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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.4.2009  
COM(2009) 207 final

2009/0064 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on Alternative Investment Fund Managers and amending Directives 2004/39/EC and  
2009/.../EC**

{ SEC(2009)576 }  
{ SEC(2009)577 }

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

#### **1.1. Context, grounds for, and objectives of the proposal**

The financial crisis has exposed a series of vulnerabilities in the global financial system. It has highlighted how risks crystallising in one sector can be transmitted rapidly around the financial system, with serious repercussions for all financial market participants and for the stability of the underlying markets.

The present proposal forms part of an ambitious Commission programme to extend appropriate regulation and oversight to all actors and activities that embed significant risks<sup>1</sup>. The proposed legislation will introduce harmonised requirements for entities engaged in the management and administration of alternative investment funds (AIFM). The need for closer regulatory engagement with this sector has been highlighted by the European Parliament<sup>2</sup> and by the High-Level Group on Financial Supervision chaired by Jacques de Larosière<sup>3</sup>. It is also the subject of ongoing discussion at international level, for example through the work of the G20, IOSCO and the Financial Stability Forum.

The funds in question are defined as all funds that are not regulated under the UCITS Directive<sup>4</sup>. Around €2 trillion in assets are currently managed by AIFM employing a variety of investment techniques, investing in different asset markets and catering to different investor populations. The sector includes hedge funds and private equity, as well as real estate funds, commodity funds, infrastructure funds and other types of institutional fund.

The financial crisis has underlined the extent to which AIFM are vulnerable to a wide range of risks. These risks are of direct concern to the investors in those funds, but also present a threat to creditors, trading counterparties and to the stability and integrity of European financial markets. These risks take a variety of forms:

	Source of Risk
Macro-prudential (systemic) risks	<ul style="list-style-type: none"><li>• Direct exposure of systemically important banks to the AIFM sector</li><li>• Pro-cyclical impact of herding and risk concentrations in particular market segments and deleveraging on the liquidity and stability of financial markets</li></ul>
Micro-prudential risks	<ul style="list-style-type: none"><li>• Weakness in internal risk management systems with respect to market risk, counterparty risks, funding liquidity risks and operational risks</li></ul>

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<sup>1</sup> Commission Communication for the Spring European Council, March 2009. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/351&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>2</sup> Report of the European Parliament with recommendations to the Commission on hedge funds and private equity (A6-0338/2008) ['Rasmussen' report] and on the transparency of institutional investors (A6-0296-2008) ['Lehne' report].

<sup>3</sup> Report of the High-Level Group on Financial Supervision in the EU, 25 February 2009, p. 25. See [http://ec.europa.eu/internal\\_market/finances/docs/de\\_larosiere\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf)

<sup>4</sup> Directive 2009/.../EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast).

Investor protection	<ul style="list-style-type: none"> <li>• Inadequate investor disclosures on investment policy, risk management, internal processes</li> <li>• Conflicts of interest and failures in fund governance, in particular with respect to remuneration, valuation and administration</li> </ul>
Market efficiency and integrity	<ul style="list-style-type: none"> <li>• Impact of dynamic trading and short selling techniques on market functioning</li> <li>• Potential for market abuse in connection with certain techniques, for example short-selling</li> </ul>
Impact on market for corporate control	<ul style="list-style-type: none"> <li>• Lack of transparency when building stakes in listed companies (e.g. through use of stock borrowing, contracts for difference), or concerted action in 'activist' strategies</li> </ul>
Impact on companies controlled by AIFM	<ul style="list-style-type: none"> <li>• Potential for misalignment of incentives in management of portfolio companies, in particular in relation to the use of debt financing</li> <li>• Lack of transparency and public scrutiny of companies subject to buy-outs</li> </ul>

The nature and intensity of these risks varies between business models. For example, macro-prudential risks associated with the use of leverage relate primarily to the activities of hedge funds and commodity funds; whereas risks associated with the governance of portfolio companies are most closely associated with private equity. However, other risks, such as those relating to the management of micro-prudential risks and to investor protection are common to all types of AIFM.

While AIFM were not the cause of the crisis, recent events have placed severe stress on the sector. The risks associated with their activities have manifested themselves throughout the AIFM industry over recent months and may in some cases have contributed to market turbulence. For example, **hedge funds** have contributed to asset price inflation and the rapid growth of structured credit markets. The abrupt unwinding of large, leveraged positions in response to tightening credit conditions and investor redemption requests has had a procyclical impact on declining markets and may have impaired market liquidity. **Funds of hedge funds** have faced serious liquidity problems: they could not liquidate assets quickly enough to meet investor demands to withdraw cash, leading some funds of hedge funds to suspend or otherwise limit redemptions. **Commodity funds** were implicated in the commodity price bubbles that developed in late 2007.

On the other hand, **private equity funds**, due to their investment strategies and a different use of leverage than hedge funds, did not contribute to increase macro-prudential risks. They have experienced challenges relating to the availability of credit and the financial health of their portfolio companies. The inability to obtain leverage has significantly reduced buy-out activity and a number of portfolio companies previously subject to leveraged buy-outs are reported to be faced with difficulties in finding replacement finance.

*The cross-border dimension of these risks calls for a coherent EU regulatory framework:*

Currently, the activities of AIFM are regulated by a combination of national financial and company law regulations and general provisions of Community law. They are supplemented in some areas by industry-developed standards. However, recent events have indicated that some of the risks associated with AIFM have been underestimated and are not sufficiently addressed by current rules. This is partly a reflection of the predominantly national perspective of existing rules: the regulatory environment does not adequately reflect the cross-border nature of the risks.

This is particularly striking in relation to the effective oversight and control of macro-prudential risks. The individual and collective activities of large AIFM, particularly those employing high levels of leverage, amplify market movements and have contributed to the ongoing instability of financial markets across the European Union. Yet there are currently no effective mechanisms for gathering, pooling and analysing information on these risks at European level.

There is also a potential cross-border dimension to the quality of risk management by AIFM: investors, creditors and trading counterparties of AIFM are domiciled in other Member States and are dependent on the controls implemented by the AIFM. Currently, jurisdictions differ widely in the way that they supervise the ongoing operations of AIFM.

Nationally fragmented approaches do not constitute a robust and comprehensive response to risks in this sector. Effective management of the cross-border dimension of these risks demands a common understanding of the obligations of AIFM; a coordinated approach to the oversight of risk management processes, internal governance and transparency; and clear arrangements to support supervisors in managing these risks, both at domestic level and through effective supervisory cooperation and information sharing at European level.

The current fragmentation of the regulatory environment also results in legal and regulatory obstacles to the efficient cross-border marketing of AIF. Provided that AIFM operate in accordance with strict common requirements, there is no obvious justification for restricting an AIFM domiciled in one Member State from marketing AIF to professional investors in another Member State market.

It is in recognition of these weaknesses and inefficiencies in the existing regulatory framework that the European Commission has committed to bring forward a proposal for a comprehensive legislative instrument establishing regulatory and supervisory standards for hedge funds, private equity and other systemically important market players.

While the enhancement of the regulatory and supervisory environment for AIFM at European level is important and necessary, it should – to be fully effective - be accompanied by parallel initiatives in other key jurisdictions. The European Commission hopes that the principles embodied in this proposal will make an important contribution to the debate on the reinforcement of the architecture for a global approach to supervision of the alternative investment industry. The Commission will continue to work with its international partners, in particular the United States, to ensure regulatory and supervisory convergence of the rules applying to AIFM and avoid regulatory overlap.

