



# **Some Challenges with the Transposition of AIFMD**

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**UAIB Roundtable  
Kyiv, 26 November 2015**

# Overview

## 1. Introduction

## 2. Selected Regulatory Dossiers

- AIFMD
- CRD and CRR

## 3. Outlook

# Introduction

# Introduction (I)

- **Challenges of EU legislation (I)**
  - **Supranational dimension**
    - *Political level*: Council; European Commission; European Parliament; ESAs
    - *Technical level*: DGs of European Commission, ESAs
  - **National dimension**
    - *Political level*: Ministry of Finance, Parliament
    - *Technical level*: Ministry of Finance, Financial Supervisory Authorities (Regulators) etc.

# Introduction (II)

- **Challenges of EU legislation (II)**
  - General Remarks
    - EU law has become a complex, multi-layer tool-box
    - EU law comprises of an overarching legal structure
    - role of EU institutions
      - European Commission
      - European Parliament
      - Council
    - “trilogue negotiations”
    - European Supervisory Authorities (ESAs): EBA, ESMA, EIOPA

# Introduction (III)

- **Challenges of EU legislation (III)**
  - European Treaties (I)
    - TFEU
      - enshrines the four fundamental freedoms of the Union
        - free movement of goods
        - free movement of persons
        - free movement of services
        - free movement of capital
    - banking and financial sector:
      - free movement of services and free movement of capital crucial
        - carrying out banking services if licensed in one MS
        - making use of banking services in other MS (and transfer of assets)
  - Treaties are superior to national (constitutional) law
  - EU law as supranational law

# Introduction (IV)

- **Challenges of EU legislation (IV)**
  - Regulations and Directives
    - Treaties are so-called primary sources of EU law
    - all other statutes and official decisions adopted by the EU are secondary sources
    - secondary sources can be
      - **binding** (such as Regulations, Directives, Decisions)
      - **non-binding** (such as Recommendations, Opinion)
    - examples are:
      - **Regulation:** *“binding in its entirety and directly applicable in all MS”*
      - **Directive:** *“binding, as to the result to be achieved, upon each MS to which it is addressed, but shall leave to the national authorities the choice of form and methods”*

# Introduction (V)

- **Challenges of EU legislation (V)**
  - Lamfalussy Report
    - led to a significant change in the EU legislative process
    - report was drafted by *Barone Alexandre Lamfalussy* and a Group of “Wise Men”; published 2001
  - **“Four Level”-Process:**
    - Level 1: Directives or Regulations by the EU (co-decision)
    - Level 2: Implementation of additional, more detailed legislation
    - Level 3: ‘consistent implementation and enforcement’ by ESAs
    - Level 4: more effective enforcement of EU legislation



# Introduction (VI)

- **Challenges of EU legislation (VI)**
  - De Larosiére Report (I)
    - report was drafted by *Jacques de Larosiére* and a “High-Level Group”; published 2008
    - options against GFC: either national actions or strengthening of EU actions
    - De Larosiére: united front against the testing of economic landscape of financial recession → **“Three Step Approach”**:
      - new regulatory agenda
      - stronger coordinated supervision
      - effective crisis management procedures

# **Selected Regulatory Dossiers**

# AIFMD (I)

- Formal Aspects (I)
  - Trigger: GFC
  - G-20 summit in London (April 2, 2009)
  - Lehman Brothers; AIG; hedge funds as “locusts”; new dogma of systemic risk
  - EC publishes draft regulation on April 30, 2009
- challenge: draft regulation itself
- needed: **3** Council Presidencies, **1** Rapporteur, > **1600** amendments
- agreement in trilogues on October 27, 2010

# AIFMD (II)

- Formal Aspects (II)

- compromise:

| Date              | Status /Review Process   |
|-------------------|--|
| • <u>X (2011)</u> | entry into force and publication   |
| • X + 4 (2015)    | review process: <ul style="list-style-type: none"><li>- ESMA</li><li>- European Commission</li></ul> |
| • X + 7 (2018)    | full implementation (including third country regime and PP regimes)                                  |

# AIFMD (III)

- Material Aspects (I)
  - De Larosi re Report calls for inclusion of shadow banking system
  - EC: “alternative investment funds *could* generate systemic risk in the future”
    - connection to other financial institutions
    - trading activities
    - investment strategies including short-selling (see Regulation (EU) No. 236/2012 on Short-Selling and Certain Aspects of CDS)
    - potential investor losses
  - also market failures in investor and stakeholder protection

# AIFMD (IV)

- Material Aspects (II)
  - structure of AIFMD framework is:
    - **manager directive** (versus product directive)
    - **AIFM is in regulatory scope not the product (AIF)**

# AIFMD (V)

- Scope of AIFMD (I)

