*
- (a) the requirements set out in Article 18 are fulfilled;
- (b) the entity is authorised to provide administration services or registered in the third country in which it is established and is subject to prudential supervision;
- (c) there is an appropriate co-operation agreement between the competent authority of the AIFM and the supervisory authority of the entity.

Article 37

Valuator established in a third country

1. Member States shall **■** allow the appointment of a valuator established in a third country **only where** all of the following conditions are met:
 - (-a) the assets concerned are located in a third country,**
 - (a) the requirements set out in Article 16 are fulfilled;
 - (b) the third country is the subject of a decision taken pursuant to paragraph 3 stating that the valuation standards and rules used by valuers established on its territory are equivalent to those applicable in the **Union**.
2. The Commission shall adopt **delegated acts in accordance with Articles 49a, 49b and 49c** specifying the criteria for assessing the equivalence of the valuation standards and rules of third countries as referred to in paragraph (1)(b).

■

3. On the basis of the criteria referred to in paragraph 2, the Commission shall **■** adopt **delegated acts in accordance with Articles 49a, 49b and 49c** stating that the valuation standards and rules of a third country legislation are equivalent to those applicable in the **Union**.

*The Commission shall ensure that those acts enter into force by ... **

■

Article 39a

AIFM established in third countries

1. **Member States shall ensure that AIFM established in a third country may market shares or units of AIF they manage to professional investors on their territory where all of the following conditions are satisfied:**
 - (a) the conditions in Article 35 are satisfied in relation to the third country in which the AIFM is established;**
 - (b) that AIFM agrees with ESMA to comply with this Directive, the necessary changes being made to take account that the AIFM is established in the third country;**
 - (c) there is an agreement between ESMA and the competent authority of the third country in accordance with paragraph 3; and**

* *OJ please insert date: one year after the entry into force of this Directive.*

- (d) *if the AIFM wishes to market shares or units of an AIF established in another third country, then the conditions in Article 35 are also satisfied in relation to that AIF's third country.*
2. *Member States shall ensure that AIFM established in a third country may provide management services in their territory where all of the following conditions are satisfied:*
- (a) *the conditions in Article 35 are satisfied in relation to the third country in which the AIFM is established;*
- (b) *that AIFM agrees with ESMA to comply with this Directive, the necessary changes being made to take account that the AIFM is established in the third country;*
- (c) *there is an agreement between ESMA and the competent authority of the third country in accordance with paragraph 3.*
3. *The agreements provided for in paragraph 1 and 2 shall contain:*
- (a) *a delegation to the competent authority of the third country by ESMA of its powers under this Directive in relation to the AIFM;*
- (b) *an agreement by the competent authority of the third country to exercise the powers of ESMA in relation to the AIFM; and*
- (c) *an agreement by the AIFM to submit to the jurisdiction of courts in the Union in relation to any matters arising from this Directive.*
4. *ESMA shall register each agreement under this Article and may revoke the agreement in the event that the AIFM fails to comply with this Directive or the competent authority fails to comply with its obligations. ESMA shall notify the competent authority of the third country of any such revocation.*
5. *The Commission shall adopt delegated acts in accordance with Articles 49a, 49b and 49c specifying the content of the agreements provided for in paragraphs 1 and 2.*

Article 39b

Application and review of conventions

The Commission shall adopt and regularly review the standards applicable to the agreements signed with third countries pursuant to this Chapter.

The Commission shall periodically review with Member States the agreements signed with third countries pursuant to this Chapter in order to check whether those third countries effectively comply with those agreements. The Commission shall notify a report on the result of the reviews to the Member States, which shall take them into account when assessing

whether authorisations issued or to be issued under this Directive should be granted, suspended or withdrawn.

The Commission shall, in accordance with Articles 49a, 49b and 49c, adopt delegated acts specifying the procedure to be followed for the adoption and review of the standards, the compliance reviews and the conditions for ensuring effective cooperation, and the consequences of the report on authorisations.

The Commission shall present a report on those matters to the European Parliament and to the Council, accompanied, where appropriate, by proposals for a review of this Chapter.

