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Investment Funds & Private Capital

AIFMD Refresher: Deal Notifications & Anti-Asset Stripping Rules

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The AIFMD contains numerous ongoing obligations that apply to sponsors and funds long after fundraising has completed. As part of our AIFMD refresher series, this article summarises one of the key AIFMD ongoing requirements that both EU and non-EU alternative investment fund managers must comply with for each fund marketed in the European Union and the United Kingdom. As most sponsors are aware, the AIFMD includes ongoing compliance requirements, including reporting to regulators and investors, post-deal notifications to EU and UK regulators and ESG investor reporting – this article focusses on the portfolio company and anti-asset stripping rules under Article 26-30 of the AIFMD.

Key Takeaways:

1. EU and UK deals may be subject to post-completion notifications, which fund managers must file with relevant regulators within 10 business days of completion.
2. Certain EU and UK deals may also be within the scope of the AIFMD “anti-asset stripping rules” which may restrict distributions, share buybacks/share redemptions and reductions of capital for a period of 24 months following the acquisition of an EU or UK portfolio company. Deal analysis should be undertaken at an early stage to ensure compliance with the AIFMD portfolio company rules.

Article:

Both EU and non-EU fund managers marketing an alternative investment fund in the EU or the UK (either under an EU marketing passport or the relevant national placement regimes (collectively referred to herein as “**AIFMs**”)) are required to notify either their home member state regulator or the regulators in each jurisdiction where the fund is registered for marketing (together, the “**Regulators**”) where a fund acquires voting rights in an EU/UK portfolio company.

Funds that acquire a stake in an EU or UK portfolio company (including indirect acquisitions via a parent company headquartered outside the EU/UK) may be required to comply with the AIFMD portfolio company rules, set out in Articles 26-30 of the AIFMD.

Notification Requirements

If the fund (or one of its portfolio companies) acquires, increases or disposes of a stake in a non-listed EEA or UK portfolio company crossing certain voting rights thresholds (10%, 20%, 30%, 50% or 75%), AIFMs must notify the relevant Regulators **within 10 working days** of completion of the relevant transaction.

In addition to direct acquisition of EU/UK targets, these notifications can be triggered in relation to (i) acquisitions or disposals of stakes in targets considered to be non-EU/UK, where the target group contains one or more EU/UK subsidiaries, and (ii) acquisitions or disposals of EU/UK entities by the fund's existing portfolio companies as part of an add-on transaction, restructuring or divestment.

Additional Notification Requirements

For funds that acquire "control" of an EU/UK non-listed company, AIFMs must notify the target company board, its shareholders and the relevant Regulators of additional information set out in Article 28 of the AIFMD. These notifications include:

- information on the identity of the manager;
- the extent of and date on which control was acquired;
- the transaction structure;
- conflicts policy and policy for communicating with the target and its employees;
- plans for future business of the target and likely repercussions on employment.

Sponsors are required to use best efforts to ensure that the company board informs the employees' representatives (or, where there are none, the employees themselves) of the information in the notification.

For the purposes of the AIFMD, "control" is 50%+ of the voting rights for non-listed companies.

Credit fund sponsors should pay particular attention to the AIFMD portfolio company rules when entering into debt-for-equity transactions following an initial debt investment in a portfolio company. If a credit fund ultimately holds greater than 10% of the voting rights of a portfolio company, the AIFMD portfolio company rules, including the regulatory notices noted above, will be triggered.

"Anti-Asset Stripping" Rules

Where a fund acquires "control" of an EU/UK portfolio company, the AIFMD anti-asset stripping rules will also apply, which will prohibit distributions (other than out of the distributable profits of the relevant portfolio company) for a period of 24 months after completion/control is acquired.

As a consequence, under the AIFMD anti-assets stripping rules, the following transactions are prohibited during the 24-month period following the acquisition of the relevant portfolio company: distributions (including dividends), capital reductions, buybacks and redemptions.

For any deal within scope of the AIFMD portfolio company rules, sponsors should consider the AIFMD anti-asset stripping restrictions at an early stage to ensure the same are considered in light of any post-completion/acquisition steps.

Helpfully, there are two exemptions to both the notification requirements and anti-asset stripping rules, which apply to small-medium sized portfolio companies (must have < 250 employees and turnover of < €50m and/or a balance sheet of < €43m) and to real estate SPVs.

Impact of Brexit – Prior to Brexit in the case of acquisitions of target groups including both UK and EU portfolio companies, transactions would have been considered one “acquisition” and the AIFMD portfolio company rules would apply to the acquisition of the whole group. However, post-Brexit, the acquisition of a target group containing both EU and UK targets/subsidiaries may create a scenario where the AIFMD portfolio company rules are applied separately to the UK and the EU group entities within the target group.

Key takeaways for sponsors are to identify potential deals within the scope of the AIFMD portfolio company rules, prepare the relevant regulatory notifications and factor in the impact of the anti-asset stripping rules as early in the deal process as possible.

Go Deeper:

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings lawyer:

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