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European Commission Publishes AIFMD, Level 2, Implementing Regulation

Adoption of the regulation accelerates implementation of the Alternative Investment Fund Managers Directive throughout the EU.

The European Commission adopted the long-heralded Alternative Investment Fund Managers Directive (AIFMD), level 2, implementing regulation (the Regulation) on 19 December 2012.[1] The Regulation, when it enters into force, will be directly applicable in all EU member states and will not require any transposition into member-state law. The European Parliament and the European Council have three months in which to scrutinise the text and, if they wish, to oppose the entire text (they have no right to amend it). However, in light of the support given to the text by Jean-Paul Gauzès, the Parliament's rapporteur on the AIFMD, and the difficulty of achieving a qualified majority in the Council, it is considered unlikely that the text will be opposed.

Overview of the Regulation

Passage of the Regulation is a precondition for the application of the AIFMD throughout the EU. The Regulation was adopted to supplement certain elements of the AIFMD and details the following:

- Conditions and procedure for the determination and authorisation of alternative investment fund managers (AIFMs), including the capital requirements applicable to AIFMs
- Operating conditions for AIFMs, including rules on remuneration, conflicts of interest, risk management, liquidity management, investment in securitisation positions, organisational requirements, and rules on valuation
- Conditions for delegation
- Rules on depositaries, including the depositary's tasks and liability
- Reporting requirements and leverage calculation
- Rules for cooperation arrangements

The adoption of the Regulation paves the way for an acceleration of the transposition of the AIFMD at national level throughout the EU.[2]

ESMA Consultation Papers

Also on 19 December, the European Securities and Markets Authority (ESMA) published two consultation

1. View the Regulation at http://ec.europa.eu/internal_market/investment/docs/20121219-directive/delegated-act_en.pdf.

2. For background information concerning the AIFMD, as well as a discussion of the proposed regulations, see our 23 July 2012 LawFlash,"EU ESMA Proposes Remuneration Guidelines", available at http://www.morganlewis.com/pubs/PIF_LF_EUESMAProposesRemunerationGuidelines_23july12.

papers—“Draft regulatory technical standards on types of AIFMs”[3] and “Guidelines on key concepts of the AIFMD”.[4] The closing date for responses to both ESMA consultations is 1 February 2013. The guidelines and technical standards should be finalised in the first half of 2013.

In its consultation on the draft technical standards on types of AIFMs, ESMA considers that the characteristics of alternative investment funds (AIFs) that make it possible to distinguish whether an AIFM is managing an AIF of the open-ended or closed-ended type should be defined in order to ensure that the rules on liquidity management, the valuation procedures, and the transitional provisions of the AIFMD are applied to AIFMs in a uniform manner.

In its consultation on the draft guidelines on key concepts of the AIFMD, the ESMA helps clarify the concepts in the definition of “AIFs” in the AIFMD by setting out the criteria for the following:

- Capital raising
- A collective investment undertaking
- Whether a “number of investors” exists
- Defined investment policy

We will be issuing a more substantive LawFlash on these developments early in 2013.

Update on AIFMD Implementation in France, Germany, and the United Kingdom

France

The *Autorité des marchés financiers* (AMF) set up an AIFMD Stakeholders’ Committee in November 2011 for the purpose of making recommendations for the implementation of the AIMFD in France. The AMF published an initial report on 15 June 2012, followed by a public consultation and publication of a final report on 26 July 2012.[5]

The AMF report emphasizes that French legislation relating to fund management is already substantially in compliance with the AIFMD’s requirements. However, the AMF proposes to seize the opportunities created by the AIFMD to give fresh impetus to the French legislation and market.

The AMF suggests implementing the AIFMD faithfully and recommends the following:

- Maintain a single regime for management companies, which would then be customized through a specific programme of operations that matches the features of each type of strategy.
- Apply the proportionality principle with regard to the requirement for the risk control function (e.g., in the case of managers of private equity or real estate funds).
- Reshape and simplify the regulatory range of French funds into three categories: Undertakings for Collective Investment in Transferable Securities (UCITS), AIFs marketed to retail investors (including retail non-UCITS or other specialised retail funds), and AIFs marketed to professional investors.
- Harmonise subscription thresholds designed to ensure that the most complex and riskiest products are marketed only to professional investors, as well as review the AIFs’ eligibility rules for institutional investors.