- Principles

- *everything that is **non-UCITS** is AIF and therefore in scope*
  - no differentiation between open-ended or closed-ended
  - no differentiation in terms of legal form
  - no differentiation if traded on stock exchange, the amount of capital or number of investors
- *framework is targeting **institutional** investors*
  - unlike UCITS
- *introduction of a “**European Passport**”*

# AIFMD (VI)

- **Scope of AIFMD (II)**
  - Main Applications of AIFMD
    - all **EU-AIFM** that manage one or more **EU-AIF** or **Non-EU-AIF**
    - all **Non-EU-AIFM** that manage **EU-AIF**, no matter if they are distributed in the EU
    - all **Non-EU-AIFM** that distribute either **EU-AIF** or **Non-EU-AIF** within the EU
  - Exemptions: holding companies, IORP institutions and institutions in the area of social insurance and pension systems
  - **quantitative thresholds** can be applied leading to “registrations”
  - **UCITS companies** have certain privileges



# AIFMD (VII)

- **Legal Framework of AIFMD**

- **Level I-Directive**

- **Level II-Measures:**

- Commission Implementing Regulation (EU) No. 447/2013
      - Commission Implementing Regulation (EU) No. 448/2013
      - Commission Delegated Regulation (EU) No. 231/2013
      - various Commission Delegated Regulations (EU)
      - to be expected: additional implementation measures in 2015

- **ESMA Activities**

- Consultation on Guidelines on Sound Remuneration Policies
      - Guidelines on Key Concepts of AIFMD and Types of AIF among others  
[www.esma.europa.eu/page/investment-management-0](http://www.esma.europa.eu/page/investment-management-0)
      - ongoing: additional activities in 2015

# AIFMD (VIII)

- **Aspects of Prudential and Risk Management Regulation (I)**
  - **Capital Adequacy**
    - CA requirements imposed in respect of initial capital, own funds and additional own funds
    - differentiation if AIF is internally or externally managed
  - **Organizational and Risk Management Requirements**
    - regulatory focus on risk management (also from a prudential perspective)
    - organizational structure for risk management (see MiFID requirements) with reporting requirements
    - greater operational responsibilities, also in terms of internal control mechanisms

# AIFMD (IX)

- **Aspects of Prudential and Risk Management Regulation (II)**
  - **Liquidity Management**
    - requirement of liquidity management systems for AIFM
    - requirement of liquidity buffers to mitigate risks
  - **Remuneration Policies**
    - AIFM is required to establish remuneration policies and practices that are consistent with an effective risk management
    - CRD III serves as basis
    - broad application to senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the managed AIFs

# AIFMD (X)

- **Aspects of Prudential and Risk Management Regulation (III)**
  - **Restrictions on Investments and Investment Strategies**
    - „pre-approval“ of applied investment strategies
    - imposition of „short-selling“-restrictions
    - reduction of leverage in case of private funds in particular
    - restrictions in terms of investments in products which do not reflect at least 5% net economic interest in the underlying securities or FI
  - **Outsourcing and Delegation**
    - approval of outsourcing arrangements
    - outsourcing(/delegation only to eligible entities
    - application of the concept of „functional and hierarchical separation“ of entities
    - requirements for sub-delegations and liability regimes

# AIFMD (XI)

- **Aspects of Prudential and Risk Management Regulation (IV)**
  - **Regulatory Reporting**
    - reporting obligations at AIFM and AIF level
    - standardized format and technical infrastructure
    - domestic to supranational level
  - **Investor and Stakeholder Protection**
    - duties in fund management (such as DD, care, effective resources, etc)
    - management of conflicts of interest (see MiFID)
    - separation of depositaries
    - valuation methods to be applied and approved valuation procedures
    - disclosure requirements (see UCITS analogy)
    - specific PE acquisition rules regarding non-listed companies

# CRD and CRR

- **CRD Implementation**

- **Experience from Austria**

- implementation of CRD and CRR has a substantial impact on the banking industry in Austria
      - » amount of regulation and (technical) requirements is enormous
      - » “side-effects” on the fund industry mostly due to domestic regulatory environment
      - » increasing need to link fund regulation and banking regulation at EU level
      - » broad exemption rules for management companies in BWG

# Outlook

# Outlook

- **2016:**
  - “going live” of pan-European AIFMD framework (some MS transpose it with UCITS V)
  - clarification of “third-country” dimension (Guernsey, Jersey – who to follow?)
- **Capital Markets Union (CMU)** will have an impact:
  - review of EuVECA → pan-European Venture Capital Regulation?
  - clarification of the treatment of Private Equity?
  - establishment of a true EU capital market?
  - harmonization and coherence of basic terms and regulatory treatments?





**Thanks a lot for your attention!**

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