

Alternative Investment Fund Managers Directive

– funds find a new home in Gibraltar

By Joey Garcia, Isolas, December 2009

Everyone in the fund industry is more than aware of the European Commission's draft directive on Alternative Investment Fund Managers (AIFM). The Directive, generally speaking, will not only affect the European hedge fund industry but also private equity and other sectors including real estate investment products. Needless to say, this is a matter which will no doubt need to be given significant consideration by Gibraltar-based funds and managers in the future.

Initially at least, there was considerable anger and frustration that the Directive had been drafted with little or no industry consultation. In a recent public hearing before the EU Economics and Monetary Affairs (Econ) Committee, Mr Gerben Everts, head of Dutch pension manager APG's global regulations and compliance, was very direct in pointing out: "If it is indeed the intention of the Directive to increase transparency on the alternative asset management industry, why do you, honourable members, accept the regulatory process to take place in the dark?"

One of the many effects of the Directive, at least initially, was to restrict Alternative Investment Funds not domiciled in the EU being marketed or sold to any professional investors (as defined by MiFID) unless a series of strict conditions were met. These included a requirement that the country in which the fund was domiciled enter into an agreement which complied with the standard set out in Article 26 of the OECD Model Tax Convention, with each of the Member States in which the fund intended to market itself. The benefit for Gibraltar here would be obvious as a jurisdiction that offers a European entry point for many Non-EU collective investment vehicles.

However, one of the effects of a series of (138) amendments proposed by Jean-Paul Gauzès, rapporteur for the European Parliament's Committee on Economic and Monetary Affairs, has been to substantially amend this provision. The amended proposals make it clear that institutional investors should be able to choose where they wish to put their money, and that they should be able to invest through existing and preserved national placement regimes. Nevertheless, the same proposals also suggest a restriction on funds of hedge funds investing more than 30% in funds domiciled outside of the EU.

A number of other suggestions made by Mr Gauzès also bode well for Gibraltar, including the removal of the suggestion of regulation for fund managers managing funds with less than €100 million in assets under management (AUM) which would keep the niche, boutique or family office manager out of the scope of the Directive.

On the whole, many of the concerns raised by investors have been taken into account and can be seen percolating into the legislation, although there are still industry concerns in relation to the regulation of short selling and the use of leverage.

Regardless of these changes, Gibraltar continues to offer an attractive EU base for managers and promoters wishing to bring their products into an EU regulatory framework and seeking the EU-regulated ‘stamp’ on their investment products, particularly at a time when the Gibraltar Funds industry is gathering momentum. In addition to this, developments such as a substantial increase in Cayman registration fees as a result of the well-reported budget deficit situation which has arisen there, could assist Gibraltar in gaining a greater market share.

In the post-Madoff environment, the trend of domiciling funds in well regulated and supervised jurisdictions such as Gibraltar has gained popularity. We expect the continued development of this trend, and to see continued interest in the re-domiciliation of Funds into Gibraltar from various offshore and non-EU centres.

The procedure for re-domiciliation under the existing Gibraltar Companies (Re-Domiciliation) Regulations 1996 is simple and effective. The process ensures continuity of performance, allows for assets to remain untouched without the need for transfers or adjustments, and crucially, provides for unit holders to remain registered as they did in the foreign jurisdiction. Needless to say, the fund must be domiciled in a jurisdiction recognised by Gibraltar for this purpose and must have appropriate provisions in its laws. In addition, the charter, statutes or memorandum and articles or other instrument constituting or defining the foreign company must also allow for the re-domiciliation.

As implied by the nature of the process itself, the continuance of a foreign company in Gibraltar does not create a new legal entity or prejudice its continuity, nor does it affect the assets or property originally held. Furthermore, the company will not be released from any contractual obligations, claims and / or actions. From a Gibraltar perspective, the process of re-domiciliation can be easily managed and is quick and simple. An application for consent to be continued in Gibraltar (in the prescribed form) must be submitted to the Registrar with the required documentation. The foreign company’s offering memorandum, as well as its constitutional documentation, would be required to comply with Gibraltar law and certain amendments would need to be made to this documentation in order for the company to be able to carry on business as an Experienced Investor Fund (EIF), Gibraltar’s premier alternative fund vehicle. Other minor formalities combined with the verification of the fund’s technicalities and the discontinuation of the foreign company in its jurisdiction would be necessary.

The Financial Services Commission would need to be satisfied that the company is in compliance with local financial services supervisory laws before it authorises it as an EIF. This would involve the company being required to appoint a local fund administrator, auditor and at least two directors, all of which must be authorised by the Regulator. The existing investors must also qualify as “Experienced Investors” (as defined in the legislation).

Once the foreign company becomes a Gibraltar company, all counterparties are appointed and the documentation is in place, the standard EIF registration procedure would then need to be followed. This would involve the EIF filing its constitutional and offering documents (by this stage Gibraltar-law compliant) with the Regulator

alongside an opinion from Gibraltar counsel confirming that the EIF has satisfied the relevant financial services legislation.

For further information in relation to the transfer of corporate / funds structures to Gibraltar and the establishment of EIFs, contact Joey Garcia at joey.garcia@isolas.gi.