



## European Opportunities In Gibraltar The Proposed Alternative Investment Fund Managers Directive



### "Best Law Firm 2009 at Fund Domicile Awards"

Hassans International Law Firm has been named "Best Gibraltar Law Firm" at the Fund Domicile Awards that took place at the Chesterfield Hotel in London on the 14th January 2010. This award is recognition of the prominence the firm plays in the fund industry in Gibraltar. The event, hosted by [www.funddomiciles.com](http://www.funddomiciles.com) was well attended and followed a full days' conference on the issues pertinent to the fund industry.

### EUROPEAN OPPORTUNITIES IN GIBRALTAR



The European Commission ("EC") drafted a proposal for the Alternative Investment Fund Managers Directive ("AIFMD" and/or the "Directive") in response to the current global financial downturn. The proposed Directive suggests that Alternative Investment Fund Managers ("AIFMs") are in need of closer, more effective regulation and supervision due to the significant impact their activities can have on global financial markets. Alternative Investment Fund ("AIFs") are defined in the Directive as all funds not regulated by the UCITS directive. These include hedge funds, funds of funds, private equity funds, commodity funds, real estate funds and infrastructure funds. AIFMs deploy a range of investment strategies and trading techniques and invest in a variety of financial products. It is estimated that at the end of 2008, AIFMs managed assets of approximately € 2 trillion throughout Europe. One of the ideas behind the

AIFMD is that it will create a European brand, similar to UCITS in respect of retail funds, promoting heightened investor protection, transparency and regulation for the AIFMs which manage AIFs. As only one of four or possibly five jurisdictions in the EU which provides a fiscally effective legislative framework for the establishment of AIFs, Gibraltar will be well placed to take full advantage of this new EU brand.

Since publication of the Directive various industry bodies have taken issue with the scope and with elements of the substance of the Directive. In light of this, Jean-Paul Gauzès, the Parliamentary Rapporteur, has recommended certain amendments for consideration (the "Gauzès report"). Furthermore, the European Parliament and the European Council (then headed by Sweden) made some major amendments (the "Swedish re-



Senior Partner James Levy QC with James Lasry and members of the Funds Team

draft"). The Presidency of the European Council is now in the hands of Spain which is likely to have its own views on the Directive.

The Directive exempts an AIFM from having to be authorised if it manages AIFs with assets under management which in total do not exceed

- (i) a threshold of €100 million which includes portfolios which are leveraged; or
- (ii) a threshold of €500 million when

the portfolio of the AIF is not leveraged and which do not have redemption rights during a period of five years.

The reasoning behind this exemption is it is unlikely that the management of funds of this size will pose significant risks to the stability and efficiency of the financial markets. However, the Directive does provide for an opt-in clause allowing AIFMs, which do not meet the thresholds stated above, to be authorised under the Directive and derive the benefits from the Directive.

EU. An AIFM will effectively be able to passport the right to market an AIF it manages without having to undergo an extensive and time-consuming AIF authorisation process in each jurisdiction where it intends to market the AIF, or having to rely on national private placement exemptions.

The Directive only permits the marketing of AIFs domiciled outside the EU if that non-EU jurisdiction has signed up to the OECD Model Tax Convention and has agreed to tax information sharing with the competent authorities of the Member States in which the AIF will be marketed. The Swedish re-draft is more restrictive with regards the marketing of non-EU AIFs. Although it allows for an authorised AIFM to manage an AIF established in a non-EU jurisdiction subject to certain provisions, it only allows passporting of EU domiciled AIFs. The Swedish re-draft states that the EC will be called upon to assess the marketing of non-EU AIFs in the Community three years after the AIMFD comes into force. It is expected that even this remote target will be met with resistance from certain Member States.



The main benefit for an AIFM being authorised is that it allows for the marketing of an AIF it manages to professional investors throughout the EU. AIFMs are only permitted to engage in inter-Member State marketing if the AIF which is being marketed is domiciled in the

For an AIFM which seeks to raise investment in Europe, the advantage of being able to passport in the EU is almost certain to outweigh any reasons for establishing an AIF outside the EU. Gibraltar, as part of the EU, offers beneficial tax treatment for alternative funds and effective legislation for the establishment of alternative funds. In fact, when the Directive is enacted, Gibraltar will be one of only four or possibly five jurisdictions in the EU which will combine favourable tax treatment for alternative funds with strong fund legislation, a wealth of fund knowledge and competitive prices.

The EC focuses on the regulation of AIFMs rather than AIFs which will continue to be regulated at national level. This is due to the perception that AIFMs are responsible for all key investment decisions of the AIFs they manage whereas the AIFs themselves are simply legal structures which allow for the collective pooling of assets. However, the Swedish re-draft states that where the legal form of the AIF permits internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF and AIFM are thus identical and in that case the AIF should therefore be authorised and comply with all requirements for an AIFM under the Directive. Many funds in Gibraltar are managed by the directors of the Fund without appointing an external investment manager. This would mean that AIFMs with internal management systems in place would have to be authorised under the AIFMD unless exempted as per the thresholds discussed earlier. Therefore an AIF which is not managed by an external AIFM can still enjoy the advantages of being able to market itself to professional investors throughout the EU similarly to UCITS funds

with respect to retail investors.

An AIFM will be obliged to meet transparency, reporting and organisational requirements under the Directive. This means making certain disclosures to investors and the competent authorities regarding the AIFs under management, potential risks of investment, fees borne by the investors and information about the amount of leverage used. The Directive also addresses acting honestly, with due skill, care and diligence and in the best interest of the AIF it manages; identifying all conflicts of interest between the AIFM and investors in an AIF it manages; implementing a risk management system to monitor all risks associated with an investment strategy of an AIF; and employing a liquidity management system and ensuring that the liquidity profile of the investments of the AIF complies with its underlying obligations. Before an AIFM is granted

authorisation under the Directive it will also need initial capitalisation of € 125,000. In addition to the initial capitalisation requirement, when the portfolio of the AIF under management exceeds € 250 million, the AIFM must have additional capital equal to 0.02% of the amount by which the value of the portfolio of all the AIF exceeds € 250 million. There are special obligations for AIFMs managing AIFs which employ "high levels of leverage" and for AIFMs managing AIFs which acquire controlling influences in companies.

An interesting section inserted by the Swedish re-draft regards remuneration of the AIFM. The Swedish re-draft requires an AIFM to have remuneration policies that are consistent with and promote effective risk management and do not encourage risk taking that exceeds the level of tolerated risk of the AIFM. It is unknown what effect this will have on the traditional industry-accepted 2% management and 20% performance fees which have recently come under scrutiny in the press.

It is uncertain when the AIFMD will be implemented. However, what is certain is that when it is, it will have an fundamental effect on a significant proportion of European-based AIFMs and that this sector should consider how best to restructure its business in order to benefit from the marketing advantages offered by the Directive. It is expected that many AIFMs will look to Gibraltar and the other European fund jurisdictions when choosing the jurisdiction to establish or manage their business.

*Article written by James Lasry & Anthony Jimenez.*



## Funds News this quarter

- James Lasry elected Chairman of the Gibraltar Funds and Investment Association.
- Senior Associate Peter Young and Associate Joelle Hernandez have joined the Funds Team.
- Chief Minister of Gibraltar The Hon P C Caruana QC MP and James Lasry video interviewed for Hedge Funds Review [www.hedgefundsreview.com](http://www.hedgefundsreview.com).
- Hassans voted 'Best Gibraltar Law Firm 2009' at the FundDomiciles.com conference.

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