



EUROPEAN PARLIAMENT

2009 - 2014

Committee on Legal Affairs

2009/0064(COD)

12.1.2010

DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on Economic and Monetary Affairs

on the proposal for a directive of the European Parliament and of the Council
on Alternative Investment Fund Managers and amending Directives
2004/39/EC and 2009/.../EC
(COM(2009)0207 – C7-0040/2009 – 2009/0064(COD))

Rapporteur (*): Evelyn Regner

(*) Associated committee – Rule 50 of the Rules of Procedure

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SHORT JUSTIFICATION

Background

The financial and economic crisis is laying bare the serious shortcomings in the regulation and supervision of financial markets. At present there is no balance between risk, on the one hand, and responsibility, and legal liability, on the other. The proposal for a directive under consideration here is intended to establish just such a balance between the risk inherent in the activities of investment funds and the responsibility they bear as a result.

On 30 April 2009, in response to a number of Parliament own-initiative reports and ever increasing public pressure, the Commission put forward a proposal for a directive on Alternative Investment Fund Managers which is designed to create a legal framework for all funds not covered by the UCITS Directive. This legal framework would provide the basis for a more effective, European solution to the problem of investment fund regulation by replacing the plethora of national rules currently applicable in this area. Although the mere fact that the Commission is taking action, and the approach it has chosen, are welcome, the proposal needs to be improved in certain key areas.

Rapporteur's position:

Your rapporteur would like to draw attention to a number of serious shortcomings in the Commission proposal:

(a) The proposal seeks to regulate fund managers, not funds themselves. Although this approach creates an impression of security, it fails to close a number of significant loopholes. What is more, managers of foreign funds who are not EU nationals would be able to invest in the EU without being registered or supervised.

(b) It is impossible to determine in advance, on the basis of threshold values, which firms are systemically important and which are not. As the current crisis shows, it only becomes clear whether a firm is systemically important when it fails. In addition, the threshold values create a loophole, since it would be an easy task to circumvent the limits by means of the purely formal division of a fund into smaller units.

(c) Although the rules governing transparency and oversight are welcome, your rapporteur still sees room for improvement. It is important that AIFMs should be forced to disclose their remuneration strategy and make clear that it is geared to sustainable business success. Reliable, transparent assessment procedures applicable throughout the EU are also essential. In cases where AIFMs are active in more than one country, the transfer of responsibility for oversight to a European authority makes sense.

(d) The way in which private equity funds use leveraged financing and transfer loans contracted in order to purchase firms to those firms themselves, in many cases jeopardising their survival, makes stricter rules to govern such funds essential. Against the background of the far-reaching implications of the purchase of a firm by a private equity fund, no exceptions should be made for SMEs in this respect.

Your rapporteur is keen to point out that the best means of making long-term business strategies more attractive is by strengthening employees' information and codetermination rights, combined with the corresponding changes to the law governing capital markets and companies such a step would imply.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive Title

Text proposed by the Commission

Proposal for a directive of the European Parliament and of the Council on Alternative Investment **Fund Managers** and amending Directives 2004/39/EC and 2009/.../EC

Amendment

Proposal for a directive of the European Parliament and of the Council on Alternative Investment **Funds and their managers** and amending Directives 2004/39/EC and 2009/.../EC

Or. de

Justification

It is the product 'alternative investment' itself which the directive should cover. This is consistent with the approach based on the identification in good time of financial transactions which may pose a systemic risk. With that aim in view, it is not enough simply to regulate marketing methods and managers.

Amendment 2

Proposal for a directive Article 3 – point j

Text proposed by the Commission

(j) 'Competent authorities' means the national authorities which are empowered by law or regulation to supervise AIFM;

Amendment

(j) 'Competent authorities' means the national authorities which are empowered by law or regulation to supervise AIFM. ***If an AIFM markets AIFs in more than three Member States, the competent authority shall be the European Securities***

Monitoring Authority;

Or. de

Justification

As soon as AIFMs start to operate in more than one country, national supervisory authorities can no longer provide adequate oversight. Since, unlike other financial market actors, few AIFs work exclusively in a given region, the transfer of responsibility to a European monitoring authority makes sense.

