

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (Text with EEA relevance)

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 (AIFMs) which manage and/or market alternative investment funds (AIFs) in the Union.

Article 2

Scope

- 1 Subject to paragraph 3 of this Article and to Article 3, this Directive shall apply to:
 - a EU AIFMs which manage one or more AIFs irrespective of whether such AIFs are EU AIFs or non-EU AIFs;
 - b non-EU AIFMs which manage one or more EU AIFs; and
 - c non-EU AIFMs which market one or more AIFs in the Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs.
- 2 For the purposes of paragraph 1, the following shall be of no significance:
 - a whether the AIF belongs to the open-ended or closed-ended type;
 - b whether the AIF is constituted under the law of contract, under trust law, under statute, or has any other legal form;
 - c the legal structure of the AIFM.
- 3 This Directive shall not apply to the following entities:
 - a holding companies;
 - b institutions for occupational retirement provision which are covered by Directive 2003/41/EC, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in Article 2(1) of that Directive or the investment managers appointed pursuant to Article 19(1) of that Directive, in so far as they do not manage AIFs;
 - c supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, the European Development Finance Institutions and bilateral development banks, the World Bank, the International Monetary Fund, and other supranational institutions and similar international organisations, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
 - d national central banks;

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- e national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;
- f employee participation schemes or employee savings schemes;
- g securitisation special purpose entities.

4 Member States shall take the necessary steps to ensure that AIFMs referred to in paragraph 1 comply with this Directive at all times.

Article 3

Exemptions

1 This Directive shall not apply to AIFMs in so far as they manage one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.

2 Without prejudice to the application of Article 46, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs:

- a AIFMs 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 AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or
- b AIFMs 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 AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

3 Member States shall ensure that AIFMs referred to in paragraph 2 at least:

- a are subject to registration with the competent authorities of their home Member State;
- b identify themselves and the AIFs that they manage to the competent authorities of their home Member State at the time of registration;
- c provide information on the investment strategies of the AIFs that they manage to the competent authorities of their home Member State at the time of registration;
- d regularly provide the competent authorities of their home Member State with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs that they manage in order to enable the competent authorities to monitor systemic risk effectively; and
- e notify the competent authorities of their home Member State in the event that they no longer meet the conditions referred to in paragraph 2.

This paragraph and paragraph 2 shall apply without prejudice to any stricter rules adopted by Member States with respect to AIFMs referred to in paragraph 2.

Member States shall take the necessary steps to ensure that where the conditions set out in paragraph 2 are no longer met, the AIFM concerned applies for authorisation within 30 calendar days in accordance with the relevant procedures laid down in this Directive.

4 AIFMs referred to in paragraph 2 shall not benefit from any of the rights granted under this Directive unless they choose to opt in under this Directive. Where AIFMs opt in, this Directive shall become applicable in its entirety.

5 The Commission shall adopt implementing acts with a view to specifying the procedures for AIFMs which choose to opt in under this Directive in accordance with paragraph 4. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

6 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

- a how the thresholds referred to in paragraph 2 are to be calculated and the treatment of AIFMs which manage AIFs whose assets under management, including any assets acquired through the use of leverage, occasionally exceed and/or fall below the relevant threshold in the same calendar year;
- b the obligation to register and to provide information in order to allow effective monitoring of systemic risk as set out in paragraph 3; and
- c the obligation to notify competent authorities as set out in paragraph 3.

Article 4

Definitions

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

- a 'AIFs' means collective investment undertakings, including investment compartments thereof, which:
 - (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
 - (ii) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC;
- b 'AIFMs' means legal persons whose regular business is managing one or more AIFs;
- c 'branch' when relating to an AIFM means a place of business which is a part of an AIFM, which has no legal personality and which provides the services for which the AIFM has been authorised; all the places of business established in the same Member State by an AIFM with its registered office in another Member State or in a third country shall be regarded as a single branch;
- d 'carried interest' means a share in the profits of the AIF accrued to the AIFM as compensation for the management of the AIF and excluding any share in the profits of the AIF accrued to the AIFM as a return on any investment by the AIFM into the AIF;
- e 'close links' means a situation in which two or more natural or legal persons are linked by:
 - (i) participation, namely ownership, directly or by way of control, of 20 % or more of the voting rights or capital of an undertaking;
 - (ii) control, namely the relationship between a parent undertaking and a subsidiary, as referred to in Article 1 of the Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts⁽¹⁾, or a similar relationship between a natural or legal person and an undertaking; for the purposes of this point a subsidiary undertaking of a subsidiary undertaking shall also be considered to be a subsidiary of the parent undertaking of those subsidiaries.

