

## STATUTORY INSTRUMENTS

# 2013 No. 1773

## The Alternative Investment Fund Managers Regulations 2013

### PART 5

#### AIFs which acquire control of non-listed companies and issuers

##### Introductory provision

**34.** In this Part, a reference to an AIFM is to—

- (a) a full-scope UK AIFM; or
- (b) a third country AIFM to which the requirement at regulation 59(3) applies, with respect to the AIFs by virtue of which that requirement applies.

##### Ways of acquiring control or shares

**35.**—(1) This Part applies where control is acquired of a non-listed company or issuer in one of the following ways—

- (a) one AIF acquires control individually;
- (b) two or more AIFs, managed by the same AIFM, acquire control jointly on the basis of an agreement aimed at acquiring such control; or
- (c) two or more AIFs, managed by two or more AIFMs, acquire control jointly on the basis of an agreement aimed at acquiring such control.

(2) This Part also applies where an AIF acquires, holds or disposes of shares of a non-listed company (but control is not acquired).

(3) This Part does not apply where the non-listed company or issuer is—

- (a) a small or medium-sized enterprise within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises<sup>M1</sup>; or
- (b) a special purpose vehicle with the purpose of purchasing, holding or administering real estate.

##### Marginal Citations

**M1** OJ L 124, 20.5.2003, p. 36.

##### Meaning of “control” and calculation of voting rights

**36.**—(1) For the purposes of this Part, “control” means—

- (a) for a non-listed company, holding more than 50% of the voting rights of the company; and

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[<sup>F1</sup>(b) for an issuer, holding the percentage of voting rights that confers control in the United Kingdom, calculated in accordance with rules made by the Panel on Takeovers and Mergers under the Companies Act 2006.]

(2) When calculating the percentage of voting rights for the purposes of this Part, if paragraph (1) (b) does not apply, in addition to the voting rights held directly by the AIF, the voting rights of the following are included—

- (a) an undertaking controlled by the AIF; and
- (b) a person acting in their own name but on behalf of the AIF or on behalf of an undertaking controlled by the AIF.

(3) For the purposes of this Part, if paragraph (1)(b) does not apply, voting rights are calculated on the basis of all the shares to which voting rights are attached even if the exercise of those rights is suspended.

#### Textual Amendments

**F1** Reg. 36(1)(b) substituted (31.12.2020) by [The Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/328\)](#), regs. 1(3), **9(1)** (as amended by [S.I. 2019/325](#), reg. 58); 2020 c. 1, Sch. 5 para. 1(1)

#### Confidential information

**37.—**(1) This regulation applies to—

- (a) employees of a non-listed company or issuer,
- (b) representatives of the employees, and
- (c) experts who assist the employees or representatives,

who receive information in accordance with this Part, or corresponding provisions adopted in an EEA State <sup>F2</sup>... implementing Articles 26 to 30 of the directive (obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers).

(2) If the information mentioned in paragraph (1) is provided in confidence—

- (a) regulation 25 of the Information and Consultation of Employees Regulations 2004 <sup>M2</sup> (breach of statutory duty), or
- (b) regulation 25 of the Information and Consultation of Employees Regulations (Northern Ireland) 2005 <sup>M3</sup> (breach of statutory duty),

applies to the information as it applies to information or documents given in confidence by an employer pursuant to the employer's obligations under those Regulations.

#### Textual Amendments

**F2** Words in [reg. 37\(1\)](#) omitted (31.12.2020) by virtue of [The Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/328\)](#), regs. 1(3), **9(2)** (as amended by [S.I. 2019/325](#), reg. 58); 2020 c. 1, Sch. 5 para. 1(1)

#### Marginal Citations

**M2** [S.I. 2004/3426](#).

**M3** [S.R. \(NI\) 2005 No. 47](#).

## **Notification of the acquisition or disposal of major holdings and control of non-listed companies**

**38.**—(1) When an AIF acquires, disposes of, or holds shares of a non-listed company, the AIFM managing the AIF must notify the FCA of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.

(2) When an AIF acquires control of a non-listed company, the AIFM managing the AIF must notify the following persons of such control—

- (a) the non-listed company;
- (b) the company's shareholders of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and
- (c) the FCA.

(3) The notification required under paragraph (2) must contain the following additional information—

- (a) the resulting situation in terms of voting rights in the company;
- (b) the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any person entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held; and
- (c) the date on which control was acquired.

(4) The AIFM must—

- (a) in its notification to the non-listed company, request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF and of the information in paragraph (3); and
- (b) use its best efforts to ensure the board of directors complies with its request.

(5) The notifications required under this regulation by an AIFM must be made as soon as possible, and in any event no later than ten working days after the date on which the AIF reaches, exceeds or falls below the relevant threshold or acquires control over the non-listed company.

