The Alternative Investment Fund Managers Directive

European Regulation of Alternative Investment Funds

Dirk Zetzsche (ed.)

The Alternative Investment Fund Managers Directive (AIFMD) may be the most important European asset management regulation of the early 21st century. However, a preponderance of practitioners and academics in the field argue that, in its present form, the directive is seriously out of touch with both the system of European financial law and industry practice.

In this first in-depth analytical and critical discussion of the content and system of the directive, thirty-four contributing authors—academics, lawyers, consultants, fund supervisors, and fund industry experts—examine the AIFMD from every angle. They cover structure, regulatory history, scope, appointment and authorization of the manager, rules on delegation, reporting requirements, transitional provisions, and the objectives stipulated in the recitals and other official documents. The challenging implications and contexts they examine include the following:

– connection with systemic risk and the financial crisis;
– impact on money laundering and financial crime;
– nexus with insurance for negligent conduct;
– connection with corporate governance doctrine;
– risk management;
– transparency;
– the cross-border dimension;
– liability for lost assets; and
– impact on alternative investment strategies.

Ten country reports add a national perspective to the discussion of the European regulation. These chapters deal with the potential interactions among the AIFMD and the relevant laws and regulations of Italy, Switzerland, Luxembourg, The Netherlands, Austria, Liechtenstein, the United Kingdom, Germany, France, and Ireland. The former are Europe’s most vibrant financial centres and markets.

Designed to spur a critical attitude towards the emerging new European financial markets framework presaged by the AIFMD, this much-needed discussion not only elaborates on the inconsistencies and difficulties sure to be encountered when applying the directive, but also provides potential solutions to the problems it raises. The book will be warmly welcomed by investors and their counsel, fund managers, depositaries, asset managers, and administrators, as well as academics in the field.
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Dirk A. Zetzsche
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Chapter 25
The AIFMD’s Impact on Real Estate Funds (and its Dutch Implementation)

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1. INTRODUCTION

The implementation of the AIFMD will lead to a drastic change in the supervision of real estate funds in the Netherlands and most likely in many other Member States as well. As a consequence of the AIFMD’s implementation, real estate AIFMs will become subject to both a licence requirement (‘authorization’) and a large number of on-going obligations (‘operating conditions’).

This chapter addresses the consequences of the AIFMD for real estate funds, with special consideration of the Dutch legislative proposal to amend the Dutch Financial Supervision Act (‘Dutch FSA’) with respect to real estate AIFMs. It is structured as follows: Part 2 focuses on the typical structure of real estate AIFs and its managers. Part 3 introduces the licensing requirements, Part 4 deals with the AIFM and depositary regulation, Parts 5 and 6 cover the real estate specific AIFMD rules on leverage and valuation. Part 7 summarizes the estimates of the implementing costs, Part 8 concludes.

1. This legislative proposal was approved by the Dutch cabinet and is currently discussed in the Dutch House of Representatives (Tweede Kamer der Staten-Generaal), Parliamentary Papers with No. 33235. This Dutch legislative proposal implementing the AIFMD is to a great extent a reflection of the AIFMD. The Dutch legislative proposal also leaves ample room which will have to be dealt with in greater detail by secondary legislation, such as orders in council (Algemene maatregelen van bestuur). This secondary legislation will most likely be closely in line with the European rules.

2. **TYPICAL STRUCTURE OF A REAL ESTATE AIF/AIFM**

In order to sketch the setting of this chapter, the structure of a real estate fund is briefly described here. Real estate funds are either structured on the basis of a contract (i.e. a limited partnership (commanditaire vennootschap) or a mutual fund (fonds voor gemene rekening)), or as a legal entity (i.e. a private limited company (besloten vennootschap) or a public limited company (naamloze vennootschap)) in which investors obtain shares. Typically, funds are managed externally by a separate legal entity, the manager. In case of a limited partnership, the manager would also be the general partner (beherend vennoot).

