



Structured Thoughts

News for the financial services community.

Update on the Proposed AIFM Directive

Background

The global financial crisis has focused regulatory attention on the regulation of private funds, such as hedge funds and private equity funds. We summarise below the key features of the European Commission's legislative proposal relating to alternative investment funds and fund managers and the successive proposals for amendments.

European Commission's Original Proposal for the Alternative Investment Fund Managers Directive (30th April 2009)¹

On 30th April 2009, the European Commission (the "Commission") published its Proposal for a Directive on Alternative Investment Fund Managers ("AIFMs"), including draft legislation, together with an Impact Assessment (the "Commission Proposal"). The proposed AIFM Directive is designed to introduce an EU-wide regime for registration and supervision of the managers of alternative investment funds ("AIFs").

The following summary briefly describes the regulatory framework envisaged by the Commission Proposal. It is broadly consistent with the high level principles later recommended by the IOSCO Technical Committee in its final report on Hedge Funds Oversight dated 22nd June 2009,² in that hedge funds and/or managers and their prime brokers should be subject to mandatory registration and ongoing supervision as to their governance and operating standards (particularly as regards systemic risk), investor disclosures and regulatory transparency. IOSCO also recommended that regulators should be authorised to cooperate and share information in order to facilitate effective oversight of cross-border funds and/or managers.

¹ European Commission Proposal for a Directive on Alternative Investment Fund Managers (30th April 2009), http://ec.europa.eu/internal_market/investment/docs/alternative_investments/fund_managers_proposal_en.pdf and the accompanying Impact Assessment, http://ec.europa.eu/internal_market/investment/docs/alternative_investments/fund_managers_impact_assessment.pdf.

² IOSCO Technical Committee's Final Report: Hedge Funds Oversight (22nd June 2009), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD276.pdf>. See also, IOSCO Consultation Report on Hedge Funds Oversight (12th March 2009), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD288.pdf> (closed 30th April 2009).

Scope

AIFs include all funds not regulated under the UCITS Directive³ (Article 3); these include:

- hedge funds;
- private equity funds (i.e., large buy-out funds, mid-cap investment funds and venture capital funds);
- real estate funds;
- commodity funds;
- infrastructure funds; and
- other “special funds” or “institutional funds” in various legal forms.

By regulating the managers of AIFs rather than AIFs themselves, the proposed AIFM Directive aims to bring within its regulatory scope an even broader range of investment funds, including those domiciled offshore.

All AIFMs established in the EU must be authorised before they start providing management services to (EU or non-EU) AIFs, except for “small fund managers.” Small fund managers include: AIFMs managing AIF portfolios of less than €100 million in assets and AIFMs managing AIF portfolios of less than €500 million in assets if they consist only of AIFs that are non-leveraged and non-redeemable for the first five years after the funds are established.

Authorisation

The management and marketing of an AIF in the EU may only be undertaken by an AIFM authorised in accordance with the requirements of the AIFM Directive. To obtain authorisation, an AIFM must apply to the competent authority of the member state where it has its registered office (“home member state”) and submit detailed information demonstrating its qualification to provide management services to AIFs and its ability to fulfil the conditions of the AIFM Directive.

This information must cover, *inter alia*:

- the AIFM’s shareholders, or members, and their holdings;
- the planned programme of activity, including how it proposes to comply with the AIFM Directive’s operating conditions, transparency requirements and disclosure obligations in relation to managing specific types of AIFs;
- the characteristics of each AIF managed, its fund rules or instruments of incorporation;
- the arrangements for the valuation and safe-keeping of assets, including the valuation company and the depositary;
- the latest annual report of the AIF;
- any arrangements for delegation of management services functions or of the depositary tasks in respect of a non-EU AIF; and
- any arrangements for marketing a non-AIF to professional investors in the EU.

³ EU Directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (85/611/EEC), <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1985/L/01985L0611-20050413-en.pdf>.

