

Revue Trimestrielle de Droit Financier

Corporate Finance and Capital Markets Law Review

Colloques

Transposition de la directive AIFM : enjeux et perspectives

Présentation de la directive AIFM et de l'ordonnance française du 25 juillet 2013 transposant celle-ci
Bénédictine FRANÇOIS

La Directive AIFM
Jean-Paul GAUZÈS

Les enjeux de la transposition de la directive AIFM pour la gestion française
Stéphane JANIN

Loi de transposition de la directive AIFM au Luxembourg
Agnès FÉREY

The AIFMD and its Italian Implementation :
Of a Slow Start and of a Windy Regulatory Exercise
Marco LAMANDINI

La transposition de la directive AIFM en Allemagne
Katrin DECKERT

Perspective de droit comparé : la régulation des hedge funds aux États-Unis post Dodd Frank Act
Anne RIVIÈRE

Les enjeux pour l'Autorité des marchés financiers
Édouard VIELLEFOND

La notion de fond d'investissement alternatif (FIA)
Stéphane TORCK

Regard sur les fonds de dettes
Frédéric LACROIX

Passeport et commercialisation des fonds
Pauline PAILLER

L'impact de la directive AIFM sur les structures de partenariat et les joint ventures
Brice HENRY
Damien LUQUÉ

Les exigences de transparence
Nicolas RONTCHEVSKY

La délégation de fonctions dans la directive AIFM
Isabelle RIASSETTO

L'affaire Madoff et ses suites
Jacques-Henri ROBERT

La responsabilité du dépositaire
Anne-Dominique MERVILLE

Le conseil d'administration

Des conseils à la recherche d'une meilleure efficacité
Jean-Marie MOULIN

Conseil d'administration ou directoire et conseil de surveillance : l'état du débat en 2013
Anne OUTIN-ADAM
Caroline COUPET

L'intérêt d'un conseil dans une SAS
Jean-Florent RÉROLLE

Les salariés au conseil : utopies et réalités
Gilles AUZERO

Remarques à propos de l'administrateur indépendant et de l'administrateur référent
Didier PORACCHIA

La sanction des délibérations adoptées par un conseil d'administration irrégulièrement composé
Hervé LE HABASQUE

Entre pouvoirs généraux et pouvoirs spéciaux : un conseil, pour quoi faire ?
Yann PACLOT

Les relations du conseil avec les autres organes sociaux et avec son Président
Paul LE CANNU

Formation, information, investigation : un triptyque au service du vote éclairé de l'administrateur
Sophie SCHILLER

Les règles pratiques de fonctionnement du conseil : délibérations, vote, procès-verbal
Bruno DONDERO
Jean-Philippe GILLE

Repenser la responsabilité des administrateurs ? La responsabilité versus rémunération des administrateurs
Dominique SCHMIDT

La responsabilité des membres des comités du conseil
Didier MARTIN

La responsabilité ratione loci des administrateurs dans les sociétés internationales
Michel MENUJUCQ

Vers une professionnalisation des administrateurs ?
Daniel LEBÈGUE

Luxembourg, à Paris ou à Londres. Je crois qu'il y a trois questions clés, notamment pour Luxembourg :

- ◆ La première c'est : 'Quid des dispositions transitoires' ? Est-ce que les dispositions transitoires vont également être ouvertes à des gestionnaires non européens leur permettant de distribuer leurs produits au Luxembourg sans avoir à se conformer avec les règles de la directive d'ici Juillet 2014 ? La réponse -qui devra être confirmée par le texte de loi - semble être positive : oui, les dispositions transitoires seront élargies aux gestionnaires de FIA existant non européen, de façon à ce que le régime de placement actuellement en vigueur puisse être utilisé pour des structures existantes et leurs fonds existants jusqu'en Juillet 2014 (**donc** sans application des règles en matière de transparence) ;
- ◆ Deuxième grande question opérationnelle : quelle sera la première date à laquelle je devrai effectuer un reporting au régulateur ? Je crois que là, l'ESMA dans son papier de consultation a clarifié les choses en annonçant la date du 31 Janvier 2014 ; même si cette date fait l'objet d'une consultation, je crois que le message à retenir est que cette date de premier reporting au régulateur est très proche, ce qui veut dire qu'il faut se préparer dès maintenant compte tenu de l'importance des ajustements nécessaires.
- ◆ Et pour conclure dernière question que se posent les gestionnaires : comment remplir les conditions pour passer le test de substance ? Et là on voit un réel effort de la part des gestionnaires pour construire de la substance et je dirais notamment au travers de la fonction de risque management : recrutement de risk managers, formalisation de la fonction, etc.