An external manager will usually enter into a management agreement which sets out the framework within which the manager is entitled to manage the fund in accordance with the investment strategy for the fund. The management agreement will provide a clear set of rules as to which fund management decisions are within the manager’s discretion and for which decisions it needs to obtain some form of prior approval. This prior approval can be granted by, for example, an investment committee, a shareholders committee, or a supervisory board. However, most day-to-day operational management is dealt with by the manager, using its own discretion and without a requirement for prior approval. Only the more fundamental issues, such as a change of the fund conditions, portfolio sales or acquisitions, or a change of valuer or accountant, need prior approval from another body in order to protect the interests of the investors. Finally, a number of real estate related activities, such as sale and purchase, letting and maintenance, are usually outsourced by the manager to real estate brokers.

3. **AIFM AUTHORIZATION**

3.1. **AUTHORIZATION VS. REGISTRATION**

Prior to the adoption of the AIFMD, many real estate AIFMs (which are AIFMs as defined by Article 5 AIFMD) did not have an asset management licence. For example, in the Netherlands, a majority of real estate AIFMs were subject to exceptions and exemption rules, stipulated in the Dutch FSA. The AIFMD will subject these as-yet unregulated AIFMs to regulation if they exceed the AIFMD’s de minimis test. Under the Dutch legislative proposal, the simplified (registration) regime of Article 3 AIFMD is available only for AIFMs that offer the units exclusively to professional investors and certain non-professional investors. In the latter case, offers may not be made to more than 150 persons or for units of less than EUR 100,000.

2. Under the (current) Dutch FSA, a licence requirement does not apply to the offering of units in real estate funds: (i) exclusively to qualified investors (gekwalificeerde belegger), or (ii) to fewer than 100 persons who are not qualified investors, see Art. 1:12(1)(a) and (b) Dutch FSA. Real estate funds that avail themselves of such an exception or exemption must explicitly state in their written communications that they are not regulated (the so-called Wild West Sign) unless they exclusively manage funds that are sold to qualified investors.

3. For details, see D. Zetzsche, *Scope of the AIFMD*, ch. 3.

4. These are managers that satisfy the de minimis test, i.e. managers that directly or indirectly manage AIFs whose assets under management do not exceed the value of EUR 100 million, or, in the case of AIFs of...
3.2. AUTHORIZATION REQUIREMENTS

Real estate AIFMs that are not subject to the simplified regime must apply for authorization with the competent authority. The competent authority in the Netherlands in this respect is the Authority for Financial Markets (‘AFM’). When applying for such a licence, an AIFM will have to prove that its key personnel are fit and proper. Applying this requirement to the real estate sector, at least two officers must meet the fit and proper requirement. To be considered fit and proper, the officers have to meet certain criteria. The fit and proper requirements are stipulated in the FSA and have been set out in detail in the Dutch Policy Rules Eligibility 2012 (Beleidsregel Geschiktheid 2012) and the Dutch Market Conduct Supervision Financial Institutions Decree (Besluit Gedragstoezicht Financiële Ondernemingen Wft) respectively. The criteria focus on knowledge, skills and professional behaviour with regard to management, organization and communication, products, services and markets (in which the AIF is active), stable and incorruptible management, and equal and consistent decision-making. Suitability is assessed by an investigation of the intentions, actions, and personal background (regarding the integrity) of the officers.

In addition, the AIFMD’s operating requirements determine the organization of real estate AIFMs. For example, the organization of AIFMs must be adequate for real estate funds. These criteria are also set out in more detail in the FSA and the Market Conduct Supervision Financial Institutions Decree. The criteria relate to, among others, the decision-making process, internal provision of information, the integrity of information, continued availability and security of automated data, and the assessment of whether the required procedures are followed.

When authorization is granted, the AIFM has access to all professional investors within the EU/EEA. In addition, the AIFM may manage AIFs established in other Member States. For real estate AIFMs the European passport is particularly helpful given that prior to the adoption of the AIFMD real estate AIFMs had to examine the legal situation for each Member State on a country-by-country basis, regardless of whether the AIFMs were licensed in their home Member State.