## **Disclosure in case of acquisition of control**

**39.**—(1) When an AIF acquires control of a non-listed company or an issuer, the AIFM managing the AIF must make available the information in paragraph (2) to—

- (a) the company or issuer;
- (b) the shareholders of the company or issuer of which the identities and addresses are available to the AIFM or can be made available by the company or issuer or through a register to which the AIFM has or can obtain access; and
- (c) the FCA.

(2) The information is—

- (a) the identity of the AIFM which either individually or in agreement with other AIFMs manages the AIF or AIFs that have acquired control;
- (b) the policy for preventing and managing conflicts of interest, in particular between—
  - (i) the AIFMs or the AIFs, and
  - (ii) the company or issuer;

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- (c) the specific safeguards to ensure that any agreement between—
    - (i) the AIFMs or the AIFs, and
    - (ii) the company or issuer,
 is concluded at arm's length; and
  - (d) the policy for external and internal communication relating to the company or issuer, in particular as regards employees of the company or issuer.
- (3) The AIFM must—
- (a) in its notification to the company or issuer, request the board of directors of the company to give the employees' representatives or, where there are none, the employees themselves, without undue delay the information in paragraph (2); and
  - (b) use its best efforts to ensure that the board of directors complies with its request.

#### **Additional disclosure when control is acquired of non-listed companies**

**40.**—(1) When an AIF acquires control of a non-listed company, the AIFM managing the AIF must ensure that within a period of 20 working days starting on the day on which control is acquired the AIF, or the AIFM acting on behalf of the AIF, discloses its intentions with regard to the matters in paragraph (2) to—

- (a) the non-listed company; and
- (b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access.

(2) The matters are the future business of the non-listed company and the likely repercussions on employment by the company, including any material change in the conditions of employment.

- (3) The AIFM must—
- (a) request that the board of directors of the non-listed company notifies the employees' representatives or, where there are none, the employees themselves, about the AIF's intentions with regard to the matters in paragraph (2); and
  - (b) use its best efforts to ensure the board of directors complies with its request.

(4) When an AIF acquires control of a non-listed company, the AIFM managing the AIF must provide the FCA and the AIF's investors with information on the financing of the acquisition.

#### **Sensitive information**

**41.** Where the communication of information as requested pursuant to a duty in regulation 38(4), 39(3) or 40(3) would seriously harm the functioning of the non-listed company, or would be seriously prejudicial to it, the board of directors is not obliged to comply with the request.

#### **Annual report of AIFs exercising control of non-listed companies**

**42.**—(1) When an AIF acquires control of a non-listed company, the AIFM managing the AIF must include in the AIF's annual report, prepared in accordance with [<sup>F3</sup>rules 3.3.2 to 3.3.8 of the Investment Funds sourcebook], the information in paragraph (3) relating to the non-listed company.

- [<sup>F4</sup>(2) The duty in paragraph (1) does not arise if—
- (a) the non-listed company has its registered office in the United Kingdom and is required to draw up an annual report under the law applicable in the United Kingdom; and
  - (b) the AIFM ensures that—

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- (i) the annual report of the non-listed company contains the information in paragraph (3); and
  - (ii) the report is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period in which the annual report must be drawn up.]
- (3) The information is—
- (a) a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report;
  - (b) any important events that have occurred since the end of the financial year of the AIF;
  - (c) the company's likely future development; and
  - (d) in relation to the company's acquisition or disposal of its own shares—
    - (i) the reasons for acquisitions made during the financial year;
    - (ii) the number and nominal value or, in the absence of a nominal value, the accountable par of the shares acquired and disposed of during the financial year and the proportion of the subscribed capital which they represent;
    - (iii) in the case of acquisition or disposal for a value, the consideration for the shares; and
    - (iv) the number and nominal value or, in the absence of a nominal value, the accountable par of all the shares acquired and held by the company and the proportion of the subscribed capital which they represent.
- (4) If the information in paragraph (3) is included in the company's annual report, the AIFM must make the information available to the investors of the AIF in so far as already available within six months following the end of the financial year of the AIF, and in any event, no later than the date on which the annual report of the company must be drawn up <sup>F5</sup> ... <sup>M4</sup>.
- (5) If the information in paragraph (3) is included in the AIF's annual report, the AIFM must request and use its best efforts to ensure that the board of directors of the non-listed company makes that information available to employees' representatives of the company or, where there are none, to the employees themselves, no later than six months following the end of the financial year of the AIF.