Voilà, je crois que je n'ai que trop parlé. Je vous remercie de votre attention et pour toute question puisque je ne peux malheureusement pas être là aujourd'hui, je vous laisse mes coordonnées email.

The AIFMD and its Italian Implementation : Of a Slow Start and of a Windy Regulatory Exercise

Marco Lamandini*

Full Professor of Business Law at the University of Bologna and Member of the (Joint) Board of Appeal of the European Supervisory Authorities

According to Article 66 of AIFMD "by 22 July 2013 Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive". Despite this deadline, Italian implementation, albeit currently on its way, is still delayed and the deadline will certainly lapse before the approval of the Italian implementing rules. Italian transposition shall be made, indeed, through the 2013 law of "European delegation" approved as a proposal (hereinafter, the "Bill") by the Council of Ministers on April 17, 2013 ; the Bill (once approved by the Parliament) shall delegate the AIFMD implementation to the Council of Ministers according to the general principles set out in the same Bill. However, at the time of writing, the bill has been approved on July 8, 2013 at the Senate and is pending for final approval at the House.

The "law of European delegation" is based on Italian law 4 February 2005 no. 11 as amended by law 24 December 2012 no. 234 and is aimed at curing the delay unfortunately accumulated by Italy in the implementation of several European directives starting from 2010 (due the earlier termination of the previous legislature). For this reason, there are currently 31 infraction proceedings filed by the Commission against Italy ; the law of "European delegation" is meant to implement 47 directives in several areas, herein included the AIFMD, also to cure such infractions.

Article 12 of the Bill of "European Delegation" sets out, according to Article 76 of the Italian Constitution, the guiding principles for AIFMD Implementation and namely provides for 14 general principles and criteria. In particular, Article 12 mandates to amend the Italian Consolidated Act on Financial Intermediation (Legislative Decree 24 February 1998 no. 58) where necessary to implement Directive EU/2011/61 and the relevant Commission's and ESMA's implementing measures so as : (1) to grant to Bank of Italy and CO.N.SO.B all relevant secondary regulatory competence ; (2) to ensure (a) that a collective investment undertaking established in Italy (i) can engage in the activities and provide the services permitted under the Directive (ii) and can establish and manage EU and non EU AIFs and (b) that a EU and non EU collective investment undertaking can establish an AIF in Italy according to the conditions laid down in the Directive ; (3) to ensure that an Italian AIFM be established and operate according to the Italian rules and that the subsidiaries of

* Opinions expressed reflect only the personal views of the A. Equal disclaimers apply.

foreign AIFM operating in Italy act in conformity with the rules of conduct set out in the Italian Consolidated Act ; (4) to amend, where relevant, the existing Italian rules on the depositary so as to align the same to the provisions of the Directive, herein included those on the depositary's liability ; (5) to bring about into the Consolidated Act the special obligations for AIFMs managing AIFs which acquire control or major shareholdings of non listed companies set out in the Directive ; (6) to grant to Bank of Italy and CO.N.SO.B all relevant supervisory functions in respect to AIF and AIFM ; (7) to align the existing Italian rules on cooperation and exchange of information between different competent authorities with those set out in the Directive ; (8) to redefine in conformity with the rules set out in the Directive the provisions of the Consolidated Act concerning the marketing in Italy of units or shares of an Italian, EU or non EU AIF ; (9) to align the investor protection regime of the Consolidated Act to the provisions of the Directive, in particular with respect to the information to be given to the investors ; (10) to subject AIFs whose units or shares are marketed to retail investors, to more stringent requirements in respect to those applicable to AIFs reserved to qualified investors ; (11) to provide for the application of pecuniary administrative sanctions to AIFM for violations of the provisions set out in the Directive ; (12) to redefine the regulatory regime applicable to the collective investment undertaking other than UCITs and the proper delimitation of the activities reserved to the same ; (13) to coordinate the new provisions with those already existing (and non affected by the Directive) so as to ensure an appropriate level of investor protection and of financial stability ; (14) to coordinate the new provisions with the existing fiscal provisions on collective investment undertakings.