Operating conditions

The proposed AIFM Directive lays down detailed operational requirements in the following areas:

- **Conduct of business and risk management**: The AIFM must act with due care, skill and integrity in the best interests of the AIF, its investors and market integrity. To this end, it must implement effective arrangements and systems to manage conflicts of interest, the risks associated with each investment, liquidity and securitisation positions.
- **Capital requirements**: The AIFM must have initial capital of at least €125,000 plus an additional amount of own funds equal to 0.02% of the amount by which value of the portfolios exceeds €250 million.
- **Organisational requirements**: AIFMs must appoint a valuator and a depositary, both of which must be independent of the AIFM and meet requisite criteria.
- **Delegation of AIFM functions**: Certain conditions must be met and prior authorisation obtained for the AIFM to delegate any of its functions to third parties.

Transparency requirements

- **AIF's annual reports**: The AIFM must make available an annual report for each AIF managed by it, which shall include a balance sheet or an asset and liability statement, an income and expenditure account and a report on activities for each financial year.
- **Disclosure to investors**: The AIFM must ensure that AIF investors receive adequate information before making an investment, which shall include the AIF's latest annual report and descriptions of its investment strategy and objectives, investment procedures, depositary, valuator, auditor and any other service providers, liquidity risk management arrangements and all fees, charges and expenses. Further periodic disclosures are also required.
- **Regular reporting obligations**: The AIFM must make certain regular filings with its home member state's competent authority.

Obligations regarding an AIFM managing specific types of AIF

The AIFM must provide additional disclosures to investors and to its home member state competent authority of leverage used and ownership reporting for AIFs with "controlling influence" (i.e., 30% or more of the voting rights) in issuers or non-listed companies.

Restrictions on marketing activities

- **Professional investors**: Upon authorisation, AIFMs are permitted to market AIFs to "professional investors" only (as defined in MiFID).⁴
- **Retail investors**: Member states may choose to permit the marketing of AIFs to retail investors in their own jurisdiction and impose stricter requirements at their discretion.
- **Cross-border marketing**:
 - ***EU AIFs***: Subject to filing appropriate information with the host member state's competent authority, AIFMs may market EU-domiciled AIFs cross-border to professional investors in all EU member states.

⁴ See Annex II of EU Markets in Financial Instruments Directive (2004/39/EC), http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_145/l_14520040430en00010044.pdf.

- *Non-EU AIFs*: After a transitional three-year period, EU AIFMs will also be permitted to market non-EU domiciled AIFs to professional investors throughout the EU, provided that they are subject to 'equivalent' regulatory standards.

Industry response to the proposed AIFM Directive

The Commission Proposal sparked intense criticism from hedge funds and private equity firms as well as regulators and aroused the sensitivities of politicians, particularly in the UK where three quarters of the European hedge funds are currently managed. Lord Myners, the Financial Services Secretary to the HM Treasury was quoted as saying the proposed draft "needs major surgery" and has been involved in lobbying the European Parliament (the "Parliament").⁵

On 26th May 2009, the Alternative Investment Management Association ("AIMA"), the global hedge fund industry association, announced a series of initiatives designed to prevent adoption of the directive in its current form.⁶ According to AIMA, due to the "lack of proper consultation," the proposed AIFM Directive "presumes a structure for the industry which bears little relationship to reality," thereby creating enormous confusion. In AIMA's view, unless certain provisions are excluded or re-drafted, implementation could be unworkable and may even conflict with many existing EU financial services regulations.

In the UK, the Financial Services Authority ("FSA") published a report on 15th October 2009, raising a number of concerns about the likely impact of the proposed AIFM Directive, including a significant reduction in investor choice and a sharp rise in compliance costs. The report concluded that the burdens resulting from the Directive would outweigh the benefits.⁷

Fierce lobbying by the AIF industry and negotiations between the industry, various national authorities and the EU regulatory bodies were soon met with a degree of success. Two further proposals were put forward in late 2009, one by the European Council's Swedish Presidency and the other by the Parliament's Committee on Economic & Monetary Affairs ("ECON Committee") with Jean-Paul Gauzès acting as *Rapporteur*, and on 15th February 2010, the EU Council's Spanish Presidency proposed another new compromise.