Chapter VIII

Competent authorities

SECTION 1: DESIGNATION, POWERS AND REDRESS PROCEDURES

Article 40

Designation of competent authorities

Member States shall designate the competent authorities which are to carry out the duties provided for in this Directive.

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

Each Member State shall require its competent authorities to establish the appropriate methods to monitor that AIFM comply with their obligations under this Directive on the basis of guidelines set by ESMA.

Where a Member State designates several competent authorities it shall inform the Commission *and ESMA* thereof, indicating any division of duties.

Article 41

Powers of competent authorities

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Such powers shall be exercised in any of the following ways:
 - (a) directly;
 - (b) in collaboration with other authorities;
 - (c) under their responsibility by delegation to entities to which tasks have been delegated;

- (d) by application to the competent judicial authorities.
2. The competent authorities shall have at least the following powers ***which shall be exercisable at any time***:
- (a) access any document in any form and receive a copy ;
 - (b) require information from any person and if necessary to summon and question a person with a view to obtaining information;
 - (c) carry out on-site inspections with or without prior announcement;
 - (d) require ***existing*** telephone and ***existing*** data traffic ***records***;
 - (da) impose a temporary prohibition of professional activity;***
 - (db) take appropriate measures to ensure that AIFM 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.***

Article 42

Powers of ESMA

ESMA shall define and regularly review guidelines for the competent authorities of the Member States on the exercise of their authorisation powers and on the reporting obligations imposed by this Directive.

ESMA shall have the powers necessary, including those set out in Article 41(2) 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.

Article 43

Administrative sanctions

- 1. Member States shall lay down the rules on measures and sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced.**
1. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with **ESMA's guidelines and** their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.
 2. Member States shall provide that the competent authority may disclose to the public any measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

Article 44

Right of appeal

Member States shall provide that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned, **is** communicated to the addressee and is the subject of the right of appeal to the courts.

That right to appeal to the courts shall apply also where, in respect of an application for authorisation which provides all the information required, no decision is taken within two months of the submission of the application

SECTION 2: CO-OPERATION BETWEEN DIFFERENT COMPETENT AUTHORITIES

Article 45

Obligation to cooperate

1. The competent authorities of the Member States shall cooperate with each other, **and with ESMA and the ESRB**, whenever necessary for the purpose of carrying out their duties under this Directive or of exercising their powers under this Directive or under national law.
2. Member States shall facilitate the cooperation provided for in this Section.
3. Competent authorities shall use their powers for the purpose of cooperation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in that Member State.

4. The competent authorities of the Member States shall immediately supply one another with the information required for the purposes of carrying out their duties under this Directive.
5. The Commission shall **█** adopt *delegated acts in accordance with Articles 49a, 49b and 49c* relating to the procedures for exchange of information between competent authorities.

*The Commission shall ensure that those acts enter into force by... **

Article 46

Exchange of information relating to the potential systemic consequences of AIFM activity

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. *ESMA and the ESRB* shall also be informed and shall forward this information to the competent authorities of the other Member States.
2. Aggregated information relating to the activities of AIFM under its responsibility shall be communicated on a quarterly basis by the competent authority of the AIFM to the Economic and Financial Committee established by *Article 134* of the **█** Treaty *on the Functioning of the European Union*.
3. The Commission shall **█** adopt *delegated acts in accordance with Articles 49a, 49b and 49c* specifying the modalities, content and frequency of the information to be exchanged pursuant to paragraph 1.

*The Commission shall ensure that those acts enter into force by ... **

Article 47

Co-operation in supervisory activities

1. The competent authorities of one Member State may request the cooperation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation on the territory of the latter within the framework of their powers pursuant to this Directive, *promptly informing ESMA thereof*.

Where a competent authority receives a request with respect to an on-the-spot verification or an investigation, it shall *do* one of the following:

* *OJ please insert date: one year after entry into force of this Directive.*
* *OJ please insert date: one year after entry into force of this Directive.*

- (a) carry out the verification or investigation itself;
- (b) allow the requesting authority to carry out the verification or investigation; *or*
- (c) allow auditors or experts to carry out the verification or investigation.

