



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

From: General Secretariat of the Council

To: Delegations

No. Cion prop.: 17329/11 EF 163 ECOFIN 815 CODEC 2148

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 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
- political agreement

Delegations will find attached the text of the political agreement on the abovementioned proposal.

DIRECTIVE 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,

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 procedure,

Whereas:

¹ OJ C , , p. .

² OJ C , , p. .

- (1) Directive 2009/65/EC of the European Parliament and of the Council³ 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 Council⁴ provides for regulation at the Union level of managers of alternative investment funds (AIFs). Additionally, Directive 2003/41/EC of the European Parliament and of the Council provides for regulation at Union level of institutions for occupational retirement provision (IORP). All three directives establish prudential requirements as regards risk management by management or investment companies managing UCITS, by the IORPs or managers of AIFs, respectively.
- (2) An effect of the financial crisis has been that investors, including UCITS, IORPs and 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 UCITS, IORPs and AIFs and, therefore, to protect investors in those funds, it is appropriate to require the IORPs, the persons managing UCITS and 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 the IORPs and the UCITS and AIFs they manage. 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 the IORPs and the managers of UCITS and AIFs, and adapted to their specificities.

³ OJ L 302, 17.11.2009, p.32.

⁴ OJ L 174, 1.7.2011, p.1.

- (3) In order to specify further the general principle on overreliance that should be introduced into Directives 2009/65/EC, 2003/41/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 AIFs are effectively prevented from over-relying on external credit ratings for assessing the creditworthiness of the assets held by UCITS, IORPs or AIFs. 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 the IORPs and the managers of UCITS and 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 the 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 agencies⁵ as amended by Regulation (EU) No [xxx/xxxx] of the European Parliament and of the Council of [xxx xxx xxxx] amending Regulation (EU) No 1060/2009⁶. 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 UCITS and 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 UCITS, 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.

⁵ OJ L 302, 17.11.2009, p. 1.

⁶ OJ L [...], [...], p. [...].

- (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

Amendments to Directive 2003/41/EC

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

‘1a. Competent authorities in charge of supervising these institutions, taking into account the nature, scale and complexity of those institutions’ activities, shall monitor the adequacy of the institutions’ credit assessment processes as well as 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 reduce 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:

'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 in charge of supervising UCITS, taking into account the nature, scale and complexity of those undertakings' activities, shall monitor the adequacy of the undertakings' credit assessment processes as well as 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 reduce 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. These 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:

'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 AIF assets.';

- (1a) the following paragraph is inserted:

'3a. Competent authorities in charge of supervising AIFs, taking into account the nature, scale and complexity of the AIF's activities, shall monitor the adequacy of their credit assessment processes as well as 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 reduce 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 AIF assets.'.

Article 3
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by XX XXXX [18 months from the date of entry into force of the directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions .

When Member States adopt those provisions, 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.

Article 5
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President