3.3. OUTSOURCING

AIFMs often delegate services to other entities. Outsourcing can, for example, apply to the advertising, accounting, or the carrying out of the investment policy. In addition to outsourcing requirements that already exist (such as those provided by the Dutch FSA), Article 20 AIFMD imposes a number of additional requirements on the outsourcing of these duties.
With respect to real estate AIFMs, the wording of Article 20 AIFMD raises the question of whether property management itself is a duty which an AIFM may only outsource with due observance of the requirements of Article 20 AIFMD. In the Dutch legislative proposal, the Dutch cabinet took the stance that the ‘day to day maintenance’ of real estate is a duty of the AIFM which it may conduct itself or delegate without taking into account the requirements of Article 20 AIFMD. The other aspects of property management are activities which an AIFM may only delegate with due observance of the delegation principles.12

3.4. IMPLEMENTATION IN THE NETHERLANDS: SPLIT SUPERVISION BY THE DNB AND THE AFM

The Dutch twin peaks model is based on a supervisory model in which the DNB is responsible for compliance with the prudential rules, whilst the AFM is responsible for supervision of the conduct of market participants. The AFM is also responsible for transparent financial market processes and the integrity in relations between market parties. Depending on the type of financial institution, either the DNB or AFM is the Competent Authority.

Although the DNB and AFM collaborate in terms of supervising the financial markets, each has its own tasks. For example, the DNB will be allocated the power to establish limits regarding the leverage used by real estate AIFMs. Additionally, the DNB will be able to impose other restrictions on AIFMs regarding the management of real estate funds. It is important to bear in mind that the DNB may only exercise these powers if the stability of the financial system is at risk. Although it still needs to be determined in additional legislation when that will actually be the case, one can assume that this will only be in exceptional situations.

Whilst the DNB supervises the compliance of real estate funds with respect to their financial obligations, the AFM supervises the conduct of real estate funds.13 For example, supervision of the valuation of assets of real estate funds will be actively carried out by the AFM relatively strictly, because real estate AIFMs must provide information on the valuation procedures of the AFM periodically. Interestingly, the DNB also focuses on the availability of a proper valuation of commercial real estate. According to the DNB, such supervision is of importance in relation to restoring confidence in the Dutch commercial real estate market. Proper valuation will create clarity regarding the value of real estate, making such real estate more attractive to specialized buyers who aim to acquire real estate.14 A recent survey of the DNB shows that in more than 25% of bank loans, the value of collateral is significantly lower than the sums of the loans secured by that collateral.15

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12. This question was discussed with respect to the amendment of Art. 4:16 FSA which implements Art. 20 AIFMD. See the Explanatory Memorandum with respect to the legislative proposal regarding the implementation of the AIFMD in the Netherlands, session year 2011-2012 of the Dutch House of Representatives, 33235, No. 3 (‘Explanatory Memorandum’), 15.
13. Art. 1:25(2) FSA instructs the AFM to supervise the conduct on financial markets and to decide on the admission of financial enterprises to those markets. This supervision on conduct is aimed at orderly and transparent financial market processes, fair relationships between market parties, and careful treatment of clients.
14. DNB, Vastgoed wordt derde crisis in de financiële wereld, Het Financieele Dagblad 1 (3 February 2012).
15. DNB, Kwart Nederlandse vastgoed onder water, Het Financieele Dagblad 1, 3 (12 May 2012).
4. DEPOSITARY

Prior to adopting the AIFMD, under the laws of some Member States (in particular the Netherlands) the appointment of a depositary was mandatory only for certain legal bodies, such as limited partnerships and mutual funds. The latter are not separate legal entities, and cannot legally own property. To achieve a separation of the AIFs from the AIFM’s assets, a depositary (often a foundation set up especially for that purpose) holds the property in ownership. The general obligation to appoint a depositary and the AIFMD’s liability regime will have impact on existing practice in these Member States.

