

# Opinion Leaders

## Corporate / Private Equity / Financing

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In this month's issue:

Editorial.....1

Legal and Tax Watch .....2

Recent Legal Advice and

Key Deals – Upcoming

Conferences .....6

### EDITORIAL

The Commission has just published a draft Directive on Alternative Investment Fund Managers, which is already known under its English acronym of "AIFM".

How does it affect Private Equity? The draft directive tells us that Private Equity funds are henceforth considered as "alternative" funds. This should not be seen as an insult. In fact, in accordance with article 3 of the directive, any fund that is not approved in accordance with the new UCITS directive and which is therefore not a "harmonized" UCITS, must be considered as an alternative fund.

Is being considered as an Alternative Fund serious? In almost all European countries, it is revolutionary. Until now, Private Equity Funds have been structured under ordinary, non-specific, legal forms that are governed by the commercial and companies laws of the member states. This draft directive will transform these ordinary legal structures into true funds with authorized fund managers, mandatory custodians and a whole set of regulations inspired by those applicable to UCITS.

In France on the other hand, this is a non-event. From the outset, French FCPR venture capital funds have been classified as UCITS under internal French law. All authorizations, legislation and regulations are fully applicable to them. Furthermore, out of the 28 European Community countries, France was the only one to consider that the MiFID directive should apply to them.

French Private Equity players therefore have nothing to fear from the AIFM directive. Quite the opposite, they should be rejoicing. All leading European private equity players will now find themselves subject to comparable regulation and will be put onto an equal footing. Countries that used light regulation for competitive advantage will no longer be attractive.

However, the directive is not perfect. Certain provisions, especially those relating to the presence of valuers, rules of governance and reporting are too strict and are unsuited to Private Equity. Clarification is required. This has not been forthcoming up to now, because industry associations, particularly European ones, focused their actions on systematically opposing any regulation.



**Daniel Schmidt**

*Partner*

We consider that industry leaders should again enter into dialogue and make a success of this directive, which is very similar to French law.

## Legal and Tax Watch

### Wealth tax relief funds: will there be another shake-up of the system?

Following the proposals adopted this winter for wealth tax holding companies, at the initiative of Senator Adnot, are wealth tax relief funds also threatened with tighter regulations? That is certainly the drift of the legislation proposed by Jean Arthuis, Chairman of the Senate Finance Commission.

He intends to amend the rules applicable to funds giving rise to wealth tax allowances on three points:

- on the time limit for achieving the investment quota of 40% (FCPR and FCPI venture capital and innovation funds) and 20% (FIP local area investment funds) in securities of eligible companies under 5 years old: these funds currently have two financial years to achieve this ratio (up to 30 months in practice), and the draft legislation intends to reduce this time limit to 6 months.
- on targets: the businesses invested in by the funds will only qualify for wealth tax relief if they meet the European Community definition of SMEs, which limits the maximum number of employees to 249 persons. Senator Arthuis wishes to extend the maximum number of employees to 5,000. We may wonder whether this measure is compatible with Europe restrictions.
- on the amounts of fees and commissions: currently, these are freely determined by the management company. Senator Arthuis wants to cap them at an amount to be fixed by decree. We should remember in this respect, that if there should have been any excesses in this matter, the management companies are requested from then on to deduct these fees and commissions from the taxable payments qualifying for wealth tax relief.

The draft law, which was put forward on 14 May, will soon be debated by the Senate.

## European news

### Publication of the draft European Directive on Alternative Investment Fund Managers, called the "AIFM"

The European Commission has put forward its draft Directive on Alternative Investment Funds Managers.

The draft directive applies to all managers established in the European Community that manage alternative funds (defined as non-UCITS funds such as hedge funds or private equity funds), irrespective of where they are domiciled or of the legal

structure of the fund. Conversely, it does not apply (i) either to asset managers directly managing a maximum of €100 million, (ii) or to Fund of Funds managers managing a maximum of €500 million provided that they are investing in funds that do not use leveraging.

The Directive provides that asset managers must be authorized, and that this authorization will be valid in all member states. For French asset managers, this requirement is nothing new: asset management companies providing collective asset management services must have AMF authorization. The Directive may even prove to be beneficial in that it may make asset management companies' European passports effective. Thus, a French asset management company should be able to manage funds domiciled in other member states or set up subsidiaries in neighboring European countries, without requiring authorization from that country.

