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REPORT

from :	General Secretariat
to :	Permanent Representatives Committee
No. Cion prop.:	9494/09 EF 67 ECOFIN 341 CODEC 682
Subject :	Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/65/EC

I. INTRODUCTION

1. On 30 April 2009 the Commission transmitted to the Council its proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/65/EC.

2. The proposal has been examined by the Working Party on Financial Services at several meetings during the Czech, Swedish and Spanish Presidencies.

3. The European Central Bank delivered its opinion on the proposal on 19 October 2009 (doc. 15162/09 EF 158 ECOFIN 681 CODEC 1249). The opinion of the Economic and Social Committee is still pending.

4. The European Parliament's Committee on Economic and Monetary Affairs is expected to adopt its report in early April in view of the final adoption by the Plenary at first reading in June or July 2010. The Presidency has nevertheless already pursued informal contacts with the European Parliament in order to facilitate convergence between the Parliament and the Council on the proposed Directive, with a view to ultimately reaching an agreement in first reading.

5. During the discussions at the Working Party on Financial Services the Presidencies have tabled several overall compromise proposals and other texts in order to make progress on the file. The latest Presidency compromise proposal is set out in doc. 6795/1/10 EF 17 ECOFIN 120 CODEC 144 REV 1.

II. STATE OF PLAY

6. Following the latest meeting of the Working Party on 25 February 2010 there was not yet a qualified majority supporting an overall compromise mainly because of the following three key outstanding issues:

   a) Scope/ optional exemptions (Article 2 b and recital 6)

   In its latest compromise proposal, the Presidency has suggested that the Directive should be applicable to all AIFM, but that the Member States would have an option to carve out the AIFM whose managed assets are below 100 million euro (if leverage is used) or 500 million euros (if leverage is not used). Even these AIFM would, however, be subject to certain minimum registration and reporting requirements.

   A large number of delegations considers the Presidency proposal acceptable as part of a global compromise. Nevertheless, there is still a blocking minority of delegations opposing the proposal; some of them would like the Directive to be applicable in general to all AIFM without the carve-out option.

b) Depositary (Article 17)

The main open issues here relate to eligible entities, which can perform the task of a depositary, to the possibility to discharge the liability in case of delegation of tasks of depositary, and to the possibility to be given to Member States to allow the use of a credit institution in another Member State as a depositary.

A small group of delegations would like to limite the eligibility to perform the task of depositary to credit institutions and authorised investment firms, whereas a vast majority of delegations also want other kind of entities (such as Central Securities Depositaries) to be eligible. These delegations also want to have additional flexibility for private equity funds in terms of choosing the depositary.

As to the possibility for the depositary to discharge its liability in case of delegation, almost all delegations can agree to the Presidency compromise text, but some delegations want to further clarify the criteria when the discharge would be possible.

The issue of having the possibility to use a credit institution in another Member State as a depositary is of importance to certain delegations, whose own depositary business is still undeveloped. The Presidency has proposed a transitional period of 4 years for using this possibility. A large majority of delegations can accept the Presidency proposal, but a few delegations are still hesitant to accept it mainly because of the length of the transitional period and the risks that it could pose to prudential supervision.

c) Third country issues (Articles 34a-35 and recitals 19a and 19aa)

The key issue here is how to address non-EU AIFM. The Presidency has proposed that Member States could allow them to market their funds to professional investors in their territory if they comply with certain minimum rules (such as reporting obligations). This approach is acceptable to a large number of Member States. On the other hand a group of delegations is strongly against this, arguing that the approach is protectionist and goes against the subsidiarity principle, and would therefore prefer to leave the possible regulation of non-EU AIFM to Member States alone.

7. Apart from the above-mentioned three key issues there are also other ones where individual delegations or small groups of them still have some problems, such as:

- Remuneration (Article 9a and Annex II)
- Valuation, in particular the issue of liability (Article 16)
- Reporting obligations to competent authorities (Article 21).

Furthermore, there are a number of scrutiny reservations on some recently introduced elements of text.

III. CONCLUSION

8. Against this background the Permanent Representatives Committee is invited to:

- resolve the outstanding issues and agree on the general approach with regard to the proposed Directive;
- recommend to the Council to confirm the agreement;
- recommend to the Council to invite the Presidency to start negotiations with the European Parliament on the basis of this general approach with a view to reaching an agreement at first reading.