Although certain modifications proposed in these successive EU proposals have been welcomed by the industry as improvements, a number of strong concerns and criticisms persist.

European Central Bank Opinion (16th October 2009)⁸

At the EU Council's request, the European Central Bank ("ECB") published an opinion dated 16th October 2009, on the draft AIFM Directive. Whilst expressing support for the Commission's aim of providing a single, harmonised authorisation and supervisory framework for the activities of AIFMs in the EU, the ECB recommended further work and improvements in certain areas of the Commission Proposal, such as:

- To tailor the provisions to reflect differences between various types of AIF,

⁵ Speech by Lord Myners, UK Financial Services Secretary to the HM Treasury: AIMA breakfast address on the Alternative Investment Fund Management Directive (7th July 2009), http://www.hm-treasury.gov.uk/speech_fsst_070709.htm.

⁶ See e.g. AIMA Press Releases: AIMA warns of global impact of EU AIFM Directive (27th July 2009), http://www.aima.org/en/media_centre/press-releases.cfm/id/6D509933-0F03-4D6B-B193ECB26D844F36; AIMA Announces Plans to Mobilise Global Hedge Fund Industry on EC Directive (26th May 2009), http://www.aima.org/en/media_centre/press-releases.cfm/id/8EA729E5-D244-4E50-8A4E5A811D552F2D.

⁷ FSA report: Impact of the proposed AIFM Directive across Europe (15th October 2009), http://www.fsa.gov.uk/pubs/other/Impact_of_AIFM_Directive.pdf.

⁸ European Central Bank Opinion of 16th October 2009 on a proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/.../EC (CON/2009/81), http://www.ecb.int/ecb/legal/pdf/en_con_2009_81_f_sign.pdf.

- To create a level playing field and minimise the risk of regulatory arbitrage between AIFMs, credit institutions and insurance companies,
- To introduce the “horizontal” provisions (e.g., short-selling, securitisation, controlling influence) which apply to all market participants (not just AIFMs) in relevant cross-sectoral EU legislation,
- To conduct an in-depth analysis to determine the relevant information to be reported and/or exchanged between regulatory authorities for supervisory purposes, and
- To refine the concept of “leverage,” taking into account, *inter alia*, the type of the AIF, its investment strategy and sources of leverage.

In addition, the ECB proposed certain drafting amendments on leverage (to remove the borrowing limits from the Commission Proposal) and on marketing.

European Parliament, Economic & Monetary Affairs Committee’s Gauzès Report (23rd November 2009)⁹

On 23rd November 2009, the European Parliament’s ECON Committee published a (preliminary) draft report prepared by *Rapporteur*, Jean-Paul Gauzès (the “Gauzès report”). The deadline for amendments to the Gauzès report was 21st January 2010, and according to the European Venture Capital Association (EVCA), MEPs have tabled some 1,300 amendments, which the ECON Committee plans to consolidate and debate on 22nd -23rd February and 16th -17th March 2010.¹⁰

The Gauzès report sought to achieve conceptual alignment of the AIFM Directive with relevant UCITS and MiFID provisions as well as the G20 principles on remuneration policies. Although regarded by many market participants as an improvement, the report has drawn mixed responses. Some of the proposals that received the most criticism included those relating to:

- the abandonment of the small fund managers exemption and the institution of a “proportionality principle” to regulate AIFs of different sizes;
- new restrictions on marketing, which would:
 - only permit marketing of non-EU AIFs under national private placement regimes if the AIFM is domiciled in the EU or there is a cooperation and information exchange agreement in place between the relevant regulators;
 - only permit professional investors to invest in third country AIFs managed by an AIFM authorised under the AIFM Directive or where there is a cooperation and information exchange agreement in place between the relevant regulators; and
 - prohibit marketing to retail investors of a fund of funds which invests more than 30% in other AIFs that do not benefit from the EU passport or a feeder AIF which invests in a master AIF that does not benefit from the EU passport;
- a requirement for the AIFM to invest its own funds in liquid assets which are readily convertible to cash in the short term, which would prevent firms using them as working capital (only banks and insurers are currently subjected to such requirements; neither UCITS nor investment firms subject to MiFID face such requirement); and

⁹ European Parliament’s Committee on Economic & Monetary Affairs report, prepared by *Rapporteur*, Jean-Paul Gauzès, on the proposal for a directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/.../EC (COM(2009)0207 – C7-0040/2009 – 2009/0064(COD)) (23rd November 2009), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-430.709+01+DOC+PDF+V0//EN&language=EN>.

¹⁰ BVCA newsletter: EU AIFM – Update No. 8 (4th February 2010), <http://www.bvca.co.uk/In-Europe/features/EUAIFMUpdateNo8>.

- a requirement that the depositary have its registered office in the same member state as the AIF, without providing for a passport.

European Council, Swedish Presidency's last revised compromise proposal (15th December 2009)¹¹

On 15th December 2009, the European Council's Swedish Presidency published its last revised compromise proposal (the "Swedish Proposal"), building on its two previous compromise proposals dated 12th and 25th November 2009, respectively, and reflecting some of the amendments tabled by the Gauzès report. By and large, it was welcomed by AIMA as addressing certain initial concerns relating to the original Commission Proposal.

In particular, as regards depositaries, the Swedish Proposal would allow not only credit institutions, but also investment firms to act as depositaries. Furthermore, it relaxed the delegation provisions to allow appointment of sub-custodians, subject to certain conditions.

However, it admitted to leaving at least four key issues unresolved due to disagreement among member states, to be handed over to the incoming Spanish Presidency to deal with.¹²

- Depositaries (custody/safekeeping of assets) – whether the tasks of depositary should be permitted to be delegated to entities other than credit institutions and investment firms and the depositaries' liability for delegated functions.
- Valuation of funds – the use of different types of valuers for different business models, the frequency of valuation for different types of AIFs, and the independence of the valuer and his liability.
- Remuneration – whether to include the new principles laid down for banks in the amendments to the Capital Requirements Directive or to adapt the rules for AIFMs.
- Third country issues (equivalency standards for Non-EU AIFs accessing EU markets) – the treatment of depositaries for non-EU AIFs which are managed by EU AIFMs remains unclear.

Furthermore, it raised new concerns, including the proposed imposition of new restrictions on remuneration, such as deferring up to 60% of AIFMs' fees and the establishment of independent remuneration committees at large hedge funds.

Although broadly aligned on key principles, it differs from the Gauzès report as discussed further below.

European Council, Spanish Presidency's Issues Note on AIFM Directive (11th January 2010)¹³

On 15th January 2010, the Council's Spanish Presidency published an Issues Note on the AIFM Directive, comparing the regulatory options put forward under the Swedish Proposal and the Gauzès report.

Scope

The Gauzès report proposed dispensing with the small fund managers exemption altogether. However, the Swedish Proposal sought to retain the managed assets thresholds in the small fund manager exemptions under

¹¹ European Council's Swedish Presidency's revised compromise proposal (15th December 2009), <http://register.consilium.europa.eu/pdf/en/09/st17/st17330.en09.pdf>.

¹² European Council's Swedish Presidency's progress report (14th December 2009), <http://icffr.com/getdoc/1f52362f-1d58-4eae-bf66-f44ffc46329a/AIFM-Directive---Swedish-Presidency-report-update.aspx>.