When carrying out the verification or investigation referred to in this paragraph, the competent authorities shall take into account any comments provided by ESMA in this regard.

2. In the case referred to in paragraph 1(a) the competent authority of the Member State which has requested cooperation may ask that members of its own personnel assist the personnel carrying out the verification or investigation. The ***overall control of the*** verification or investigation shall, however, ***rest with*** the Member State on whose territory it is conducted.

In the case referred to in paragraph 1(b) the competent authority of the Member State on whose territory the verification or investigation is carried out may request that members of its own personnel assist the personnel carrying out the verification or investigation.

3. Competent authorities may refuse to exchange information or to act on a request for cooperation in carrying out an investigation or on-the-spot verification only ***where***:
 - (a) an investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public order of the Member State addressed;
 - (b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;
 - (c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

The competent authorities shall inform the requesting competent authorities of any decision taken under the first subparagraph, stating the reasons ***therefor***.

4. The Commission shall **█** adopt ***delegated acts in accordance with Articles 49a, 49b and 49c*** concerning procedures for on-the-spot verifications and investigations.

█

Article 48

Dispute settlement

1. ***ESMA*** shall establish a mediation mechanism.

2. In *the event* of disagreement between competent authorities on an assessment, action or omission of one of the competent authorities concerned under this Directive, competent authorities shall refer the matter to *ESMA*, where discussion will take place in order to reach a rapid and effective solution. ■
- 2a. *If the disagreement persists, ESMA may impose a solution on the competent authorities concerned.*

Chapter IX

Transitional and final provisions

Article 49

Committee

■ The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee¹.

■

Article 49a

Exercise of the delegation

1. *The power to adopt the delegated acts referred to in Article 2(4), Article 9(2), Article 10(3), Article 11(5), Article 12(3), Article 13, Article 16(4), Article 18(4), Article 19(4), Article 20(3), Article 21(4), Article 24(2), Article 25(3), Article 28(2), Article 29(4), Article 31(3), Article 33(7), Article 37(2), Article 37(3), Article 38(3), Article 38(4), Article 39a(2), Article 39a(3), Article 45(5), Article 46(3), Article 47(4) and Article 53 shall be conferred on the Commission for a period of five years following the entry into force of this Directive. The Commission shall make a report regarding renewal of the delegated powers at the latest 12 months before the end of the five-year period, accompanied, where appropriate, by a legislative proposal to extend the duration of the delegation of powers. The report must specify the period and articles for which extension of the delegated acts is requested.*
2. *As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.*
3. *The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in Articles 49b and 49c.*

Article 49b

¹ OJ L 191, 13.7.2001, p. 45.

Revocation of the delegation

- 1. The delegation of power referred to in Article 2(4), Article 9(2), Article 10(3), Article 11(5), Article 12(3), Article 13, Article 16(4), Article 18(4), Article 19(4), Article 20(3), Article 21(4), Article 24(2), Article 25(3), Article 28(2), Article 29(4), Article 31(3), Article 33(7), Article 37(2), Article 37(3), Article 38(3), Article 38(4), Article 39a(2), Article 39a(3), Article 45(5), Article 46(3), Article 47(4) and Article 53 may be revoked by the European Parliament or by the Council.*
- 2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of power shall endeavour to inform the other institution and the Commission stating the delegated powers which could be subject to revocation.*
- 3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the European Union.*

Article 49c

Objections to delegated acts

- 1. The European Parliament or the Council may object to a delegated act within a period of four months from the date of notification. At the initiative of the European Parliament or the Council this period shall be extended by two months. The Commission shall not adopt delegated acts during periods of parliamentary recess or in the two weeks immediately before such recess.*
- 2. If, on the expiry of that period, neither the European Parliament nor the Council has objected to the delegated act, it shall be published in the Official Journal of the European Union and shall enter into force at the date stated therein.*
- 3. If the European Parliament or the Council objects to a delegated act, it shall not enter into force.*

Article 50

Review

Two years after the date referred to in *the first paragraph of* Article 54, the Commission shall, on the basis of public consultation and in the light of the discussions with competent authorities, review the application and the scope of this Directive. This review shall also take due account of developments at international level and discussions with third countries and international organisations.

