

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 IX

COMPETENT AUTHORITIES

SECTION 1

Designation, powers and redress procedures

Article 44

Designation of competent authorities

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

They shall inform ESMA and the Commission thereof, indicating any division of duties.

The competent authorities shall be public authorities.

Member States shall require that their competent authorities establish the appropriate methods to monitor that AIFMs comply with their obligations under this Directive, where relevant on the basis of guidelines developed by ESMA.

Article 45

Responsibility of competent authorities in Member States

1 The prudential supervision of an AIFM shall be the responsibility of the competent authorities of the home Member State of the AIFM, whether the AIFM manages and/or markets AIFs in another Member State or not, without prejudice to those provisions of this Directive which confer the responsibility for supervision on the competent authorities of the host Member State of the AIFM.

2 The supervision of an AIFM's compliance with Articles 12 and 14 shall be the responsibility of the competent authorities of the host Member State of the AIFM where the AIFM manages and/or markets AIFs through a branch in that Member State.

3 The competent authorities of the host Member State of the AIFM may require an AIFM managing or marketing AIFs in its territory, whether or not through a branch, to provide the information necessary for the supervision of the AIFM's compliance with the applicable rules for which those competent authorities are responsible.

Those requirements shall not be more stringent than those which the host Member State of the AIFM imposes on AIFMs for which it is the home Member State for the monitoring of their compliance with the same rules.

4 Where the competent authorities of the host Member State of the AIFM ascertain that an AIFM managing and/or marketing AIFs in its territory, whether or not through a branch, is in breach of one of the rules in relation to which they have responsibility for supervising compliance, those authorities shall require the AIFM concerned to put an end to that breach and inform the competent authorities of the home Member State thereof.

5 If the AIFM concerned refuses to provide the competent authorities of its host Member State with information falling under their responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph 4, the competent authorities of its host Member State shall inform the competent authorities of its home Member State thereof. The competent authorities of the home Member State of the AIFM shall, at the earliest opportunity:

- a take all appropriate measures to ensure that the AIFM concerned provides the information requested by the competent authorities of its host Member State pursuant to paragraph 3, or puts an end to the breach referred to in paragraph 4;
- b request the necessary information from the relevant supervisory authorities in third countries.

The nature of the measures referred to in point (a) shall be communicated to the competent authorities of the host Member State of the AIFM.

6 If, despite the measures taken by the competent authorities of the home Member State of the AIFM pursuant to paragraph 5 or because such measures prove to be inadequate or are not available in the Member State in question, the AIFM continues to refuse to provide the information requested by the competent authorities of its host Member State pursuant to paragraph 3, or persists in breaching the legal or regulatory provisions, referred to in paragraph 4, in force in its host Member State, the competent authorities of the host Member State of the AIFM may, after informing the competent authorities of the home Member State of the AIFM, take appropriate measures, including those laid down in Articles 46 and 48, to prevent or penalise further irregularities and, in so far as necessary, to prevent that AIFM from initiating any further transactions in its host Member State. Where the function carried out in the host Member State of the AIFM is the management of AIFs, the host Member State may require the AIFM to cease managing those AIFs.

7 Where the competent authorities of the host Member State of the AIFM have clear and demonstrable grounds for believing that the AIFM is in breach of the obligations arising from rules in relation to which they have no responsibility for supervising compliance, they shall refer those findings to the competent authorities of the home Member State of the AIFM which shall take appropriate measures, including, if necessary, request additional information from the relevant supervisory authorities in third countries.

8 If despite the measures taken by the competent authorities of the home Member State of the AIFM or because such measures prove to be inadequate, or because the home Member State of the AIFM fails to act within a reasonable timeframe, the AIFM persists in acting in a manner that is clearly prejudicial to the interests of the investors of the relevant AIF, the financial stability or the integrity of the market in the host Member State of the AIFM, the competent authorities of the host Member State of the AIFM may, after informing the competent authorities of the home Member State of the AIFM, take all appropriate measures needed in order to protect the investors of the relevant AIF, the financial stability and the integrity of the market in the host Member State, including the possibility of preventing the AIFM concerned to further market the units or shares of the relevant AIF in the host Member State.

9 The procedure laid down in paragraphs 7 and 8 shall also apply in the event that the competent authorities of the host Member State have clear and demonstrable grounds for disagreement with the authorisation of a non-EU AIFM by the Member State of reference.

10 Where the competent authorities concerned disagree on any of the measures taken by a competent authority pursuant to paragraphs 4 to 9, they may bring the matter to the attention of ESMA, which may act in accordance with the powers conferred to it under Article 19 of Regulation (EU) No 1095/2010.

11 Where applicable, ESMA shall facilitate the negotiation and conclusion of the cooperation arrangements required by this Directive between the competent authorities of the Member States and the supervisory authorities of third countries.