## **1.2. Preparation of the proposal: consultation and impact assessment**

The European Commission has consulted extensively on the adequacy of regulatory arrangements for non-UCITS fund managers and for the marketing of non-UCITS funds in the European Union. It has also consulted specifically on a series of issues relating to the activities of hedge funds. The numerous initiatives and studies that the Commission has drawn upon for the purposes of this legislative proposal are described at length in the Impact Assessment.

## 2. GENERAL APPROACH

This proposal focuses on those activities that are specific or inherent to the AIFM sector and hence need to be addressed by targeted requirements. A number of the concerns that are commonly expressed about the activities of AIFM are linked to behaviours (e.g., short-selling, use of stock borrowing or other instruments to build a stake in company) which are not unique to this category of financial market participant. To be fully effective and coherent, these concerns must be addressed by comprehensive measures which apply to all market participants who engage in the relevant activities. A number of these issues will form the focus of the review of relevant EU Directives, which will determine the appropriate scope and content of any corrective measures.

The present proposal is therefore designed to address matters that call for provisions specific to AIFM and their business. The proposed Directive aims to:

- Establish a secure and harmonised EU framework for monitoring and supervising the risks that AIFM pose to their investors, counterparties, other financial market participants and to financial stability; and
- Permit, subject to compliance with strict requirements, AIFM to provide services and market their funds across the internal market.

The following section sets out the key principles underpinning the provisions of the proposed Directive. Specific provisions are described in greater detail in Section 3.5.

### *Managers of all non-UCITS funds require authorisation under the Directive*

While the focus is currently on hedge funds and private equity, the European Commission believes that it would be ineffective and short-sighted to limit any legislative initiative to these two categories of AIFM: ineffective because any arbitrary definition of these funds might not adequately capture all the relevant actors and could be easily circumvented; and short-sighted because many of the underlying risks are also present in other types of AIFM activity. The regulatory solution which is likely to prove the most enduring and productive is therefore to capture all AIFM whose activities give rise to those risks. Accordingly, the management and administration of any non-UCITS in the European Union must be authorised and supervised in accordance with the requirements of the Directive.

### *This broad coverage does not imply a 'one size fits all' approach*

A common set of basic provisions will govern the conditions for the initial authorisation and organisation of all AIFM. These core provisions will be tailored to the different asset classes so that irrelevant or inappropriate requirements are not imposed on investment policies for which they make no sense. In addition to these common provisions, the proposal foresees a number of specific, tailored provisions which will only apply to AIFM that employ certain techniques or strategies when managing their AIF (for instance, systematic use of a high degree of leverage, acquisition of control of companies) and will ensure an appropriate degree of transparency with respect to these techniques.

### *De minimis exemption for managers of small asset portfolios*

The proposed Directive contains two de minimis exemptions for small managers. All AIFM managing AIF portfolios with total assets of less than €100 million will be exempt from the

provisions of the proposed Directive. The management of these funds is unlikely to pose significant risks to financial stability and market efficiency. Hence extending these regulatory requirements to small managers would impose costs and administrative burden which would not be justified by the benefits. However, for AIFM which only manage AIF which are not leveraged and which do not grant investors redemption rights during a period of five years following the date of constitution of each AIF a de minimis threshold of €500 million applies. This significantly higher de minimis threshold is justified by the fact that managers of unleveraged funds are not likely to cause systemic risks. Exempted AIFM would have no rights under the Directive, unless they opt to apply for authorisation under the Directive.

On this basis, supervisory attention will be focused on the areas where risks are concentrated. A threshold of €100 million implies that roughly 30% of hedge fund managers, managing almost 90% of assets of EU domiciled hedge funds, would be covered by the Directive. It would capture almost half of managers of other non-UCITS funds and provide an almost full coverage of the assets invested in their funds.

### ***The focus is on the decision making and risk-taking entities in the value chain***

The risks to market stability, efficiency and investors stem primarily from the conduct and organisation of the AIFM and certain other key actors in the fund governance and value-chain (depository bank where relevant and valuation entity). The most effective way to tackle the risks is therefore to focus on these entities which are decisive in terms of the risks associated with the management of AIF.

### ***AIFM will be entitled to market AIF to professional investors***

Authorisation as an AIFM will entitle the manager to market the AIF to professional investors only (as defined by MiFID). Many AIF entail a relatively high level of risk (of loss of much or all of the capital invested) and/or have other features which render them unsuitable for retail investors. In particular, they may lock investors in to their investment for longer than is acceptable for retail funds. Investment strategies are typically complex and often involve investment in illiquid and harder-to-value investments. The marketing of these AIF will therefore be limited to those investors that are equipped to understand and to bear the risks associated with this type of investment.

The limitation to professional investors is consistent with the current situation in many Member States. However, some of the categories of AIF covered by the proposed Directive – such as funds of hedge funds and open-ended real estate funds - are accessible to retail investors in some Member States, subject to strict regulatory controls. Member States may allow for marketing to retail investors within their territory and may apply additional regulatory safeguards for this purpose.

### ***... including the right to market funds cross-border:***

Compliance with the requirements of the proposed Directive would be sufficient to permit AIFM to market AIF to professional investors on markets in other Member States. Cross-border marketing would be subject only to the filing of appropriate information with the host competent authority.

### ***AIFM will be permitted to manage and market AIF domiciled in third countries***

Currently, many EU domiciled managers manage funds which are domiciled in third countries and market them in Europe. The Directive introduces new conditions to address any additional risks to European markets and investors that could arise from such operations. It also ensures that national tax authorities may obtain all information from the tax authorities of the third country which are necessary to tax domestic professional investors investing in offshore funds. The activities of management and administration of AIF are reserved to EU domiciled and authorised AIFM, with the possibility for AIFM to delegate administration (but not management) functions to offshore entities subject to appropriate conditions. In particular, depositaries appointed to take custody of money and assets must be EU established credit institutions which can only sub-delegate functions subject to strict conditions. Valuers appointed in third country jurisdictions must be subject to equivalent regulatory standards. Subject to these strict conditions, the proposals envisage that EU AIFM could market AIF domiciled in third countries to professional investors throughout Europe after an additional period of three years. In the meantime Member States may allow or continue to allow AIFM to market AIF domiciled in third countries to professional investors on their territory subject to national law.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

#### **3.1. Legal basis**

The proposal is based on Article 47(2) of the EC Treaty.

#### **3.2. Subsidiarity and proportionality**

Article 5(2) of the EC Treaty requires the Community to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The activities of AIFM affect investors, counterparties and financial markets located in other Member States and hence the risks associated with the activities of AIFM are often cross-border in nature. The effective monitoring of macro-prudential risks and oversight of AIFM activity thus requires a common level of transparency and regulatory safeguards across the EU. The Directive also provides a harmonised framework for the safe and efficient cross-border marketing of AIF, which could not be established as effectively through the uncoordinated action of Member States.

The proposed Directive is also proportionate, as required by Article 5(3) of the EC Treaty. Many of the provisions of the Directive relate to particular activities; if an AIFM does not engage in these activities, the provisions shall not apply. Moreover, the Directive provides two *de minimis* exemptions: authorisation requirements are to be waived for AIFM managing AIF below a threshold of €100 million, since these are unlikely to give rise to important systemic risks or to be a threat to orderly markets. For AIFM managing only AIF which are not leveraged and which do not grant investors redemption rights during a period of five years following the date of constitution of each AIF a *de minimis* threshold of €500 million applies.