It shall submit a report to the European Parliament and the Council together with appropriate proposals.

Before reviewing the application and the scope of this Directive, the Commission shall put forward proposals for amendments to Directives 2006/48/EC and 2006/49/EC to ensure an appropriate level of capital requirements for those financial institutions doing business with AIF, taking into account the risk incurred, financial stability at large and potential conflicts of interest.

Article 51

Transitional provision

AIFM operating in the *Union* before ...* shall adopt all necessary measures to comply with this Directive and shall submit an application for authorisation *by ...**.*

Article 51a

Micro-finance AIF

In order to develop a convenient regulatory framework for the asset class of microfinance investment funds in compliance with the principle of proportionality, the Commission shall propose a specific regulatory framework for microfinance investment funds including by amending Directive 2009/65/EC.

Article 51b

Amendment of Directive 2003/6/EC

Directive 2003/6/EC shall be amended as follows:

(1) In the first subparagraph of Article 1, the following points are added:

"7a. 'Short selling' shall mean the sale of a security that the seller does not own and any sale that is completed by the delivery of a security borrowed by, or for the account of, the seller.

7b. 'Naked short selling' shall mean the short sale of a security when the seller has not borrowed, or entered into an agreement to borrow, before or at the time of submitting the short sale order, the security it is due to deliver to the purchaser."

(2) The following Article is inserted:

"Article 5a

In order to regulate short sales and prohibit naked short sales of equity securities,

* ***OJ please insert date of transposition of this Directive.***

** ***OJ please insert date: one year after transposition of this Directive.***

including securities giving access to the shares of an issuer, the Commission shall adopt delegated acts laying down the requirements in the following areas:

- (a) the compulsory reporting of net short positions, including derivatives, by any person to the competent authority of the Member State, of the most relevant market in terms of liquidity and of the Member State in which the issuer is incorporated, when certain thresholds are crossed, and public disclosure of such reporting when certain other thresholds are crossed;*
- (b) the marking of orders by financial intermediaries so as to distinguish short sales from other sales;*
- (c) the production of documentation by market participants showing that, before entering into a short sale or committing to do so, they have previously borrowed the shares or entered into an agreement to do so;*
- (d) the delivery by market participants of shares they have sold no later than three days after the trade date and the buy-in of the sold shares in the event of failure to deliver within that time period;*
- (e) the provision of appropriate powers to the competent authorities in order to sanction failures to comply with points (a) to (d);*
- (f) the provision of appropriate powers to the competent authorities exceptionally to restrict or prohibit the establishment of or increase in a net short position in an equity security whose price has fallen significantly and to restrict or prohibit sales in an equity security whose price has fallen significantly;*
- (g) consultations by the competent authorities through the European Securities Markets Authority, established by Regulation (EU) No .../2010, before exceptionally restricting or prohibiting the establishment of or increase in a net short position in equity securities or the sales in an equity security on a particular market segment or across all markets in the event of a significant market decline."*

Article 52

Amendment of Directive 2004/39/EC

Directive 2004/39/EC shall be amended as follows:

*In Article 19(6), the following indent is added **■** :*

- "- the service does not relate to an AIF within the meaning of Article 3(a) of [Directive 2010/.../EU]."*

Article 52a

Amendment of Directive 2006/48/EC

Directive 2006/48/EC shall be amended as follows:

In Annex XI, the following point is added:

"3a. For the purposes of the determination to be made under Article 124(3), as the case may be, the competent authorities shall monitor specifically the exposures of a credit institution which constitute leverage for alternative investment funds in accordance with Directive 2010/.../EU [on Alternative Investment Fund Managers]."

Article 53

Amendment of *Directive 2009/65/EC*

Directive *2009/65/EC* shall be amended as follows:

The following *Article* is inserted:

"Article 50a

In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that 'repackage' loans into tradeable securities and other financial instruments (originators) and UCITS that invest in these securities or other financial instruments, the Commission shall adopt, **by means of delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union**, requirements in the following areas:

- (a) the requirements that need to be met by the originator in order for a UCITS to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011, including requirements that ensure that the originator retains a net economic interest of not less than 5 %;
- (b) qualitative requirements that must be met by UCITS which invest in these securities or other financial instruments."