Furthermore, due to the limitations as to which parties may function as depositaries, the role and the identity of the depositary changes. In addition to the list of entities entitled to function as depositaries under Article 21(3) AIFMD, Article 21(3) subsection 3 AIFMD entitles the Member States to name non-prudentially supervised entities as depositaries for illiquid assets. This exception is of particular importance for real estate. The potential suppliers of these depositary services (banks, trust offices) are still rather hesitant in publicly offering their services since the full scope of the risks and liabilities is not yet fully clear.

With respect to real estate AIFs, the AIFMD does not contain a requirement that a depositary of a real estate fund must be the owner of the fund’s property. Such provisions were embedded, for example, in the Dutch FSA. Hence, the AIFMD changes the depositary’s role from safeguarding the assets by holding them as (legal) property to supervision of a number of the AIFM’s duties. Neither the AIFMD nor the Dutch legislative proposal determine who must be the owner of the real estate fund’s property. If a real estate fund has no legal personality it cannot fulfil this role. The AIFM or the joint unit holders in a real estate fund can possibly fulfil that role and hold the property in their own name. This latter solution is not advisable. If a unit holder terminates its participation it will be required not only to transfer its unit, but also to transfer its share in the community of property under Netherlands law, which transfer will have to be effected by means of a notarial deed.

16. Defined in Art. 1:1 AFS.
17. For details, see S. Hooghiemstra, Depositary Regulation, ch. 17; and C. Clerc & J. Deege, The AIF Depositary’s Liability for Lost Assets, ch. 18.
18. See S. Hooghiemstra, Depositary Regulation, ch. 17.
19. See also Recital 34 AIFMD.
20. See J. W. P. M. Van der Velden, Civielrechtelijke aspecten van fondsen voor gemene rekening, 16 Vastgoed Fiscaal en Civiel (December 2011).
21. Explanatory Memorandum, 14. The Dutch legislature has stated in this Explanatory Memorandum that certain matters will be specified in more detail in an order in council, and that parties which may potentially be able to fulfil this role will be consulted beforehand. If the real estate fund is a legal entity it can own the real estate property itself.
5. LEVERAGE

5.1. AIFMD RULES

The AIFMD’s rules on leverage\(^{22}\) are intended to protect the interests of investors\(^{23}\) and the stability of the financial system.\(^{24}\) A real estate fund particularly employs leverage if, in addition to the contributions of the unit holders, the investment strategy of the AIFM focuses on borrowing in relation to real estate investments. It is difficult to comment on an average level of debt for the real estate funds sector, as the levels of debt vary from fund to fund. Some funds are structured without the use of any external debt, whilst others are very highly geared. As a general rule of thumb, real estate financiers generally lend against loan-to-value ratios of 50-70%, although, especially prior to the financial crisis, those levels were sometimes much higher. As the use of leverage will increase the exposure of a real estate fund, the Competent Authority may impose limits on the use of leverage (Article 25 AIFMD).\(^{25}\) For the purpose of determining whether the Competent Authority shall exercise its power to impose leverage limits on AIFMs, several factors are taken into account. These factors include the obligation of the AIFM to provide information regarding the use of leverage when applying for a licence,\(^ {26}\) the maximum level of leverage which may be employed,\(^ {27}\) and reporting obligations with respect to the overall level of leverage employed by each AIF managed by the AIFM.\(^ {28}\)

Under the AIFMD, real estate AIFMs must determine their maximum use of leverage. In making this determination, real estate AIFMs must take into account the type of investment fund, the investment strategy and the sources of leverage.\(^ {29}\) If the leverage employed exceeds reasonable limits, the Competent Authority may impose limits.

In addition, real estate AIFMs employing leverage must take notice of the obligation to implement an appropriate system to manage liquidity. In concrete terms, this means that AIFMs will have to adopt procedures which make it possible to monitor the liquidity risk of a real estate fund and which ensure that the liquidity of the investments of a real estate fund complies with the underlying obligations. The effectiveness of this system will subsequently be monitored by means of stress tests.\(^ {30}\)

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\(^{22}\) ‘Leverage’ within the meaning of the AIFMD means any method by which a manager increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means. See Art. 4(i)(v) AIFMD and Arts 8-13 draft AIFMD (Commission) Regulation.