#### **3.3. Choice of instrument**

The choice of a Directive as the legal instrument represents a sensible trade-off between harmonisation and flexibility. The proposed Directive provides a sufficient degree of



harmonisation to provide a consistent and secure pan-European framework for the authorisation of AIFM and their ongoing supervision. The choice of a Directive allows Member States a degree of flexibility in deciding how to adapt their national legal orders to the new framework. This is consistent with the principle of subsidiarity.

### **3.4. Comitology**

The proposal is based on the Lamfalussy process for regulating financial services. The proposed Directive contains the principles necessary to ensure that AIFM are subject to consistently high standards of transparency and regulatory oversight in the European Union, while foreseeing the adoption of detailed implementing measures through comitology procedures.

### **3.5. Content of the proposal**

#### *3.5.1. Scope and definitions*

In order to ensure that all AIFM operating in the European Union are subject to effective supervision and oversight, the proposed Directive introduces a legally binding authorisation and supervisory regime for all AIFM managing AIF in the European Union. The regime will apply irrespective of the legal domicile of the AIF managed. For reasons of proportionality, the Directive will not apply to AIFM managing portfolios of AIF with less than €100 million of assets or of less than €500 million, in case of AIFM managing only AIF which are not leveraged and which do not grant investors redemption rights during a period of five years following the date of constitution of each AIF.

#### *3.5.2. Operating conditions and initial authorisation*

To operate in the European Union, all AIFM will be required to obtain authorisation from the competent authority of their home Member State. All AIFM operating on European soil will be required to demonstrate that they are suitably qualified to provide AIF management services and will be required to provide detailed information on the planned activity of the AIFM, the identity and characteristics of the AIF managed, the governance of the AIFM (including arrangements for the delegation of management services), arrangements for the valuation and safe-keeping of assets and the systems of regulatory reporting, where required. The AIFM will also be required to hold and retain a minimum level of capital.

To ensure that the risks associated with AIFM activity are effectively managed on an ongoing basis, the AIFM will be required to satisfy the competent authority of the robustness of internal arrangements with respect to risk management, in particular liquidity risks and additional operational and counterparty risks associated with short selling; the management and disclosure of conflicts of interest; the fair valuation of assets; and the security of depository/custodial arrangements.

Given the diversity of AIFM investment strategies, the proposed Directive foresees that the precise requirements, in particular with regard to disclosure, will be tailored to the particular investment strategy employed.

#### *3.5.3. Treatment of investors*

The proposed Directive provides for a minimum level of service and information provision to its (professional) investors, on an initial and ongoing basis, to facilitate their due diligence and

ensure an appropriate level of investor protection. The proposed Directive requires AIFM to provide to their investors a clear description of the investment policy, including descriptions of the type of assets and the use of leverage; redemption policy in normal and exceptional circumstances; valuation, custody, administration and risk management procedures; and fees, charges and expenses associated with the investment.

#### *3.5.4. Disclosure to regulators*

To support the effective macro-prudential oversight of AIFM activities, the AIFM will also be required to report to the competent authority on a regular basis on the principal markets and instruments in which it trades, its principal exposures, performance data and concentrations of risk. The AIFM will also be required to notify the competent authorities of the home Member State of the identity of the AIF managed, the markets and assets in which the AIF will invest and the organisational and risk management arrangements established in relation to that AIF.

#### *3.5.5. Specific requirements for AIFM managing leveraged AIF*

The use of a systematically high level of leverage allows AIFM to have an impact on the markets in which they invest which may be a multiple of the equity capital of the fund. The proposal empowers the Commission to set leverage limits through comitology procedures where this is required to ensure the stability and integrity of the financial system. The proposed Directive grants additional emergency powers to the national authorities to restrict the use of leverage in respect of individual managers and funds in exceptional circumstances. It furthermore foresees that AIFM employing leverage on a systematic basis above a defined threshold will be required to disclose aggregate leverage in all forms, and the main sources of leverage to the home authority of the AIFM. The draft proposal does not impose obligations upon competent authorities as regards the use of this information. It requires competent authorities for such leveraged funds to aggregate and share, with other competent authorities, information that is relevant for monitoring and responding to the potential consequences of AIFM activity for systemically relevant financial institutions across the EU and/or for the orderly functioning of the markets on which AIFM are active.

#### *3.5.6. Specific requirements for AIFM acquiring controlling stakes in companies*

The proposal provides for disclosures of information to other shareholders and the representatives of employees of the portfolio company in which the AIFM acquired a controlling interest. It foresees that the AIFM issues annual disclosure on the investment strategy and objectives of its fund when acquiring control of companies, and general disclosures about the performance of the portfolio company following acquisition of control. These reporting obligations are introduced in view of the need for private equity and buy-out funds to account publicly for the manner in which they manage companies of wider public interest. The information requirements address the perceived deficit of strategic information about how private equity managers intend to, or currently, manage portfolio companies.

For reasons of proportionality the draft proposal does not extend these requirements to acquisitions of control in SMEs – and thereby seeks to avoid imposing these obligations on start-up or venture capital providers (to the extent that they are not already exempted from the scope of the entire Directive). To meet concerns about reduction in information following the delisting of public companies by private equity owners, the draft proposal requires that such delisted companies continue to be subject to reporting obligations for listed companies for up to 2 years following delisting.

### 3.5.7. *Rights of AIFM under the Directive*

In order to facilitate the development of the single market, an AIFM authorised in its home Member State will be entitled to market its funds to professional investors on the territory of any Member State. As a corollary of the high common regulatory standard achieved by the proposed Directive, Member States will not be permitted to impose additional requirements on AIFM domiciled in another Member State insofar as marketing to professional investors is concerned. The cross-border marketing of AIF shall be subject only to a notification procedure, under which relevant information is provided to the host Member State.

The proposed Directive does not provide rights in relation to marketing AIF to retail investors. Member States may allow for marketing to retail investors within their territory and may apply additional regulatory safeguards for this purpose. Such requirements shall not discriminate according to the domicile of the AIFM.

### 3.5.8. *Third country aspects*

The proposed Directive permits AIFM to market AIF located in third country domiciles subject to strict controls on the performance of key functions by service providers in those jurisdictions. The rights granted under the Directive to market such AIF to professional investors will only become effective three years after the transposition period, because of the time needed to provide for additional requirements in implementing measures. In the meantime Member States may allow or continue to allow AIFM to market AIF domiciled in third countries to professional investors on their territory subject to national law. The key functions and activities which are likely to give rise to risks for European markets, investors or counterparties are required to be undertaken by EU established entities, operating subject to harmonised rules. The Directive contains provisions which define the functions which can be undertaken by third country entities or delegated to them under the responsibility of EU authorised institutions. These provisions also define the conditions (regulatory and supervisory equivalence) under which limited functions can be undertaken by third country entities. In addition, the draft Directive only permits the marketing of AIF domiciled in a third country, if their country of domicile has entered into an agreement based on Article 26 of the OECD Model Tax Convention with the Member State on whose territory the AIF shall be marketed. This shall ensure that national tax authorities may obtain all information from the tax authorities of the third country which are necessary to tax domestic professional investors investing in offshore funds. Three years after the transposition period the Directive will allow AIFM established in a third country to market their funds in the EU provided that the regulatory framework and supervisory arrangements in that third country are equivalent to those of the proposed Directive, and EU operators enjoy comparable access to that third country market. In all cases, decisions on the equivalence of the relevant third country legislation and comparable market access will be taken by the Commission.

