

Insight: Capital Markets

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Deadline Approaches – Non-EEA fund managers must consider their options

The Alternative Investment Fund Managers Directive (2011/61/EU) (the “**Directive**”) and the supplementary level 2 Regulation (EU) No 231/2013 (the “**Regulation**”) introduce an authorisation regime and centralised rulebook for the management and marketing within the European Economic Area (the “**EEA**”)¹ of alternative investment funds (“**AIFs**”) by alternative investment fund managers (“**AIFMs**”).

Under the Directive, non-EEA AIFMs² will be required to comply with the Directive in the event that they seek to:

- manage one or more EEA AIFs³; or
- market one or more AIFs managed by them to professional investors⁴ in the EEA, irrespective of the domicile of such AIFs.

Transitional Period to end 22 July 2014

Transitional arrangements have been in place in most EEA member states under which AIFMs that were marketing AIFs in the EEA immediately before 22 July 2013 could continue to market AIFs up to 22 July 2014. For example, many non-EEA AIFMs have been entitled to postpone their compliance with the Directive’s marketing obligations in the UK until 22 July 2014. However, this transitional period in the Directive expires on 22 July 2014 and non-EEA AIFMs who are not planning to register as an AIFM in the EEA must consider what they will need to do in order to continue to raise investments for funds in the EEA.

After 22 July 2014, AIFMs have the following broad choices:

- register for marketing in each member state where the AIF is to be marketed and comply with the provisions of the Directive set out in Article 42 (publication of annual reports, disclosure of prescribed information to investors, periodic filing with regulators and if applicable compliance with requirements for private equity funds);

1. EEA countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, UK.

2. “**Non-EU AIFM**” means an AIFM which is not an EU AIFM. “**EU AIFM**” means an AIFM which has its registered office in a member state (Article 4(ab) and (l) of the Directive).

3. “**EU AIF**” means: (i) an AIF which is authorised or registered in a member state under the applicable national law; or (ii) an AIF which is not authorised or registered in a member state, but has its registered office and/or head office in a member state (Article 4(k) of the Directive).

4. “**professional investor**” means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to MiFID. In practice, professional clients will include institutional investors such as banks, securities brokers, insurance companies and investment funds, as well as large corporate entities that meet specified criteria. Natural persons, clients who are individuals, may also elect to be treated as a professional client provided they have been assessed by an investment firm as meeting certain specified criteria which include the size of the individual’s portfolio and frequency of trading.



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- stop actively marketing funds but rely on investors to seek out investments via so-called “reverse solicitation” (investment interest must be at the initiative of the investor, and must be regarding a specific fund);
- establish a subsidiary in the EEA that can be authorised as an AIFM; or
- cease marketing in the EEA.

In the light of the above there are a number of steps non-EEA AIFMs should be taking, including:

- Assessing their marketing plans and investor lists to identify EEA domiciled investors;
- Considering registering under article 42 of the Directive in relevant countries;
- Reviewing offering memoranda to ensure they include suitable disclaimers if marketing is not to be undertaken in Europe; and
- Assessing strategies for accepting investments via reverse solicitation.

We set out below some questions and answers that we think may be useful for AIFMs navigating the Directive.

Q1 What does “Marketing” mean?

A The Directive defines marketing as follows: *“A direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled or with a registered office in the Union.”*

This is only partially helpful and it is for each country in the EEA to consider providing guidance.

The UK Financial Conduct Authority (the “**FCA**”) gives guidance on marketing under the Directive in its Perimeter Guidance manual (“**PERG**”), specifically in PERG 8.375, 8.377 and 8.378:

“The meaning of an offering or placement

(1) The terms ‘offering’ or ‘placement’ are not defined in the AIFMD UK regulation but, in our view, an offering or placement takes place for the purposes of the AIFMD UK regulation when a

person seeks to raise capital by making a unit or share of an AIF available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment.

- (2) An ‘offering’ includes situations where the units or shares of an AIF are made available to the general public and a ‘placement’ includes situations where the units or shares of an AIF are only made available to a more limited group of potential investors.
- (3) However, an ‘offering’ or ‘placement’ does not include secondary trading in the units or shares of an AIF, because this does not relate to the capital raising in that AIF, except in situations where there is an indirect offering or placement. Similarly, the listing of the units or shares of an AIF on the official list maintained by the FCA in accordance with section 74(1) of FSMA will not in and of itself constitute an offering or placement, although it may be accompanied by such an offering or placement.