To obtain authorization, asset managers must implement rules of good practice (rules on managing conflicts of interest, risk and liquidity). They must also at all times hold sufficient resources, particularly as capital. Finally, in terms of organization, the assets managed by the funds must be held by a custodian separate from the management company and some of its activities may be delegated to an agent provided the agent is authorized to manage alternative funds. We may again observe that French asset management companies are already subject to such rules, particularly on good practice since, unlike their European competitors, they have to implement MiFID obligations.

The draft Directive strengthens transparency obligations for asset management companies. Thus, whenever a fund, alone or with other funds, reaches a 30% holding in voting rights of an unquoted European company, the asset manager is required to provide certain disclosures to the company, to its shareholders and its employee representatives (particularly in terms of company development). This will apply unless the unquoted company affected is an SME within the meaning of community law.

Furthermore, the draft directive provides that alternative funds can be marketed to professional investors within the meaning of MiFID and, if the member state in which they are based permits it, to retail investors. Third-party alternative funds can also be marketed by alternative fund managers to professional investors domiciled in the Community provided that the country in which the fund is established is signatory to a tax information exchange agreement.

The draft directive will soon be submitted to the European Parliament and to the Council. If the draft is approved before the end of 2009, the Directive is expected to come into force in 2011, except for the provisions applicable to third party countries, which will not come into force until 2014.

We should observe that the Directive is expected to have very little direct impact on the working methods of French asset managers. On the contrary, it should bring the obligations applicable to European asset managers up to the same level, with French asset managers probably enjoying a head start.

## **The Commission's recommendations on remuneration for the financial services sector and for directors' salaries**

The European Commission has published two recommendations:

- the first one relates to the financial sector. It recommends finding an "appropriate balance between the level of basic remuneration and the level of bonus"; bonuses must be for long-term performance, and if appropriate must be paid back by their recipients. Remuneration policy must be internally transparent, clear, well documented and communicated to stakeholders.
- the second relates to directors' remuneration. Golden parachutes must be capped at a maximum of two years of the fixed component of remuneration, and are not permitted in the case of failure. Similarly as for financial services, variable remuneration must be linked to pre-defined and measurable performance criteria, that promote the long-term viability of businesses. Finally, the control exercised by shareholders over remuneration policies is to be strengthened.

## **Tax news**

### **Carried Interest**

The draft decrees and tax regulations giving details of the new tax regime applicable to carried interest are at the consultation stage with industry associations.

### **Filing requirements: deferral of the deadline for filing individual returns**

If the wealth tax filing deadline stays at 15 June 2009, taxpayers can send supporting documentation (individual statement to which will be attached, for subscriptions to units in a Fund, a copy of the retention commitment) relating to wealth tax deductions to which they are entitled for investing in an SME by 15 September 2009 at the latest.

## **Legal News**

### **Draft legislation for promoting access to credit for small and medium-sized enterprises**

This draft law which was adopted at first reading by the National Assembly requires the Bank of France and the Supervisory Authority for the Insurance industry and Mutual associations to make public each year the amount of credit granted to businesses (of under three years and to SMEs) and also insurance industry investments intended to finance SMEs.

**The Decrees of 19 May 2009 relating to public offers, to reports on crossing shareholding thresholds and to declarations of intent and also to implementation of Order no. 2009-80 of 22 January 2009 relating to public offers and relating to various finance provisions**

The decrees modify the regulatory portion of various codes particularly to reflect the new terminology arising from the Order amending the rules on public offers.

**AMF news**

**The AMF is consulting on the proposed amendments to its general regulations relating to the regime for offers to the public**

The level of the threshold, on regulated markets, for making an offer will be reduced to 30% of share capital or voting rights. This consultation closes on 30 June 2009.

The Ministry of the Economy has launched a consultation on various provisions, at the legislative level, relating to public offers. In particular, it is intended to repeal the provisions relating to underwriting prices and to the introduction of mandatory public offers on organized multilateral trading facilities (MTFs).

**The AMF has launched a public consultation on its draft general regulations relating to crossing shareholding thresholds and declarations of intent**

To take the amendments made by the Order of 30 January 2009 into account, the AMF intends to amend its general regulations on crossing thresholds on the following points:

- the methods for calculating the threshold that gives rise to the obligation to report, in particular the question of the regime applicable to derivatives and the methods for taking various financial instruments into account;
- the content of the report on crossing the threshold;
- for Alternext, setting the thresholds for reporting to the AMF at 50% and 95%, in addition to reporting to the issuer.

Finally, the draft amendments on declarations of intent affecting the regime, the procedures for and the content of the report.

