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Update

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Amendments to the Directive on Alternative Investment Fund Managers (“AIFMD”)

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As part of the package of measures to implement the Capital Markets Union, the European Commission released on 25 November 2021 a [Proposal for a Directive](#) (“**Proposal**”) amending [Directive 2011/61/EU](#) (“**AIFMD Directive**”) on Alternative Investment Fund Managers (“AIFMD” and “AIF” respectively).

The Proposal introduces amendments regarding the activities that can be undertaken by AIFM, outsourcing or delegation of functions, liquidity risk management, depositary services and loan origination by AIF.

1. Activities and Services

Under the Proposal, the activities that may be carried out and the services that may be provided by AIFM are extended by adding originating loans and servicing securitisation special purpose entities (Annex I, points 3 and 4), as well as benchmark administration and credit servicing (Article 6(4)).

2. Human Resources

For the effective management of the AIFM the minimum of two persons of sufficiently good repute and sufficiently experience is maintained. However, it is proposed that they must be resident in the Union, full-time employees or, if they have no employment relationship with the AIFM, commit to conduct the business of the AIFM on a full-time basis (Article 8(1)(c)).

The Commission proposes to further detail the information that must be included in the authorisation process of AIFMs in their home Member State (Article 7(2)), including:

- a) For the persons who effectively direct the business of the AIFM, a detailed description of their role, title and level of seniority, the reporting lines and responsibilities in the AIFM and outside the AIFM, the time allocated to each responsibility and the technical and human resources that support their activities;
- b) Within the programme of activities with the organisational structure (our "governance manual"), a detailed description of the human and technical resources that will be used by the AIFM in its activity and in supervising the activity of the outsourced entities.

It should be noted that these amendments have little impact on the Portuguese legal system, as CMVM Regulation no. 2/2015 already required that information in its Annex A (elements and instructive information relating to the application for authorisation of UCITS Managers).

3. Delegation

To protect investors in cross-border activity, the Commission proposes that the Member State competent authorities report to ESMA annually on situations where AIFM delegate more investment management and risk management functions to third country entities than they retain ("delegation notifications") (Article 7(5) and (8)). Also, with regards to delegation of functions, it is proposed to clarify that the delegation provisions apply not only to all functions listed in Annex I of the AIFMD, but also to ancillary services permitted.

4. Depositary

Also noteworthy are the proposals on custody services. The major disappointment is the absence of a proposal for a European passport for depositaries. In any event, the Commission proposes, on the one hand, that the competent authorities of the Member States should be able to authorise a depositary to have its head office in a country other than the AIF's home Member State, so that, with greater competition, greater cost and structural efficiency can be promoted (Article 61(5)). On the other hand, it proposes to bring central securities depositories in the custody chain, without burdening the depositaries with due diligence requirements in the process of delegating these entities, given the fact that they are supervised (Article 21(11)(c)). In fact, currently, as the central securities depositories are not considered as delegated entities by the depositaries, they face difficulties in accessing the necessary information for the full compliance with their duties.

5. Loan origination activities

The Proposal also introduces specific rules for the managers of loan originating AIFs - the equivalent of our specialised alternative investment undertakings for credit (OIAEs for credit) - in order to reduce systemic risk to the financial system arising from the activity of these AIFM, protect the value of the investment and reduce liquidity pressure. Firstly, we highlight the proposal to standardise liquidity instruments at European Union level, through an Annex V to AIFMD, which lists the different liquidity management tools that can be used by AIFM (temporary suspension on redemptions, minimum period between redemption request and financial settlement, redemption fees, periods of suspension of subscriptions and redemptions, swing pricing, anti-dilution levy, redemptions in kind and side pockets), and the activation and deactivation of these instruments must be reported to the competent authorities. As regards risk management, the Commission proposes that managers of loan-originating AIFs develop and implement up to date and effective policies, procedures and processes for the granting of credit, the assessment of credit risk and the administering and monitoring of the credit portfolio, to be reviewed at least annually (Article 15(3)(d)). It is further proposed that the loan granted to a single borrower by the AIF may not exceed 20% of the total capital of the AIF, where the borrower is a financial undertaking or an AIF (Article 15(4a)). The Proposal also includes rules to prevent potential conflicts of interest by prohibiting the granting of loans by an AIF to its AIFM, the staff of the AIFM, the AIFM's depositary or its delegated by the AIFM to perform this function (Article 15(4d)). In this regard, the Commission proposes that the AIFM ensure that the AIF retain, on an ongoing basis, 5% of the notional value of the loans they have granted and sold off (not bought on the secondary market) and subsequently sold on the secondary market (Article 15(4e)). In respect of liquidity management, where AIFM are generally required to ensure consistency of investment strategy, liquidity profile and redemption policy with respect to each AIF they manage, it is proposed that only close-ended AIF may engage in significant loan origination (i.e. with a total notional amount exceeding 60% of the net asset value); that AIFM adopt at least one liquidity management tool (which may be redemption gates, notice periods and redemption fees); and that AIFM managing open-ended AIFs may, in justified circumstances, in the interest of investors and in accordance with the terms provided for in their instruments of incorporation, activate the liquidity management tools set out in Annex V of the AIFMD.

6. Reporting obligations

The proposal also results in an extension of disclosure obligations which AIFM must ensure for transparency purposes, namely the conditions for the use of liquidity management facilities, the fees and charges which will be borne by the AIFM or its affiliates, the AIF or any of their

investments, the composition of the originated loan portfolio, the identification of the parent, subsidiary or special purpose vehicle (SPV) in relation to the investments in the AIF made by the AIFM, its employees or directors or affiliates (Article 23), and the instruments and markets in which it trades on behalf of the AIF it manages (Article 24).

Finally, the Proposal updates the requirements for third country entities not to be incorporated in jurisdictions identified as high-risk countries in accordance with the latest European money laundering legislation (Articles 21(6)(c), 35(2)(b), 36(1)(c), 37(7)(e), 40(2)(b) and 42(1)(c)).

The proposal has already been submitted to the Council of the European Union for discussion, followed by possible consideration and approval by the European Parliament.