### 3.5.9. *Supervisory cooperation information sharing and mediation*

In order to ensure the secure functioning of the AIFM sector, competent authorities of the Member States will be required to cooperate whenever necessary so as to achieve the aims of the Directive. Given the cross-border nature of risks arising in the AIFM sector, a prerequisite for effective macro-prudential oversight will be the timely sharing of relevant macro-prudential data at the European, or even global, level. The competent authorities of the home Member State will thus be required to transmit relevant macro-prudential data, in a suitably aggregated format, to public authorities in other Member States. In case of disagreement

between competent authorities the matter shall be referred to CESR for mediation with the aim to reach a rapid and effective solution. The competent authorities shall duly consider the advice of CESR.

### **3.6. Budgetary Implications**

The proposal has no implications for the Community budget.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**on Alternative Investment Fund Managers and amending Directives 2004/39/EC and**  
**2009/.../EC**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

Having regard to the proposal from the Commission<sup>5</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>6</sup>,

Having regard to the opinion of the European Central Bank<sup>7</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>8</sup>,

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 largely beneficial, but recent financial difficulties have underlined how activities of AIFM may also serve to spread or amplify risks through the financial system. Uncoordinated national responses to these risks make the efficient management of these risks difficult. This Directive therefore 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 Community.
- (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

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<sup>5</sup> OJ C , , p. .

<sup>6</sup> OJ C , , p. .

<sup>7</sup> OJ C , , p. .

<sup>8</sup> OJ C , , p. .

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/.../EC on the coordination of laws, regulations and administrative provisions relating to the undertakings for collective investment in transferable securities (UCITS) (recast)<sup>9</sup>, 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/.../EC on the basis of authorisation under this Directive.

- (4) The Directive lays down requirements regarding the way in which AIFM should manage alternative investment funds (AIF) under their responsibility. It would be disproportionate to regulate the structure or composition of the portfolios of the AIF managed by AIFM and it would be difficult to provide for such extensive harmonisation due to the very diverse types of AIF managed by AIFM.
- (5) The scope of this Directive should be confined to the management of collective investment undertakings which raise capital from a number of investors with a view to investing it in accordance with a defined investment policy on the principle of risk-spreading for the benefit of those investors. This Directive should not apply to the management of pension funds or managers of non-pooled investments such as endowments, sovereign wealth funds or assets held on own account by credit institutions, insurance or reinsurance undertakings. This Directive should neither apply to actively managed investments in the form of securities, such as certificates, managed futures, or index-linked bonds. It should, however, cover managers of all collective investment undertakings which are not required to be authorised as UCITS. Investment firms authorised under Directive 2004/39/EC on Markets in Financial Instruments<sup>10</sup> should not be required to obtain an authorisation under this Directive in order to provide investment services in respect of AIF. Investment firms can however only provide investment services in respect of AIF, if and to the extent the units or shares thereof can be marketed in accordance with this Directive.
- (6) In order to avoid imposing excessive or disproportionate requirements, this Directive provides for an exemption for AIFM where the cumulative AIF under management fall below a threshold of EUR 100 million. The activities of the AIFM concerned are unlikely to have significant consequences for financial stability or market efficiency. For AIFM which only manage unleveraged AIF and do not grant investors redemption rights during a period of five years a specific threshold of EUR 500 million applies. This specific threshold is justified by the fact that managers of unleveraged funds, specialised in long term investments, are even less likely to cause systemic risks. Furthermore, the five years lock-up of investors eliminates liquidity risks. AIFM which are exempt from this Directive should continue to be subject to any relevant national legislation. They should however be allowed to be treated as AIFM subject to the opt-in procedure foreseen by this Directive.
- (7) This Directive aims at providing a harmonised and stringent regulatory and supervisory framework for the activities of AIFM. Authorisation in accordance with

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<sup>9</sup> OJ L [...], [...], p. [...].

<sup>10</sup> OJ L 145, 30.4.2004, p. 1.

this Directive should cover the services of management and administration of AIF throughout the Community. In addition, authorised AIFM should be entitled to market AIF in the Community to professional investors, subject to a notification procedure.

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

- (13) Reliable and objective asset valuation is crucial for the protection of investor interests. Different AIFM employ different methodologies and systems for valuing assets, depending on the assets and markets in which they predominantly invest. It is appropriate to recognise these differences but to, nevertheless, require the valuation of assets to be undertaken by an entity which is independent of the AIFM.
- (14) AIFM may delegate responsibility for the performance of its functions in accordance with this Directive. AIFM should remain responsible for the proper performance of their functions and compliance with the rules set out in this Directive.
- (15) Given that AIFM employing high levels of leverage in their investment strategies may, under certain conditions, contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFM using certain techniques giving rise to particular risks. The information needed to detect, monitor and respond to those risks has not been collected in a consistent way throughout the Community, and shared across Member States so as to identify potential sources of risk to the stability of financial markets in the Community. To remedy this situation, special requirements should apply to AIFM, which consistently use high levels of leverage in their investment strategies. Those AIFM should be obliged to disclose information regarding their use and sources of leverage. That information should be aggregated and shared with other authorities in the Community, so as to facilitate a collective analysis of the impact of the leverage of those AIFM on the financial system in the Community, as well as a common response.
- (16) Activities of AIFM based on the use of high levels of leverage could be detrimental to the stability and efficient functioning of financial markets. It is considered necessary to allow the Commission to impose limits on the level of leverage that AIFM could use, in particular in those cases where AIFM employ high levels of leverage on a systematic basis. The limits to the maximum amount of leverage should take into account aspects related to the source of leverage and the strategies employed by the AIFM. They should also take into account the essentially dynamic nature of the management of leverage by most AIFM using a high level of leverage. In this respect the limits to leverage could for example either consist in a threshold that should not be breached at any point in time or a limit on the average leverage employed during a given period (i.e. monthly or quarterly).
- (17) It is necessary to ensure that an AIFM provides all companies over which it can exercise a controlling or dominant influence with the information necessary for the company to assess how this controlling influence in the short to medium term impacts the company's economic and social situation. To this end, particular requirements should apply to AIFM managing AIF which are in a position to exercise controlling influence over a listed or non-listed company, in particular to notify the existence of this position and to disclose information to the company and all its other shareholders about the intentions of the AIFM with regard to the future business development and other planned changes of the controlled company. In order to ensure transparency regarding the controlled company, enhanced reporting requirements should apply. The



annual reports of the relevant AIF should be supplemented with information that is specific to the type of investment and the controlled company.