Amendment 3

**Proposal for a directive
Article 5 a (new)**

Text proposed by the Commission

Amendment

Article 5a

The ESMA shall maintain a central, public register containing the following items of information about every AIF and every AIFM:

- (a) a clear identifier;***
- (b) the name;***
- (c) the competent authority in the home Member State.***

For every AIF it shall also contain the names of:

- (a) the AIFM responsible;***
- (b) the depositary;***
- (c) the valuator.***

This electronic register shall be made accessible to the public on the Internet. AIFM or AIF may commence business operations only after all the information specified in this Article has been entered in the register and made public.

Or. de

Justification

Although company registers of this kind are normally kept at national level, it would run counter to the European nature of the regulatory approach if decentralised registers were to be set up.

In view of the plethora of supervisory authorities, there is a need to establish a list containing detailed information about AIF and AIFM. Such a list would make it easier for investors and supervisory authorities to locate documents submitted as part of the authorisation procedure and facilitate the identification of what may be mutually reinforcing risks in the portfolios held by different funds.

Amendment 4

Proposal for a directive

Article 16 – paragraph 1 – subparagraph 1

Text proposed by the Commission

AIFM shall ensure that, for each AIF that it manages, a valuator is appointed ***which is independent of the AIFM*** to establish the value of assets acquired by the AIF and the value of the shares and units of the AIF.

Amendment

AIFM shall ensure that, for each AIF that it manages, a ***certified*** valuator is appointed to establish, ***on the basis of statutory valuation guidelines***, the value of assets acquired by the AIF and the value of the shares and units of the AIF.

Or. de

Justification

Only uniform EU valuation procedures can be reliable and transparent. In addition, uniform EU criteria for rating independent valuers must also be laid down. Only by combining these two approaches can relatively reliable assessments of AIF portfolios be drawn up.

Amendment 5

Proposal for a directive

Article 16 – paragraph 4 – subparagraph 1

Text proposed by the Commission

The Commission shall adopt implementing measures further specifying the ***criteria under which a valuator can be considered independent*** in the meaning of paragraph 1.

Amendment

The Commission shall adopt implementing measures further specifying the ***conditions governing the certification of valuers and the principles underlying the valuation criteria*** in the meaning of paragraph 1.

Justification

Only uniform EU valuation procedures can be reliable and transparent. In addition, uniform EU criteria for rating independent valuers must also be laid down. Only by combining these two approaches can relatively reliable assessments of AIF portfolios be drawn up.

Amendment 6

**Proposal for a directive
Article 17 – paragraph 4**

Text proposed by the Commission

Amendment

(4) Depositaries may delegate their tasks to other depositaries. ***deleted***

Justification

If financial transactions are to be transparent, it is important that depositaries should carry out their allotted tasks themselves and not delegate them to third parties. It must be possible at all times to determine where the depositary is domiciled, otherwise Article 20(1)(d) of the proposal for a directive under consideration here would also become redundant.

Amendment 7

**Proposal for a directive
Article 20 – paragraph 1 – point j a (new)**

Text proposed by the Commission

Amendment

(ja) the AIFM's remuneration strategy.

Justification

Disclosure of an AIFM's remuneration strategy is vital to improving transparency (see also Article 10(1)(new)).

Amendment 8

Proposal for a directive

Article 20 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

When AIF are sold to pension funds attention must be drawn to the specific risks associated with this form of investment. In addition, in such cases the documents which must be issued to investors must also be made available to the holders of pension rights, their representatives or the expert advisers they have appointed.

Or. de

Justification

Pension funds have a particular responsibility, since they are increasingly being asked to perform public-service tasks in the form of the provision of old-age pensions for employees. For that reason, if they are allowed to invest in AIF at all special disclosure requirements are essential. In addition, steps should be taken to ensure that the primary investors, i.e. the holders of pension rights, are not deprived of vital information they need to monitor the actions of their asset manager and/or pension fund.