The meaning of indirect offering or placement

- (1) Marketing may take place by a direct or indirect offering or placement of units or shares of an AIF. The reference to indirect offering or placement would include situations where an AIFM distributes units or shares of an AIF through a chain of intermediaries.
- (2) For example, if the units or shares of an AIF are temporarily purchased by a third party (e.g. an underwriter or placement agent) with the objective of distributing them to a wider investor base, this could be an indirect offering or placement when those units or shares are made available for purchase by investors, if the third party is acting at the initiative of, or on behalf of, the AIFM.

The meaning of a unit or share of an AIF

The terms ‘unit’ and ‘share’ in the AIFMD UK regulation are generic and can be interpreted as encompassing all forms of equity of, or other rights in, an AIF. As such, the terms are not limited to AIFs which are structured as companies or unitised funds and may include other forms of collective investment undertakings, such as partnerships or non-unitised trusts.”

The FCA has also suggested that it is possible that the provision of draft documents to an investor will not amount to “marketing”:

“Communications with investors in relation to draft documentation

Under article 31 of the Directive, an AIFM is required to submit the documentation and information in Annex III to the Directive with its application for permission to market an AIF managed by it and to notify their competent authority of any material changes to this documentation and information. Therefore, the prescribed documentation and information should be in materially final form before the AIFM may apply for permission to market an AIF. Any communications relating to this draft documentation do not, in the FCA’s view, fall within the meaning of an ‘offer’ or ‘placement’ for the purposes of the Directive, as the AIFM cannot apply for permission to market the AIF at this point. For example, a promotional presentation or a pathfinder version of the private placement memorandum would not constitute an offer or placement, provided such documents cannot be used by a potential investor to make an investment in the AIF. However, a unit or share of the AIF should not be made available for purchase as part of the capital raising of the AIF on the basis of draft documentation in order to circumvent the marketing restriction.”

However, as there is no European guidance on the meaning of marketing, other EEA member states may take a different view.

Q2 What does “Reverse Solicitation” mean?

A The UK FCA has given guidance saying that it should normally be sufficient for an investor to confirm that the offering or placement was made at its initiative provided this is obtained before the offer or placement takes place. An investment manager cannot rely on such confirmation if it has been obtained in order to circumvent the AIFMD. Other EEA countries may take different and more restrictive approaches. Investment managers should review their documentation and in particular subscription agreements to ensure suitable representations and confirmations are included for use in cases where fund interests or shares are offered or placed via reverse solicitation.

Q3 What does Marketing “within the EEA” mean?

A The definition of marketing in the Directive covers marketing “to or with investors domiciled or with a registered office in the Union.” We consider that marketing to an investor who is not domiciled nor has a registered office in the EEA would not be marketing in the EEA even if such investor’s beneficial owners were located in the EEA. This would include, for example, an AIF that is itself an investor, that is managed by a non-EEA AIFM and has EEA underlying investors. This is only the case, however, if the investment manager acts with discretion on behalf of the fund investors and its underlying owners. So there may be some scope for non-EEA managers to consider marketing to appropriate entities within financial groups that are not located in the EEA.

Q4 What if we have already marketed to an investor relying on the one year transitional period but the investor will only make a decision to invest after 22 July 2014?

A If the investor has received, before 22 July 2014, all the information they need to make an informed investment decision, but the investor makes its decision after this date, it should not trigger any additional compliance requirements. However, if investors receive further information after 22 July 2014, the position is not quite so clear. Drawing a bright line is not easy, but if an investor proactively continues a dialogue with the fund manager after 22 July, it is possible that such marketing could be deemed a result of reverse solicitation.

Q5 What happens if we don’t comply?

A Article 48 of the Directive states that “Member States shall lay down the rules on measures and penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced.”

For example, under the UK AIFM Regulations 2013, an AIFM or an investment firm that acts in contravention of the marketing restrictions is subject to consequences depending on whether the AIFM or investment firm concerned is an authorised person or an unauthorised person for the purposes of FSMA (i.e. has a license granted by the UK FCA).

The consequences of contravention by an unauthorised person include imprisonment for a term not exceeding three months or a fine. Investigations can be carried out under

section 168 of FSMA and the enforceability of agreements resulting from unlawful communications can be called into question (section 30 of FSMA, in relation to controlled agreements or the exercise of rights conferred by a controlled investment).

With regards to contravention by an authorised person, unlawful marketing is actionable at the suit of a private person who suffers loss as a result of such marketing, subject to the defences and other incidents applying to actions for breach of statutory duty.