- (18) Many AIFM currently manage AIF domiciled in third countries. It is appropriate to allow authorised AIFM to manage AIF domiciled in third countries, subject to appropriate arrangements that ensure the sound administration of those AIF and the effective safe-keeping of assets invested by Community investors.
- (19) AIFM should also be able to market AIF domiciled in third countries to professional investors both in the home Member State of the AIFM and in other Member States. That right should be subject to notification procedures and the existence of a tax agreement with the third country concerned which ensures an efficient exchange of information with the tax authorities in the domicile of the Community investors. Given the fact that such AIF and the third country in which they are domiciled have to meet additional requirements, some of which first have to be laid down in implementing measures, the rights granted under the Directive to market AIF domiciled in third countries to professional investors should only become effective three years after the transposition period. In the meantime Member States may allow or continue to allow AIFM to market AIF domiciled in third countries to professional investors on their territory subject to national law. During this period of three years, AIFM can however not market such AIF to professional investors in other Member States on the basis of rights granted under this Directive.
- (20) It is appropriate to allow the AIFM to delegate administrative tasks to an entity established in a third country provided that necessary safeguards are in place. Similarly, a depositary may delegate its depositary tasks in respect of AIF domiciled in a third country to a depositary domiciled in that third country, provided that the legislation of that third country ensures a level of protection of investor interests which is equivalent to that in the Community. Under certain conditions, it should also be possible for the AIFM to appoint an independent valuator established in a third country.
- (21) Subject to the existence of an equivalent regulatory framework in a third country, as well as of effective access for AIFM established in the Community to the market of that third country, Member States should be allowed to authorise AIFM in accordance with the provisions of this Directive, without requiring that it has a registered office in the Community, after a period of three years as from the end of the transposition period. This period takes account of the fact that such AIFM and the third country in which they are domiciled have to meet additional requirements some of which first have to be laid down by implementing measures.
- (22) It is necessary to clarify the powers and duties of competent authorities responsible for implementing this Directive, and to strengthen the mechanisms needed to ensure the necessary level of cross-border supervisory cooperation.
- (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 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 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 competent authorities, other authorities, bodies or persons should be 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 data<sup>11</sup>.
- (26) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>12</sup>.
- (27) In particular the Commission should be empowered to adopt the measures necessary for the implementation of this Directive. In this respect, the Commission should be able to adopt measures determining the procedures under which AIFM managing portfolios of AIF whose assets under management do not exceed the threshold set out in this Directive may exercise their right to be treated as AIFM covered by this Directive. These measures are also designed to specify the criteria to be used by competent authorities to assess whether AIFM comply with their obligations as regards their conduct of business, the type of conflicts of interests AIFM have to identify, as well as the reasonable steps AIFM are expected to take in terms of internal and organizational procedures in order to identify, prevent, manage and disclose conflicts of interest. They are designed to specify the risk management requirements to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages as well as any arrangements needed to enable AIFM to manage the particular risks associated with short selling transactions, including any relevant restrictions that might be needed to protect the AIF from undue risk exposures. They are designed to specify the liquidity management requirements of this Directive and in particular the minimum liquidity requirements for AIF. They are designed to specify the requirements that originators of securitisation instruments have to meet in order for an AIFM to be allowed to invest in such instruments issued after 1 January 2011. They are as well designed to specify the requirements that AIFM have to comply with when investing in such securitisation instruments. They are designed to specify the criteria under which a valuator can be considered independent in the meaning of this Directive. They are designed to specify the conditions under which the delegation of AIFM functions should be approved and the conditions under which the manager could no longer be considered to be the manager of the AIF in case of excessive delegation. They are designed to specify the content and format of the annual report that AIFM have to make available for each AIF they manage and to specify the disclosure obligations of AIFM to investors and reporting requirements to competent authorities as well as their frequency. They are designed to specify the

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<sup>11</sup> OJ L 281, 23.11.1995, p. 31.

<sup>12</sup> OJ L 184, 17.7.1999, p. 23.

disclosure requirements imposed on AIFM as regards leverage and the frequency of reporting to competent authorities and of disclosure to investors. They are designed to setting limits to the level of leverage AIFM can employ when managing AIF. They are designed to determine the detailed content and the way AIFM acquiring controlling influence in issuers and non-listed companies should fulfil their information obligation towards issuers and non-listed companies and their respective shareholders and representatives of employees, including the information to be provided in the annual reports of the AIF they manage. They are designed to specify the types of restrictions or conditions that can be imposed on the marketing of AIF to professional investor in the home Member State of the AIFM. They are designed to specify general criteria for assessing equivalence of valuation standards of third countries where the valuator is established in a third country, the equivalence of legislation of third countries regarding depositaries and, for the purpose of the authorisation of AIFM established in third countries, the equivalence of prudential regulation and ongoing supervision. They are designed to specify general criteria for assessing whether third countries grant Community AIFM effective market access comparable to that granted by the Community to AIFM from third countries. They are designed to specify the modalities, content and frequency of exchange of information regarding AIFM between the competent authorities of the home Member State of the AIFM and other competent authorities where the AIFM individually or collectively with other AIFM may have an impact on the stability of systemically relevant financial institutions and the orderly functioning of markets. They are designed to specify the procedures for on-the-spot verifications and investigations.

- (28) Since those measures are of general scope and are designed to amend non-essential elements of this Directive, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC. Measures not falling under the above category should be subject to the regulatory procedure provided in Article 5 of that Decision. Those measures are designed to state that the fund valuation standards of a specific third country are equivalent to those applicable in the Community where the valuator is established in a third country. They are designed to state that the legislation on depositaries of a specific third country is equivalent to this Directive. They are designed to state that the legislation on prudential regulation and on-going supervision of AIFM in a specific third country is equivalent to this Directive. They are designed to state whether a specific third country grants Community AIFM effective market access comparable to that granted by the Community to AIFM from that third country. They are designed to specify standard models for notification and attestations and to specify the procedure for the exchange of information between competent authorities.
- (29) Since the objectives of the action to be taken, 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 Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. 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 all AIFM established in the Community, which provide management services to one or more alternative investment funds (AIF) irrespective of:
  - (a) whether the AIF is domiciled inside or outside of the Community;
  - (b) whether the AIFM provides its services directly or by delegation;
  - (c) whether the AIF belongs to the open-ended or closed-ended type;
  - (d) the legal structure of the AIF and of the AIFM.

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

2. This Directive shall not apply to any of the following:
  - (a) AIFM which either directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIF whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of 100 million Euro or 500 millions euros when the portfolio of AIF consists of AIF that are not leveraged and with no redemption rights exercisable during a period of 5 years following the date of constitution of each AIF;
  - (b) AIFM established in the Community which do not provide management services to AIF domiciled in the Community and do not market AIF in the Community;
  - (c) UCITS or their management or investment companies authorised in accordance with Directive 2009/.../EC [the UCITS Directive];

- (d) credit institutions which are covered by Directive 2006/48/EC of the European Parliament and the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast);
  - (e) institutions which are covered by Directive 2003/41/EC of the European Parliament and the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision<sup>13</sup>;
  - (f) institutions which are covered by the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance<sup>14</sup>, Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance<sup>15</sup> and Directive 2005/68/EC of the European Parliament and Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC<sup>16</sup>;
  - (g) supranational institutions, such as the World Bank, the IMF, the ECB, the EIB, the EIF, other supranational institutions and similar international organisations, in case such institutions or organisations manage one or several AIFs.
3. Member States shall ensure that AIFM not reaching the threshold set out in paragraph 2(a) are entitled to be treated as AIFM falling under the scope of this Directive.
4. The Commission shall adopt implementing measures with a view to determining the procedures under which AIFM managing portfolios of AIF whose assets under management do not exceed the threshold set out in paragraph 2(a) may exercise their right under paragraph 3.

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

### *Article 3* *Definitions*

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

- (a) 'Alternative investment fund' or AIF means any collective investment undertaking, including investment compartments thereof whose object is the collective investment in assets and which does not require authorisation pursuant to Article 5 of Directive 2009/.../EC [the UCITS Directive];

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<sup>13</sup> OJ L 235, 23.9.2003, p. 10.

<sup>14</sup> OJ L 228, 16.8.1973, p. 3.

<sup>15</sup> OJ L 345, 19.12.2002, p. 1.

