

EU Directive on the Regulation of Alternative Investment Fund Managers	
	<p>The following is a summary of the certain relevant provisions of the latest draft Directive expected to be voted (possibly subject to some further changes) in Parliament in November.</p> <p>It does not purport to be exhaustive and is based on the information available at the time of the publication. Although we have made every effort to ensure accuracy of the information hereafter, we do not guarantee the completeness and correctness and readers should always obtain professional advice before deciding to take any action (or not, as the case may be) in relation to the information contained herein.</p>
Scope (Art. 2)	<p>The Directive is applicable to:</p> <ul style="list-style-type: none"> (i) all EU AIFM, which manage one or more alternative investment funds (AIF) (see definition below) irrespective of whether the AIF is an EU AIF or a non-EU AIF; (ii) all non-EU AIFM, which manage one or more EU AIF; and (iii) all non-EU AIFM, which market one or more AIF in the EU, irrespective of whether the AIF is an EU AIF or a non-EU AIF. <p>'AIF' is defined as any collective investment undertaking, including investment compartments thereof which is not a UCITS fund and which raises 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. It is unclear whether the criteria "from a number of investors" would exclude funds which have only one investor (but which in theory could also have several investors). (Art. 4)</p> <p>'AIFM' is defined as any legal person whose regular business is the assumption of portfolio and/or risk management functions of one or more AIF. (Art. 4)</p> <p>'Marketing' is defined as any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled in the Union. Hence, investments upon the initiative of the investor would not be covered. (Art. 4)</p> <p>The Directive does not apply to mere "holding companies" and employee participation schemes or employee saving schemes.</p> <p>Moreover, AIFM insofar as they manage one or more AIF whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, are exempt provided that none of those investors itself is an AIF.</p>
<i>Exempted and excluded persons</i>	
Lighter Regime for smaller AIFMs (Art. 3)	<p>For certain AIFMs, the Directive provides for a lighter regime. This is the case for the following AIFM whose assets under management do not exceed a certain threshold:</p> <ul style="list-style-type: none"> 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 EUR 100 million; or

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<i>Opt-in possible</i>	<p>b) 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, in total do not exceed a threshold of EUR 500 million when the portfolio of AIF consists of AIF that are not leveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.</p> <p>For these purposes ‘leverage’ is defined as 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. According to the recitals (referring explicitly to private equity funds) leverage existing purely at the level of the portfolio company is not meant to be included when referring to leverage.</p> <p>With respect to such “smaller” AIFM, the Directive foresees that they shall at least be subject to a registration with the competent authorities of its home Member State and provide information on the main instruments in which they are trading and on the principal exposures and most important concentrations of AIF they manage. Member States are also free to adopt stricter rules with respect to such “smaller” AIFM.</p> <p>Such “smaller” AIFM do not benefit from any of the rights granted under this Directive, unless the AIFM chooses to opt-in (which is possible) in which case the entire Directive, subject to the exceptions set forth herein, shall be applicable to those AIFM. However, many of the exceptions included earlier the Parliament’s draft for smaller funds are no longer included.</p>
Determination of the AIFM subject to authorisation (Art. 5)	<p>Pursuant to the Directive each AIF managed within the scope of the Directive shall have a single AIFM, which shall be responsible for ensuring compliance with the requirements of the Directive. The AIFM shall be either:</p> <p>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 (i.e. portfolio and risk management); or</p> <p>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.</p> <p>We understand that for instance in a classical limited partnership structure where the general partner would be acting on behalf of the limited partnership one could appoint an external manager acting as AIFM. It is expected that fund sponsors will in future have <u>one</u> AIFM for several funds and not – as has often been the case in the past – one manager for each fund.</p>
Authorisation of AIFM (Art. 6 et seq.)	<p>No AIFM may manage one or more AIF unless it has been authorised in accordance with the Directive. An authorized AIFM has to comply with the conditions for authorisation established in the Directive at all times. In order to obtain an authorisation the following conditions must be met in particular:</p>