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 Directive 2009/65/EC shall be amended accordingly."

Article 54

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [...] . They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

However, they shall apply the provisions transposing Chapter VII as from three years after the date referred to in the first *paragraph*.

When Member States adopt the provisions referred to in the first *paragraph*, these provisions shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 55

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 56

Addressees

This Directive is addressed to the Member States.

Done at

For the European Parliament

The President

For the Council

The President

ANNEX Ia

***FUNCTIONS INCLUDED IN THE ACTIVITY OF COLLECTIVE PORTFOLIO
MANAGEMENT***

- 1. Investment management.***
- 2. 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.***
- 3. Marketing.***

ANNEX Ib

REMUNERATION POLICIES

1. *When establishing and applying the remuneration policies for those categories of staff, including senior management, whose professional activities have a material impact on their risk profile or the risk profiles of AIF they manage, AIFM shall comply with the following principles:*
 - (a) *the remuneration policy must be consistent with and promote sound and effective risk management and must not encourage risk-taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the AIF it manages;*
 - (b) *the remuneration policy must be in line with the business strategy, objectives, values and interests of the AIFM and the AIF it manages or the investors of the AIF, and must include measures to avoid conflicts of interest;*
 - (c) *the management body in its supervisory function of the AIFM must adopt and periodically review the general principles of the remuneration policy and is responsible for its implementation;*
 - (d) *the implementation of the remuneration policy must, at least annually, be subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;*
 - (e) *staff members engaged in risk management must be compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;*
 - (f) *where remuneration is performance-related, the total amount of remuneration must be based on a reasonable combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria must be reasonably taken into account;*
 - (g) *the assessment of performance must be set in a multi-year framework appropriate to the life-cycle of the AIF managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIF it manages and their investment risks;*
 - (h) *guaranteed variable remuneration must be exceptional and must occur only in the context of hiring new staff and is limited to the first year;*
 - (i) *fixed and variable components of total remuneration must be appropriately balanced; the fixed component represents a sufficiently high proportion of the*

total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;

- (j) payments related to the early termination of a contract must reflect performance achieved over time and must be designed in a way that does not reward failure;*
 - (k) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components must include a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;*
 - (l) when a risk is revealed which, if known at the time when a variable remuneration was paid, would have been taken into consideration in the determination of this remuneration, the AIFM must be able to claw back (through a repayment request) a portion, of at least 20 %, of that variable remuneration for adjustment purposes, but only to the extent the mechanism provided under point (m) is insufficient to effect such an adjustment; the claw-back mechanism must be applicable for a period which is appropriate in view of the risks taken into account when the remuneration was paid but which shall be no less than four years;*
 - (m) a substantial portion (at least 50 %) of the variable remuneration component must be deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and must be correctly aligned with the nature of the risks of the AIF in question, but which shall be no less than four years; remuneration payable under deferral arrangements must vest no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount must be deferred;*
 - (n) the variable remuneration, including the deferred portion, must be paid or vest only if it is sustainable with reference to the financial situation of the AIFM as a whole, and justified on the basis of the performance of the business unit, the AIF and the individual concerned; the total variable remuneration must be generally considerably contracted in the event of subdued or negative financial performance of the AIFM or of the AIF concerned;*
 - (o) staff members are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements.*
- 2. The principles set out in point 1 shall apply both to the remuneration paid by the AIFM and to the remuneration paid by the AIF itself, including carried interest.*

Point 1 shall apply to returns to employees from their investments in AIF managed by the AIFM and to remuneration paid in connection with the liquidation of an AIF. Point 1(m) shall not apply in respect of variable remuneration linked directly to fees earned by the AIFM which cannot be clawed back.

- 3. AIFM that are significant in terms of their size or the size of the AIF they manage,*

their internal organisation and the nature, the scope and the complexity of their activities shall establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk.

The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the AIFM or the AIF concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the AIFM concerned.