

Summary of proposed EC-Directive on Alternative Investment Fund Manager (AIFM)

Scope, Definitions (Art. 1-3)	<ul style="list-style-type: none"> ➤ Directive applies to all AIFM established in the EC, which manage AIF, irrespective of <ul style="list-style-type: none"> • whether the AIF is established inside or outside of the EC • whether the AIFM manages AIF directly or by delegation • whether the AIF belongs to open-ended or close-ended type • the legal structure of the AIF and of the AIFM (irrespective of whether self-managed or not and whether listed or not) <p>Exceptions</p> <ul style="list-style-type: none"> ➤ Directive shall not apply: <ul style="list-style-type: none"> • if assets under management inclusive leverage do not exceed 100 Mio € <u>or</u> • if assets under management do not exceed 500 Mio. Euro, no Leverage is used and no redemption rights exercisable during a period of 5 years after constitution of each AIF • AIFM regarding the management of AIF whose only investors are the parents or subsidiaries of the AIFM or other subsidiaries of those parents that are not AIF themselves • to AIFM which do not manage or market AIF domiciled in the EC • to institutions for occupational retirement provision • to supranational institutions, such as World Bank, IMF, ECB, EIB, EIF • central banks • national, regional and local governments and public bodies which manage funds supporting social security and public pension systems • securitization special purpose entities
Operating conditions (Art. 9-18)	<p>Minimum capital of AIFM (Art. 14)</p> <ul style="list-style-type: none"> ➤ initial capital of at least 125.000 € ➤ when the value of managed portfolios exceeds 250 Mio. €, additional amount of own funds equal to 0,02 % of the amount by which the value exceeds 250 Mio. € in total not exceeding EUR 10 Mio. ➤ as “portfolios” of the AIFM shall be deemed any AIF managed by the AIFM, including those for which the AIF has delegated functions or those the AIF is managing under delegation ➤ irrespective of the value of the portfolios own funds of never less than the amount required under Art. 21 Dir. 2006/49/EC (¼ of the fix general expenses or lined out in the business plan) ➤ AIFM may be authorized to provide up to 50 % of the additional amount of own funds through a guarantee of a Member State or equivalent bank or insurer ➤ an initial capital of only EUR [50,000/ 60,000] and no additional amount is required for AIFM managing solely AIF which: <ul style="list-style-type: none"> • are not leveraged • provide no redemption rights for 5 years after the constitution of each AIF • make investments and divestments solely on a non-frequent basis ➤ initial capital and additional amount requirements do not apply to management companies authorized under Directive 2009/65/EC (UCITS) which also manage AIF <p>Admission to fall below minimum capital (Art. 8a)</p> <p>The national authorities may allow temporally limited exceptions from the minimum capital requirements</p>

Organization (Art. 15)

- adequate and appropriate resources for the management activities
- updated systems, documented internal procedures and controls of business in order to mitigate and manage risks

Valuation (Art. 16)

- AIFM has to establish appropriate and consistent valuation procedures for each AIF
- Where appropriate, the management functions and the evaluation functions shall be independent
- valuation at least once a year, or each time shares and units are issued or redeemed if this is more frequent, unless such more frequent valuation is unnecessary due to the stability of the AIF assets' value
- external valuers are subject to the delegation provisions (Art. 18)
- supervising authorities may require review by external valuator or auditor
- rules shall be laid down in the law of the country where the AIF is established or in the AIF rules of incorporation

Depositary (Art. 17, 38)

- for each AIF it manages, the AIFM has to ensure that the appointed depositary fulfills the following tasks:
 - receive all payments made by investors and book them on behalf of the AIFM in a segregated account
 - safe-keep any financial instruments which belong to the AIF
 - verify whether the AIF has obtained the ownership of all other assets the AIF invests in
- an AIFM shall not act as depositary
- depositaries may delegate their tasks to other depositaries
- depositary shall be a credit institution having its registered office in the EC and in accordance with Dir. 2006/48/EC (taking up and pursuit of business)
- depositary is liable to AIFM and investors of AIF for any losses suffered by them
- liability to investors may be invoked either directly or indirectly through the AIFM, depending on the legal nature of the relationship
- liability shall not be affected by any delegation

Delegation (Art. 18, 36)