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<i>Conditions</i>	<p>a) the relevant competent authorities are satisfied that the AIFM will be able to fulfil the conditions of the Directive;</p> <p>b) the AIFM has sufficient initial capital and own funds (see Art. 9);</p> <p>c) the persons who effectively conduct the business of an AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIF managed by the AIFM;</p> <p>d) the shareholders or members of the AIFM that have qualifying holdings (more than 10 % of the capital or voting rights) are suitable taking into account the need to ensure the sound and prudent management of the AIFM; and</p> <p>e) the head office and the registered office of the AIFM are located in the same Member State.</p>
<i>Procedure, Timing</i>	<p>The competent authorities of the home Member State of the AIFM shall inform the applicant in writing within three months of the submission of a complete application, whether or not authorisation has been granted. The competent authorities may prolong this period for up to three additional months, where they consider it necessary due to the specific circumstances of the case and after having notified the AIFM accordingly.</p> <p>AIFM may start managing AIF with investment strategies described in the application in their home Member State as soon as the authorisation is granted, but not earlier than one month after having submitted any missing information.</p>
<i>Subsequent Changes</i>	<p>In case of changes after <i>submission for authorisation</i>, the AIFM must, before implementation, notify the competent authorities of the home Member State of the AIFM in respect of any material changes to the conditions for initial authorisation, in particular material changes to the information provided in accordance with Article 7.</p> <p>If the competent authorities of the relevant home Member State decide to impose restrictions or reject those changes, they shall, within one month of receipt of that notification, inform the AIFM. The competent authorities may prolong this period for up to one additional month. If the relevant competent authorities do not oppose the changes within the relevant assessment period, they may be effected.</p>
<i>Capital Requirements (Art. 9)</i>	<p>An AIFM which is an internally managed AIF must have an initial capital of at least EUR 300 000.</p> <p>Where an AIFM is appointed as external manager of one or more AIF, the AIFM shall have an initial capital of at least EUR 125 000.</p> <p>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 but the required total of the initial capital and the additional amount must not, however, exceed EUR 10 million.</p> <p>For the purpose of such capital requirements any AIF managed by the AIFM, including AIF for which the AIFM has delegated one or more functions in accordance with the Directive but excluding any AIF portfolios that the AIFM is managing under delegation, shall be deemed to be the portfolios of the AIFM.</p>

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	Irrespective of the amount of the requirements set out above, the own funds of the AIFM shall never be less than 25% of the average costs of the AIFM.
<p>Operating Conditions (Art. 12 et seq.)</p> <p><i>General principles / conflicts of interest</i></p> <p><i>Risk Management</i></p>	<p>AIFM must meet certain operating conditions on an ongoing basis (e.g. acting honestly, with due skill, care and diligence, fairly and in the best interests of the AIF or the investors of the AIF and the integrity of the market; employ effectively the resources and procedures that are necessary for the proper performance of its business activities; take all reasonable steps to avoid conflicts of interests and, when they cannot be avoided, to identify, prevent, manage and monitor conflicts of interest from adversely affecting the interests of the AIF and its investors and to ensure that the AIF it manages are fairly treated; comply with all applicable regulatory requirements).</p> <p>No investor in an AIF may obtain a preferential treatment, unless this is disclosed in the relevant AIF's rules or instruments of incorporation.</p> <p>The AIFM shall functionally and hierarchically separate the functions of risk management from the operating units, including the portfolio management. It must implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or can be exposed. It remains to be seen what exactly this will mean for private equity fund managers.</p> <p>The AIFM shall set a maximum level of leverage which the AIFM may employ on behalf of each AIF it manages as well as the extent of the right of the re-use of collateral or guarantee that could be granted under the leveraging arrangement.</p>
Remuneration (Art. 13)	<p>The AIFM must have remuneration policies and practices for those categories of staff, including senior management, whose professional activities have a material impact on the risk profiles of AIF they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the AIF it manages.</p> <p>The AIFM shall determine the remuneration policies and practices in accordance with certain principles listed in the Directive and to be further specified by the new European regulatory authority, ESMA. This means in particular:</p> <p>When establishing and applying the totally remuneration policies (including carried interest), the AIFM must comply with certain principles which are based on the principles already applicable to the financial services sector and which include among many others:</p> <ol style="list-style-type: none"> a) the remuneration policy may not encourage risk-taking which is inconsistent with the risk profiles fund rules of the AIF; b) the remuneration of senior officers in risk management in compliance functions must be directly overseen by a remuneration committee; c) the guaranteed variable remuneration is exceptional and may only occur in the context of high hiring new staff and must be limited to the first year;