Article 46

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 the power to:

- a have access to any document in any form and to receive a copy of it;
- b require information from any person related to the activities of the AIFM or the AIF 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 existing telephone and existing data traffic records;
- e require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
- f request the freezing or the sequestration of assets;
- g request the temporary prohibition of professional activity;
- h require authorised AIFM, depositaries or auditors to provide information;
- i adopt any type of measure to ensure that AIFMs or depositaries continue to comply with the requirements of this Directive applicable to them;
- j require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;
- k withdraw the authorisation granted to an AIFM or a depositary;
- l refer matters for criminal prosecution;
- m request that auditors or experts carry out verifications or investigations.

3 Where the competent authority of the Member State of reference considers that an authorised non-EU AIFM is in breach of its obligations under this Directive, it shall notify ESMA, setting out full reasons as soon as possible.

4 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 AIFs in the market for a financial instrument could jeopardise the orderly functioning of that market.

Article 47

Powers and competences of ESMA

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

ESMA shall further have the powers necessary, including those enumerated in Article 48(3), to carry out the tasks attributed to it by this Directive.

2 The obligation of professional secrecy shall apply to all persons who work or who have worked for ESMA, and for the competent authorities or for any other person to whom ESMA has delegated tasks, including auditors and experts contracted by ESMA. Information covered by professional secrecy shall not be disclosed to another person or authority except where such disclosure is necessary for legal proceedings.

3 All the information exchanged under this Directive between ESMA, the competent authorities, EBA, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council⁽⁴⁾ and the ESRB shall be considered confidential, except where ESMA or the competent authority or other authority or body concerned states at the time of communication that such information may be disclosed or where such disclosure is necessary for legal proceedings.

4 In accordance with Article 9 of Regulation (EU) No 1095/2010, ESMA may, where all the conditions in paragraph 5 are met, request the competent authority or competent authorities to take any of the following measures, as appropriate:

- a prohibit the marketing in the Union of units or shares of AIFs managed by non-EU AIFMs or of non-EU AIFs managed by EU AIFMs without the authorisation required in Article 37 or without the notification required in Articles 35, 39 and 40 or without being allowed to do so by the relevant Member States in accordance with Article 42;
- b impose restrictions on non-EU AIFMs relating to the management of an AIF in case of excessive concentration of risk in a specific market on a cross-border basis;
- c impose restrictions on non-EU AIFMs relating to the management of an AIF where its activities potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions.

5 ESMA may take a decision under paragraph 4 and subject to the requirements set out in paragraph 6 if both of the following conditions are met:

- a a substantial threat exists, originating or aggravated by the activities of AIFMs, to the orderly functioning and integrity of the financial market or to the stability of the whole or a part of the financial system in the Union and there are cross border implications; and
- b the relevant competent authority or competent authorities have not taken measures to address the threat or the measures that have been taken do not sufficiently address the threat.

6 The measures taken by the competent authority or competent authorities pursuant to paragraph 4 shall:

- a effectively address the threat to the orderly functioning and the integrity of the financial market or to the stability of the whole or a part of the financial system in the Union or significantly improve the ability of competent authorities to monitor the threat;

- b not create a risk of regulatory arbitrage;
- c not have a detrimental effect on the efficiency of the financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, in a way that is disproportionate to the benefits of the measures.

7 Before requesting the competent authority to take or renew any measure referred to in paragraph 4, ESMA shall consult, where appropriate, the ESRB and other relevant authorities.

8 ESMA shall notify the competent authorities of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the non-EU AIFM concerned of the decision to request the competent authority or competent authorities to impose or renew any measure referred to in paragraph 4. The notification shall at least specify the following details:

- a the AIFM and the activities to which the measures apply and their duration;
- b the reasons why ESMA is of the opinion that it is necessary to impose the measures in accordance with the conditions and requirements set out in this Article, including the evidence in support of those reasons.

9 ESMA shall review its measures referred to in paragraph 4 at appropriate intervals and in any event at least every 3 months. If a measure is not renewed after that 3-month period, it shall automatically expire. Paragraphs 5 to 8 shall apply to a renewal of measures.

10 The competent authorities of the Member State of reference of the non-EU AIFM concerned may request ESMA to reconsider its decision. The procedure set out in the second subparagraph of Article 44(1) of Regulation (EU) No 1095/2010 shall apply.

Article 48

Administrative penalties

1 Member States shall lay down the rules on measures and penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal penalties, Member States shall ensure, in accordance with their national law, that the appropriate administrative measures can be taken or administrative penalties 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 those measures are effective, proportionate and dissuasive.

2 Member States shall provide that the competent authorities may disclose to the public any measure or penalty 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, be detrimental to the interests of the investors or cause disproportionate damage to the parties involved.

3 ESMA shall draw up an annual report on the application of administrative measures and imposition of penalties in the case of breaches of the provisions adopted in the implementation of this Directive in the different Member States. Competent authorities shall provide ESMA with the necessary information for that purpose.

*Article 49***Right of appeal**

1 The competent authorities shall give written reasons for any decision to refuse or withdraw authorisation of AIFMs to manage and/or market AIFs, or any negative decision taken in the implementation of the measures adopted in application of this Directive, and communicate them to applicants.

2 Member States shall provide that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned 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 6 months of the submission of the application.

(1) OJ L 331, 15.12.2010, p. 48.