<sup>16</sup> OJ L 323, 9.12.2005, p. 1.

- (b) 'manager of alternative investment funds ' or AIFM means any legal or natural person whose regular business is to manage one or several AIF;
- (c) 'Valuator' means any legal or natural person or company valuing the assets or establishing the value of the shares or units of an AIF;
- (d) 'management services' means the activities of managing and administering one or more AIF on behalf of one or more investors;
- (e) 'Marketing' means any general offering or placement of units or shares in an AIF to or with investors domiciled in the Community, regardless of at whose initiative the offer or placement takes place;
- (f) 'Professional investor' means any investor within the meaning of Annex II of Directive 2004/39/EC;
- (g) 'Retail investor' means any 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 an AIFM provides 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 as 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 a particular investment whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means;
- (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 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 market<sup>17</sup> shall be taken into account;
- (n) 'Issuer' means any issuer of shares domiciled in the Community within the meaning of Article 2(1)(d) of Directive 2004/109/EC;

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<sup>17</sup> OJ L 390, 31.12.2004, p. 38.

- (o) 'Representatives of employees' means representatives of employees as defined by Article 2(e) of Directive 2002/14 of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>18</sup>.

## **Chapter II**

### **AUTHORISATION OF AIFM**

#### *Article 4*

##### *Requirement 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.

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 Community.

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

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

#### *Article 5*

##### *Procedure for granting the authorisation*

An AIFM applying for an authorisation shall provide the following to the competent authorities of the Member State where it has its registered office:

- (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.
- (b) a programme of activity, including information on how the AIFM intends to comply with its obligations under chapters III, IV and where applicable, V, VI and VII;
- (c) detailed information about the characteristics of the AIF it intends to manage, including the identification of the Member States or third countries on whose territory they are domiciled;

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<sup>18</sup> OJ L 80, 23.3.2002, p. 29.

- (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) any additional information referred to in Article 20(1).

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

## *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 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 laws, 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 involved in the enforcement of those laws, 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.
4. The competent authorities shall inform the applicant, within two months of the submission of a complete application, whether or not authorisation has been granted.  
  
Reasons shall be given whenever an authorisation is refused or when restrictions are imposed.
5. AIFM may start providing management services in the home Member State as soon as the authorisation is granted.



*Article 7*  
*Changes in the scope of the authorisation*

AIFM shall, before implementation, notify the competent authorities of the home Member State of any change regarding the information provided in their initial application that may substantially affect the conditions under which the authorisation has been granted, in particular changes 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 irregular 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. Member States shall ensure that AIFM may provide their management services within the Community 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 of those AIF and the integrity of the market;

- (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 implementing measures specifying the criteria to be used by competent authorities to assess whether AIFM comply with their obligation under paragraph 1.

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

#### *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 implementing measures:

- (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 organizational procedures in order to identify, prevent, manage and disclose conflicts of interest.

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

*Article 11*  
*Risk management*

1. The AIFM shall ensure that the functions of risk management and portfolio management are separated and subject to separate reviews.
2. The AIFM shall implement risk management systems in order to measure and monitor appropriately all risks associated to each AIF investment strategy and to which each AIF is or can be exposed to.

The AIFM shall review the risk management systems at least once a year and adapt it, whenever necessary.

3. The AIFM shall at least:
  - (a) implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF, according to the investment strategy, the objectives and risk profile of the AIF;
  - (b) ensure that the risks associated to each investment position of the AIF and their overall effect on the AIF's portfolio can be accurately identified, measured and monitored at any time through appropriate stress testing procedures;
  - (c) ensure that the risk profile of the AIF shall correspond to the size, portfolio structure and investment strategies and objectives of the AIF as laid down in the AIF rules or instruments of incorporation.
4. In the case of AIFM which engage in short selling when investing on behalf of one or more AIF, Member States shall ensure that the AIFM operates procedures which provide it with access to the securities or other financial instruments at the date when the AIFM committed to deliver them, and that the AIFM implements a risk management procedure which allows the risks associated with the delivery of short sold securities or other financial instruments to be adequately managed.
5. The Commission shall adopt implementing measures further specifying the following:
  - (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.

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

*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.

2. AIFM shall ensure that each AIF it manages has a redemption policy which is appropriate to the liquidity profile of the investments of the AIF and which must be laid down in the AIF rules or instruments of incorporation.

- 3 The Commission shall adopt implementing measures further specifying:

- (a) the liquidity management requirements set out in paragraph 1 and
- (b) in particular, the minimum liquidity requirements for AIF which redeem units or shares more often than half-yearly.

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

*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 tradeable securities and other financial instruments (originators) and AIFM that invest in these securities or other financial instruments on behalf of one or more AIF, the Commission shall adopt implementing measures laying down the requirements in the following areas:

- (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 per cent;
- (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.

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

## SECTION 2: CAPITAL REQUIREMENTS

### *Article 14* *Initial and ongoing capital*

AIFM shall have own funds of at least EUR 125 000.

Where the value of the portfolios of AIF managed by the AIFM exceeds EUR 250 million, the AIFM shall provide an additional amount of own funds; 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.

Irrespective of the amount of the requirements set out in the first and second subparagraphs, the own funds of the AIFM shall never be less than the amount required under Article 21 of 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 institutions (recast)<sup>19</sup>.

For the purposes of the first, second and third subparagraphs 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;
- (b) any AIF portfolios that the AIFM is managing under delegation.

## 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 independent of the AIFM to establish the value of assets acquired by the AIF and the value of the shares and units of the AIF.

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<sup>19</sup> OJ L 177, 30.6.2006, p. 201.

The valuator shall ensure that the assets, shares and units are valued at least once a year, and each time shares or units of the AIF are issued or redeemed if this is more frequent.

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.
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 domiciled or in the AIF rules or instruments of incorporation.
4. The Commission shall adopt implementing measures further specifying the criteria under which a valuator can be considered independent in the meaning of paragraph 1.

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

#### *Article 17* *Depository*

1. For each AIF it manages, the AIFM shall ensure that a depository is appointed to fulfil, where relevant, the following tasks:
  - (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;
  - (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.
2. An AIFM shall not act as depository.

The depository shall act independently and solely in the interest of AIF investors.
3. The depository shall be a credit institution having its registered office in the Community and be authorised in accordance with Directive 2006/48/EC of the European Parliament and Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)<sup>20</sup>.
4. Depositories may delegate their tasks to other depositories.

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<sup>20</sup> OJ L 177, 30.6.2006, p. 1.

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

In case of any loss of financial instruments which the depositary safe-keeps, the depositary can only discharge itself of its liability if it can prove that it could not have avoided the loss which has occurred.

Liability to AIF investors may be invoked either directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors. The depositary's liability shall not be affected by any delegation referred to in paragraph 4.

## **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 request prior authorisation from the competent authorities of the home Member State for each delegation.

The following conditions have to 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, the third party must also be authorised as an AIFM to manage an AIF of the same type;
- (c) the delegation shall 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 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 when this is in the interest 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.

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

2. In no case shall the AIFM's liability be affected by the fact that the AIFM has delegated functions to a third party, nor shall the AIFM delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF.
3. The third party may not sub-delegate any of the functions delegated to it.
4. The Commission shall adopt implementing measures further specifying the following:
  - (a) the conditions for approving the delegation;
  - (b) the conditions under which the manager could no longer be considered to be the manager of the AIF as set out in paragraph 2.