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	<p>d) subject to the legal structure of the AIF a substantial portion which is at least 50 % of any variable remuneration shall consist of units or shares of the AIF concerned or equivalent ownership interests unless the management of the AIF accounts only for less than 50 % of the total portfolio managed by the AIFM in which case the minimum of 50 % shall not apply;</p> <p>e) a substantial portion, which is at least 40 % of the variable remuneration component must be deferred over a period which is appropriate in view of that life cycle and redemption policy of the AIF concerned and is correctly aligned with nature of the risks of the AIFM in question; this period should be at least three to five years; in the case of the variable remuneration component and of a particularly high amount, at least 60 % of the amount is deferred.</p> <p>It is very questionable how all such principals must be interpreted in practice which remains subject to further review. “Carried Interest” is defined as 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. This definition raises also questions as Carried Interest would typically be a disproportionate profit as a return on a commitment held in the fund.</p>
<p>Organisational Requirements (Art. 18 et seq.)</p> <p><i>Valuation</i></p> <p><i>Valuer</i></p> <p><i>Liability</i></p>	<p>Besides the general principle that the AIFM shall, at all times, use adequate and appropriate human and technical resources that are necessary for the proper management of AIF, in particular the following organizational requirements must be met:</p> <p>The AIFM shall ensure that, for each AIF that it manages, appropriate and consistent procedures are established to ensure a proper and independent valuation of the assets of the AIF at least once a year and, in case of a closed-ended AIF, upon each sale and acquisition.</p> <p>The AIFM shall also ensure that the net asset value per share or unit of AIF is calculated and disclosed to the investors.</p> <p>The valuation function must be performed by:</p> <p>a) an independent external valuer, being a legal or natural person separate from the AIF, the AIFM and from any other persons with close links to the AIF or the AIFM; or</p> <p>b) the AIFM itself, provided that the valuation task is functionally separated from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented. When the valuation function is not performed by an independent external valuer, the competent authorities of the home Member State of the AIFM may require the AIFM to have its valuation procedures and/or valuations verified by an external valuer or, where appropriate, an auditor.</p> <p>The AIFM is responsible for the proper valuation of AIF assets, the calculation of the net asset value and the publication of that net asset value. Therefore, in no case shall the AIFM's liability towards the AIF and its investors be affected by the fact that the AIFM has appointed an external valuer.</p> <p>However, notwithstanding the above and irrespective of any contractual arrangements providing otherwise, the external valuer shall be liable to the AIFM for any losses suffered by the AIFM as a result of the external valuer's negligence or intentional failure to perform its tasks.</p>

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<p>Delegation of AIFM Functions / Conditions (Art. 20)</p>	<p>The delegation (and sub-delegation) of tasks typically carried out by the AIFM is in particular subject to notification to competent authorities and to the following conditions:</p> <ul style="list-style-type: none"> a) the AIFM must be able to justify its entire delegation structure with objective reasons; b) the delegate may not be conflicted and must dispose of sufficient resources to perform the respective tasks and the persons who effectively conduct the business must be of sufficiently good repute and sufficiently experienced; c) where the delegation concerns the portfolio management or the risk management, the mandate must be given only to undertakings which are authorised or registered for the purpose of asset management and subject to supervision. Where this condition cannot be satisfied, delegation may only be given on the condition of prior approval by the competent authorities of the home Member State of the AIFM; d) where the delegation concerns the portfolio management or the risk management and is given to a third-country undertaking, in addition to the requirements in point (c), co-operation between the competent authorities of the home Member State of the AIFM and the supervisory authority of the undertaking shall be ensured; e) the AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all 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 delegate and to withdraw the delegation with immediate effect when this is in the interest of investors. <p>The AIFM shall review the services provided by each delegate on an ongoing basis.</p>
<p><i>Liability in case of Delegation</i></p>	<p>In no case shall the AIFM's liability towards the AIF and its investors be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, 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 and to the extent that it becomes a letter-box entity.</p>
<p>Depositary (Art. 21)</p> <p><i>Special Depositaries for closed-ended funds making illiquid investments and/or acquiring controlling stakes (i.e. private equity and real estate funds)</i></p>	<p>For each AIF it manages, the AIFM shall ensure that a single depositary is appointed in accordance with the provisions set forth below. The depositary shall generally be a credit institution or an investment firm or similar institutions meeting certain requirements.</p> <p>Member States may allow that for closed ended AIF (no redemption rights exercisable during the period of five years from the date of the initial investments) which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody (i.e. financial instruments) or generally invest in issuers or non-listed companies in order to acquire control over such companies, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct and which can furnish sufficient financial and professional guarantees to be able to effectively perform the relevant depositary functions and meet the commitments inherent to those functions. This is means according to the recitals that a notary, a lawyer or a registrar may assume the depositary functions.</p>

