

## Funds find a new home in Gibraltar

Despite numerous proposed changes, Gibraltar is well placed to capitalise on to the proposed European Directive controlling Fund Managers, argues Joey Garcia.

Initially at least, there was considerable anger and frustration that the European Commission's draft Directive on Alternative Investment Fund Managers (AIFM) had been prepared with little or no industry consultation. The Directive affects not only the European hedge fund industry, but also private equity and other sectors, including real estate investment products.

In a recent public hearing before the EU Economics and Monetary Affairs (ECON) Committee, Gerben Everts, head of Dutch pension manager APG's global regulations and compliance, was very direct in pointing out that, "If it is indeed the intention of the Directive to increase transparency on the alternative asset management industry, why do you, honourable members, accept the regulatory process to take place in the dark?"

However, changes to the draft Directive mean that Gibraltar still stands to benefit, but possibly less so, in some areas.

Initially, it was intended to restrict Alternative Investment Funds not domiciled in the EU being marketed or sold to any professional investors (as defined by MiFID) unless a series of strict conditions were met. The benefit for Gibraltar, as a jurisdiction offering a European entry point for many Non-EU collective investment vehicles, was obvious.

However, a series of (138) amendments proposed by Jean-Paul Gauzès, rapporteur for the European Parliament's Committee on Economic and Monetary Affairs, has substantially amended this provision.

Now it is suggested that institutional investors should be able to choose where they wish to put their money, and that they should be able to invest through existing and preserved national placement regimes.

However, the same proposals also suggest a restriction on hedge funds investing more than 30 per cent in funds domiciled outside of the EU.

Other suggestions made by Gauzès also bode well for Gibraltar, including the removal of the suggestion of regulation of funds with less than €100m in assets under management (AUM). This would keep the niche, boutique or family office manager out of the scope of the Directive.

On the whole, many of the concerns raised by investors have been taken into account and can be seen percolating into the draft legislation, although there are still industry concerns in relation to the regulation of short selling and the use of leverage. Moving forward, there will be a second consideration given to the amendments to the Directive proposed by Gauzès in March of this year, which should be followed by a vote in ECON on the amendments in April. The draft directive could then be subjected to a maximum of three readings if the European Council and the European Parliament are unable to reach an agreement on the report, with a target deadline of January 2012 for the implementation of the directive in national law.

Regardless of these changes, Gibraltar continues to offer an attractive EU base for managers and promoters wishing to bring their products into an EU regulatory framework and seeking the EU regulated 'stamp' on their investment products.

This is particularly so at a time when the Gibraltar Funds industry is gathering momentum.

Developments elsewhere - such as a substantial increase in Cayman registration fees following that country's well-reported budget deficit - could also assist Gibraltar in gaining a greater market share.

In the post-Madoff environment, the trend of domiciling funds in well regulated and supervised jurisdictions such as Gibraltar has gained popularity and we expect this trend to continue.

There will be continued interest in the re-domiciliation of Funds into Gibraltar from various offshore and non-EU centres.

The procedure for re-domiciliation under the existing Gibraltar Companies (Re-Domiciliation) Regulations 1996 is quick, simple and effective

The process ensures continuity of performance, allows for assets to remain untouched without the need for transfers or adjustments and crucially, provides for unit holders to remain registered as they did in the foreign jurisdiction.

The fund must be domiciled in a jurisdiction recognised by Gibraltar for this purpose and must have appropriate provisions in its laws. The charter, statutes or memorandum and articles or other instrument constituting or defining the foreign company must also allow for re-domiciliation.

Continuance of a foreign company in Gibraltar does not create a new legal entity or prejudice its continuity, nor does it affect the assets or property originally held. The company will not be released from any contractual obligations, claims and/or actions.

From a Gibraltar perspective, the process of re-domiciliation can be easily managed. An application for consent to be continued in Gibraltar has to be submitted to the Registrar with the required documentation.

The foreign company's offering memorandum, as well as its constitutional documentation, is needed to comply with Gibraltar law. Amendments to this documentation need to be made so the company can carry on business as an Experienced Investor Fund (EIF), Gibraltar's premier alternative fund vehicle.

Other minor formalities combined with the verification of the fund's technicalities and the discontinuation of the foreign company in its jurisdiction is also necessary.

The Financial Services Commission needs to be satisfied that the company is in compliance with local financial services supervisory laws before granting EIF status.

The company is required to appoint a local fund administrator, auditor and at least two directors, all authorised by the Regulator. The existing investors must also qualify as "Experienced Investors" (as defined in the legislation).

Once the foreign company becomes a Gibraltar company, all counterparties are appointed and the documentation is in place, the standard EIF registration procedure is followed, including an opinion from Gibraltar counsel confirming that the EIF satisfies the relevant Financial Services legislation.

For further information please contact:



**Joey Garcia**  
senior associate and funds specialist  
joey.garcia@isolas.gi



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