According to article 1 of the Bill, which incorporates by reference article 31(1) of law 24 December 2012, no. 234, once the Bill is approved, the Council of Ministers must implement the Directive either : (a) within 3 months from the date of approval of the Bill if the deadline for transposition of the relevant Directive has already lapsed or (b) with 2 months of advance in respect to the transposition deadline of the Directive if this is not lapsed yet (this latter provision, however, is not applicable in respect to AIFMD, due to the delay already accumulated). Considering the current parliamentary stage of the Bill, that the Legislative Decree shall be approved only after a formal consultation process with the industry and after submission of the draft to the competent parliamentary commissions for their preliminary opinion, it is likely that the implementation of the Directive shall occur at the end of 2013. As a matter of fact, Bank of Italy and CO.N.SO.B have started in the last months internal discussions in preparation for a tentative draft of Legislative Decree but their works in progress are still strictly confidential and there is no text yet available for consultation due to persisting uncertainties on some relevant policy choices (e.g. distribution of competences between the competent national supervisory authorities) to be adopted at the implementing level.

The AIFMD implementation shall have a substantial impact on the current Italian regulatory framework for AIFM and, perhaps, also on AIFs (although, as it is well known, the latter are not harmonized by the AIFMD). Indeed, AIFs and AIFMs are currently primarily regulated, together with other mutual investment funds, under title III of the Italian Consolidated Act (articles 33-49). Implementing measures of the "framework principles" set out in the Consolidated Act have been enacted through the Decree of the Minister of the Economy and Finance 24 May 1998, no. 228, as amended by

Decree no. 47/2003 and no. 197/2010 (the "Decree") and are now further detailed by regulation of the Bank of Italy 8 May 2012, which has been recently amended by regulation 8 May 2013. Under the existing national rules :

(1) Italian AIFs can be established by Italian (external) AIFMs under article 37 of the Consolidated Act. In particular, the Decree sets out the general criteria for the establishment of the different investment funds as regards : (a) the object of investment ; (b) the classes of targeted investors ; (c) the manner of participating in open- and closed end-funds, with special reference to the frequency of the issue and redemption of units, the minimum subscription, if any and the procedures to be followed ; (d) the minimum duration, if any ; (e) the terms and the conditions for the purchase or transfer of assets for funds investing exclusively or prevalently in real estate. In particular AIFs are covered by articles 9 ("open ended non harmonized funds") ; 12 (closed end funds) ; 13 (real estate funds) ; 15 (reserved funds) ; 15 bis (guaranteed funds) and 16 (hedge funds) of the Decree and by the relevant Bank of Italy implementing measures.

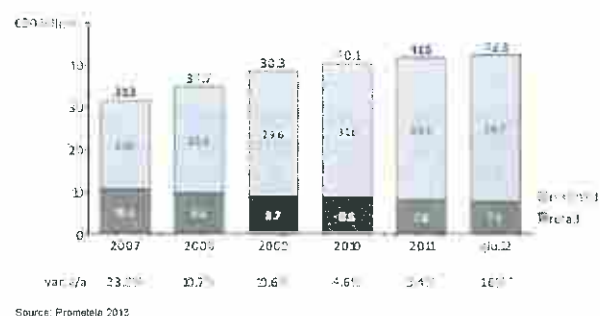
(2) Harmonized non Italian EU AIFMs are authorized to establish branches in Italy, to establish and manage a harmonized investment fund in Italy and to provide services in Italy according to the terms and conditions set out in article 41 of the Consolidated Act. Bank of Italy has further implemented these general provisions with the Regulation of 8 May 2012.

(3) Units of EU AIFs and of non EU mutual investment funds can be offered in Italy according to the terms and conditions set out in article 42 of the Consolidated Act. Bank of Italy has further implemented these general provisions with the Regulation of 8 May 2012.

A snapshot of the recent market trends of the Italian AIFs' industry offers a view of the quite critical evolution of alternative assets' management in Italy in the wake of the financial crisis ; regulatory competition played also a major role in this respect, as it is clearly showed by the (relatively) high number of AIFs and AIFMs established abroad by Italian institutions and assets' managers.

