

## AIFMD

Directive 2011/61/EU of the European Parliament and the Council **on alternative investment funds managers** (the “Directive”)

### 1. Overview

#### **Objective**

The AIFMD aims to create a harmonised regulation framework for alternative funds distributed in the EU.

The AIFMD has the objective of regulating the alternative investment fund managers and the distribution of AIFs in the European Union in order to ensure investor protection and avoid systemic risk.

#### **Scope**

The AIFMD applies to:

- EU AIFMs managing AIFs, irrespective of their country of domiciliation (EU AIFs or non-EU AIF)
- non-EU AIFMs managing EU AIFs
- non-EU AIFMs which market their AIFs in the EU

#### **Key topics covered by the Level 1 (Directive)**

With an objective of harmonisation, the Directive covers key topics:

- authorisation
- capital requirements
- delegation of duties to third parties,
- use of leverage funds,
- valuation requirements by the investment manager itself or by an outside expert,
- conduct of business,
- remuneration policies
- reporting to National Competent Authorities,
- marketing provisions and rules in relation to third countries
- depositary provisions
- passport

#### **Depositary provisions**

For each AIF it manages, an AIF must mandate a depositary who must be subject to a supervisory authority. The Directive includes requirements for firms acting as depositary of AIFs:

- eligible depositary: an EU credit institution, an EU Investment company or a UCITS depositary
- depositary liability regime: the Directive clearly establishes the principle of liability of the depositary with regard to the fund managed in the event of loss of the assets under management, thus obliging the custodian to return identical assets or the cash value of these assets to the fund managed, with the exception of an external event beyond reasonable control;

#### **Passport**

The Directive creates a passport for European fund managers effective as of the application date in 2013.

It should be noted the passport granted by the Directive only allows marketing within the EU for investors that are at least professionals (in reference to the terminology of the MiFID).

On 30 July 2015, ESMA published an opinion on the extension of the passport to non-EU fund managers recommending that the passport been extended to Guernsey, Jersey and Switzerland (subject to conditions for Switzerland). ESMA will extend the passport on a country-by-country basis.

The timing for the extension of the passport to non-EU AIFs and AIFMs is uncertain. The Commission has the power to adopt a delegated act which would extend the passport to non-EU AIFMs. If it does so, a delegated act will have to be adopted.

Until the passport is extended, EU AIFMs who manage non-EU AIFs and non-EU AIFMs who manage non-EU AIFs may continue to use national private placement regimes (“NRPPs”) as it is the sole regime available.

The Timing for termination of “NRPPs” is uncertain. The Commission has the power to adopt a delegated act that would specify the date on “NRPPs” are to terminate if it has received a positive opinion in this regard from ESMA.

**Key topics covered by the Level 2:** calculation of assets under management, method used to calculate leverage, level of additional capital, operating requirements applicable to managers, delegation of financial management duties, risk management, liquidity management, depositaries' responsibilities and reporting requirements

## 2. Chronology of events: key dates

- ✓ 1st July 2011: Directive published in OJ
- ✓ 21 July 2011: Directive entered into force
- ✓ 19 December 2012: Level 2 Regulation published in OJ, applicable on the same date
- ✓ 22 July 2013: Entry into application of the Directive (deadline for transposition), Level 2 applicable on the same date
- ✓ 22 July 2014: Deadline for (existing) AIFM to be compliant with AIFMD
- ✓ 8 October 2014: ESMA's guidelines on reporting obligations under AIFMD apply
- ✓ 30 October 2018: Amendments of Level 2 on safekeeping duties of depositaries
- ✓ 10 January 2020: Publication of KPMG report, mandated by the European Commission, on the functioning of AIFMD. AIFMD provisions are assessed as having achieved their main objectives. Some areas will require further analysis such as diverging interpretations rules by National Authorities and some overlap in reporting requirements with other European rules
- ✓ 1st April 2020: Entry into application of the new safekeeping duties of depositaries: Delegated Regulation 2018/1618
- ✓ 10 June 2020: Publication by the European Commission of its own [report](#) (10 pages) on the functioning of the AIFMD for the co-legislators (the Council and the Parliament) on the impact of the Directive on AIFs, AIFMs and investors. This report confirmed that the objectives of AIFMD have been achieved.
- ✓ 18 August 2020: ESMA sent [a letter](#) to the Commission to recommend topics to prioritize in AIFM review such as the harmonization of AIFMD and UCITS regime, delegation and substance, liquidity management tools, leverage, the AIFMD reporting regime and data use, the harmonization of supervision of cross-border entities and the study of benefits and risks of a depositary passport.
- ✓ 22 October 2020: The Commission launched a [consultation](#) on the review of AIFMD. The consultation focused on the following 7 areas:
  - I. Functioning of the AIFMD regulatory framework, scope and authorisation requirements
  - II. Investor protection
    - a) investor classification and investor access
    - b) depositary regime
    - c) transparency and conflicts of interest
    - d) valuation rules
  - III. International relations
  - IV. Financial stability
    - a) macroprudential tools
    - b) supervisory reporting requirements
    - c) leverage
  - V. Investing in private company
  - VI. Sustainability / ESG
  - VII. Miscellaneous
- ✓ Answers to the consultation were required by 29 January 2021.

- ✓ **25 November 2021: The European Commission published on a proposal amending AIFM Directive (Directive 2011/61/EU)**, notably based notably on the analysis of the answers to the public consultation on the functioning of this directive that closed on 29 January 2021.

The AIFM Directive has reached its objectives of creating an internal market for AIFS, nevertheless targeted improvements are proposed to improve the Directive's effectiveness in the following areas:

- Clarify delegation rules,
- Harmonise liquidity management tools,
- Improve the level of data gathered through regulatory reporting,
- Include Central Securities Depositories (CSDs) in the custody chain,
- Harmonise requirements for AIFMs active in the direct lending space,
- Improve the supply of depositary services in European small markets.

**The European Commission also recommended amending the UCITS Directive (Directive 2009/65/EC) specifically regarding delegation, liquidity risk management, data reporting and regulatory treatment of CSDs.**

- ✓ **Next steps:**
  - **The European Commission's proposal is now under review of the European institutions, Parliament and Council.**
  - **Once adopted by the EU co-legislators, Member States will have 24 months for transposition in local law.**

Links to the documents published by the Commission:

- the press release ([here](#))
- the proposal amending AIFMD et UCITS Directives ([here](#)) and the annexes ([here](#))
- the impact Assessment accompanying the proposal ([here](#)) and its summary ([here](#))

## 10 Reference texts

[Level 1 Directive](#)

[Level 2 Regulation](#)

[Amendments of Level 2](#)