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<i>Location of Depositary</i>	<p>The depositary shall be located in the home Member State of the EU AIF and for non-EU AIF in the third country where the AIF is established, or in the home Member State of the AIFM managing the AIF, or, as the case may be, in the Member State of reference of the AIFM managing the AIF.</p> <p>The appointment of a depositary established in a third country shall at all times be subject to equivalent regulations and certain cooperation and exchange of information arrangements with the competent authorities of the depositary.</p>
<i>Functions of Depositary</i>	<p>The depositary must ensure:</p> <ul style="list-style-type: none"> • monitoring of cash flows; • safe-keeping of financial instruments; • in case the assets are not financial instruments: Verification of ownership (based on documents provided by AIF/AIFM and external evidence, where available); • that sale, issue, cancellation of fund shares, units etc. are in accordance with applicable law and fund rules; • that the value of the shares or units of the AIF is calculated in accordance with the applicable national law and the AIF rules. <p>The depositary may not delegate to third parties any of its functions, other than the custodian functions relating to financial instruments and even in that case only upon meeting certain requirements.</p>
<i>Liability of the Depositary</i>	<p>The depositary shall be liable to the AIF, or, as the case may be, to the investors of the AIF, for the loss by the depositary, or as the case may be, a third party to whom the custody has been delegated, of financial instruments held in custody. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.</p> <p>The depositary shall also be liable to the AIF, or, as the case may be, to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly perform its obligations.</p>
Transparency Requirements (Art. 22 et seq.)	
<i>Annual Reports</i>	<p>An AIFM shall for each of the EU AIF it manages and for each of the AIF it markets into the EU make available an annual report for each financial year no later than six months following the end of the financial year. The annual report shall among others contain the following information:</p> <ul style="list-style-type: none"> • Any changes in the information previously disclosed to investors in accordance with the Directive during the financial year (e.g. a description of the investment strategy and objectives of the AIF, the types of assets which the AIF may invest in, of the techniques it may employ and of all associated risks, any applicable investment restrictions, the main legal implications of the contractual relationship, the identity of the AIFM, the depositary, auditor and any other service providers, a description of any delegated management function and of any safekeeping function delegated by the depositary).

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<p><i>Disclosure to investors</i></p>	<ul style="list-style-type: none"> • The total amount of remuneration for the financial year split into fixed and variable remunerations paid by the AIFM to its staff members and the number of beneficiaries and, where relevant, carried interest paid by the AIF, the amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF. <p>An AIFM shall for each of the EU AIF it manages and for each of the AIF it markets in the EU make available to investors the following information before they invest in the AIF as well as any changes thereof, including, but not limited to, a description of:</p> <ol style="list-style-type: none"> a) investment strategy and objectives of the AIF, the types of assets which the AIF may invest in, techniques it may employ and associated risks, any investment restrictions, types and sources of leverage permitted and associated risks, the maximum level of leverage which the AIFM may employ on behalf of the AIF; b) any delegated management functions; c) any conflicts of interest; d) the AIF's valuation procedure and pricing methodology, all fees, charges and expenses and the maximum amounts thereof which are directly and indirectly borne by the investors and e) any preferential treatment.
<p><i>Reporting obligations to competent authorities</i></p>	<p>The AIFM shall for each of the AIF it manages and markets in the EU provide the same information as disclosed to investors to the competent authorities of its home Member State. It shall make available information about the overall level of leverage employed by each AIF it manages. That information shall also 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.</p>
<p><i>Special disclosure obligations for AIFM managing leveraged AIFs (Art. 25 et seq.)</i></p>	<p>The AIFM must demonstrate to the competent authority that the leverage limits for each AIF it manages are reasonable and that it complies at all times with the leverage limits set by it. Competent authorities shall assess the risks that the use of leverage by AIFM with respect to specific AIFs could entail and when it is deemed necessary in order to ensure the stability and integrity of the financial system, the competent authorities shall impose limits to the level of leverage that an AIFM may employ or other restrictions on the management of the AIFM with respect to the AIF under its management. Similarly, the new European authorities ESMA or ESRB may, based on the information received by the competent (national) authorities, determine that the leverage employed by an AIFM or by a group of AIFM poses substantial risk and may issue advice to competent authorities specifying the remedial measures to be taken (including limits to the level of leverage).</p>
<p>Special obligations for AIFM managing AIFs which acquire major holdings or control of non-listed companies and issuers (private equity) (Art. 26 et seq.)</p>	<p>The Directive provides for a set of rules establishing certain disclosure obligations for AIFM managing AIF which acquire major holding or control of non-listed companies and issuers (private equity funds).</p>

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Scope of the specific "private equity" disclosure requirements

Special disclosure requirements shall apply to (i) AIFM managing one or more AIF which either individually or jointly, acquire major holding or control of a portfolio company and to (ii) AIFM cooperating with one or more other AIFM on the basis of an agreement pursuant to which the AIF managed by these AIFM jointly, acquire major holding control of a portfolio company.