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A situation in which two or more natural or legal persons are permanently linked to the same person by a control relationship shall also be regarded as constituting a ‘close link’ between such persons;

- f ‘competent authorities’ means the national authorities of Member States which are empowered by law or regulation to supervise AIFMs;
- g ‘competent authorities’ in relation to a depositary means:
 - (i) if the depositary is a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in point (4) of Article 4 thereof;
 - (ii) if the depositary is an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in point (22) of Article 4(1) thereof;
 - (iii) if the depositary falls within a category of institution referred to in point (c) of the first subparagraph of Article 21(3) of this Directive, the national authorities of its home Member State which are empowered by law or regulation to supervise such categories of institution;
 - (iv) if the depositary is an entity referred to in the third subparagraph of Article 21(3) of this Directive, the national authorities of the Member State in which that entity has its registered office and which are empowered by law or regulation to supervise such entity or the official body competent to register or supervise such entity pursuant to the rules of professional conduct applicable thereto;
 - (v) if the depositary is appointed as depositary for a non-EU AIF in accordance with point (b) of Article 21(5) of this Directive and does not fall within the scope of points (i) to (iv) of this point, the relevant national authorities of the third country where the depositary has its registered office;
- h ‘competent authorities of the EU AIF’ means the national authorities of a Member State which are empowered by law or regulation to supervise AIFs;
- i ‘control’ means control as defined in Article 1 of Directive 83/349/EEC;
- j ‘established’ means:
 - (i) for AIFMs, ‘having its registered office in’;
 - (ii) for AIFs, ‘being authorised or registered in’, or, if the AIF is not authorised or registered, ‘having its registered office in’;
 - (iii) for depositaries, ‘having its registered office or branch in’;
 - (iv) for legal representatives that are legal persons, ‘having its registered office or branch in’;
 - (v) for legal representatives that are natural persons, ‘domiciled in’;
- k ‘EU AIF’ means:
 - (i) an AIF which is authorised or registered in a Member State under the applicable national law; or
 - (ii) an AIF which is not authorised or registered in a Member State, but has its registered office and/or head office in a Member State;
- l ‘EU AIFM’ means an AIFM which has its registered office in a Member State;
- m ‘feeder AIF’ means an AIF which:

- (i) invests at least 85 % of its assets in units or shares of another AIF (the ‘master AIF’);
 - (ii) invests at least 85 % of its assets in more than one master AIFs where those master AIFs have identical investment strategies; or
 - (iii) has otherwise an exposure of at least 85 % of its assets to such a master AIF;
- n ‘financial instrument’ means an instrument as specified in Section C of Annex I to Directive 2004/39/EC;
- o ‘holding company’ means a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to their long-term value, and which is either a company:
- (i) operating on its own account and whose shares are admitted to trading on a regulated market in the Union; or
 - (ii) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents;
- p ‘home Member State of the AIF’ means:
- (i) the Member State in which the AIF is authorised or registered under applicable national law, or in case of multiple authorisations or registrations, the Member State in which the AIF has been authorised or registered for the first time; or
 - (ii) if the AIF is neither authorised nor registered in a Member State, the Member State in which the AIF has its registered office and/or head office;
- q ‘home Member State of the AIFM’ means the Member State in which the AIFM has its registered office; for non-EU AIFMs, all references to ‘home Member State of the AIFM’ in this Directive shall be read as the ‘Member State of reference’, as provided for in Chapter VII;
- r ‘host Member State of the AIFM’ means any of the following:
- (i) a Member State, other than the home Member State, in which an EU AIFM manages EU AIFs;
 - (ii) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of an EU AIF;
 - (iii) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of a non-EU AIF;
 - (iv) a Member State, other than the Member State of reference, in which a non-EU AIFM manages EU AIFs;
 - (v) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of an EU AIF; ^[F1] or
 - (vi) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of a non-EU AIF; ^[F2] or
 - (vii) ^[F2] a Member State, other than the home Member State, in which an EU AIFM provides the services referred to in Article 6(4);]

