

Amendments made to Level 1 text of AIFMD

Articles 12, 24 and 46

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Article 12 General principles

1. Member States shall ensure that, at all times, AIFMs:
 - (a) act honestly, with due skill, care and diligence and fairly in conducting their activities;
 - (b) act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
 - (c) have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities;
 - (d) take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated;
 - (e) comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
 - (f) treat all AIF investors fairly.

No investor in an AIF shall obtain preferential treatment, unless such preferential treatment is disclosed in the relevant AIF's rules or instruments of incorporation..

1a. For the purpose of paragraph 1, Member States shall require AIFMs to act in such a way as to prevent undue costs from being charged to the AIFs and its unitholders.

The costs which comply with the following conditions shall be regarded as due:

- (a) The costs are in line with disclosures in the prospectus referred to in Article 23(3), the fund rules or instruments of incorporation as referred to in Article 23(1) and the key information document referred to in Article 5(1) of Regulation (EU) No 1286/2014;**
- (b) The costs are necessary for the AIF to operate in line with its investment strategy and objective or to fulfil regulatory requirements.**
- (c) The costs are borne by investors in a way that ensures fair treatment of investors, except for cases mentioned in Article 12 (1) where AIF rules or instruments of incorporation provide for a preferential treatment.**

1b. Member States shall require AIFMs to maintain, operate and review an effective pricing process that allows for the identification and quantification of all costs borne by the AIFs or their unitholders. This pricing process shall ensure that the following conditions are fulfilled:

- (a) the costs are not undue; and**
- (b) the costs borne by retail investors are justified and proportionate, having regard to the characteristics of the AIF, including its investment objective, strategy, expected returns, level of risks and other relevant characteristics.**

1c. Member States shall ensure that AIFMs are responsible for the effectiveness and quality of their pricing process. The pricing process shall be clearly documented, shall clearly set out the responsibilities of the management bodies of the AIFM in determining and reviewing the costs borne by investors, and shall be subject to periodic review. The assessment of costs shall be based on objective criteria and methodology, including a comparison to market standards.

1d. Member States shall require AIFMs to assess at least annually whether undue costs have been charged to AIF or its unit holders.

Member States shall require AIFMs to reimburse investors where undue costs have been charged to the AIF or its unit-holders.

Member States shall require AIFMs to report to the competent authorities, of their home Member State, to the competent authority of the home Member State of the AIF, where applicable, to the depositary and to the financial auditors of the AIFMs and the AIF, where applicable, situations where undue costs have been charged to the AIF or its unit-holders.

1e. Member States shall require AIFMs to assess at least annually the conditions mentioned in paragraph 1b, point (b). The assessment shall take into account the criteria set out in the pricing process and, for AIFs marketed to retail investors, include a comparison with the relevant benchmark on costs and performance published by ESMA in accordance with paragraph 1f.

When an AIF or its share classes, when they have different cost structures, deviate from the benchmark referred to in paragraph 1f, the AIFM shall perform additional testing and further assessments and establish whether costs and charges are nevertheless justified and proportionate. If justification and proportionality of costs and charges cannot be demonstrated, or if the AIF or its share classes do not comply with other criteria set out by the AIFM in the pricing process, that AIF or its share class shall not be marketed to retail investors by the AIFM.

1f. After having consulted EIOPA and competent authorities, ESMA shall, where appropriate, develop and make publicly available benchmarks to enable the comparative assessment of costs and performance of AIFs, or their share classes where they have different cost structures, to be used for the assessment set out in paragraph 1e.

Common benchmarks shall be developed, where it is feasible to do so, for AIFs, or their share classes where they have different cost structures, marketed to retail investors that present similar levels of performance, risk, strategy, objectives, or other characteristics.

These benchmarks shall display a range of costs and performance, especially cases where costs and performance depart significantly from the average. The benchmarks shall be updated on a regular basis.

2. Each AIFM the authorisation of which also covers the discretionary portfolio management service referred to in point (a) of Article 6(4) shall:

- (a) not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client;
- (b) with regard to the services referred to in Article 6(4), be subject to Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the criteria to be used by the relevant competent authorities to assess whether AIFMs comply with their obligations under paragraph 1 and measures to ensure that the AIFM complies with the duties set out in paragraphs 1 to 1e of this Article, in particular to:

(a) specify the minimum requirements for the pricing process to prevent undue costs from being charged to the AIF and its unit-holders, in particular, by:

- (i) ensuring that costs are correctly identified and quantified, and comply with the condition set out in paragraph 1a, point (a);
- (ii) identifying which costs can be charged to the AIF and its unit-holders taking into account the level of the costs and the nature of the costs by reference to a list of eligible costs that meet the conditions set out in paragraph 1a, points (b) and (c), and the conditions under which competent authorities may authorise on a case-by-case basis costs which are not included in the list of eligible costs but that meet the conditions set out in paragraph 1a, points (b) and (c);
- (iii) identifying potential conflict of interests and measures to mitigate the occurrence of conflicts of interest.
- (iv) establishing a procedure to determine the level of compensation in case undue costs have been charged to investors.