¹³ European Council Spanish Presidency's Issues Note on AIFM Directive (11th January 2010), <http://register.consilium.europa.eu/pdf/en/10/st05/st05164.en10.pdf>.

the Commission Proposal. The Swedish Proposal would also expressly exclude “securitisation vehicles” from the scope of the AIFM Directive.

Capitalisation requirements (initial capital and own funds)

The Swedish Proposal suggested amending the Commission Proposal by imposing a cap of €10 million on the own funds requirement and additionally requiring that:

- an AIFM that is an internally managed AIF must have initial capital of at least €300,000; and
- if an AIFM “opts in” to the AIFM Directive, it will only be required to have initial capital of €50,000, provided that it manages solely AIFs that are non-leveraged and non-redeemable for the first five years and are an investing, rather than a trading, fund (“makes investments solely on a non-frequent basis”).

The Gauzès report similarly proposed a cap of €10 million on own funds, but provided that the capital requirement may be reduced by up to 50% if the balance is guaranteed by a credit institution or insurance company having a registered office in the EU (or in a third country with equivalent prudential rules). Furthermore, it would require that such funds be invested in liquid assets or assets which are readily convertible to cash in the short term, which would prevent firms from using them as working capital. In addition, it sought to require AIFM to hold a professional indemnity insurance.

Valuation

The Gauzès report would allow for valuation to be an “independent function” and exempt private equity from this requirement. However, it proposed to impose a (non-delegable) joint responsibility on the AIFM and the depositary for the proper valuation of assets and calculation of net asset value (“NAV”) of the AIF. By contrast, the Swedish Proposal only proposed a general requirement for AIFMs to implement proper procedures ensuring independent valuations. The frequency of valuation is left unresolved.

Depositaries

Both the Swedish Proposal and the Gauzès report proposed to extend the category of persons eligible to act as depositaries charged with custody of the assets beyond banks.

Leverage

Under the Swedish Proposal, national regulators will be empowered to monitor leverage limits through disclosures and impose leverage limits as necessary to ensure financial stability. The Gauzès report suggested that AIFMs should define in advance the leverage limits for each AIF they manage.

Disclosure of controlling interests in non-listed companies

The Swedish Proposal only applies the disclosure requirements for AIFs’ controlling interests in non-listed companies (called “controlling influence” by the Gauzès report) to 50% or greater stakes in a non-listed company which is not a small or medium-sized enterprise (“SME”).

Third country regime (marketing of non-EU AIFs)

The Commission Proposal has been criticised for unduly restricting EU market access for non-EU AIFMs through its proposed equivalency standards and for proposing to restrict the ability of EU AIFMs to provide investment services to non-EU AIFs.

The Swedish Proposal removed some of the more onerous provisions relating to the marketing of non-EU AIFs from the Commission Proposal; however, it proposed to leave it up to EU member states to allow authorised AIFMs managing a non-EU AIF to market that fund to professional investors in their own jurisdiction under their domestic private placement regime. That is aligned with the current position for all non-UCITS funds, including non-EU AIFMs managing non-EU AIFs. That is, although only EU AIFMs managing EU AIFs will be able to enjoy

EU-wide passports, both EU and non-EU AIFMs could market non-EU AIFs in a member state to the extent permitted by the laws of that member state.

As discussed above, the Gauzès report proposed certain additional marketing restrictions.

Master-feeder structures

The Swedish Proposal sought to ensure that master-feeder structures (where a feeder AIF invests “at least 85% of its assets” in shares or units of one or more master AIFs which have identical investment strategies) cannot be used to circumvent the EU passport rules and that an EU feeder AIF can only benefit from an EU passport if the master AIF is also established in the EU and managed by an authorised AIFM.

Similarly, the Gauzès report proposed that when a feeder AIF invests in a master AIF which would not benefit from the EU passport under the AIFM Directive, such feeder AIF should not benefit from the EU passport either.