- For each delegation of functions the AIFM must notify the competent authorities of the home member state
- third party must be creditworthy, of good repute and experienced
- where the delegation concerns portfolio management or risk management, the mandate must be given to undertakings authorized or registered for the purpose of asset management and subject to prudential supervision
- delegation of portfolio management or risk management to third-country undertakings requires co-operation of the authorities of the home Member State and the third-country
- delegation shall not prevent the effectiveness of supervision of the AIFM and of managing in the best interests of investors
- AIFM must demonstrate that the third party is qualified and capable, that it was selected with due care and that the AIFM is in a position to monitor effectively the delegated activities
- no delegation to depositary, valuator or any other undertaking whose interests may conflict with those of the AIF or the investors
- AIFM shall review services of the third party on an ongoing basis
- liability of AIFM is not affected by the delegation, no delegation to the extent that the AIFM becomes a letter-box entity
- The third party may sub-delegate any of the functions delegated to it

	<p><u>Conduct of Business (Art. 9-13):</u></p> <p>General principles (Art. 9) AIFM shall:</p> <ul style="list-style-type: none"> • act honestly, with due skill, care and diligence and fairly in conducting its activities • act in the best interests of the AIF, the investors and the integrity of the market • ensure that all investors are treated fairly without preferential treatment, unless it is disclosed in the AIF rules <p>Conflicts of interest (Art. 10)</p> <ul style="list-style-type: none"> ➤ AIFM has to take all reasonable steps to identify conflicts of interest between AIFM and investors or between one investor and another ➤ AIFM shall maintain and operate effective arrangements to prevent conflicts of interest ➤ AIFM shall segregate tasks and responsibilities which may be regarded as incompatible with each other ➤ where arrangements are not sufficient to ensure that risks of damage will be prevented, AIFM shall clearly disclose the general nature of sources of conflicts to the investors before undertaking business on their behalf and develop appropriate policies and procedures <p>Risk management (Art. 11)</p> <ul style="list-style-type: none"> ➤ risk management and portfolio management are to be separate and to be treated as subjects of separate reviews ➤ risk management systems to measure and monitor all risks associated to each AIF investment strategy and to which each AIF is or can be exposed to shall be implemented ➤ AIFM have to implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF ➤ AIFM have to ensure that the risk profile of the AIF corresponds to size, portfolio, structure and investment strategy ➤ in case the AIFM engages in short selling, it has to implement a risk management procedure which allows the risks associated with short selling to be adequately managed <p>Liquidity management (Art. 12)</p> <ul style="list-style-type: none"> ➤ for each AIF the AIFM has to employ an appropriate liquidity management system and adopt procedures which ensure that the liquidity profile of the investments complies with the underlying obligations ➤ AIFM shall regularly conduct stress tests under normal and exceptional liquidity conditions ➤ AIFM have to ensure that each AIF has a redemption policy appropriate to the liquidity profile of the investments of the AIF, which has to be laid down in the AIF rules <p>Investment in securitisation positions (Art. 13)</p> <ul style="list-style-type: none"> ➤ for investments in securities the EC shall define requirements in the following areas: <ul style="list-style-type: none"> • requirements to be met by the originator in order for an AIFM to be allowed to invest in securities • requirements to ensure that the originator retains a net economic interest of not less than 5 % • qualitative requirements to be met by AIFM which invest in securities
<p>Transparency requirements (Art. 19-21)</p>	<p>Annual report (Art. 19)</p> <ul style="list-style-type: none"> ➤ AIFM has to make available for each AIF an annual report for each financial year to investors and competent authorities no later than 4 months following the end of the financial year ➤ shall at least contain balance sheet, income and expenditure account, report on activities of the financial year ➤ annual report shall be audited and the auditor's report shall be reproduced in full in the annual report

Disclosure to investors (Art. 20)

