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Brussels,  
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## Opinion

**Title**                      **Proposal on Alternative Investment Fund Managers**  
**(draft version of 31 March 2009)**

**Lead DG**                      **DG MARKT**

### 1) Impact Assessment Board Opinion

#### **(A) Context**

Following up on the Communication on Driving European Recovery [COM (2009)114], the Commission plans to bring forward legislative proposals to ensure appropriate oversight and regulation of all systemically important market players by the end of April 2009. Against this background, a particular area of concern refers to those investment funds which do not comply with the harmonised rules laid down by the UCITS Directive. Non-UCITS or "alternative investment" funds (AIFs) – such as hedge funds or private equity funds - do not form a homogenous class and are generally restricted to professional or institutional investors. AIFs and/or their managers (AIFMs) operate within a complex regulatory environment resulting from the combination of some indirect measures at the EU level and a patchwork of national regulations.

#### **(B) Positive aspects**

The report has addressed the recommendations of the first opinion to a large extent. The analysis of risks is clearer. The presentation of problems has been strengthened, including with regard to single market issues. The analysis of the concrete measures proposed has been expanded extensively, along with the analysis of the international aspects. In addition, the overall presentation of the report has been significantly improved, thus providing a clear explanation of the underlying reasoning.

#### **(C) Main recommendations for improvements**

*The recommendations below are listed in order of descending importance. Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.*

**General recommendation: The report has been significantly improved. There remain, however, some areas where further clarification would be welcome. These regard: the implications of the on-shore / off-shore structure of the AIF industry, notably with regard to the off-shore provision of valuation and depository services;**

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**the justification for the suggested de minimis thresholds; the distribution of supervisory responsibilities within the EU; and the impact on AIFMs domiciled in third countries.**

**(1) Further clarify the implications of the on-shore / off-shore structure of the AIF industry.** The revised report has clarified many of the issues arising from the on-shore / off-shore structure of the industry with respect to both the origin of risks and the proposed supervisory regime. However, it would be useful to further elucidate whether supervisory conditions of the same order would apply to the off-shore provision of valuation and depositary services (page 36). The report should clarify whether such provision would require "appropriate agreements" between the relevant authorities (page 36), "particular attention" by the competent (i.e. home) authority (page 42) or an assessment of the latter's capacity to effectively exercise supervisory functions (page 52).

**(2) Strengthen the analysis of the planned de minimis clauses.** As recommended, the revised report discusses the planned use of de minimis clauses to ensure proportionality. This analysis could also discuss the risk that multiple AIFMs and AIFs may be set up to circumvent the proposed minimum threshold on net assets managed. The reasons why the latter is regarded as the relevant one for systemic risk and market efficiency (page 47) should be discussed. The report should also comment on the significant difference in coverage that the threshold implies for hedge funds and other non-UCITS funds (see tables 12 and 13). Finally, the report should either provide a quantitative indication for the leverage threshold or explain which criteria would determine when leverage use would be considered extensive (page 50).

**(3) Further explain the envisaged distribution of supervisory responsibilities across the single market.** The revised report has significantly clarified this issue but could usefully specify when information collected by the competent authorities would be shared at the EU level rather than only with public authorities in Member States (see for instance last paragraph in box 6). Finally, the report should explain the reason why colleges of supervisors are not considered as a possible tool for the cross-border management of risk in the AIF industry.

**(4) Clarify the impact on third countries' AIFM.** The revised report has expanded the analysis of international issues. However, it would be useful to explain whether the envisaged prohibition to market AIF or AIFM services in the EU for (non-authorised) AIFM domiciled in third countries (page 52) would imply a change compared to the status quo.

#### **(D) Procedure and presentation**

Following the previous Board recommendations, the results of public consultations were better integrated into the report, an annex on the Lamfalussy approach has been added and the legal basis of the proposal is now explicitly identified. All current annexes should be referred to explicitly in the main text. The text on the minimum threshold for net assets under management in footnote 53 should be consistent with the main text (pages 47-49).

## **2) IAB scrutiny process**

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External expertise used	No
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Date of adoption of Opinion	<b>08 AVR. 2009</b> The present opinion concerns a resubmitted draft IA report. The first opinion was issued on 23 March 2009.