For the purpose of this section, "control" shall mean with respect to non-listed companies more than 50% of the voting rights of the company. When calculating the percentage of voting rights held by the relevant AIF, not only the voting rights held directly by the relevant AIF shall be taken into account, but also the voting rights of (i) any undertaking controlled by the AIF and (ii) those of any natural or legal person acting in its own name but on behalf of the AIF or of any undertaking controlled by the AIF.

The special disclosure (and asset stripping) requirements shall not apply where the non-listed companies concerned are small and medium enterprises within the meaning of Art. 2 (1) of the annex of Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises ("SME") or real estate special purpose vehicles. SME are enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

The special disclosure requirements are subject to the restrictions of the protection of confidential information (Art. 6 of Directive 2002/14/EC).

Notification upon exceeding certain thresholds

When an AIF acquires, disposes or holds shares of a non-listed company, the AIFM managing this AIF must 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%.

The notifications shall be made as soon as possible, but not later than ten working days upon the event of exceeding an participation threshold or acquisition of control over a non-listed company.

Disclosure of control (Art. 28)

When an AIF, individually or jointly, acquires control over a non-listed company (or an issue as described above), the AIFM managing such AIF shall notify:

- (i) the non-listed company,
- (ii) 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 get access, and
- (iii) the competent authorities of the home Member State of the AIFM.

And such notification must contain additional information such as:

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- the resulting situation in terms of voting rights;
- the conditions under which control has been reached (e.g. including information about the identity of the different shareholders involved);
- the date on which control was reached;
- the identity of the AIFM which either individually or in agreement with other AIFM manage(s) the AIF that has/have reached control;
- the policy for preventing and managing conflicts of interests (in particular between the AIFM, the AIF and the company) and
- the policy for external and internal communication relating to the company in particular as regards employees.

In its notification to the company, the AIFM shall **request the board of** directors of the company to **inform the representatives of employees** or, where there are no such representatives, the employees themselves, without undue delay of the information referred to above. The AIFM shall use its best efforts to ensure that the board of directors informs the employees in accordance with what is set forth above

When an AIF acquires, individually or jointly, control of a non-listed company, the AIFM managing such AIF shall ensure that the AIF, or the AIFM acting on behalf of the AIF, makes available 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 (i) the non-listed company, and (ii) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available.

When an AIF reaches a position to exercise control of a non-listed company, the AIFM shall further provide the competent authorities of its home Member State and the investors of the AIF with information on the financing of the acquisition.

Annual Reporting of AIF exercising control of non-listed companies (Art. 29)

When an AIF acquires, individually or jointly, control of a non-listed company, the AIFM managing such AIF shall

- (i) either request and use its best efforts to make sure that the annual report of the non-listed company is drawn up in accordance with the Directive and made available by the board of the company to all representatives of employees or, where there are no such representatives, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or
- (ii) for each such AIF include in the annual report of the AIF the information relating to the relevant non-listed company referred to in Article 29 para 2.

Such additional information to be included in the annual report of the company, or, as the case may be, the AIF includes:

- 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.
- an indication of:
 - a) any important events that have occurred since the end of the financial year;
 - b) the company's likely future development;