#### Textual Amendments

- F3** Words in [reg. 42\(1\)](#) substituted (31.12.2020) by [The Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/328\)](#), regs. 1(3), **9(3)(a)** (as amended by [S.I. 2019/325](#), reg. 58); 2020 c. 1, Sch. 5 para. 1(1)
- F4** [Reg. 42\(2\)](#) substituted (31.12.2020) by [The Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/328\)](#), regs. 1(3), **9(3)(b)** (as amended by [S.I. 2019/325](#), reg. 58); 2020 c. 1, Sch. 5 para. 1(1)
- F5** Words in [reg. 42\(4\)](#) omitted (31.12.2020) by virtue of [The Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/328\)](#), regs. 1(3), **9(3)(c)** (as amended by [S.I. 2019/325](#), reg. 58); 2020 c. 1, Sch. 5 para. 1(1)

#### Marginal Citations

- M4** For companies registered under the [Companies Act 2006 \(c. 46\)](#), provisions about annual reports are contained in Part 15 of that Act.

### Asset stripping

**43.—**(1) When an AIF acquires control of a non-listed company or an issuer, for a period of 24 months following the acquisition of control, the AIFM managing the AIF—

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- (a) must not facilitate, support or instruct any distribution, capital reduction, share redemption or acquisition by the company or issuer of its own shares;
  - (b) in so far as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing body of the company or issuer, must not vote in favour of a distribution, capital reduction, share redemption or acquisition by the company or issuer of its own shares; and
  - (c) in any event must use its best efforts to prevent distributions, capital reductions, share redemptions or the acquisition by the company or issuer of its own shares.
- (2) In paragraph (1) “distribution” means a distribution to shareholders, including a payment of dividends and of interest relating to shares—
- (a) made when on the closing date of the last financial year the net assets as set out in the company or issuer's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount must be deducted from the amount of subscribed capital; or
  - (b) the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes.
- (3) In paragraph (1) “capital reduction” does not include a reduction in subscribed capital, the purpose of which is—
- (a) to offset losses incurred; or
  - (b) to include sums of money in a non-distributable reserve, provided that, following that operation, the amount of such reserve is not more than 10% of the reduced subscribed capital.
- (4) In paragraph (1) “share redemption” or “acquisition by the company or issuer of its own shares”—
- (a) refers to a redemption or acquisition of shares, including shares previously acquired by the company or issuer and held by it, and shares acquired by a person acting in that person's own name but on the company or issuer's behalf, that would have the effect of reducing the net assets below the amount mentioned in paragraph (2)(a); but
  - (b) does not include an acquisition of shares in the circumstances described in [F6section 659(2)(b) or (c) of the Companies Act 2006, or an acquisition permitted by Chapter 4 of Part 18 of that Act] .
- (5) In this regulation—
- [F7“law” means the law of the United Kingdom, or of any part of the United Kingdom]
- F8  
...
- “statutes” means the instruments of incorporation of the company or issuer.

#### Textual Amendments

- F6** Words in reg. 43(4)(b) substituted (31.12.2020) by [The Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/328\)](#), regs. 1(3), **9(4)(a)** (as amended by [S.I. 2019/325](#), reg. 58 and [S.I. 2019/1212](#), regs. 1(3), 16); 2020 c. 1, Sch. 5 para. 1(1)
- F7** Word in reg. 43(5) substituted (31.12.2020) by [The Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/328\)](#), regs. 1(3), **9(4)(b)(i)** (as amended by [S.I. 2019/325](#), reg. 58); 2020 c. 1, Sch. 5 para. 1(1)

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**F8** Words in reg. 43(5) omitted (31.12.2020) by virtue of [The Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/328\)](#), regs. 1(3), **9(4)(b)(ii)** (as amended by [S.I. 2019/325](#), reg. 58); 2020 c. 1, Sch. 5 para. 1(1)

### **FCA powers in relation to this Part**

**44.**—(1) A full-scope UK AIFM that contravenes any provision of this Part is to be treated as having contravened rules made under section 137A of the Act (FCA's general rule-making power).

(2) Information to be provided to the FCA under regulation 38(1) or (2) or 40(4), or made available to the FCA under regulation 39(1), must be—

- (a) provided or made available in such manner as the FCA may direct;
- (b) accompanied by such further information as the FCA may direct in order to verify compliance with requirements under this Part.

(3) The FCA may give guidance consisting of such information and advice as it considers appropriate with respect to this Part.

(4) Before giving guidance with respect to this Part, the FCA must—

- (a) publish—
  - (i) a draft of the proposed guidance in the way appearing to the FCA to be best calculated to bring it to the attention of the public; and
  - (ii) a notice that representations about the proposals may be made to the FCA within a specified time; and
- (b) have regard to any representations made in accordance with that notice.

(5) Paragraph (4) does not apply if the FCA considers that the delay caused by those procedures would be prejudicial to the interests of a non-listed company or issuer, or the shareholders or employees of such a company.

**Status:**

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