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

## **Chapter IV**

### **Transparency requirements**

#### *Article 19* *Annual report*

1. An AIFM shall, for each of the AIF it manages, make available an annual report for each financial year. The annual report shall be made available to investors and competent authorities no later than four 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;
3. The accounting information given in the annual report shall be 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, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC<sup>21</sup>. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

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<sup>21</sup> OJ L 157, 9.6.2006, p. 87.



4. The Commission shall adopt implementing measures further specifying the content and format of the annual report. These measures shall be adapted to the type of AIFM to which they apply.

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

## *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, all the assets which the AIF can invest in and of the techniques it may employ and of all associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks and of any restrictions to the use of leverage;
  - (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 domiciled;
  - (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 depositary function and the identity of the third party to whom the function has been delegated;
  - (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;

- (j) the latest annual report.
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 implementing measures further specifying the disclosure obligations of AIFM and the frequency of the disclosure referred to in paragraph 2. These measures shall be adapted to the type of AIFM to which they apply.

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

#### *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 the AIF it manages.  
  
It shall provide aggregated information on the main instruments in which it is trading, markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of each of the AIF it manages.
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;
  - (d) the main categories of assets in which the AIF invested;
  - (e) where relevant, the use of short selling during the reporting period.
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;
  - (b) a detailed list of all AIF which the AIFM manages for the end of each quarter.
4. The Commission shall adopt implementing measures further specifying the reporting obligations referred to in paragraphs 1, 2 and 3 and their frequency.

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

## **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 high levels of leverage on a systematic basis.

AIFM shall assess on a quarterly basis whether the AIF employs high levels of leverage on a systematic basis and shall inform the competent authorities accordingly.

For the purposes of the second subparagraph, an AIF shall be deemed to employ high levels of leverage on a systematic basis where the combined leverage from all sources exceeds the value of the equity capital of the AIF in two out of the past four quarters.

##### *Article 23* *Disclosure to investors*

AIFM managing one or more AIF employing high levels of leverage on a systematic basis 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) quarterly disclose to investors the total amount of leverage employed by each AIF in the preceding quarter.

*Article 24*  
*Reporting to competent authorities*

1. AIFM managing one or more AIF employing high levels of leverage on a systematic basis 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.

2. The Commission shall adopt implementing measures further specifying the disclosure requirements with regard to leverage and the frequency of reporting to competent authorities and of disclosure to investors.

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

*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 or risks of disorderly markets
2. Home Member States shall ensure that all information received under Article 24, aggregated in respect of all AIFM that it supervises, are made available to other competent authorities through the procedure set out in Article 46 on supervisory co-operation. It 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.
3. In order to ensure the stability and integrity of the financial system, the Commission shall adopt implementing measures setting limits to the level of leverage AIFM can employ. These limits should take into account, inter alia, the type of AIF, their strategy and the sources of their leverage.

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

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

temporary nature and should comply with the provisions adopted by the Commission pursuant to paragraph 3.

## **SECTION 2: OBLIGATIONS FOR AIFM MANAGING AIF WHICH ACQUIRE 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 30 % or more of the voting rights of an issuer or of a non-listed company domiciled in the Community, 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 30 % or more of the voting rights of the issuer or the non-listed company, as appropriate.
2. This section shall not apply where the issuer or the non-listed company concerned are small and medium enterprises that employ fewer than 250 persons, have an annual turnover not exceeding 50 million euro and/or an annual balance sheet not exceeding 43 million euro.

### *Article 27*

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

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

This notification shall be made, as soon as possible, but not later than four trading days the first of which being the day on which the AIFM has reached the position of being able to exercise 30% of the voting rights.
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 30% threshold has been reached, including information about the identity of the different shareholders involved;
  - (c) the date on which the threshold was reached or exceeded.

## 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 acquires 30 % or more of the voting rights of an issuer or a non-listed company, that AIFM makes the information set out in the second and third subparagraphs available to the issuer, the non-listed company, their respective shareholders and representatives of employees or, where there are no such representatives, to the employees themselves.

With regard to issuers, the AIFM shall make available the following to the issuer concerned, its shareholders and representatives of employees:

- (a) the information referred to in Article 6(3) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids<sup>22</sup>;
- (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.

With regard to non-listed companies, the AIFM shall make available the following to the non-listed company concerned, its shareholders and representatives of employees:

- (d) the identity of the AIFM which either individually or in agreement with other AIFM have reached the 30 % threshold;
- (e) the development plan for the non-listed company;
- (f) the policy for preventing and managing conflicts of interests, in particular between the AIFM and the non-listed company;
- (g) the policy for external and internal communication of the issuer or non-listed company, in particular as regards employees.

2. The Commission shall adopt implementing measures determining:

- (a) the detailed content of the information provided under paragraph 1;
- (b) the way the information shall be communicated.

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

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<sup>22</sup>

OJ L 142, 30.4.2004, p.12.

## 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 invested:
  - (a) with regard to operational and financial developments, presentation of revenue and earnings by business segment, statement on the progress of company's activities and financial affairs, assessment of expected progress on activities and financial affairs, report on significant events in the financial year;
  - (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.
  - (d) statement on significant divestment of assets.

In addition, the AIF annual report shall, for each issuer in which it has acquired a controlling influence, contain the information provided for in point (f) of Article 46a(1) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies<sup>23</sup> and an overview of the capital structure as referred to in points (a) and (d) of Article 10(1) of Directive 2004/25/EC.

For each non-listed company in which it has acquired a controlling influence, the AIF report shall provide an overview of management arrangements and the information provided for in points (b), (c) and (e) to (h) of Article 3 of 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<sup>24</sup>.

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 above to all representatives of employees of the company concerned referred to in paragraph 1 of Article 26 within the period referred to in Article 19 (1)
4. The Commission shall adopt implementing measures specifying the detailed content of the information to be provided under paragraphs 1 and 2.

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<sup>23</sup> OJ L 222, 14.8.1978, p. 11.

<sup>24</sup> OJ L 26, 31.1.1977, p. 1.

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

#### *Article 30*

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

Where, following an acquisition of 30 % or more of the voting rights of an issuer, the shares of that issuer are no longer admitted to trading on a regulated market, it shall nevertheless continue to comply with its obligations under Directive 2004/109/EC for two years 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 domiciled;
  - (b) the AIF rules or instruments of incorporation;
  - (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 ten 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 implementing measures 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 implementing measures specifying the types of restrictions or conditions that can be imposed on the marketing of AIF pursuant to the second subparagraph of this paragraph. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 49(3).

4. Without prejudice to Article 32(1), Member States shall ensure that AIF managed by AIFM are only marketed to professional investors.

#### *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.

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 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.

Member States shall also inform the Commission 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 domiciled;
  - (b) the AIF rules or instruments of incorporation;
  - (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 under its management 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 ten 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 about 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 point (e) of paragraph 1 shall be subject to the laws and supervision of the host Member State.
5. Member States shall ensure that the notification letter and the attestation referred to in paragraph 1 are provided in a language customary in the sphere of international finance.

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, in accordance with the procedure referred to in Article 49(2), adopt implementing measures 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. AIFM may only market shares or units of an AIF domiciled in a third country to professional investors domiciled in another Member State than the home Member State of the AIFM as from the date referred to in the second subparagraph of Article 54(1).

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

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 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.

## **Chapter VII**

### **Specific rules in relation to third countries**

#### *Article 35*

#### *Conditions for the marketing in the Community of AIF domiciled in third countries*

An AIFM may only market shares or units of an AIF domiciled in a third country to professional investors domiciled in a Member State, if the third country has signed an

agreement with this Member State 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.