Bank of England’s Financial Markets Law Committee (“FMLC”) Report, Issue 145 – AIFM Directive: Legal Risks (January 2010)¹⁴

On 2nd February 2010 Bank of England’s Financial Markets Law Committee (“FMLC”) published a report titled “AIFM Directive: Legal Risks/Analysis of certain core areas of the Alternative Investment Fund Managers which are capable of giving rise to significant legal uncertainty” (dated January 2010) (the “FMLC Report”). According to the FMLC Report, the current proposals are so flawed as to potentially “create significant legal uncertainty” and lead to “systemic failure and widespread market disruption.”

Specifically, the most serious issues in the current proposals were highlighted as follows:

- the uncertain scope of the directive, in particular the definitions of AIF and AIFM;
- the imposition of onerous (“impractical, complicated and costly”) requirements on depositaries, such as their joint liability with the AIFM for valuation of assets;
- the definition of “leverage” should be clarified; and
- third country provisions should be amended for a more flexible approach to allowing EU AIFMs to manage non-EU AIFs and non-EU funds to market to EU investors.

UK House of Lords EU Committee 3rd Report of Session 2009-10¹⁵

On 10th February 2010, the UK House of Lords EU Committee went so far as to urge the UK government to block the AIFM Directive, due to serious concerns about the current proposals. The following are some of the main concerns outlined in the House of Lords report:

- **Incompatibility with the global regulatory framework:** AIFM Directive provisions must be harmonised with equivalent legislation in third countries, especially the United States, in order to avoid the risk of regulatory arbitrage.
- **Protectionist passporting regime:** Current proposals may prevent EU investors from investing in non-EU funds as well as impose significant obstacles to managers wishing to market non-EU funds in the EU.
- **Disproportionate disclosure requirements:** The proposed disclosure requirements for AIFMs exceed the systemically relevant data needed to enable competent authorities to monitor threats to financial stability.

¹⁴ Bank of England’s Financial Markets Law Committee Report, Issue 145 – AIFM Directive: Legal Risks (January 2010), <http://www.fmlc.org/papers/Issue145Report.pdf>.

¹⁵ House of Lords EU Committee 3rd Report of the Session 2009-10 (10th February 2010), <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/48/48i.pdf>.

- **An unworkable “one size fits all” approach:** The proposals fail to differentiate between the wide variety of AIFs, such as hedge funds, private equity, real estate, commodity or infrastructure funds.

European Council, Spanish Presidency’s New Compromise Proposal on the AIFM Directive (15th February 2010)¹⁶

On 15th February 2010, the Council’s Spanish Presidency published a new compromise proposal for an amended text of the AIFM Directive (the “Spanish Proposal”) expanding on its previous proposal of just two weeks earlier and further amending the Swedish Proposal.

Market participants had been quick to express their disappointment with the Spanish Presidency’s earlier compromise proposal dated 1st February 2010,¹⁷ claiming that not only did it fail to produce any improvement, but made matters worse in some respects, particularly as regards the third country regime due to their protectionist effects.

In principle, AIFMs would only be permitted to market EU AIFs to professional investors in the EU, based on a single authorisation, and the EU-wide marketing passport, granted under the AIFM Directive. However, the Spanish Proposal would allow member states the authority to permit AIFMs to market non-EU AIFs which are established in selected third countries to professional investors in their own jurisdiction. Clearly this would make it harder for AIFs based outside the EU to access EU investors, encouraging protectionism and limiting choice whilst raising costs for the investors.

The main criticisms concerned the departure from the Swedish Proposal to permit the marketing of non-EU AIFs by non-EU AIFMs into the EU under member states’ private placement regimes. Under the Spanish Proposal, non-EU AIFs could only be marketed to EU investors if there is a cooperation and information sharing agreement in place between the competent authorities of the fund’s (non-EU) home country and the host member state in the EU where the fund is proposed to be sold. Furthermore, in order to engage in such marketing activities in the EU, the manager of the non-EU AIF would have to comply with additional disclosure requirements under the AIFM Directive.