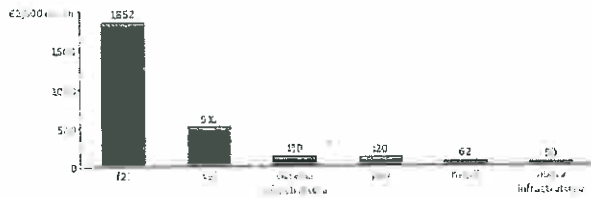
(a) Real Estate Funds

In the last few years the value of assets under management is still growing, but at progressively lower rates



(b) Infrastructures' Funds

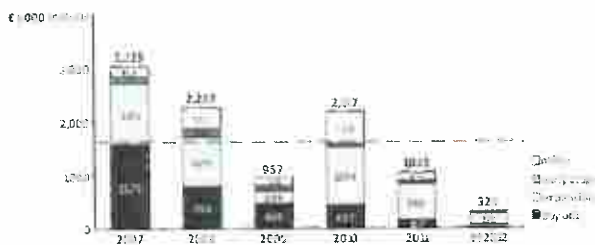
Infrastructure funds are focused solely on the Italian market and all commitments are basically centered on a single AIF (f2i, equaling 68 % of overall commitments)



Source: Prometeia 2013

(c) Private Equity Funds

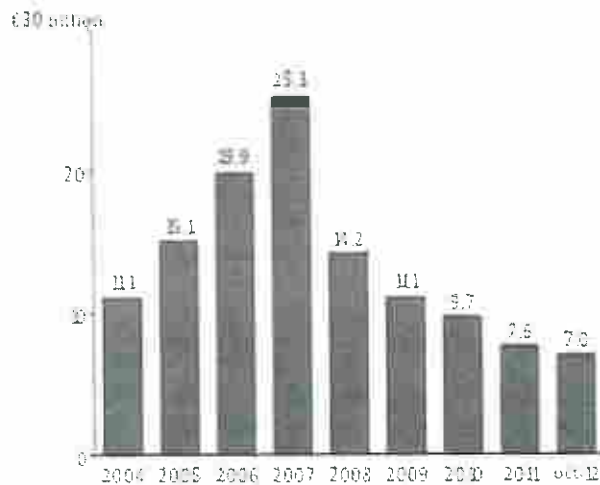
This segment of the industry shows commitments at around 300 Million € in the first half of 2012, with a sharp decrease compared to 2011 (-70 %)



Source: Prometeia 2013

(d) Hedge funds

From the peak in December 2007, the assets managed by the Italian hedge funds have fallen by over 70 % with very significant outflows from institutional investors



Source: Prometeia 2013

It is difficult to predict, at this stage, what policy options shall be finally adopted by Italian regulators in the implementation of the AIFMD. In particular, it is not clear yet whether the Italian regulator, which so far has adopted one of the most restrictive approaches in regulating AIFs, shall confirm the same regulatory philosophy or shall take the opportunity offered by the persistent non harmonization of alternative funds in the directive to start engaging in regulatory competition by aligning its (stricter) requirements to the more flexible (and more lenient) requirements set by other prevailing European jurisdictions. To my mind, such a regulatory response could prove rational at least under two counts: on one hand, to foster the “re-incorporation” in Italy of the very many AIFs established in other EU jurisdictions by Italian assets’ managers due to the perverse incentives of EU regula-

tory and supervisory competition in laxity; on the other hand, to attract as much as possible third country AIFs benefiting, in due course, of the passport provisions set out in the AIFMD. In particular, to align Italian prudential and portfolio requirements concerning AIFs to the standards prevailing in the international market so as to enhance the level playing field, it could be considered: (a) to widen, subject to appropriate diversification, portfolio requirements for Italian open ended retail AIFs; (b) widen the possibility for Italian AIFs to invest in non listed securities issued by SMEs; (c) to better align the rules applicable to Italian reserved funds to the one applicable to foreign funds; (d) to cancel the current requirement that the minimum investment unit in an Italian hedge fund be no less than € 500.000 (art. 16 of D.M 228/1999); (e) to reconsider the current Italian regulation of real estate funds, permitting also retail open ended AIFs and introducing “restructuring” real estate funds mimicking the deep pocket funds as a systemic response to the current real estate crisis; (e) to remove the obligation to list in a Stock Exchange units of AIFs whose amount be less than € 25.000 (art. 5 D.M. 228/99); (f) to introduce a fixed capital internally managed asset manager (SICAF)

Irrespective of the fundamental policy choices, it is however clear that, in implementing the AIFMD, the Italian regulator shall amend in several respects the existing national framework. The following list is a simple sample of some expected amendments.

