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INFORMATION NOTE

from:	General Secretariat
to:	Permanent Representatives Committee/Council
Subject:	Proposal for a directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings of collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of the excessive reliance on credit ratings - Outcome of the European Parliament's first reading (Strasbourg, 14 to 17 January 2013)

I. INTRODUCTION

In accordance with the provisions of Article 294 of the TFEU and the joint declaration on practical arrangements for the codecision procedure ¹, a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this dossier at first reading, thereby avoiding the need for second reading and conciliation.

¹ OJ C 145, 30.6.2007, p.5

In this context, the rapporteur, Leonardo DOMENICI (S&D, IT) presented one compromise amendment (amendment 12) to the proposal for a directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings of collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of the excessive reliance on credit ratings, on behalf of the Committee on Economic and Monetary Affairs. This amendment had been agreed during the informal contacts referred to above.

II. VOTE

When it voted on 16 January 2013, the plenary adopted amendment 12 to the proposal for a directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings of collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of the excessive reliance on credit ratings. The Commission's proposal as amended by the Parliament constitutes the Parliament's first-reading position which is contained in its legislative resolution as set out in the Annex hereto ¹.

The Parliament's position reflects what had been agreed between the institutions and ought therefore to be acceptable to the Council.

Consequently, once the legal-linguistic experts have examined the text, the Council should be in a position to approve the Parliament's position.

¹ The version of the Parliament's position in the legislative resolution has been marked up to indicate the changes made by the amendments to the Commission's proposal. Additions to the Commission's text are highlighted in *bold and italics*. The symbol "■" indicates deleted text.

Undertakings of collective investment in transferable securities (UCITS) and alternative investment funds managers *I**

European Parliament legislative resolution of 16 January 2013 on the proposal for a directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings of collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of the excessive reliance on credit ratings (COM(2011)0746 – C7-0419/2011 – 2011/0360(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0746),
 - having regard to Article 294(2) and Article 53(1) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0419/2011),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the opinion of the European Central Bank of 2 April 2012¹,
 - having regard to the opinion of the European Economic and Social Committee of 23 May 2012²,
 - having regard to the undertaking given by the Council representative by letter of 5 December 2012 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Legal Affairs (A7-0220/2012),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

¹ OJ C 167, 13.6.2012, p. 2.

² OJ C 229, 31.7.2012, p. 64.

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Position of the European Parliament adopted at first reading on 16 January 2013 with a view to the adoption of Directive 2013/.../EU of the European Parliament and of the Council amending *Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision*, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of the excessive reliance on credit ratings*

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

* TEXT HAS NOT YET UNDERGONE LEGAL-LINGUISTIC FINALISATION.

Having regard to the opinion of the European Central Bank¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure³,

Whereas:

- (1) ***Directive 2003/41/EC of the European Parliament and of the Council⁴ provides for regulation at Union level of institutions for occupational retirement provision (IORP).*** Directive 2009/65/EC of the European Parliament and of the Council⁵ provides for regulation at Union level of undertakings of collective investment in transferable securities (UCITS). Similarly, Directive 2011/61/EU of the European Parliament and of the Council⁶ provides for regulation at the Union level of managers of alternative investment funds (AIFs). ***All three*** directives establish prudential requirements as regards risk management by ***IORPS, by*** management or investment companies managing UCITS, or by managers of AIFs, respectively.

¹ OJ C 167, 13.6.2012, p. 2.

² OJ C 229, 31.7.2012, p. 64.

³ Position of the European Parliament of 16 January 2013.

⁴ OJ L 235, 23.9.2003, p.10.

⁵ OJ L 302, 17.11.2009, p.32.

⁶ OJ L 174, 1.7.2011, p.1.

- (2) An effect of the financial crisis has been that investors, including **IORPs**, managers of UCITS and managers of AIFs, rely excessively on credit ratings to carry out their investments on debt instruments, without necessarily conducting their own assessments of the creditworthiness of issuers of such debt instruments. In order to improve the quality of the investments made by **IORPs**, by managers of UCITS and by managers of AIFs and, therefore, to protect investors in those funds, it is appropriate to require **IORPs**, managers of UCITS and managers of AIFs to avoid relying exclusively and automatically on external credit ratings **or using them as the only parameter** when assessing the risk involved in the investments made by **IORPs**, by managers of UCITS and by managers of AIFs **■**. The general principle on the avoidance of excessive reliance on external credit ratings should therefore be integrated into the risk-management processes and systems of **IORPs**, managers of UCITS and managers of AIFs, and adapted to their specificities.

