



January 2010
AK Position Paper

Draft Proposal on the Alternative Investment
Fund Managers Directive and on the
Amendment of Directives 2004/39/EC and
2009/.../EC; COM(2009) 207 final

Assessment of the Draft Report by MEP Jean-
Paul Gauzès

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social, educational, economical and consumer issues both, on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour, social insurance and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 – amongst others unemployed, persons on maternity (paternity) leave, community and military service – of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

The Austrian Federal Chamber of Labour welcomes in principle the effort of the European Commission, to make an aspect of the currently mainly deregulated financial markets, namely the sale of alternative investment products, subject to regulation.

Unfortunately, the result has not only turned out to be very minimalistic but was in parts even more watered down by the Amendment Applications of the Parliamentary rapporteur of the Committee on Economic and Monetary Affairs, Member of European Parliament (MEP) **Jean-Paul Gauzès**. This is true i.a. with regard to the sale of financial market products, where focus is set only on Alternative Investment Fund (AIF) resp. Alternative Investment Fund Managers (AIFM) located within the EU, whilst AIF resp. AIFM located in third countries are supposed not to be included in the Directive.

The AK position in detail

The Austrian Federal Chamber of Labour is asking you to **reject** the following **Amendment Applications** of the Parliamentary rapporteur of the Committee on Economic and Monetary Affairs, MEP Jean-Paul Gauzès, (Doc No 2009/0064 COD) for the following reasons:

AA 22, AA 116, AA 118, AA 120, AA 123, AA 126, AA 129

All AIFM should be included independent of their location.

AA 35

The regulation has to include all persons, who are involved in selling and marketing AIF, independent of any internal distribution of competences.

AA 38

The sector of Marketing/Sales has to cover all activities, independent of who initiated the marketing activities, as otherwise the floodgates will be opened to possibilities of evasion.

AA 56

In view of the possible systemic risks, which could emanate from the activities of an AIFM, capping the capital requirement to € 10 Mio, has to be rejected. For reasons of financial market stability and in order to avoid too much market concentration, giving preference to major providers, which is the result of imposing an upper limit

of capital requirements, must also be rejected.

On the other hand, the Austrian Federal Chamber of Labour expressly welcomes the following **Amendment Applications** of the Parliamentary rapporteur of the Committee on Economic and is asking you to **support** these:

AA 2, AA 24, AA 33, AA 34

The abolition of the threshold values ensures that all AIFM are subject to the provisions of the Directive.

AA 11

Because of the difficulty to assess systemic effects of the leverage it would be sensible to limit these and to provide for relevant information to be made available to the newly established supervisory authorities.

AA 23

This amendment would determine who the addressee of the present regulatory provision is, independent of the legal form of the AIF.

AA 50, AA 51, AA 52, AA 89

It is high time that the issue of manager remuneration is addressed at EU level and that at least its framework is regulated. The remuneration must be based on the principle of sustainable success of management activities. It

must also be made transparent by reporting duties.

AA 53

The economic and systemic impact of short-selling is controversial. It is therefore important that regulated procedures ensure that financial instruments are available on the day of the delivery obligation and that relevant reporting duties are introduced.

AA 124

A period of one month is appropriate to enable authorities of the destination Member State to properly evaluate the documents. The period of 10 days, as proposed by the European Commission is definitely too short.

Unfortunately and in spite of relevant requests from different stakeholders there is still a great reluctance to regulate the funds themselves. The Committee on Economic and Monetary Affairs as well as the European Commission content themselves to regulate only fund managers.

Hence, the Austrian Federal Chamber of Labour suggests on the basis of the proposal of the European Commission to **introduce** the following **new Amendment Applications**, which should in particular take the following principles into account:

1.) Regulation of AIFM **and** AIF

Not only the fund manager, but also the fund itself, i.e. private equity and alternative investment funds have to be subject to the regulation. Therefore, Articles 20, 22, 25 and 27 of the Directive proposal of the European Commission would have to be amended accordingly.

2.) Responsibility of the European Security and Markets Authority

If a fund, which is subject to the regulation, is active in more than three Member States, the new European Security and Markets Authority should automatically become the responsible supervisory authority. Article 3 of the current directive proposal should be amended accordingly.