a) First of all, it seems unlikely and hardly consistent with the AIFMD provisions, the persistence of the, typically “Italian”, bifurcation between Italian AIFMs that (i) “promote” (i.e. establish) and/or (ii) manage AIFs, as currently permitted in Italy under article 1(1)(n) of the Consolidated Act. Article 4(1)(b) of the directive provides indeed that the AIFM “manages” the funds and article 4(1)(w) clarifies that “managing” means “performing at least investment management functions referred to in point 1(a) or (b) of Annex I for one or more funds”. This means performing mandatorily either portfolio management or risk management (minimal activities). In turn, article 5 states that each AIF managed within the scope of the Directive shall have a single AIFM. The existing bifurcation shall therefore remain in the system only for UCITS

b) AIFMS are now entitled to new “supplementary” services, by national derogation under article 6 of the Directive. This poses new questions which should be cleared with the implementation of the Directive. This is, for instance, the case of reception and transmission of orders in relation to financial instruments. Such service is currently not permitted in Italy to an investment company managing UCITS; however, under article 6(2) of the Directive AIFMs can perform the additional activity of UCITS management subject to authorisation under Directive 2009/65/EC; in this case in principle they should also get entitled to the provision of the supplementary service of reception and transmission of orders. A second example is given by portfolio management and investment advice. Such services are obviously already permitted in Italy and are normally governed by MiFID; however, once they are provided by a AIFM, it must be clarified if the European passport shall be granted under the AIFD provisions or under MiFID provisions.

c) Also the notion of “marketing activity” seems to be redefined in order to align the Italian framework to the Directive. Marketing is a service listed in Annex I of the Directive.

Article 4(1)(x) clarifies that it means "a direct or indirect offering or placement at the initiative of the AIFM with investors domiciled in the EU". On the contrary, Italian law, in relation to the marketing activity performed out of the main office, currently sets out a safe harbor solely for the offer to professional clients (art. 30(2) CA) and subject to authorisation the marketing from the fund manager of units or shares of the investment fund (art. 33(2)(ebis) CA). Since the Directive exempts "passive marketing", this should also be reflected in the Italian law.

AIFs and exceeding the leverage limitations admitted by article 25 of the Directive, the implementation of the Directive might offer the opportunity for a relaxation of the same. This confirms that the harmonization process, being politically embedded in a complex multiparty context biased by deep national selfishness and critical discrepancies originated by several years of regulatory and supervisory competition in laxity within Europe, is often conducive to the relaxation, rather than the strengthening, of the investor protection requirements.

d) As to AIFMs under the threshold of assets under management set out in the Directive, they are currently not exempted from authorisation under Italian law. In turn article 3(2) of AIFMD exempts from authorization such AIFM, but subjects the same to registration if they are leveraged AIFMs under 100 M. of assets or non leveraged AIFMs under 500 M. of assets. Under article 3(3) of the AIFMD Member States are bound to ensure registration and minimum requirements but are free to impose "stricter rules". Passport shall apply, however, to such AIFMs only if they opt in the Directive provisions (article 3(4) AIFMD) : it is therefore likely that Italy will opt in the Directive regime also for these "exempted" AIFMs, simply adapting the applicable rules under the principle of proportionality.

e) As to prudential requirements and professional indemnity insurance Italian law currently sets a minimum capital for the fund manager of 1 M instead of the harmonized (AIFMD and UCITs) amount of € 125.000. There are no Italian provisions yet concerning : (i) the possibility to invest own funds exceeding the minimum in liquid assets according to article 9(8) of the Directive ; (ii) the obligation to hold a professional indemnity insurance against liability (as an alternative to additional own funds) according to article 9(7). Both provisions shall therefore implemented and the opportunity could be taken to align the minimum capital requirement to the harmonized standard.

f) As to the depositary, it is not expected the exercise by Italy of the national discretion permitted under article 21(3) second part to add additional eligible entities to the permitted depositaries listed in article 21(3)(a)(b)(c). This might prove questionable, especially in respect to public notaries, because they could provide additional competition in such market (especially in respect of small and medium scale funds) without lessening the expected due diligence.

g) As to the organizational and valuation of assets requirements, it is expected that the implementation of the Directive shall be used to align the former with those already imposed to UCITs managers and to provide, as to the latter, strict adherence to the provisions of article 19 of the Directive, which prohibits the conferral of such valuation function to the depositary unless "it has functionally and hierarchically separated the performance of its depositary functions from the tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investor of the AIF".

h) Finally, as to the transparency requirements, currently Italian article 2 of Decree 228/99 is stricter than articles 22 and 23 of the Directive as to the presentation of the annual report and the semiannual report. The implementation of the Directive is therefore expected to relax the Italian provisions aligning the same to the Directive. Similarly, current Italian requirements capping the amount of leverage permitted to