On 19 December 2012, a law was passed authorizing the French government to implement the AIMFD in French legislation by ordinance (*ordonnance*), which means that there will be no debate in the French Parliament. The proposed text of the ordinance is not publicly available, but it is likely to follow the AMF’s recommendations

3. View ESMA’s consultation paper “Draft regulatory technical standards on types of AIFMs” at http://www.esma.europa.eu/system/files/2012-844.pdf.

4. View ESMA’s consultation paper “Guidelines on key concepts of the AIFMD” at http://www.esma.europa.eu/ro/system/files/2012-845.pdf.

5. View the AMF’s final report at http://www.amf-france.org/documents/general/10529_1.pdf.

summarised above.

Germany

In Germany, the AIFMD will be implemented by the German Investment Code (*Kapitalanlagegesetzbuch*) (GIC). The GIC will replace the current German Investment Act (which implemented UCITS Directive 2009/65/EC in Germany) and will comprise the future legal framework for all investment funds in Germany. A first draft of the GIC was published by the German Ministry of Finance on 20 July 2012. After amendment by the federal government, a second draft was published on 30 October 2012. Although this draft will likely be amended to adjust the GIC to the technical implementation regulations of the AIFMD (Level 2 measures), it can be expected that the GIC will become effective prior to the expiry of the implementation deadline of AIFMD in July 2013.

With respect to the implementation of the AIFMD, the draft GIC aims at a one-to-one transposition of the AIFMD, i.e., the provisions of the AIFMD should be incorporated into German law unchanged to the greatest possible extent. In certain aspects, however, the draft GIC goes beyond the mandatory minimum requirements of the AIFMD and may impose a more stringent legal framework on the German investment fund industry than that required by the AIFMD. For example, the GIC does not intend to implement the *de minimis* exemption of the AIFMD in German law but will apply to all investment funds irrespective of their size. In addition, the GIC will extend to all fund types the application of certain provisions of the AIFMD that are not yet part of the UCITS legal framework. The most prominent example of this approach is that a depositary must be designated for any investment fund in the future.

United Kingdom

The UK's Financial Services Authority (FSA) and HM Treasury are working together to implement the AIFMD in the UK. In November 2012, the FSA published its first consultation paper[6] on UK implementation, which follows its January 2012 discussion paper[7] in which the FSA explained the background of the AIFMD and its general approach to implementing it in UK law. Based on this, it seems likely that implementation by the FSA will be effected by the following:

- The creation of a new Investment Funds Sourcebook, referred to as FUND, within the FSA Handbook. FUND will replace the current rules and guidance contained in the Collective Investment Schemes Sourcebook (COLL) and will contain requirements for both UCITS operators and AIFMs.
- Amending nonfund sourcebooks within the FSA Handbook to include AIFMD requirements for systems and controls and conduct of business.

The FSA also plans to publish a second consultation paper in February 2013.

HM Treasury is expected to consult formally by the end of Q1/2013 on amendments to primary and secondary legislation to implement the AIFMD. It seems likely that implementation by the UK government will be effected by the following:

- Amending section 235[8] of the Financial Services and Markets Act 2000.[9] Section 235 contains a definition of a "collective investment scheme" and could be impacted by transposing the AIFMD definition of an AIF into UK law.
- Amending the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001[10] to include some new regulated activities, including the activity of managing AIFs.

6. View the FSA's consultation paper at http://www.fsa.gov.uk/static/pubs/cp/cp12-32.pdf.
7. View the FSA's discussion paper at http://www.fsa.gov.uk/static/FsaWeb/Shared/Documents/pubs/discussion/dp12-01.pdf.
8. View section 235 at http://uk.practicallaw.com/3-505-5868?pit=.
9. View the act at http://uk.practicallaw.com/5-505-5867?pit=.
10. View the order at http://uk.practicallaw.com/2-506-5523?pit=.

- Making a set of new regulations (the AIFMD Regulations 2013).

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

Frankfurt
Torsten Schwarze +49 69 71 40 07 63 tschwarze@morganlewis.com

London
William Yonge +44 (0)20 3201 5646 wyonge@morganlewis.com

Paris
Ann G. Baker +33 1 53 30 44 24 abaker@morganlewis.com

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