- (3) In order to specify further the general principle on overreliance that should be introduced into Directives **2003/41/EC**, 2009/65/EC and 2011/61/EU, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in particular to ensure that **IORPs**, managers of UCITS and managers of AIFs are effectively prevented from over-relying on external credit ratings for assessing the creditworthiness of the assets held **■**. It is appropriate in this regard to amend the powers of the Commission in those Directives to adopt delegated acts in respect of the general provisions regarding risk-management processes and systems employed by **IORPs**, managers of UCITS and managers of AIFs. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, **and that it publish the results of such consultations**.

- (4) The relevant measures should be complementary to other provisions in Regulation (EU) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies¹. Those provisions set the general objective of reducing excessive reliance by investors on external credit ratings and should facilitate the achievement of that aim.
- (5) Since the objective of this Directive, namely to contribute to the reduction of the excessive reliance of **IORPS**, managers of UCITS and managers of AIFs on external credit ratings when making their investments, cannot be sufficiently achieved at the Member State level **acting in a coordinated manner** and can therefore, by reason of the pan-Union structure and impact of the activities of **IORPS**, managers of UCITS, managers of AIFs and credit rating agencies, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

¹ OJ L 302, 17.11.2009, p. 1.

- (6) *Directives 2003/41/EC, 2009/65/EC and 2011/61/EU should therefore be amended accordingly.*
- (7) *In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,*

HAVE ADOPTED THIS DIRECTIVE:

Article -1
Amendment to Directive 2003/41/EC

In Article 18 of Directive 2003/41/EC, the following paragraph is inserted:

'1a. Competent authorities, taking into account the nature, scale and complexity of the investments of institutions, shall monitor the adequacy of their credit assessment processes, assess the use of references to credit ratings in their investment policies and, where appropriate encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on ratings.'

Article 1
Amendments to Directive 2009/65/EC

Article 51 of Directive 2009/65/EC is amended as follows:

(1) in paragraph 1, the first subparagraph is replaced by the following:

'1. A management or investment company shall employ a risk-management process which enables it to monitor and measure at any time the risk of the positions and their contribution to the overall risk profile of the portfolio. In particular, it shall not solely or mechanistically rely on external credit ratings for assessing the creditworthiness of the UCITS' assets.';

(1a) *the following paragraph is inserted:*

'3a. Competent authorities, taking into account the nature, scale and complexity of the investments of UCITS shall monitor the adequacy of their credit assessment processes of the management companies, assess the use of references to credit ratings in their investment policies and, where appropriate encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on ratings.';

- (2) in paragraph 4, point (a) is replaced by the following:
- '(a) criteria for assessing the adequacy of the risk-management process employed by the management company in accordance with the first subparagraph of paragraph 1. Those criteria shall ensure that the management company is prevented from relying solely or mechanistically on external credit ratings for assessing the creditworthiness of the UCITS' assets;'

Article 2
Amendments to Directive 2011/61/EU

Article 15 of Directive 2011/61/EU is amended as follows:

- (1) in paragraph 2, the first subparagraph is replaced by the following:
- '2. AIFMs shall 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 may be exposed. In particular, AIFMs shall not solely or mechanistically rely on external credit ratings for assessing the creditworthiness of the AIFs' assets.';

(1a) *the following paragraph is inserted:*

'3a. Competent authorities shall, taking into account the nature, scale and complexity of the investments of AIF, monitor the adequacy of their credit assessment processes of AIFMs, assess the use of references to credit ratings in the investment policies of AIFs and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on ratings.'

(2) in paragraph 5, point (a) is replaced by the following:

(a) the risks-management systems to be employed by AIFMs in relation to the risks which they incur on behalf of the AIFs they manage. These risk-management systems shall prevent AIFMs from relying solely or mechanistically on external credit ratings for assessing the creditworthiness of the AIFs' assets.'

Article 3
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...*. They shall forthwith communicate to the Commission the text of those measures **█**.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

* OJ please insert date: 18 months after the date of entry into force of this Directive.

Article 5
Addressees

This Directive is addressed to the Member States.

Done at ...,

For the European Parliament
The President

For the Council
The President