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	c) the information concerning acquisitions of own shares prescribed by Article 22 (2) of Directive 77/91/EEC.
Asset Stripping (Art. 30)	<p>When an AIF, individually or jointly, acquires control of a non-listed company, the AIFM managing such AIF is before the end of the period expiring 24 months following the acquisition of control of the company by the AIF not allowed to facilitate, support, instruct or, if applicable, to vote on behalf of the AIF at the governing bodies of the company in favour of any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described below and in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares.</p> <p>The above mentioned obligations of the AIFM shall relate to the following:</p> <ul style="list-style-type: none"> 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; 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 paragraph (a). <p>The expression "distribution" shall include in particular the payment of dividends and of interest relating to shares.</p> <p>The provisions on capital reductions do not apply on a reduction in the subscribed capital whose purpose it is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following this operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital.</p> <p>The restriction in subparagraph (c) shall be subject to the exceptions and conditions laid down in Article 20 (1) (b) to (h) of the Second Company Law Directive 77/91/EEC. Under these provisions certain transactions that would otherwise constitute an acquisition of own shares are not treated as such (e.g. shares acquired as a result of a universal transfer of assets, fully paid-up shares acquired free of charge or shares acquired from a shareholder in the event of failure to pay them up).</p>
Marketing of EU AIF by EU AIFM (Art. 31)	An authorized EU AIFM may market any EU AIF that it manages to " professional investors " in the home Member State of the AIFM as soon as the notification requirements (see below) are met. Where the EU AIF is a " feeder AIF ", the right to market is subject to the condition that the "master-AIF" is also an EU AIF which is managed by an authorized EU AIFM.

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<i>Notification process</i>	<p>For these purposes “professional investor” has the meaning set forth in Annex II of Directive 2004/39/EC on markets in financial instruments (“MiFID”) which are e.g. credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies and large undertakings (i.e. undertakings meeting two of the following size requirements: balance sheet total ≥ EUR 20 000 000, net turnover ≥ EUR 40 000 000 or own funds ≥ EUR 2 000 000). “Feeder AIF” means an AIF which invests at least 85 % of its assets in one or more other AIF (“Master AIF”).</p> <p>The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each EU AIF that it intends to market.</p> <p>No later than 20 working days after receipt of the complete notification file, the competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification. In the event of a material change in any of the particulars communicated to the competent authorities for purposes of the notification, the AIFM shall give written notice of that change to the competent authorities.</p>
<i>Marketing of EU AIF in other Member States (passport)</i>	<p>Member States shall ensure that an authorized EU AIFM may market an EU AIF that it manages to professional investors in another Member State than the home Member State of the AIFM as soon as the following conditions are met. If the EU AIF is a feeder AIF, the right to market is subject to the condition that the master AIF is also an EU AIF and is managed by an authorized EU AIFM. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each EU AIF that intends to market.</p> <p>The competent authorities of the home Member State of the AIFM shall no later than 20 working days after the date of receipt of the complete notification transmit the complete notification via to the competent authorities of the Member States where the AIF is proposed to be marketed. The competent authorities of the home Member State of the AIFM shall enclose an attestation that the AIFM concerned is authorized to manage AIF with such particular investment strategy. Upon transmission of such certification file and corresponding notification to the AIFM, the AIFM may start marketing the AIF in the host Member State.</p>
Managing AIF established in other Member States (Art. 33)	<p>An authorized EU AIFM may manage EU AIFs established in another Member State either directly or via the establishment of a branch provided that the AIFM is authorized to manage that type of AIF. The host Member State of the AIFM may not impose any additional requirements on the AIFM in respect of matters covered by the Directive.</p>
Third Country Rules (Art. 34 et seq.) <u>EU AIFM</u>	<p>An <u>authorised</u> (in accordance with Art. 6 et seq.) EU AIFM may manage non-EU AIF which are not marketed in the EU provided that:</p>

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a) **managing non-EU AIF** which are not marketed in any Member State of the EU (Art. 34)

- (a) The AIFM complies with all the requirements of the Directive except for Art. 21 and 22 (depository and annual report) in respect of those AIF; and,
- (b) Appropriate cooperation arrangements are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the competent authorities of the home Member State of the AIFM to carry out their duties according to this Directive.

b) **marketing in the EU WITH a passport** of a non-EU AIF managed by such EU AIFM (Art. 35)

Authorised **EU AIFM** may **market to professional investors in the EU non-EU AIF** they manage (and EU feeder AIF whose master AIF is not an EU AIF managed by an authorised EU AIFM) as soon as the following conditions are met. The AIFM must comply with the Directive and:

- (a) Appropriate **cooperation arrangements** are in place between the competent authorities of the home Member State of the AIFM, the host Member States of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established;
- (b) The third country is **not listed as Non-Cooperative Country and Territory** by the Financial Action Task Force on anti-money laundering and terrorist financing; and
- (c) The third country has signed an **agreement** with the home Member State of the AIFM and with each other Member State in which the shares or units of the non-EU AIF are proposed to be marketed, 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, including multilateral tax agreements.

In case the AIFM intends to **market a non-EU AIF in its home Member State**, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market. No later than 20 working days after receipt of a complete notification, the competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF in its territory. In case of a positive decision, the AIFM may start marketing the AIF in its home Member State as of the date of such notification.