Amendment 9

Proposal for a directive

Article 22

Text proposed by the Commission

Amendment

This section shall apply only to ***AIFM which manage one or more AIF*** employing high levels of leverage on a systematic basis.

AIFM shall assess on a quarterly basis whether the AIF employs high levels of leverage on a systematic basis and shall inform the competent authorities accordingly.

For the purposes of the second subparagraph, an AIF shall be deemed to employ high levels of leverage on a

This section shall apply only to ***AIF*** employing high levels of leverage on a systematic basis ***and AIFM which manage one or more such AIF.***

AIF and AIFM shall assess on a quarterly basis whether the AIF employs high levels of leverage on a systematic basis and shall inform the competent authorities accordingly.

For the purposes of the second subparagraph, an AIF shall be deemed to employ high levels of leverage on a

systematic basis where the combined leverage from all sources exceeds the value of the equity capital of the AIF ***in two out of the past four*** quarters.

systematic basis where the combined leverage from all sources exceeds the value of the equity capital of the AIF ***on more than three trading days in two preceding*** quarters.

Or. de

Justification

It is the product 'alternative investment' itself which the directive should cover. This is consistent with the approach based on the identification in good time of financial transactions which may pose a systemic risk. With that aim in view, it is not enough simply to regulate marketing methods and managers.

Leverage represents an amount of money and can therefore be calculated only at a given moment, not over a period of time.

Amendment 10

Proposal for a directive Article 25 – paragraph 2

Text proposed by the Commission

(2) Home Member States shall ensure that all information received under Article 24, aggregated in respect of all AIFM that it supervises, are made available to other competent authorities through the procedure set out in Article 46 on supervisory co-operation. It shall, without delay, also provide information through this mechanism, and bilaterally to other Member States directly concerned, if an AIFM under its responsibility could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institution in other Member States.

Amendment

(2) Home Member States shall ensure that all information received under Article 24, aggregated in respect of all ***AIF and*** AIFM that it supervises, are made available to other competent authorities, ***the European Committee on Systemic Risks and the ESMA*** through the procedure set out in Article 46 on supervisory co-operation. It shall, without delay, also provide information through this mechanism, and bilaterally to other Member States directly concerned, if an ***AIF and*** AIFM under its responsibility could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institution in other Member States.

Or. de

Justification

If uniform assessment of the implications of the leverage employed is to be possible, a transparent calculation method must be established at European level. The new European

agencies must be involved in this process.

Amendment 11

Proposal for a directive

Article 25 – paragraph 3 – subparagraph 1

Text proposed by the Commission

In order to ensure the stability and integrity of the financial system, the Commission shall adopt implementing measures setting limits to the level of leverage AIFM can employ. These limits should take into account, inter alia, the type of AIF, their strategy and the sources of their leverage.

Amendment

In order to ensure the stability and integrity of the financial system, the Commission shall adopt implementing measures setting limits to the level of leverage ***AIF and*** AIFM can employ. These limits should take into account, inter alia, the type of AIF, their strategy, ***their volume of business*** and the sources of their leverage. ***In that connection, the level of leverage may not exceed five times the own capital employed and the own capital requirements may on no account be lower than for credit institutions.***

Or. de

Justification

The limits on leverage should be stricter the larger the AIF is. In order to rule out systemic risks, the level of leverage must be capped on the basis of the amount of own capital employed. In order to prevent circumvention of the rules, uniform provisions laying down own capital requirements for the financial sector as a whole are needed.

Amendment 12

Proposal for a directive

Article 25 – paragraph 4

Text proposed by the Commission

(4) In exceptional circumstances and when this is required in order to ensure the stability and integrity of the financial system, the competent authorities of the home Member State may impose additional limits to the level of leverage that AIFM can employ. Measures taken by the competent authorities of the home Member

Amendment

(4) In exceptional circumstances and when this is required in order to ensure the stability and integrity of the financial system, the competent authorities of the home Member State may impose additional limits to the level of leverage that AIFM ***and AIF*** can employ. Measures taken by the competent authorities of the home

States shall have a temporary nature and should comply with the provisions adopted by the Commission pursuant to paragraph 3.