The following are some of the new amendments included in the latest Spanish Proposal:

- **“Optional exemptions” for small AIFMs (“common management or control”):** New wording is added allowing member states the discretion to provide “optional exemptions” to AIFMs which, either directly or indirectly through another company under “common management or control,” manage AIFs whose assets exceed the same threshold amounts under the “small fund managers” exemptions. Furthermore, it is proposed that in this case the member states shall at least require the “exempted” AIFMs to register, regularly report information and notify its home member state competent authority if they no longer meet the conditions for the exemptions to apply.

The “common management or control” wording is also added to other thresholds, e.g., capital requirements (own funds).

- **Organisation requirements:** In setting organisation requirements for AIFMs the home competent authorities shall have “regard also to the nature of the AIF managed by the AIFM.”
- **Valuation:** Rules for valuation and calculation of NAV shall be laid down in the national laws of the country where the AIF is established and/or the AIF’s rules or instruments of incorporation.

¹⁶ EU Council Spanish Presidency’s new compromise proposal on the proposed AIFM Directive (15th February 2010), <http://register.consilium.europa.eu/pdf/en/10/st06/st06498.en10.pdf>.

¹⁷ EU Council Spanish Presidency’s compromise proposal on the proposed AIFM Directive (1st February 2010), <http://register.consilium.europa.eu/pdf/en/10/st05/st05918.en10.pdf>.

Such rules should set out the procedures for assets to be valued and published at least once a year and more frequently as regards open-ended AIFs according to the particular characteristics and the issuance and redemption policies of the specific assets involved.

- **Depository:** The Spanish Proposal would subject the depository's appointment to approval by the competent authority of the AIF's home member state or (for non-regulated AIF) the AIFM's home member state.
- **Disclosure of controlling interests in non-listed companies:** The disclosure requirements for AIFs with controlling interests (i.e., 50% or greater stakes) in a non-listed company shall not apply where the non-listed company is a special purpose vehicle with the purpose of "purchasing, holding or administrating real estate."
- **Third country regime:** The Spanish Proposal adds new provisions which lay down the conditions for an EU AIFM to engage in marketing a non-EU AIF. These provisions give member states the discretion to allow an EU authorised AIFM to market to professional investors in their own countries an AIF which is established in a third country, or a feeder AIF where the master AIF is established in a third country and/or is not managed by an authorised AIFM, provided that (i) the AIFM complies with all the requirements of the AIFM Directive except those relating to depositaries and (ii) appropriate cooperation arrangements are in place between the competent authorities of the AIFM's home member state (EU) and the AIF's home third country (non-EU).

Next steps

At present, the three respective proposals by the Commission, the Council and the Parliament (i.e., the Commission Proposal, the Spanish Proposal and the Gauzès report) are all simultaneously on the table to be considered and discussed among the EU legislators.

An amended draft of the AIFM Directive is expected to be published when the Commission, the Council and the Parliament have been able fully to consider the outstanding issues and proposals, and come to a conclusion on the alternative regulatory options.

The amended draft is then expected to be voted on in the ECON Committee on 12th April 2010 and in Plenary Sitting on 14th June 2010 (indicative date).¹⁸

Throughout the remaining legislative process, the various provisions will undoubtedly continue to draw intense lobbying from the industry as well as behind-the-scenes lobbying and negotiations among both the EU member states and those non-EU countries with significant interests in the European AIF market.

¹⁸ European Parliament Legislative Observatory – Procedure File on Alternative Investment Fund Managers (amend. Directives 2004/39/EC and 2009/.../EC), <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2009/0064>. See also, European Commission webpage on "Alternative Investments," http://ec.europa.eu/internal_market/investment/alternative_investments_en.htm.

Contacts

Peter Green
+44 20 7920 4013
pgreen@mofo.com

Helen Kim
+44 20 7920 4147
hkim@mofo.com

Contact your Morrison & Foerster lawyer with any questions.

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