\(^{23}\) See, \textit{inter alia}, Art. 15(4) AIFMD.

\(^{24}\) See R. Wilhelmi & M. Bassler, \textit{AIFMD, Systemic Risk and Financial Crisis}, ch. 2.

\(^{25}\) For details, see F. Dornseifer, \textit{Hedge Funds and Systemic Risk Reporting}, ch. 22.

\(^{26}\) Art. 7(3) AIFMD.

\(^{27}\) Art. 15(4) AIFMD.

\(^{28}\) Art. 24(4), (5) AIFMD.

\(^{29}\) Other factors which managers must take into account are: the relevant relationships with other financial services institutions which could create systemic risks, the need to limit exposure to any single counterparty, the extent to which leverage is collateralised, the asset-liability ratio, and the scale, nature and extent of the activity of the manager on the markets concerned. Art. 15(4) AIFMD.

\(^{30}\) Art. 16(1) AIFMD.
ESMA has advised the EC on the question of which requirements liquidity management systems and procedures must satisfy.\(^{31}\) It follows from Articles 48 and 74 draft AIFMD (Commission) Regulation that the liquidity management systems and procedures must take into account the investment strategy, the liquidity profile and the redemption policy of each AIF. Furthermore, the liquidity management system shall ensure that the AIFM maintains a level of liquidity in the AIF appropriate to its underlying obligations. The AIFM shall monitor the liquidity profile of the portfolio of the AIF’s assets and shall implement and maintain appropriate liquidity measurement arrangements and procedures to assess the quantitative and qualitative risks of the positions of the AIF.

AIFMs that employ leverage will also be subject to certain disclosure obligations vis-à-vis AIF investors.\(^{32}\) These disclosure obligations cover a wide range of issues described in the AIFMD. The most important disclosure obligations in respect of leverage are those regarding the disclosure of information concerning the circumstances under which a fund may employ leverage, which types and sources of leverage are permitted and the related risks, restrictions on the use of leverage, rules applicable to the extent of the right to reuse collateral, and the maximum leverage that an AIFM may employ for the benefit of a real estate fund. If a real estate fund is obliged to publish a prospectus,\(^{33}\) then (i) the prospectus must contain the foregoing information, or (ii) the foregoing information must be stated separately.

AIFMs are also subject to an ongoing obligation to make information available to investors (unit holders) for each EU real estate fund they manage or market and which employs leverage. This disclosure obligation concerns: (i) any changes in the maximum level of leverage that an AIFM may employ, and the extent of the right to reuse collateral or any guarantees granted under the leverage arrangement, and (ii) the overall leverage actually employed.\(^{34}\) ESMA has also already advised the EC on this matter. That advice mainly concerned the frequency of the previously mentioned provision of information and the form in which this information is given, in order for the description of leverage to take place in a uniform and appropriate manner.\(^{35}\)

5.2. IMPLEMENTATION IN THE NETHERLANDS: LEVERAGE MONITORING BY THE DNB

According to the Dutch legislative proposal, leverage will be regulated in part 3 of the FSA. Given that in the Netherlands the DNB is charged with the prudential rules with regard to, *inter alia*, real estate funds, the DNB will be the primary competent authority in this respect.\(^{36}\)

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31. In the Draft Level 2 Implementing Measures, the rules concerning liquidity management systems do not deviate from ESMA/2011/379 in terms of substance.
32. For further details, see D. Zetzsche & D. Eckner, *Investor Information, Transparency and Disclosure*, ch. 15.
33. In accordance with the applicable rules on this subject laid down in the PD and the Dutch FSA.
34. Art. 23 AIFMD.
35. The draft AIFMD (Commission) Regulation does not deviate from ESMA/2011/379 regarding the ongoing duty of disclosure.
36. Pursuant to Art. 1:24 FSA, it is the duty of DNB to exercise prudential supervision on financial enterprises.
Real estate AIFMs which employ leverage on a substantial basis\(^{37}\) will have a disclosure obligation towards the DNB. They will be obliged to disclose information about, for example, the overall level of leverage employed by each of the real estate funds they manage and the breakdown between leverage arising from borrowing of cash or securities and leverage arising from financial derivatives. Information on the five largest sources of borrowed cash and the amounts of leverage received from those sources must be included for each of the real estate funds.\(^{38}\)