Member States shall have a temporary nature and should comply with the provisions adopted by the Commission pursuant to paragraph 3.

Or. de

Justification

It is the product 'alternative investment' itself which the directive should cover. This is consistent with the approach based on the identification in good time of financial transactions which may pose a systemic risk. With that aim in view, it is not enough simply to regulate marketing methods and managers.

Amendment 13

Proposal for a directive Article 26 – paragraph 1 – point a

Text proposed by the Commission

(a) AIFM managing one or more AIF which either individually or in aggregation acquires 30 % or more of the voting rights of an issuer or of a non-listed company domiciled in the Community, as appropriate;

Amendment

(a) AIFM exercising, on the basis of the equity interests or other interests held by one or more AIF they manage, a dominant influence over an issuer or over a non-listed company. At all events, the acquisition of more than 25% of the voting rights shall be deemed to constitute a dominant influence;

Or. de

Justification

A leveraged buy-out often has serious consequences for the firm concerned, and above all for its employees. The threshold triggering regulation of private equity funds must therefore be correspondingly lower. The rules must also cover situations involving the indirect exercise of a dominant influence.

Amendment 14

Proposal for a directive Article 26 – paragraph 1 – point b

Text proposed by the Commission

(b) AIFM having concluded an agreement

Amendment

(b) AIFM having concluded an agreement

with one or more other AIFM which would allow the AIF managed by these AIFM to **acquire 30 % or more of the voting rights** of the issuer or the non-listed company, as appropriate.

with one or more other AIFM which would allow the AIF managed by these AIFM to **exercise, on the basis of equity interests or other interests, a dominant influence over** the issuer or the non-listed company, as appropriate. **At all events, the acquisition of more than 25% of the voting rights shall be deemed to constitute a dominant influence;**

Or. de

Justification

A leveraged buy-out often has serious consequences for the firm concerned, and above all for its employees. The threshold triggering regulation of private equity funds must therefore be correspondingly lower. The rules must also cover situations involving the indirect exercise of a dominant influence.

Amendment 15

Proposal for a directive

Article 26 – paragraph 1 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

In every case AIFM shall be deemed to control the AIF they manage and their subfunds.

Or. de

Justification

A leveraged buy-out often has serious consequences for the firm concerned, and above all for its employees. The threshold triggering regulation of private equity funds must therefore be correspondingly lower. The rules must also cover situations involving indirect control.

Amendment 16

Proposal for a directive Article 26 – paragraph 2

Text proposed by the Commission

Amendment

(2) This section shall not apply where the issuer or the non-listed company concerned are small and medium enterprises that employ fewer than 250 persons, have an annual turnover not exceeding 50 million euro and/or an annual balance sheet not exceeding 43 million euro. **deleted**

Or. de

Justification

Any move to exempt investment in SMEs from regulation should be rejected, since in some Member States a majority of leveraged buy-outs concern firms which fall below the thresholds indicated, so that a majority of the transactions in question would continue to be excluded from the scope of the rules on oversight. In addition, employees of firms which fall below the SME threshold must also be provided with information, in keeping with the principles underpinning the directive on the information and consultation of workers (2002/14/EC).

Amendment 17

Proposal for a directive Article 27 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Amendment

Member States shall ensure that when an AIFM **is in a position to exercise 30% or more of the voting rights of** a non-listed company, such AIFM notifies **the non-listed company and** all other share-holders the information provided in paragraph 2.

Member States shall ensure that when an AIFM **secures a dominant influence over** a non-listed company, such AIFM notifies all other share-holders the information provided in paragraph 2.

Or. de

Justification

As regards the changes to the thresholds, see justification for the amendment to Article 26. AIF should also be covered by the provisions of the directive.

Amendment 18

Proposition de directive

Article 27 – paragraph 1 – subparagraph 2

Text proposed by the Commission

This notification shall be made, as soon as possible, but not later than four **trading** days the first of which being the day on which **the** AIFM has reached the position of being able to exercise **30% of the voting rights**.