- AIFM shall make available to investors the following information before they invest and any changes thereof:
 - description of investment strategy and objectives of the AIF, all assets the AIF can invest in, techniques, risks, investment restrictions, use of leverage with permitted sources, associated risks and restrictions to the use of leverage
 - description of procedures by which the AIF may change its investment strategy or investment policy or both
 - description of the legal implications of contractual relationships entered into for the purpose of investment incl. information on jurisdiction
 - identity of depositary, valuator, auditor and any other service provider and a description of their duties and investors rights in case of failures
 - description of delegated management or depositary function and identity of the third party to whom the function has been delegated
 - description of the valuation procedure
 - description of liquidity risk management including redemption rights in normal and exceptional circumstances, existing redemption arrangements and how AIFM ensures a fair treatment of investors
 - description of all fees, charges and expenses and the maximum amounts thereof borne by investors
 - in case of preferential treatments the investor and a description of that preferential treatment
 - the last annual report
- Investors are to be notified about any changes in the information affecting them
- for each AIF the AIFM shall periodically disclose to investors:
 - percentage of AIF's assets which are subject to special arrangements arising from their illiquid nature
 - any new arrangements for managing systems employed to manage the liquidity of the AIF
 - the current risk profile of the AIF and the risk management systems employed to manage the risks
- For each AIF applying leverage on a systematic basis the AIFM shall:
 - disclose the maximum leverage and any right of re-use of collateral or any guarantee granted under the leveraging agreement
 - disclose the total amount of leverage employed by that AIF in the preceding quarter

Reporting obligations to competent authorities (Art. 21)

- AIFM shall regularly report to competent authorities of its home member state on the principal markets and instruments it trades
- for each AIF it manages it shall report the following to the competent authorities:
 - percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature
 - any new arrangements for managing the liquidity of the AIF
 - the actual risk profile of the AIF and the risk management tools to manage the risks
 - main categories of assets in which the AIF invested
 - where relevant, the use of short selling during the reporting period
- for each AIF the AIFM has to submit the following documents to the competent authorities:
 - annual report of each AIF for each financial year within four months from the end of the period to which it relates
 - a detailed list of all AIF which the AIFM manages for the end of each quarter
- AIFM employing leverage on a systematic basis shall, on request of its home Member State authorities, report
 - the overall leverage employed by each AIF and
 - a break down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives.

	<ul style="list-style-type: none"> ➤ Member State authorities may require additional information where necessary for the effective monitoring of systematic risk
<p>Obligations regarding AIFM managing specific types of AIF (Art. 22-25)</p>	<p>Supervision of markets (Art. 25)</p> <ul style="list-style-type: none"> ➤ competent authorities shall use the information from the extended annual report (Art. 21) to identify the extent to which the use of leverage contributes to the built-up of systematic risk in the financial system or risks of disorderly markets ➤ all information shall be made available to other competent authorities if an AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemic relevant institution in other member states <ul style="list-style-type: none"> ➤ When deemed necessary in order to ensure the stability of the financial system, authorities may impose additional limits to the level of leverage that an AIFM can employ or other restrictions on the management of the AIFM with respect to the AIF under its management, measures shall have a temporary nature
<p>Obligations for AIFM managing AIF which acquire controlling influence in companies (Art. 26-30)</p>	<p>Controlling Influence For the purpose of this section (Art. 26 – 30), more than 50% of the voting rights of a non-listed company constitute controlling influence</p> <p>Scope (Art. 26)</p> <ul style="list-style-type: none"> ➤ obligations apply to AIFM which either individually or in aggregation acquire controlling influence of a non-listed-company or AIFM having concluded an agreement with one or more other AIFM which would allow the AIF to acquire a controlling influence in the non-listed-company ➤ obligations shall <u>not</u> apply where the non-listed-companies meet at least two of the following criteria: (1) to employ less than [250] persons, (2) to have a balance sheet not exceeding EUR [43] million, (3) an annual net turnover not exceeding EUR [50] million <p>Notification of the acquisition of controlling influence in non-listed companies (Art. 27)</p> <ul style="list-style-type: none"> ➤ AIFM has to notify the non-listed-company and other available shareholders the following information as soon as possible, but not later than [four/ten] trading days: <ul style="list-style-type: none"> • the resulting situation in terms of voting rights • the conditions under which the controlling influence has been reached, including information about the identity of the different shareholders involved and any chain of indirect influence • the date on which the controlling influence was reached <p>Disclosure in case of acquisition of controlling influence in non-listed companies (Art. 28)</p> <ul style="list-style-type: none"> ➤ An AIFM managing an AIF that acquires controlling influence of a non-listed company, has to make the following information to the non-listed company, its shareholders and representatives of employees or employees themselves: <ul style="list-style-type: none"> • identity of the AIFM which individually or in agreement with other AIFM have reached the controlling influence • policy for preventing and managing conflicts of interests, in particular between the AIFM and the non-listed company <p>Specific provisions regarding the annual report (Art. 29)</p> <ul style="list-style-type: none"> ➤ in addition to the content lined out in Art. 19 the AIFM has to include in the annual report the following information: <ul style="list-style-type: none"> • operational and financial developments in particular, revenue and earnings, capital structure of the nature of the company's operations and its principal activities, the main categories of products sold and/or services performed, significant new products/services (as far as already publicly disclosed). • numbers of employees and material changes in such number