3.) Introduction of a central register

In view of the large number of supervisory authorities it is necessary to set

up a body, which keeps a record of AIF and AIFM. Such a register would make finding documents, which were made available for listing purposes, but also the realization of possibly correlating risks in portfolios of different funds easier both for investors and the supervisory authorities. This register should be set up within the new European Security and Markets Authority and include in particular clear and unique identification, such as the name of the AIFM/AIF, the competent supervisory authority as well as the responsible AIFM, depositor and the evaluator. For reasons of transparency the register should be publically available on the internet; the AIFM resp. AIF will only be permitted to start to operate after having been registered.

With this in mind, a new article should be incorporated in the Directive.

4.) Depositary

It is the aim of the desired regulation to restore transparency in the financial markets. Therefore, it is important to clarify where the securities are physically deposited. The option to delegate the custody counteracts this objective and should therefore be rejected. Consequently, Article 17 Abs 4 of the Directive proposal should be deleted accordingly.

5.) Evaluation

The far too optimistic evaluations of securitized loans and structured products resulted ultimately in the creation of the speculation bubble, which, when it finally burst, triggered the current crisis. In order to avoid such misma-

agement in future, it is necessary to also regulate the rating agencies. The present Directive should indirectly take this into consideration by specifying that any evaluation may only be carried out by certified evaluators in accordance with statutory evaluation guidelines, whereby the European Commission determines the principles for certification and evaluation criteria in more detail by introducing appropriate implementation measures. Therefore, from the point of view of the Austrian Federal Chamber of Labour, Article 16 of the Directive proposal would have to be amended accordingly.

6.) Information duty towards investors – Pension funds

Pension funds are subject to a special responsibility, as they are increasingly assigned tasks related to services of general interest in form of pension plans and retirement security for workers. That is why AIF that are sold to pension funds, have to point out the special risks, which are associated with this form of investment. In order to increase the signal effect, the documents, which are mandatory for investors should also be made available to the beneficiaries, their representatives and their expert consultants respectively. Therefore, Article 20 of the Directive proposal would have to be amended.

7.) Restriction of leveraged financing

In order to avoid any accumulation of systemic risks, as it is currently the case, it is necessary to cap leveraged financing in relation to equity capital

invested at European level. In view of the Austrian Federal Chamber of Labour, the maximal leverage effect should not exceed five times the equity capital invested. In order to avoid possibilities of evasion, the same capital requirements as for credit institutes would have to be applied. Article 25 Paragraph 3 of the Directive proposal should be amended accordingly.

8.) No exception for private equity funds

Due to leveraged financing and the frequently applied practice to transfer loans to the acquired company, all private equity funds must become subject to strict regulation, if one aspires to a consolidation of both the financial market AND the real economy, as the impact on the workforce is often quite drastic. That is why the threshold value with regard to the acquired companies has to be abolished (no restriction to SME). The regulation should take effect by the time a controlling influence is reached. This has automatically to be assumed when more than 25% of the votes are acquired. In order to protect the workforce and in view of the congruence of European legislation, obtaining the controlling influence must be treated equally to the transfer within the meaning of the Transfer of Undertakings Directive 2001/23 EC. Therefore, in the opinion of the Austrian Federal Chamber of Labour Article 26-30 should be amended accordingly.

9.) Consumer protection

The near collapse of the financial markets has shown that not even pro-

fessional investors and rating agencies respectively had neither a proper understanding of the products, which they evaluated and included in their portfolios, nor assessed the collateral risks in a correct way. It is therefore essential to introduce improved investor protection and to permit the sale of alternative investments to non-professional investors within the EU only from a threshold value of € 50,000. The signal effect associated with this shall prevent that alternative investments are marketed and sold as a secure variant of a savings book. Therefore, Article 32 of the Directive proposal needs to be amended accordingly.

We ask you, dear Member of Parliament, to consider the deep concerns that the Austrian Federal Chamber of Labour has with regard to the current version of the Draft Directive and to introduce resp. to support the Amendment Proposals mentioned above. We would also ask you to reject resp. support the Amendment Applications mentioned above, submitted by the Parliamentary rapporteur of the Committee on Economic and Monetary Affairs, MEP Jean-Paul Gauzès, for the reasons stated.



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