Amendment

This notification shall be made, as soon as possible, but not later than four **working** days the first of which being the day on which **an** AIFM has reached the position of being able to exercise **a dominant influence**.

Or. de

Justification

As regards the changes to the thresholds, see justification for the amendment to Article 26. AIF should also be covered by the provisions of the directive.

Amendment 19

Proposal for a directive

Article 28 – paragraph 1 – subparagraph 1

Text proposed by the Commission

In addition to Article 27, Member States shall ensure that where an AIFM **acquires 30% or more of the voting rights of** an issuer or a non-listed company, that AIFM makes the information set out in the second and third subparagraphs available to the issuer, the non-listed company, their respective shareholders and representatives of employees or, where there are no such representatives, to the employees themselves.

Amendment

In addition to Article 27, Member States shall ensure that where an AIFM **secures a dominant influence over** an issuer or a non-listed company, that AIFM makes the information set out in the second and third subparagraphs available to the issuer, the non-listed company, their respective shareholders and representatives of employees or, where there are no such representatives, to the employees themselves.

Or. de

Justification

Consensus-based agreements between investors and employees can only be achieved if those employees can obtain information from persons who are also authorised to conduct

negotiations concerning the continued existence of the firm and its future strategy. In order to reduce the uncertainty surrounding the relevant negotiating partners during transfers of ownership, the requirements concerning the provision of information to employees must be broadened. When it comes to such transfers, AIFM should be treated in the same way as any other firm.

Amendment 20

Proposal for a directive

Article 28 – paragraph 1 – subparagraph 2 – point b

Text proposed by the Commission

(b) the policy for preventing and managing conflicts of interests, in particular between the AIFM and the issuer;

Amendment

(b) the policy for preventing and managing conflicts of interests, in particular between the **AIF or** AIFM and the issuer;

Or. de

Justification

Consensus-based agreements between investors and employees can only be achieved if those employees can obtain information from persons who are also authorised to conduct negotiations concerning the continued existence of the firm and its future strategy. In order to reduce the uncertainty surrounding the relevant negotiating partners during transfers of ownership, the requirements concerning the provision of information to employees must be broadened. When it comes to such transfers, AIFM should be treated in the same way as any other firm.

Amendment 21

Proposal for a directive

Article 28 – paragraph 1 – subparagraph 3 – introductory wording

Text proposed by the Commission

With regard to non-listed companies, the AIFM shall make available the following to the non-listed company concerned, its shareholders and representatives of employees:

Amendment

With regard to non-listed companies, the **AIF or** AIFM shall make available the following to the non-listed company concerned, its shareholders and representatives of employees:

Or. de

Justification

Consensus-based agreements between investors and employees can only be achieved if those employees can obtain information from persons who are also authorised to conduct negotiations concerning the continued existence of the firm and its future strategy. In order to reduce the uncertainty surrounding the relevant negotiating partners during transfers of ownership, the requirements concerning the provision of information to employees must be broadened. When it comes to such transfers, AIFM should be treated in the same way as any other firm.

Amendment 22

Proposal for a directive

Article 28 – paragraph 1 – subparagraph 3 – point d

Text proposed by the Commission

(d) the identity of the AIFM which either individually or in agreement with other AIFM have ***reached the 30 % threshold***;

Amendment

(d) the identity of the ***AIF and*** AIFM which either individually or in agreement with other ***AIF or*** AIFM have ***secured a dominant influence***;

Or. de

Justification

Consensus-based agreements between investors and employees can only be achieved if those employees can obtain information from persons who are also authorised to conduct negotiations concerning the continued existence of the firm and its future strategy. In order to reduce the uncertainty surrounding the relevant negotiating partners during transfers of ownership, the requirements concerning the provision of information to employees must be broadened. When it comes to such transfers, AIFM should be treated in the same way as any other firm.