**Authorisation
(Art. 4-8)**

Requirement for authorization (Art. 4)

- no AIFM may manage AIF without prior authorisation (in accordance with this directive or, in case it is not covered by this directive in accordance with the national law of a member state)
- AIFM may be authorized to manage all or certain types of AIF
- authorization shall be valid for all member states (EC-passport)
- authorization shall cover delegation arrangements made by the AIFM and communicated in the application

Required information for authorisation (Art. 5)

AIFM applying for an authorisation have to provide the following to the competent authorities of the member state where it has its registered office:

- identities of shareholders or members, that have qualifying holdings and amounts of those holdings
- programme of activity, including information on how the AIFM intends to comply with its obligations under this directive
- detailed information about the characteristics of the AIF, including member state or third country on whose territory they are domiciled
- fund rules or instruments of incorporation of each AIF
- information on arrangements for delegation to third parties of management services functions
- information on arrangements made for safe-keeping of the assets of AIF
- additional information referred to in Art. 20 I

Conditions for granting the authorisation (Art. 6, 39)

- authorisation is granted only if the competent authorities are satisfied that the AIFM will be able to fulfill the conditions of this directive, in particular the requirements regarding sufficient initial capital
- authorization will be refused when the laws of a third country governing persons with which the AIFM has close links as defined in Art. 4 (31) dir. 2004/39/EU prevent the effective exercise of supervisory functions
- competent authorities may restrict the scope of authorization, in particular as regards the types of AIF and delegation arrangements
- information within 2 months of the submission whether or not authorisation is granted
- reasons shall be given when authorization is refused or restrictions are imposed

Ongoing Supervision / Requirements (Art. 8a)

The competent authorities of the home member state shall require the AIFM to comply with the directive during its business operation.

Changes in the scope of authorisation (Art. 7)

- AIFM has to notify the competent authorities before implementation of any change regarding the information provided in their initial application that may initially affect the conditions under which authorization has been granted (investment strategy, rules of incorporation, identity of further AIF the AIFM intends to manage)
- authorities shall within a month of receipt notification approve, impose restrictions or reject those changes

Withdrawal of authorisation (Art. 8)

- when AIFM has obtained authorization by making false statements or by any other irregular means
- when AIFM no longer fulfils the conditions under which authorization was granted
- when AIFM has seriously or systematically infringed the provisions transposing this Directive