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- s ‘initial capital’ means funds as referred to in points (a) and (b) of the first paragraph of Article 57 of Directive 2006/48/EC;
- t ‘issuer’ means an issuer within the meaning of point (d) of Article 2(1) of Directive 2004/109/EC where that issuer has its registered office in the Union, and where its shares are admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;
- u ‘legal representative’ means a natural person domiciled in the Union or a legal person with its registered office in the Union, and which, expressly designated by a non-EU AIFM, acts on behalf of such non-EU AIFM vis-à-vis the authorities, clients, bodies and counterparties to the non-EU AIFM in the Union with regard to the non-EU AIFM’s obligations under this Directive;
- v ‘leverage’ means any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means;
- w ‘managing AIFs’ means performing at least investment management functions referred to in point 1(a) or (b) of Annex I for one or more AIFs;
- x ‘marketing’ means a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union;
- y ‘master AIF’ means an AIF in which another AIF invests or has an exposure in accordance with point (m);
- z ‘Member State of reference’ means the Member State determined in accordance with Article 37(4);
- aa ‘non-EU AIF’ means an AIF which is not an EU AIF;
- ab ‘non-EU AIFM’ means an AIFM which is not an EU AIFM;
- ac ‘non-listed company’ means a company which has its registered office in the Union and the shares of which are not admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;
- ad ‘own funds’ means own funds as referred to in Articles 56 to 67 of Directive 2006/48/EC;
- ae ‘parent undertaking’ means a parent undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC;
- af ‘prime broker’ means a credit institution, a regulated investment firm or another entity subject to prudential regulation and ongoing supervision, offering services to professional investors primarily to finance or execute transactions in financial instruments as counterparty and which may also provide other services such as clearing and settlement of trades, custodial services, securities lending, customised technology and operational support facilities;
- ag ‘professional investor’ means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC;
- ah ‘qualifying holding’ means a direct or indirect holding in an AIFM which represents 10 % or more of the capital or of the voting rights, in accordance with Articles 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation of the holding laid down in Article 12(4) and (5) thereof, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;
- ai ‘employees’ representatives’ means employees’ representatives as defined in point (e) of Article 2 of Directive 2002/14/EC;
- aj ‘retail investor’ means an investor who is not a professional investor;

- ak ‘subsidiary’ means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;
- al ‘supervisory authorities’ in relation to non-EU AIFs means the national authorities of a third country which are empowered by law or regulation to supervise AIFs;
- am ‘supervisory authorities’ in relation to non-EU AIFMs means the national authorities of a third country which are empowered by law or regulation to supervise AIFMs;
- an ‘securitisation special purpose entities’ means entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions⁽²⁾ and other activities which are appropriate to accomplish that purpose;
- ao ‘UCITS’ means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC.

2 For the purposes of point (ad) of paragraph 1 of this Article, Articles 13 to 16 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⁽³⁾ shall apply *mutatis mutandis*.

3 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

- a the methods of leverage, as defined in point (v) of paragraph 1, including any financial and/or legal structures involving third parties controlled by the relevant AIF; and
- b how leverage is to be calculated.

4 The European Supervisory Authority (European Securities and Markets Authority) (ESMA) shall develop draft regulatory technical standards to determine types of AIFMs, where relevant in the application of this Directive, and to ensure uniform conditions of application of this Directive.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Textual Amendments

- F1** Deleted by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (Text with EEA relevance).
- F2** Inserted by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (Text with EEA relevance).

Article 5

Determination of the AIFM

1 Member States shall ensure that each AIF managed within the scope of this Directive shall have a single AIFM, which shall be responsible for ensuring compliance with this Directive. The AIFM shall be either:

- a an external manager, which is the legal person appointed by the AIF or on behalf of the AIF and which through this appointment is responsible for managing the AIF (external AIFM); or

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- b where the legal form of the AIF permits an internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF itself, which shall then be authorised as AIFM.

2 In cases where an external AIFM is unable to ensure compliance with requirements of this Directive for which an AIF or another entity on its behalf is responsible, it shall immediately inform the competent authorities of its home Member State and, if applicable, the competent authorities of the EU AIF concerned. The competent authorities of the home Member State of the AIFM shall require the AIFM to take the necessary steps to remedy the situation.

3 If, notwithstanding the steps referred to in paragraph 2 being taken, the non-compliance persists, and in so far as it concerns an EU AIFM or an EU AIF, the competent authorities of the home Member State of the AIFM shall require that it resign as AIFM of that AIF. In that case the AIF shall no longer be marketed in the Union. If it concerns a non-EU AIFM managing a non-EU AIF, the AIF shall no longer be marketed in the Union. The competent authorities of the home Member State of the AIFM shall immediately inform the competent authorities of the host Member States of the AIFM.

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- (1) OJ L 193, 18.7.1983, p. 1.
- (2) OJ L 15, 20.1.2009, p. 1.
- (3) OJ L 177, 30.6.2006, p. 201.