In case the AIFM intends to **market a non-EU AIF in one or more Member State(s) other than its home Member State**, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market. The competent authorities of the home Member State of the AIFM shall, no later than 20 working days after the date of receipt of the complete notification file, transmit this complete notification file to the competent authorities of the Member State where the AIF is proposed to be marketed and without delay notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member State(s) of the AIFM as of the date of that notification by the competent authorities.

c) **marketing in Member States WITHOUT a**

Without prejudice to Article 35, **Member States may allow** an authorised EU AIFM to **market to professional investors, on their territory only**, non-EU AIF they manage (and EU feeder AIF whose master AIF is not an EU AIF managed by an authorised EU AIFM), provided that:

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passport of non-EU AIF managed by such EU AIFM (Art. 36)

- (a) The AIFM complies with all the requirements under the Directive with the exception of Article 21 (depository);
- (b) Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established;
- (c) The third country is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

Non-EU AIFM (WITH Passport)

A non-EU AIFM intending to **manage EU AIF and/or to market AIF managed by it in the EU** in accordance with Art. 38 or 39 (i.e. based upon a passport) must acquire a prior **authorisation** by the competent authorities of their **Member State of reference** in accordance with the provisions set forth below.

a) Authorisation requirements

A non-EU AIFM intending to obtain authorisation to manage EU AIF and/or market AIF managed by it in the EU in accordance with Article 38 or 39 must comply the Directive and must have a **legal representative established in its Member State of reference**.

The non-EU AIFM shall submit a **request for authorisation** to the competent authorities of its Member State of reference. The competent authorities shall assess whether the determination by the AIFM as regards its Member State of reference respects the criteria laid down in the Directive. No authorisation shall be given unless the following additional conditions are met:

- (a) The Member State of reference is indicated by the AIFM in accordance with the Directive and the procedure regarding the assessment of the proper Member State of reference has been followed by the relevant competent authorities;
- (b) The AIFM has appointed a legal representative established in its Member State of reference;
- (c) The legal representative shall, next to the AIFM itself, be the contact person of the non-EU AIFM for the investors of the relevant AIF, for ESMA and for the competent authorities and be sufficiently equipped to perform the compliance function pursuant to the Directive;
- (d) Appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference, the host Member States of the AIFM, the competent authorities of the EU AIF concerned and the supervisory authorities of the third country;
- (e) The third country is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing;
- (f) The third country has signed an agreement with the Member State of reference, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention;
- (g) The effective exercise by the competent authorities of their supervisory functions under the Directive is not prevented by the laws, regulations or administrative provisions of a third country governing the AIFM.

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Peer review of authorisation and supervision of non-EU AIFM (Article 37a)

ESMA shall, on an annual basis, conduct peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non-EU AIFM under the application of Articles 37, 38, 39 and 39bis, to further enhance consistency in supervisory outcomes, in accordance with the ESMA Regulations. ESMA shall develop methods to allow for objective assessment and comparison between the authorities reviewed. On the basis of the conclusions of the peer review, ESMA may issue guidelines and recommendations. The competent authorities shall make every effort to comply with those guidelines and recommendations.

b) Notification requirements

A duly authorised **non-EU AIFM** may **market** the shares or units of an **EU AIF** it manages **to professional investors in the EU with a passport** as soon as the following conditions are met.

aa) EU AIF managed by such non-EU AIFM (Article 38)

The AIFM shall submit a **notification** to the competent authorities of its Member State of reference in respect of each EU AIF that it intends to market.

(a) In case the AIFM intends to market the EU AIF in its Member State of reference, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM no later than 20 working days after receipt of a complete notification whether it may start marketing the AIF. In case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference as of the date of the notification by the competent authorities confirming that the AIFM may start marketing the AIF.

(b) In case the AIFM intends to market the EU AIF in another Member State, the competent authorities of the Member State of reference shall transmit the complete notification file and an attestation that the AIFM concerned is authorised to manage AIF with that particular investment strategy to the competent authorities of the Member States where the units or shares of the AIF are proposed to be marketed no later than 20 working days after the date of receipt of the complete notification file from the AIFM. Such transmission will only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of the Directive and if in general the AIFM complies with the provisions of this Directive. Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall without delay notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member State(s) of the AIFM as of the date of that notification.