The basis for the supervisory powers of the DNB is the identification of the degree to which the use of leverage contributes to the build-up of systemic risks, market disruptions, or risks that may threaten the long-term growth of the economy. In order to be able to perform this duty adequately, AIFMs will have the duty to demonstrate that the leverage limits are reasonable and that they are also in compliance with those limits. The risk related to the level of leverage is assessed by the DNB and may be restricted if the stability and integrity of the financial system are at stake. Rules concerning the circumstances under which these powers may be exercised will be implemented by means of further legislation.\(^{39}\)

6. VALUATION

Valuation is a key concern for real estate investors. Since there are no two identical pieces of real estate, market- or index-based evaluation of real estate are to some extent arbitrary. For this reason, the AIFMD’s rules on valuation\(^{40}\) have a special meaning for AIFs investing in real estate.

For the purpose of protecting the interests of investors,\(^{41}\) the AIFMD also contains rules on the valuation of assets of real estate funds. This valuation may be performed by an AIFM or by an external valuer.\(^{42}\) In addition to several general requirements, specific rules will apply to valuations performed by an external valuer or an AIFM. Furthermore, rules will be introduced regarding the liability of AIFMs in connection with the valuation of assets. Supervision will be conducted by the AFM.

The AIFMD introduces the obligation for AIFMs to establish appropriate and consistent procedures for the proper and independent valuation of the assets of real estate funds. In this respect, AIFMs must ensure that the rules applicable to the valuation of assets and the calculation of the NAV per unit or share in a real estate fund are laid down.\(^{43}\) Both the assets and the NAV must be valued and calculated at least once a year.\(^{44}\) The valuation rules may be further specified by national law. For example, the Dutch legislative proposal

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37. The EC will establish further rules for determining what a ‘substantial’ degree of leverage is. For details, see D. Zetzsche & D. Eckner, *Investor Information, Transparency and Disclosure*, ch. 15.
38. Art. 24(4) AIFMD.
39. Art. 25 AIFMD. These provisions in the legislative proposal are stipulated in Art. 3:18b FSA.
40. For details on Art. 19 AIFMD see D. Zetzsche, *Scope of AIFMD*, ch. 3.
42. Art. 19 AIFMD.
43. These valuation rules must be laid down in the law of the Member State where the registered office of the real estate fund (provided the real estate fund is a legal person) is based, and/or in the regulations and/or the articles of association of the real estate fund.
44. Art. 19(1)-(3) AIFMD.
stipulates that real estate AIFMs must ensure that the AIFs constituting documents (the articles of association of the legal person, or the fund rules of the fund) stipulate the manner in which unit holders will be informed with respect to the valuation and the NAV.45

6.1. EXTERNAL VALUER

If an external valuer performs the valuation, an AIFM must demonstrate that (i) the external valuer is subject to mandatory professional registration recognized by law, (ii) the external valuer is sufficiently competent to perform its valuation duties effectively, and (iii) the appointment of the valuer complies with the requirements of the AIFMD.46 An external valuer may be a natural person or a legal person. The essential condition that must be met is the independence of the valuer in relation to the real estate fund, the relevant AIFM, or any other persons with close links to the real estate fund. This duty is personal in nature and may not be delegated to a third party.47 A depositary cannot be appointed as an external valuer, unless its depositary functions are functionally and hierarchically separated from its tasks as external valuer.48

An AIFM may also perform the valuation itself, although in that case the valuation task must be functionally independent from the portfolio management and the remuneration policy. In addition, other measures must ensure that conflicts of interest and undue influence upon the employees are prevented.49

6.2. LIABILITY IN CONNECTION WITH A VALUATION

Any potential liability in connection with an improper valuation in respect of a real estate AIF and the unit holders in the real estate fund will lie with the AIFM. This also applies if an AIFM has appointed an external valuer. An external valuer may nevertheless be liable in respect of the AIFM for all losses suffered by the AIFM in the event of the external valuer’s intentional failure or negligence to perform its tasks. This liability cannot be excluded by means of contractual agreements.50