**Amendments to AMF instructions nos. 2005-01 and 2005-02 relating to procedures for authorization and to periodic provision of information by French and foreign UCITS marketed in France and also, to full prospectuses of UCITS approved by the AMF (except for FCIMT [futures], FCPR [venture capital funds], FCPI [innovation fund], FIP [local area investment fund], FCPE [employee savings plan] and SICAVAS [open-ended employee share plan])**

The amended instructions will particularly give details of the methods to be used for ring fencing assets to enable asset management companies to isolate into side pockets those assets, the sale of which would not be in the interest of unit holders.

## Recent Legal Advice and Key Deals – Upcoming conferences

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### Recent Legal Advice and Key Deals:

- Wealth tax holding companies: constitution, information notices and marketing procedures
- Public offers by companies
- Consultation on the conditions and procedures for obtaining approval for investment services
- Consultation on the possibility of Funds making loans
- Legal opinion relating to financing a project in the UK by a French company, together with analysis of guarantees granted to its local subsidiaries.
- Consultation on the conditions that a "road- show" must fulfill to comply with French regulations on conflicts of interest.
- Finance leases. Analysis of the transaction and its effects in accounting law and on invoicing rentals.
- Consultation on non-competition commitments (legal and contractual) applicable to corporate officers on termination of office, and on the need for financial consideration.
- Consultation on the strategy to be put in place as part of an alert procedure to be implemented by Statutory Auditors for a French company owned by a foreign fund
- As part of our pro bono activities, drafting a partnership contract between a US company and an NGO promoting access to drinking water

### Upcoming conferences:

#### *Private Equity/Finance*

- **Conference "SME support forum"**- 6 July at the Paris Chamber of Commerce and Industry. Presentation by Florence Moulin on "The letter and spirit of the TEPA law

### ***Labor Law***

- **Conference "Organizing Global Reductions in Force: law and methods"** - 5 June 2009 at Cornell University in New York, with Yasmine Tarasewicz as speaker.
- **HR Club: Employment law case law review** – organized in partnership with the AEF in Proskauer Rose's premises on 18 June with Béatrice Pola as speaker.
- **Seminar "Current issues in restructuring"** - on 30 June, organized by the EFE with the Yasmine Tarasewicz House Speaker.

### ***IP/IT***

- **Breakfast seminar "Employee creation and inventions: is your company protected?"** - on 4 June 2009 in Proskauer Rose's premises with Grégoire Goussu and Claudia Oudey as speakers.

### ***Disputes***

- **IPG** - on 18 June at New York, Los Angeles, Washington, D.C., Paris and London, with Philippe Goossens and Mireille Dany.

### ***Competition***

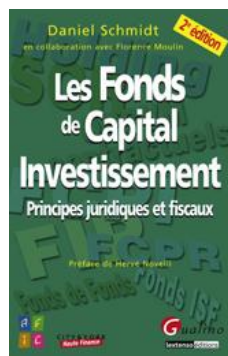
- **Breakfast seminar "A year's competition case law June 2008 - June 2009"** - on 9 June 2009, in Proskauer Rose's premises with Mireille Dany and Marianne Le Moullec and speakers.

### ***Criminal Law***

- **IBA Conference 12th Transnational Crime on the theme "international criminal law"** - From 11 to 13 June - organization by the IBA in New York with Philippe Goossens as speaker.

## Publications:

- **"Les Fonds de Capital Investissement, Principes Juridiques et Fiscaux"**, 2nd edition, Daniel Schmidt and Florence Moulin (Cabinet Proskauer Rose), Preface by Mr Hervé Novelli, Publisher Gualino.



- **"Le Guide des négociations commerciales 2009-2010"**, Mireille Dany (Proskauer Rose), Régis Fabre and Léna Sersiron (Baker & McKenzie), Editions Dalloz
- **"Guide de l'investissement ISF dans les PME"**, published by Les Echos-Capital Finances, with contributions from Daniel Schmidt and Florence Moulin (Cabinet Proskauer Rose). For more details: <http://www.lesechos.fr>

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## Corporate / Private Equity / Financing

For more information about this practice area, contact:

Daniel Schmidt  
33.1.53.05.60.00 – dschmidt@proskauer.com  
Florence Moulin  
33.1.53.05.60.00 – fmoulin@proskauer.com

Publication E-mail: [leaders.dopinion@proskauer.com](mailto:leaders.dopinion@proskauer.com)

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