In the event of a material change in any of the particulars communicated in the notification the AIFM has made to the competent authorities of its Member State of reference, the AIFM shall give written notice of that change to the competent authorities of the Member State of reference.

bb) non-EU AIF managed by such non-EU AIFM (Article 39)

A duly authorised (see Art. 37) non-EU AIFM may **market** shares or units of a **non-EU AIF** it manages **to professional investors in the EU with a passport** as soon as the following conditions are met. The AIFM must **comply with all the requirements of the Directive and in addition:**

(a) Appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference, the competent authorities of the host Member States of the AIFM and the supervisory authority of the third country where the non-EU AIF is established.

(b) The third country is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and

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	<p>terrorist financing.</p> <p>(c) The third country has signed an agreement with the Member State of reference and with each other Member State in which the shares or units of the non-EU AIF are proposed to be marketed, which fully complies with Article 26 of the OECD Model Tax Convention.</p> <p>The AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each non-EU AIF that it intends to market.</p> <p>(a) In case the AIFM intends to market the non-EU AIF in its Member State of reference, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification no later than 20 working days after receipt of a complete notification. In case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference as of the date of the notification by the competent authorities confirming that the AIFM may start marketing the AIF.</p> <p>(b) In case the AIFM intends to market the non-EU AIF in another Member State, the competent authorities of the Member State of reference shall, no later than 20 working days after the date of receipt of the complete notification file, transmit the complete notification file and an attestation that the AIFM concerned is authorised to manage AIF with that particular investment strategy to the competent authorities of the Member States where the AIF is proposed to be marketed. Such transmission will only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that in general the AIFM complies with the provisions of this Directive. Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall without delay notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member State(s) of the AIFM as of the date of that notification.</p> <p>In the event of a material change in any of the particulars communicated in the notification the AIFM has made to the competent authorities of its Member State of reference, the AIFM shall give written notice of that change to the competent authorities of the Member State of reference.</p>
<i>Non-EU AIFM (WITHOUT Passport): National Private Placement Regimes (Art. 40)</i>	<p>Member States may allow non-EU AIFM to market to professional investors, on their territory only, shares or units of AIF they manage subject to at least to the following rules:</p> <p>(a) Compliance with certain transparency requirements under the Directive (annual report, disclosure to investors and competent authorities) in respect of each AIF marketed by the AIFM;</p> <p>(b) Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member State where the AIF is marketed, insofar applicable, the competent authorities of the EU AIF concerned and the supervisory authorities of the third country where the non-EU AIFM is established; and</p> <p>(c) The third country where the non-EU AIFM, and as the case may be, the non-EU AIF is established is not listed as Non-Cooperative</p>

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	<p>Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.</p> <p>We understand that no authorisation requirements would apply in such case.</p>
Marketing to retail investors (Art. 41)	Member States may allow AIFM to market AIFs they manage in accordance with the Directive to retail investors on their territory irrespective of whether the AIFs are marketed on a domestic or cross-border basis or whether they are EU- or non-EU based. In such cases Member States may impose stricter requirements on the AIF or the AIFM than the requirements applicable to the AIF marketed to professional investors on their territory (but in respect of AIF marketed cross-border not stricter than imposed on AIF marketed domestically).
Transitional provisions / Grandfathering (Art. 59) <i>Grandfathering</i>	<p>An EU AIFM managing and/or marketing EU AIFs and EU AIFM managing but not marketing non-EU AIFM before the final transposition date must adopt all necessary measures to comply with the Directive and shall submit an application for authorisation within one year of that date.</p> <p>EU AIFM marketing non-EU AIF and any non-EU AIFM managing EU AIF and/or marketing EU AIFs into the EU before the final transposition date shall adopt all necessary measures to comply with the Directive and shall submit an application for authorisation within one year of that date.</p> <p>Subject to grandfathering are:</p> <ol style="list-style-type: none"> a) AIFM insofar as they manage AIF of the closed-ended type before the final transposition date, which do not make any additional investments after this date may, however, continue to manage such AIF without authorisation under this Directive. b) AIFM insofar as they manage AIF of the closed-ended type whose subscription period for investors has closed prior to the entry into force of the Directive and are constituted for a period of time which expires at the latest three years after the final transposition date may, however, continue to manage such AIF without needing to comply with this Directive (except for certain transparency requirements) or to submit an application for authorisation under the Directive. The purpose of this rule is unclear as it does not seem to be of much relevance in practice.
2nd Level ESMA	Almost all of the requirements set forth in the Directive are subject to further details to be adopted by means of delegated acts by ESMA and/or by the commission.