

Clients & Friends Alert

Restructuring of Unlisted EU Companies: AIFMD Applies to Non-EU Fund Managers on Acquisitions of Substantial Stakes

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Background

The Alternative Investment Fund Managers Directive (“AIFMD”)¹ imposes restrictions on “asset stripping”² on managers (“AIFMs”) of alternative investment funds (“AIFs”) that acquire control of EU companies. The rules contain new notification requirements (as low as 10% of shares). These requirements apply to EU and non-EU AIFMs marketing in the EU and will impact private equity, venture capital and some hedge funds, their portfolio companies and target companies.

I am outside the EU, does the AIFMD apply to me at all?

If a non-EU manager of a non-EU fund markets in the EU using the available national private placement regime for the relevant Member State, then the asset stripping rules, together with certain transparency requirements, will apply.

If a non-EU manager of a non-EU fund does not market actively in the EU – perhaps using the reverse enquiry route – then AIFMD does not apply.

From mid-2015, the rules will also apply to non-EU AIFMs marketing in the EU via the passporting regime.

In summary, what do the rules on asset stripping provide?

When a fund (individually or jointly with others) acquires control (more than 50% of voting rights) over a private company established in the EU, the manager of the fund may not, for a period of two years thereafter, facilitate, support, instruct or vote in favour of certain distributions and capital reductions and must use best efforts to prevent such capital reductions.³

¹ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, OJ L 174, 1 July 2011, pp. 1-73.

² Articles 28-30 AIFMD.

³ Article 30 of the AIFMD.

The restrictions apply where such action would (by reference to the company's annual accounts for the previous financial year):

- i. result in the net assets of the company being lower than the amount of subscribed capital, plus undistributable reserves; or
- ii. exceed the distributable profits of the company.

What about a restructuring exercise to offset losses?

A capital reduction does not include a reduction in subscribed capital used to offset losses incurred, or sums of money in a non-distributable reserve (of not more than 10% of the reduced subscribed capital). The result is that the prohibition will not apply where such actions are conducted as part of a restructuring exercise to offset losses.

And shareholder debt?

Distributions made in respect of shareholder debt are not caught by these rules.

What are the additional rules for acquisition of major holdings?

A manager must notify its regulator of the acquisition of voting rights of a non-listed company when this reaches, exceeds or falls below 10%, 20%, 30%, 50% or 75%, and make certain disclosures as specified in the AIFMD.⁴

A non-EU manager of a non-EU fund will notify the regulator in the Member State where it notified its intention to market under the applicable national private placement regime.

What are my notification obligations for acquisitions of control?

Similar to the acquisition of a major holding, the manager of a fund that acquires control of an EU company must notify its regulator of the acquisition of control of a non-listed company or an issuer and make certain disclosures as specified in the AIFMD.⁵

For non-listed companies, control means more than 50% of the voting rights attached to the company's shares even if the exercise thereof is suspended. For issuers, the threshold for control is determined by reference to the threshold for a mandatory bid under the Takeovers Directive⁶ and varies between EU Member States. Given that the control test is based on the holding of shares with voting rights, these rules would not appear to apply to situations where a fund acquires only control of the board of the company.

⁴ These are enumerated in Article 27, paragraphs 2-4.

⁵ These disclosure requirements are enumerated in Articles 28-29.

⁶ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30 April 2004, pp. 12-23.

What type of information do I have to disclose on acquisitions of major holdings and control?

The manager will have to notify (i) the non-listed company, (ii) the shareholders; and (iii) the competent authorities of the Member State.

The notification has to include (i) the conditions subject to which control was acquired, (ii) information about the identity of the different shareholders involved and (iii) the chain of undertakings through which voting rights are effectively held. The manager has to request the board of directors of the company to inform the employee's representatives of the acquisition of control and the related information provided.

Upon acquisition of control, the manager has to disclose its policy for preventing and managing conflicts and its policy for external and internal communication relating to the company, in particular as with regard to employees.

Finally, the manager has to provide competent authorities with information on the financing of the acquisition.

When in practice do I have to consider these rules?

The rules on asset stripping will be relevant in refinancing transactions which involve, or are shortly followed by, a distribution, capital reduction or share redemptions. Therefore, when structuring and implementing refinancing transactions, funds should consider distribution of value to shareholders, intra-group transfers and even sale of the shares a third party within the two-year period.

When planning a restructuring, funds and their managers will need to take account of these restrictions and consider the available steps if the proposed transaction will be caught by the restrictions.

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