(b) provide for criteria to determine whether costs are justified and proportionate in accordance with paragraph 1b, point (b) and for taking corrective measures mentioned in paragraph 1e and specify the methodology used by ESMA to develop its benchmarks.

4. By [five years after the start of application of this amending Directive], after consulting ESMA, the Commission shall submit a report to Council and Parliament on the implementation of this Article. The report shall evaluate at least the following:

(a) whether this Article has had a positive impact on the costs and performance of AIF offered to retail investors and to which extent;

(b) whether the assessment set out in paragraph 1e is proportionate in terms of complexity and costs incurred by AIFMs.

Article 24 Reporting obligations to competent authorities

1. An AIFM shall regularly report to the competent authorities of its home Member State on the principal markets and instruments in which it trades on behalf of the AIFs it manages. It shall provide information on the main instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of each of the AIFs it manages.
2. An AIFM shall, for each of the EU AIFs it manages and for each of the AIFs it markets in the Union, provide the following to the competent authorities of its home Member State:
 - (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
 - (b) any new arrangements for managing the liquidity of the AIF;
 - (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
 - (d) information on the main categories of assets in which the AIF invested; and
 - (e) the results of the stress tests performed in accordance with point (b) of Article 15(3) and the second subparagraph of Article 16(1).
 - (f) information on the costs borne by investors and performance of the AIF, at the level of each AIF or at the level the AIF's share classes where those share classes have different cost structures.**
3. The AIFM shall, on request, provide the following documents to the competent authorities of its home Member State: (a) an annual report of each EU AIF managed by the AIFM and of each AIF marketed by it in the Union, for each financial year, in accordance with Article 22(1); (b) for the end of each quarter a detailed list of all AIFs which the AIFM manages.
4. An AIFM managing AIFs employing leverage on a substantial basis shall make available information about the overall level of leverage employed by each AIF it manages, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and the extent to which the AIF's assets have been reused under leveraging arrangements to the competent authorities of its home Member State.

That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIFs managed by the AIFM, and the amounts of leverage received from each of those sources for each of those AIFs.

For non-EU AIFMs, the reporting obligations referred to in this paragraph are limited to EU AIFs managed by them and non-EU AIFs marketed by them in the Union.

5. Where necessary for the effective monitoring of systemic risk, the competent authorities of the home Member State may require information in addition to that described in this Article, on a periodic as well as on an ad-hoc basis. The competent authorities shall inform ESMA about the additional information requirements.

In exceptional circumstances and where required in order to ensure the stability and integrity of the financial system, or to promote long-term sustainable growth, ESMA may request the competent authorities of the home Member State to impose additional reporting requirements.

6. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:
 - (a) when leverage is to be considered to be employed on a substantial basis for the purposes of paragraph 4; and
 - (b) the obligations to report and provide information provided for in this Article.

Those measures shall take into account the need to avoid an excessive administrative burden on competent authorities.

Article 46 Powers of competent authorities

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Such powers shall be exercised in any of the following ways:
 - (a) directly;
 - (b) in collaboration with other authorities;
 - (c) under their responsibility by delegation to entities to which tasks have been delegated;
 - (d) by application to the competent judicial authorities.
2. The competent authorities shall have the power to:
 - (a) have access to any document in any form and to receive a copy of it;
 - (b) require information from any person related to the activities of the AIFM or the AIF and if necessary to summon and question a person with a view to obtaining information;
 - (c) carry out on-site inspections with or without prior announcements;
 - (d) require existing telephone and existing data traffic records;
 - (e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
 - (f) request the freezing or the sequestration of assets;
 - (g) request the temporary prohibition of professional activity;
 - (h) require authorised AIFM, depositaries or auditors to provide information;
 - (i) adopt any type of measure to ensure that AIFMs or depositaries continue to comply with the requirements of this Directive applicable to them;
 - (j) require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;
 - (k) withdraw the authorisation granted to an AIFM or a depositary;
 - (l) refer matters for criminal prosecution;
 - (m) request that auditors or experts carry out verifications or investigations.
 - (n) require to compensate investors where undue costs have been charged to the AIF or its unit-holders.**
3. Where the competent authority of the Member State of reference considers that an authorised non-EU AIFM is in breach of its obligations under this Directive, it shall notify ESMA, setting out full reasons as soon as possible.
4. Member States shall ensure that the competent authorities have the powers necessary to take all measures required in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIFs in the market for a financial instrument could jeopardise the orderly functioning of that market.