<p>Provisions for marketing in the home member state (Art. 31, 32)</p>	<ul style="list-style-type: none"> ➤ AIFM may market shares of AIF to professional investors (No HNWI) <p>Notification to authorities about new AIF (Art. 31)</p> <ul style="list-style-type: none"> ➤ AIFM shall submit a notification to the competent authorities of its home member state in respect of each AIF it intends to market ➤ notification shall comprise the following: <ul style="list-style-type: none"> • identification of the AIF and information on where the AIF are domiciled • AIF rules or instruments of incorporation • description of or any information on the AIF available to investors • information on arrangements established to prevent shares from being marketed to retail investors ➤ no later than 10 working days after receipt of notification authorities shall inform AIFM whether it may start the AIF identified in the notification <p>Marketing to retail investors (Art. 32)</p> <ul style="list-style-type: none"> ➤ member states may allow the marketing of AIF to retail investors in their territory, irrespective of whether marketed on a domestic or cross-border basis ➤ for that purpose they may impose stricter requirements on AIFM, but may not impose stricter rules for AIF marketed cross-border than for those marketed domestically ➤ no such ability is given to the Member States if the AIF is offered under a prospectus in accordance with Directive 2003/71/EC ➤ member states that permit the marketing to retail investors shall inform the commission of the types of AIF which AIFM may market to retail investors and the additional requirements
<p>Provisions for marketing in other member states (Art. 33)</p>	<ul style="list-style-type: none"> ➤ when an authorised AIFM intends to market shares of an AIF it manages in another member state to professional investors, it shall submit the following documents to the competent authorities of its member state: <ul style="list-style-type: none"> • notification letter including a programme of operations identifying the AIF and information on where the AIF is domiciled • the rules or instruments of incorporation • description of or any information on the AIF available for investors • indication of the member state in which it intends to market the shares of an AIF • arrangements made for the marketing and arrangements established to prevent shares from being marketed to retail investors ➤ competent authorities of the home member state shall no later than 10 working days after receipt of the complete documentation, transmit it to the authorities of the member state where the AIF will be marketed, an attestation that the AIFM is authorised shall be enclosed ➤ authorities of the home member state have to notify the AIFM about transmission without delay, AIFM may start the marketing in the host member state as of the date of that notification ➤ in case of a change in any of the particulars the AIFM shall give written notice of the change to authorities of its home member state at least one month before implementing the change
<p>Provisions for providing management services in other member states (Art. 34)</p>	<ul style="list-style-type: none"> ➤ AIFM may provide management services for AIF domiciles in another member state directly or via establishment of a branch, provided that it is authorised to manage this type of AIF ➤ AIFM wishing to provide management services for AIF domiciled in other member states <u>for the first time</u> shall communicate the following to the authorities of its home member state: <ul style="list-style-type: none"> • member state in which it intends to provide management services • programme of operations stating in particular the services which it intends to perform and identifying the AIF it intends to manage

	<ul style="list-style-type: none"> ➤ If the AIFM intends to establish a branch, it shall provide additionally the following information: <ul style="list-style-type: none"> • organisational structure of the branch • address in the home member state from which documents may be obtained • names of persons responsible for the management of the branch ➤ authorities of home member state shall, no later than ten working days after receipt of the documentation transmit it to the authorities of the other member state and an attestation that they have authorised the AIFM, they shall immediately notify the AIFM about the transmission ➤ upon receipt of the notification AIFM may start to provide its services in the host member state ➤ host member state shall <u>not</u> impose any additional requirements on the AIFM ➤ in case of a change in any of the particulars the AIFM shall give written notice of the change to authorities of its home member state at least one month before implementing the change
<p>Rules in relation to third countries (Art. 35 – 39)</p>	<ul style="list-style-type: none"> ➤ an AIFM may only market shares of an AIF 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 Art. 26 OECD model tax convention and ensures an effective exchange of information in tax matters ➤ where AIFM market shares of AIF domiciled in a third country, the home member state may prolong the period referred to in Art. 32 (3), when this is necessary to check whether the conditions of this Directive are met (Art. 35) ➤ AIF domiciled in a third country shall allow the depository to delegate functions to a sub-depository in the same third country provided that: <ul style="list-style-type: none"> • legislation of the third country is equivalent to the provisions of this Directive and is effectively enforced • sub-depositaries are subject to effective prudential regulation and supervision which is equivalent to the provisions laid down in Community law • cooperation between home member state and authorities of the third country is sufficiently ensured • the third country has standards to prevent money laundering and terrorist financing equivalent to those laid down in Community law (Art. 38) ➤ depository's liability towards investors shall not be affected by the sub-delegation ➤ AIFM established in a third country may be authorised to market shares of an AIF to professional investors in the Community under the conditions of this Directive, provided that: <ul style="list-style-type: none"> • legislation of the third country regarding prudential regulation and ongoing supervision is equivalent to the provisions of this Directive and is effectively enforced • the third state grants Community AIFM effective market access comparable to that granted by the Community to AIFM from that third country • the AIFM provides the authorities of the member state in which it applies for authorization with the information referred to in Art. 5, 31 • a cooperation agreement between the authorities of the 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 • the third country has signed an agreement with the member state in which it applies for authorization which fully complies with the standards laid down in Art. 26 of OECD model tax convention and ensures an effective exchange of information in tax matters (Art. 39)
<p>Transitional provision (Art. 51)</p>	<ul style="list-style-type: none"> ➤ 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