Amendment 23

Proposal for a directive

Article 28 – paragraph 1 – subparagraph 3 – point f

Text proposed by the Commission

(f) the policy for preventing and managing conflicts of interests, in particular between the AIFM and the non-listed company;

Amendment

(f) the policy for preventing and managing conflicts of interests, in particular between the ***AIF or*** AIFM and the non-listed company;

Justification

Consensus-based agreements between investors and employees can only be achieved if those employees can obtain information from persons who are also authorised to conduct negotiations concerning the continued existence of the firm and its future strategy. In order to reduce the uncertainty surrounding the relevant negotiating partners during transfers of ownership, the requirements concerning the provision of information to employees must be broadened. When it comes to such transfers, AIFM should be treated in the same way as any other firm.

Amendment 24**Proposal for a directive****Article 28 – paragraph 1 – subparagraph 3 – point g a (new)***Text proposed by the Commission**Amendment*

(ga) the person or persons authorised to conclude legally binding agreements relating to business strategy and employment policy.

Justification

Consensus-based agreements between investors and employees can only be achieved if those employees can obtain information from persons who are also authorised to conduct negotiations concerning the continued existence of the firm and its future strategy. In order to reduce the uncertainty surrounding the relevant negotiating partners during such transfers, the requirements concerning the provision of information to employees must be broadened. When it comes to such transfers, AIFM should be treated in the same way as any other firm.

Amendment 25**Proposal for a directive****Article 28 – paragraph 1 – subparagraph 3***Text proposed by the Commission**Amendment*

In every case the securing of a dominant influence shall constitute a transfer within the meaning of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member

*States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses¹.
OJ L 82, 22.3.2001, p. 16.*

Or. de

Amendment 26

Proposal for a directive Article 30

Text proposed by the Commission

Where, following *an acquisition of 30 % or more of the voting rights of* an issuer, the shares of that issuer are no longer admitted to trading on a regulated market, it shall nevertheless continue to comply with its obligations under Directive 2004/109/EC for two years from the date of withdrawal from the regulated market.

Amendment

Where, following *the securing of a dominant influence over* an issuer, the shares of that issuer are no longer admitted to trading on a regulated market, it shall nevertheless continue to comply with its obligations under Directive 2004/109/EC for one year from the date of withdrawal from the regulated market.

Or. de

Amendment 27

Proposal for a directive Article 32 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Member States may allow the marketing of AIF to retail investors in their territory.

Amendment

Member States may allow the marketing of AIF to retail investors in their territory *on the basis of a minimum investment of EUR 50 000.*

Or. de

Justification

It has become clear that not even professional investors were and are in a position to assess correctly the levels of risk in their portfolios. The introduction of a threshold value, and the message such a provision sends out, is intended to prevent alternative investment funds being

marketed as a safe alternative to a savings account.

Amendment 28

Proposal for a directive

Article 32 – paragraph 2 – subparagraph 1

Text proposed by the Commission

Member States that permit the marketing of AIF to retail investors on their territory, shall, within one year of the date referred to in Article 54(1) inform the Commission of:

Amendment

Member States that permit the marketing of AIF to retail investors on their territory, ***on the basis of a minimum investment of EUR 50 000***, shall, within one year of the date referred to in Article 54(1) inform the Commission ***and the ESMA*** of:

Or. de

Justification

It has become clear that not even professional investors were and are in a position to assess correctly the levels of risk in their portfolios. The introduction of a threshold value, and the message such a provision sends out, is intended to prevent alternative investment funds being marketed as a safe alternative to a savings account.

Amendment 29

Proposal for a directive

Article 32 – paragraph 2 – subparagraph 2

Text proposed by the Commission

Member States shall also inform the Commission of any subsequent changes with regard to the first subparagraph.

Amendment

Member States shall also inform the Commission ***and the ESMA*** of any subsequent changes with regard to the first subparagraph.

Or. de

Justification

It has become clear that not even professional investors were and are in a position to assess correctly the levels of risk in their portfolios. The introduction of a threshold value, and the message such a provision sends out, is intended to prevent alternative investment funds being marketed as a safe alternative to a savings account.

