

THE DIRECTIVE ON INVESTMENT FUND MANAGERS (AIFM DIRECTIVE)

The End of Gray Capital Market?



The Directive on Alternative Investment Fund Managers (**AIFM**)¹ aims to create an effective and extensive regulatory framework for alternative investment fund managers within the EU, to advance the stability and transparency of investment vehicles. The AIFM-Directive applies only to the management of alternative investment funds (**AIF**). AIFs, in themselves, are not covered by the AIFM-Directive, but are regulated by national acts of EU-Member-

States (as was done by German legislation). The AIFM-Directive applies to (i) all EU AIFMs that manage one or more AIFs regardless of whether such AIFs are EU AIFs; (ii) non-EU AIFMs that manage one or more EU AIFs; (iii) non-EU AIFMs that market one or more AIFs in the EU regardless of whether such AIFs are EU AIFs or non EU AIFs. As a consequence, the AIFM-Directive does not apply to:

- (a) holding companies;
- (b) institutions for occupational retirement;
- (c) supranational institutions;
- (d) national central banks;
- (e) national, regional and local governments or and bodies to other institutions which manage funds supporting social security and pension systems;
- (f) employee participation schemes or employee savings schemes; and
- (g) securitization special purpose entities.

AIFMs that manage one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF, do not fall within the scope of the AIFM-Directive.

The AIFM-Directive covers all types of investment funds, as far as they are not undertakings for collective investment in transferable securities (UCITS) within the meaning of the UCITS IV-Directive. Therefore, the AIFM-Directive applies to managers of most fund-types, including:

- Private Equity Funds;

¹ The AIFM-Directive was formally published in the Official Journal of the European Union on 1 July 2011 and entered into force on 21 July 2011 [Directive 2011/61/EC of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) No 1095/2010].

- Real Estate Funds;
- Funds of Funds
- Hedge Funds;
- Venture Funds;
- Property Funds.

The AIFM-Directive contains, inter alia, the following obligations:

- Registration/Authorization requirements for AIFM;
- Special authorization requirements for AIFM or AIF based outside the EU (e. g. Turkey, U.S.A. and Switzerland);
- Minimum capital requirements;
- Operating conditions and organizational requirements for AIFM;
- Risk management requirements and obligations;
- Appointment of depository through a written contract;
- Implementation of EU-Passport (or so called "EU-Marketing-Passport") regulations;
- Marketing of units or shares of EU AIFs in the home member state of the AIFM;
- Requirements for EU AIFMs which manage non-EU AIFs which are not marketed in member states;
- Transparency requirements (such as reporting, disclosure and information obligations);
- Specific leverage and depository rules;
- Marketing of AIFs by AIFMs to retail investors.

EU-Member-States have to transpose the AIFM-Directive (as a coordinated regulatory framework) into national legislation by 21 July 2013. For this reason, in 2012 Germany released a draft for an Act on the implementation of AIFM-Directive. The draft will create a new extensive law titles the "German Investment Code" (Kapitalanlagegesetzbuch – GIC), which will comprise closed-end-funds, UCITS and other open-ended investment funds by one single act. Other EU countries are expected for follow Germany's example and enact new laws soon.

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