6.3. SUPERVISION

The Competent Authority is allocated the power to require AIFMs to have their valuation procedures or valuations verified by an external valuer, or, where necessary, by an auditor or a different external valuer if the external valuer does not satisfy certain requirements which have yet to be implemented in more detail.51 In addition, the Competent Authority will exercise its ‘normal’ powers, i.e., supervising compliance with the statutory rules applicable to market conduct.

45. See Art. 4:37k FSA.
46. Art. 19(5) AIFMD.
47. Art. 19(6) AIFMD.
48. Art. 19(4) AIFMD.
49. Art. 19(4) AIFMD.
50. Art. 19(10) AIFMD.
51. Art. 19(9) AIFMD.
7. FINANCIAL IMPLICATIONS FOR REAL ESTATE FUNDS

It is expected that, as a result of the implementation of the AIFMD, 240 AIFMs in the Netherlands that are currently not subject to supervision will become subject to supervision, of which 185 are expected to fall under the scope of the simplified regime. Undoubtedly, the implementation of the AIFMD will become a costly affair for the industry. As to actual numbers, it is helpful to consider the provisional cost estimate in the Explanatory Memorandum on the Dutch legislative proposal.

In the Explanatory Memorandum the initial costs, i.e. the costs for applying for a licence or registration and the costs for changing the management, are estimated at approximately EUR 125,000 for an AIFM that does not fall under the scope of the current national rules. The costs for an AIFM already subject to supervision are estimated at EUR 50,000. As for the recurring costs – i.e. costs incurred in connection with reporting requirements and information obligations in respect of the Competent Authority and third parties – these are estimated at EUR 75,000 per year. The remaining costs for the business community cannot be estimated until further legislation establishes all details of the regulation applicable to the real estate funds. Obviously, these significant further costs have raised concerns among both market participants and investors.

8. CONCLUSION

The implementation of the AIFMD will bring many changes with respect to the real estate fund industry, also in the Netherlands. A larger part of the real estate fund managers will be regulated, which will result in changes to the internal structure of real estate funds and their managers, and will impose additional costs for the industry. The requirements applicable to AIFMs and depositaries will become more stringent.

In light of the already strict AIFMD rules, it is not advisable to apply even stricter rules by way of national gold plating. Thus, we welcome the fact that the Dutch legislature has abandoned pro-regulatory efforts and adopted a light-touch approach for providers of smaller real estate AIFs. Nevertheless, more rigid notification and information obligations will apply. In this way, the AIFMD grants power to the Competent Authority that enables it – more than is possible under the previously existing regimes – to ‘keep an eye on things’.

52. Explanatory Memorandum, 26.
53. Explanatory Memorandum, 26-28. This estimate comprises EUR 100,000 for changing management, EUR 5,000 for a licence application, EUR 5,000 for testing the day-to-day policymaker, and EUR 15,000 for legal advice.
54. Explanatory Memorandum, 26-28. With a view to curtailing administrative expenses, existing managers which already have a licence, save for exceptions, need not, in principle, apply for a new licence. Their licence will be converted by operation of law. Therefore, the costs will comprise only EUR 50,000 for changing management.
55. Consultation on the legislative proposal, Amendment Act FSA, the Dutch Civil Code (Burgerlijk Wetboek) and the Dutch Economic Offences Act (Wet op de Economische Delicten) in order to implement the AIFMD, 84.
56. Explanatory Memorandum, 28. Thus, the enactment of the draft AIFMD (Commission) Regulation will have to be awaited in order to make a more exact estimate.
In light of the above, it is important that real estate AIFMs determine as soon as possible whether their real estate AIFs will fall under the scope of the AIFMD. If that is the case, real estate AIFMs must commence the licensing process well before 22 July 2014 – the final deadline for AIFMs to be in compliance with the AIFMD (and the Dutch implementing legislation).