Where AIFM market shares or units of AIF domiciled in a third country the home Member States may prolong the period referred to in Article 31(3), when this is necessary to check whether the conditions of this Directive are met.

Before allowing AIFM to market shares or units of AIF domiciled in a third country, the home Member State shall have particular regard to the arrangements made by the AIFM in accordance with Article 38, where relevant.

#### *Article 36*

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

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

- (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 only allow the appointment of a valuator established in a third country, provided that all of the following conditions are met:

- (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 valutors established on its territory are equivalent to those applicable in the Community.

2. The Commission shall adopt implementing measures specifying the criteria for assessing the equivalence of the valuation standards and rules of third countries as referred to in paragraph (1) (b).

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

3. On the basis of the criteria referred to in paragraph 2, the Commission shall, in accordance with the procedure referred to in Article 49(2), adopt implementing measures, stating that the valuation standards and rules of a third country legislation are equivalent to those applicable in the Community.

### *Article 38*

#### *Delegation of the depositary tasks in respect of AIF domiciled in third countries*

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

The following conditions shall also be met:

- (a) the third country is the subject of a decision taken pursuant to paragraph 4 stating sub-depositaries domiciled in that country are subject to effective prudential regulation and supervision which is equivalent to the provisions laid down in Community law;
  - (b) co-operation between the home Member State and the relevant authorities of the third country is sufficiently ensured;
  - (c) the third country is the subject of a decision taken pursuant to paragraph 4 stating that the standards to prevent money laundering and terrorist financing are equivalent to those laid down in Community law.
2. The depositary's liability towards investors shall not be affected by the fact that it has delegated to a third country depositary the performance of all or a part of its tasks.
3. The Commission shall adopt implementing measures specifying the criteria for assessing the equivalence of the prudential regulation, supervision and standards of third countries as referred to in paragraph 1.

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

4. On the basis of the criteria referred to in paragraph 3, the Commission shall, in accordance with the procedure referred to in Article 49(2), adopt implementing measures, stating that prudential regulation, supervision and standards of a third country are equivalent to this Directive.

### *Article 39*

#### *Authorisation of AIFM established in third countries*

1. Member States may authorise, in accordance with this Directive, AIFM established in a third country to market units or shares of an AIF to professional investors in the Community under the conditions of this Directive, provided that:
  - (a) the third country is the subject of a decision taken pursuant to paragraph 3 (a) stating that its legislation regarding prudential regulation and on-going supervision is equivalent to the provisions of this Directive and is effectively enforced;

- (b) the third country is the subject of a decision taken pursuant to paragraph 3 (b) stating that it grants Community AIFM effective market access comparable to that granted by the Community to AIFM from that third country;
- (c) the AIFM provides the competent authorities of the Member State in which it applies for authorisation with the information referred to in Articles 5 and 31 ;
- (d) a cooperation-agreement between the competent authorities of that Member State and the supervisor of the AIFM exists which ensures an efficient exchange of all information that are relevant for monitoring the potential implications of the activities of the AIFM for the stability of systemically relevant financial institutions and the orderly functioning of markets in which the AIFM is active.
- (e) the third country has signed an agreement with the Member State in which it applies for authorisation which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters.

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

- (a) general equivalence criteria for the equivalence and effective enforcement of third country legislation on prudential regulation and on-going supervision, based on the requirements laid down in Chapters III, IV and V.
- (b) general criteria for assessing whether third countries grant Community AIFM effective market access comparable to that granted by the Community to AIFM from those third countries.

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

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

- (a) that the legislation on prudential regulation and ongoing supervision of AIFM in a third country is equivalent to this Directive and effectively enforced;
- (b) that a third country grant Community AIFM effective market access at least comparable to that granted by the Community to AIFM from that third country.

## **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.

Where a Member State designates several competent authorities it shall inform the Commission 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 of investigation:
  - (a) have access to any document in any form and to receive a copy of it;
  - (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 announcements;
  - (d) require records of telephone and data traffic.

##### *Article 42*

##### *Supervisory powers*

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

- (a) impose a temporary prohibition of professional activity;
  - (b) take appropriate measures to ensure that AIFM continue to comply with the relevant legislation;
  - (c) refer matters for criminal prosecution to the competent jurisdictions.
2. Member States shall ensure that the competent authorities have the powers necessary to take all measures required in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIF in the market for a financial instrument could jeopardise the orderly functioning of that market.

*Article 43*  
*Administrative sanctions*

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 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, 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 co-operate*

1. The competent authorities of the Member States shall co-operate with each other 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 co-operation provided for in this section.
3. Competent authorities shall use their powers for the purpose of co-operation, 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, in accordance with the procedure referred to in Article 49(2), adopt implementing measures relating to the procedures for exchange of information between competent authorities.

#### *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. The Committee of European Securities Regulators (CESR) established by Commission Decision 2009/77/EC of 23 January 2009<sup>25</sup> 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 114(2) of the EC Treaty.
3. The Commission shall adopt implementing measures specifying the modalities, content and frequency of the information to be exchanged pursuant to paragraph 1.

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<sup>25</sup> OJL 25, 29.01.2009, p. 18-22

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

*Article 47*  
*Co-operation in supervisory activities*

1. The competent authorities of one Member State may request the co-operation 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.

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

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

2. In the case referred to in paragraph 1(a) the competent authority of the Member State which has requested co-operation, may ask that members of its own personnel assist the personnel carrying out the verification or investigation. The verification or investigation shall, however, be the subject of the overall control of 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 co-operation in carrying out an investigation or on-the-spot verification only in the following cases:
  - (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 therefore.

4. The Commission shall adopt implementing measures concerning procedures for on-the-spot verifications and investigations.

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

*Article 48*  
*Mediation*

1. The Committee of European Securities Regulators (CESR) shall establish a mediation mechanism.
2. In case 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 the CESR, where discussion will take place in order to reach a rapid and effective solution. The competent authorities shall duly consider the advice of the CESR.

**Chapter IX**  
**Transitional and final provisions**

*Article 49*  
*Committee*

1. 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 Committee<sup>26</sup>.
2. Where reference is made to this paragraph, Articles 5 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission shall apply, having regard to the provisions of Article 8 thereof.  
  
The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.
3. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

*Article 50*  
*Review*

Two years after the date referred to in 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.

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<sup>26</sup> OJ L 191, 13.7.2001, p. 45.

*Article 51*  
*Transitional provision*

AIFM operating in the Community before [the deadline for the transposition of this Directive] shall adopt all necessary measures to comply with this Directive and shall submit an application for authorisation within one year of the deadline for the transposition of this Directive.

*Article 52*  
*Amendment of Directive 2004/39/EC*

The following indent is added in Article 19(6) of Directive 2004/39/EC:

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

*Article 53*  
*Amendment of Directive 2009/.../EC<sup>27</sup>*

Directive 2009/XX EC shall be amended as follows:

The following new Article 50a shall be inserted:

"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 implementing measures laying down the 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 per cent;
- (b) qualitative requirements that must be met by UCITS which invest in these securities or other financial instruments.

Those measures, designed to amend this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 107(2)."

*Article 54*  
*Transposition*

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

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<sup>27</sup> OJ L , , p. .

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

When Member States adopt the provisions referred to in the first subparagraph, 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 Brussels,

For the European Parliament  
*The President*

For the Council  
*The President*