

Sharon Bowles, Chairwoman, Economic and Monetary Affairs Committee, European Parliament  
 Herman Van Rompuy, President of the EU Council of Ministers  
 Michel Barnier, Commissioner, Internal Market and Services, European Commission  
 Jean Paul Gauzès, Rapporteur, Alternative Investment Fund Managers Directive, European Parliament  
 Elena Salgado, Minister for Economy and Finance, Government of Spain

## ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE

Now that the Trilogues are underway and the institutions of the EU are seeking to reconcile their positions on this Directive, we offer the following suggestions to make that process as smooth and effective as possible.

We are very appreciative of the work that has been undertaken by M Gauzes, the Rapporteur for this Directive in the European Parliament, and his colleagues on the ECON Committee. We feel that the draft Directive has improved a very great deal under their scrutiny and deliberation.

We also recognise the substantial progress made in the Council. Our suggestions here seek to take the best from both drafts, in the best interests of investors and pensionholders who it is intended should benefit but on whom, ultimately, the costs of this Directive will fall.

### Exemptions

We firmly support the new article 2a in the ECON draft of 28 May. We think this strikes the right balance and ensures adequate but proportionate coverage, particularly given the nature of the governance of investment companies listed on regulated markets, and already covered by a number of EU Directives. However, if this is not acceptable to the Council, we suggest a compromise under which Council text article 2b of draft number 6795/3/10 REV 3 is included, with an addition at I (c) of the ECON text:

“AIFM in the form of self-managed AIF which have legal personality, do not grant their shareholders any redemption or repurchase rights, invest predominantly in transferable securities and have their shares traded on a regulated market in the European Union.”

This allows a national regulator to exempt investment trusts, if they so determine, on the grounds that their strong governance arrangements suitably protect investors already.

### Depositary

We support the ECON text of article 17.5. However, we think the word ‘reasonably’ could usefully be inserted in the final sentence to make it clear that force majeure only applies if an external event “was not foreseeable and that the depositary could not reasonably have avoided the loss which has occurred”. This amendment would make clear that the force majeure qualification would apply where a depositary had taken all reasonable steps to prevent loss, in line with the philosophy lying behind the duties as stated in the previous sentence

### **Third country funds**

We remain very concerned about the impact of both the ECON and the Council drafts on third country funds. We believe they could lead, if implemented, to a reduction in choice for investors and pension holders and unnecessary limitations on the availability of investment funding in the EU, at a time of severely constrained economic growth the Union. Moreover, they might be unreasonable in their effects on existing holders of such investments who may be denied the ability to realise them in normal markets.

We strongly support the continuance of national private placement regimes under local member state regulation. There is no conflict between setting criteria for some funds and fund managers to obtain a 'passport' for cross-border marketing and, in parallel, maintaining Member State discretion on which non-EU funds may be marketed by private placement to qualified investors. We believe this is the only pragmatic and workable solution on the third country issue.

We are therefore pleased to see that a new Recital has been added to the Consolidated Compromise Text of 10/05/2010 at (21a), to the effect that consideration should be given by the Commission to develop a European private placement regime and in our view the status quo should be maintained pending the outcome of that review.

If this is not done, then as a minimum we would suggest the following amendments to the same text:

- The deletion of Article 35a – professional investors should have freedom to invest where they want at their own initiative;
- The deletion of Article 32 (1a) – the same applies to retail fund managers, as professional investors; and
- The deletion of Article 39 1b and c and Article 39 3 – these provisions will be unworkable. As an alternative, third country funds should be marketable provided that they and their managers meet the principles on the regulation of hedge funds set out in the June 2009 IOSCO report on hedge funds oversight.

<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf>

### **Remuneration**

There should be a requirement, which is of relevance to AIF shareholders, specifically to disclose the fee basis of the charges made by the AIFM to the AIF and, importantly, the total amount of costs involved. This transparent disclosure requirement is already operated successfully in the UK's investment industry and we think it can be applied more widely, enhancing transparency across the Union's investment industry. This provides information of practical value to investors and pension holders and those who make decisions on their behalf. On the basis of this improvement to the protection given to investors, we strongly recommend that disclosure of salaries paid to staff of AIFMs should not be required at all under the AIFMD, due to its potential to mislead. Given that most AIFMs manage the affairs of many authorised funds and AIFs, the salaries paid bear no relation to the risks involved in any one AIF. On the other hand the terms of the management contract are of vital importance,

Whatever approach to the codes applying to fund manager remuneration is finally adopted, this should at the very least be consistent across the various G20 bodies and pronouncements, and other EU directives (such as the CRD). General information on the philosophy lying behind remuneration of AIFMs may be given in the context of compliance with the required remuneration policy as set out in these directives.

I hope these comments are useful as you and your colleagues proceed with the Trilogue. We stand ready to discuss if that would be helpful. I am placing this letter on our website and copying it to other interested parties.

OWEN KELLY

*Alley*