Belgium’s New Law Implementing the EU Alternative Investment Fund Managers Directive


The European Union’s Alternative Investment Fund Managers Directive (‘AIFMD’) provides for comprehensive changes in the regulatory framework applicable to alternative investment fund managers (‘AIFMs’) that manage or market alternative investment funds (‘AIFs’) within the European Union. The AIFMD does not introduce rules and regulations on a harmonised level for AIFs. However, it provides for authorisation and prudential supervision for AIFMs (including self-managed AIFs) which indirectly but heavily impact the AIFs under management. Detailed rules are laid down in delegated regulations and, more specifically, in Commission Delegated Regulation (EU) No 231/2013, which are all directly applicable in all EU member states.

The deadline for transposition of the AIFMD into national law by EU member states was July 22, 2013. Belgium did not meet this deadline. Finally, on June 17, 2014, the Act of April 19, 2014, on Alternative Investment Funds and Their Managers (‘AIFM Act’) was published in the Belgian Official Gazette and generally entered into force on June 27, 2014.

Scope

The AIFMD and the AIFM Act define an AIF as a ‘collective investment undertaking’ which raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors, but excludes funds that are authorised under the EU regulations governing undertakings for collective investment in transferable securities (‘UCITS’).

The definition is intentionally broad, without regard to form of fund entity, fund structure (e.g., closed end or open end), economic terms or jurisdiction of formation, and captures hedge funds, private equity funds, venture capital funds, real estate funds and infrastructure funds.

Holding companies, pension funds, certain supranational institutions, national central banks, employee participation or saving plans and securitisation special purpose entities are excluded from the definition.

The definition was potentially capture ‘co-investment’ transactions in which were not directly connected to an AIFM activity, including transactions in which an AIFM manages on behalf of an capital market fund or other collective investment undertaking.

As such, the AIFMD and the AIFM Act effectively cover all AIFMs managing or marketing AIFs which do not currently require authorisation under the EU UCITS Directive in the following situations:

1. In relation to EU AIFMs: all AIFs managed by them (whether or not based in the EU and whether or not marketed to EU investors), and
In relation to non-EU AIFMs: all EU AIFs managed by them. In addition to "non-EU AIFMs" which manage AIFs through "passport", or the AIFM can benefit from the "European Passport". They may also at any time opt in under the AIFMD, in which case the AIFM can benefit from the "European Passport". Exempt AIFMs are still required to register with the Belgian Financial Services and Markets Authority ("FSMA") and to comply with certain disclosure requirements on investment strategy and activities on an ongoing basis, so as to allow the FSMA to effectively monitor systemic risk.

Disclosure and Transparency

AIFMs are subject to a series of enhanced disclosure requirements on investment strategy and activities on an ongoing basis, so as to allow the FSMA to effectively monitor systemic risk.

Impact on the Belgian Fund Industry

Before the introduction of the AIFMD, the Belgian legal framework for funds was exclusively laid down in the Act of 28 July 1978 on Certain Forms of Collective Investment in Financial Shares ("the UCITS Act"). Under the provisions of the UCITS Act, all UCITS (including UCITS managers) and investment vehicles (which were excluded from the UCITS Act) remain regulated by the UCITS Act. All UCITS managers are required to comply with a broad set of Belgian-specific rules and regulations.

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Regulatory Capital

The AIFMD and the AIFM Act create a regulatory framework for funds. This framework is aimed at preventing asset stripping and similar events. AIFMs are subject to a series of enhanced disclosure requirements on investment strategy and activities on an ongoing basis, so as to allow the FSMA to effectively monitor systemic risk.

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null of an external event beyond its reasonable control, the consequences of which would have been unavoidable regardless of its reasonable efforts.

Leverage
AIFMs managing one or more AIFs employing leverage on a substantial basis are required to disclose to the FSMA information on the overall level of leverage employed by an AIF, the nature of leverage and the terms of each trade in leveraging arrangements. Further, there is a broad range of provisions to keep leverage under control and to prevent it from causing systemic risks.

Remuneration
AIFMs are required to put in place remuneration policies and practices for those categories of staff whose professional activities have a material impact on the risk profile of the AIF they manage, including senior management, risk takers, control functions and any other employee with an equivalent remuneration package. Assessment for rewards must be based on longer-term performance and a framework appropriate to the life cycle of the AIF. Guaranteed variable pay should be the exception rather than the rule and must be limited only to new staff in their first year. In addition, a substantial proportion of the variable remuneration component (at least 40 percent and, in some cases, up to 60 percent) must be deferred over an appropriate period.

The text of Belgium’s Act on Alternative Investment Funds and Their Managers, in Dutch, can be accessed at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2014041962&table_name=wet.


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