

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 V

AIFMs MANAGING SPECIFIC TYPES OF AIF

SECTION 2

Obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers

Article 26

Scope

- 1 This Section shall apply to the following:
 - a AIFMs managing one or more AIFs which either individually or jointly on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with paragraph 5;
 - b AIFMs cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly, acquire control of a non-listed company in accordance with paragraph 5.
- 2 This Section shall not apply where the non-listed companies concerned are:
 - a small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises⁽¹⁾; or
 - b special purpose vehicles with the purpose of purchasing, holding or administering real estate.
- 3 Without prejudice to paragraphs 1 and 2 of this Article, Article 27(1) shall also apply to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.
- 4 Article 28(1), (2) and (3) and Article 30 shall apply also to AIFMs managing AIFs that acquire control over issuers. For the purposes of those Articles, paragraphs 1 and 2 of this Article shall apply *mutatis mutandis*.
- 5 For the purpose of this Section, for non-listed companies, control shall mean more than 50 % of the voting rights of the companies.

When calculating the percentage of voting rights held by the relevant AIF, in addition to the voting rights held directly by the relevant AIF, the voting rights of the following shall be taken into account, subject to control as referred to in the first subparagraph being established:

- a an undertaking controlled by the AIF; and

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- b a natural or legal person acting in its own name but on behalf of the AIF or on behalf of an undertaking controlled by the AIF.

The percentage of voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended.

Notwithstanding point (i) of Article 4(1), for the purpose of Article 28(1), (2) and (3) and Article 30 in regard to issuers control shall be determined in accordance with Article 5(3) of Directive 2004/25/EC.

6 This Section shall apply subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC.

7 This Section shall apply without prejudice to any stricter rules adopted by Member States with respect to the acquisition of holdings in issuers and non-listed companies in their territories.

Article 27

Notification of the acquisition of major holdings and control of non-listed companies

1 Member States shall require that when an AIF acquires, disposes of or holds shares of a non-listed company, the AIFM managing such an AIF notify the competent authorities of its home Member State of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10 %, 20 %, 30 %, 50 % and 75 %.

2 Member States shall require that when an AIF acquires, individually or jointly, control over a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF notify the following of the acquisition of control by the AIF:

- a the non-listed company;
- b the shareholders of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and
- c the competent authorities of the home Member State of the AIFM.

3 The notification required under paragraph 2 shall contain the following additional information:

- a the resulting situation in terms of voting rights;
- b the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;
- c the date on which control was acquired.

4 In its notification to the non-listed company, the AIFM shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the AIFM and of the information referred to in paragraph 3. The AIFM shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.

5 The notifications referred to in paragraphs 1, 2 and 3 shall be made as soon as possible, but no later than 10 working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

Article 28

Disclosure in case of acquisition of control

1 Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company or an issuer pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such AIF shall make the information referred to in paragraph 2 of this Article available to:

- a the company concerned;
- b the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and
- c the competent authorities of the home Member State of the AIFM.

Member States may require that the information referred to in paragraph 2 is also made available to the competent authorities of the non-listed company which the Member States may designate to that effect.

2 The AIFM shall make available:

- a the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;
- b the policy for preventing and managing conflicts of interest, in particular between the AIFM, the AIF and the company, including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company is concluded at arm's length; and
- c the policy for external and internal communication relating to the company in particular as regards employees.

3 In its notification to the company pursuant to point (a) of paragraph 1, the AIFM shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in paragraph 1. The AIFM shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.

4 Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such AIF ensure that the AIF, or the AIFM acting on behalf of the AIF, disclose its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to:

- a the non-listed company; and
- b the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access.

In addition, the AIFM managing the relevant AIF shall request and use its best efforts to ensure that the board of directors of the non-listed company makes available the

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information set out in the first subparagraph to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.

5 Member States shall require that when an AIF acquires control of a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF provide the competent authorities of its home Member State and the AIF's investors with information on the financing of the acquisition.

Article 29

Specific provisions regarding the annual report of AIFs exercising control of non-listed companies

1 Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF shall either:

- a request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with paragraph 2 is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or
- b for each such AIF include in the annual report provided for in Article 22 the information referred to in paragraph 2 relating to the relevant non-listed company.

2 The additional information to be included in the annual report of the company or the AIF, in accordance with paragraph 1, shall include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report. The report shall also give an indication of:

- a any important events that have occurred since the end of the financial year;
- b the company's likely future development; and
- c the information concerning acquisitions of own shares prescribed by Article 22(2) of Council Directive 77/91/EEC⁽²⁾.

3 The AIFM managing the relevant AIF shall either:

- a request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in point (b) of paragraph 1 relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves within the period referred to in Article 22(1); or
- b make available the information referred to in point (a) of paragraph 1 to the investors of the AIF, in so far as already available, within the period referred to in Article 22(1) and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the national applicable law.

Article 30

Asset stripping

1 Member States shall require that when an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF shall for a period of 24 months following the acquisition of control of the company by the AIF:

- a not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2;
 - b in so far as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2; and
 - c in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in paragraph 2.
- 2 The obligations imposed on AIFMs pursuant to paragraph 1 shall relate to the following:
- a any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
 - b any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;
 - c to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in point (a).
- 3 For the purposes of paragraph 2:
- a the term 'distribution' referred to in points (a) and (b) of paragraph 2 shall include, in particular, the payment of dividends and of interest relating to shares;
 - b the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital; and
 - c the restriction set out in point (c) of paragraph 2 shall be subject to points (b) to (h) of Article 20(1) of Directive 77/91/EEC.

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- (1) [OJ L 124, 20.5.2003, p. 36.](#)
- (2) [OJ L 26, 31.1.1977, p. 1.](#)