

AIFMD marketing for third country managers – deadlines and dilemmas

The AIFMD transitional period will end at the latest on 22 July 2014. Many third country managers have relied on this ‘grace period’ since the AIFMD was transposed in most EEA countries in July 2013 and have only recently taken their first tentative steps towards registering under the AIFMD’s private placement rules (known as the ‘Article 42 requirements’) which will apply after July 2014. However, these registration processes have proved far from straightforward, hindered by diverging requirements and lack of clarity. This briefing examines some of the practical issues that have arisen and the deadlines that should be borne in mind as the expiry of the grace period looms on the horizon.

What constitutes ‘AIFMD marketing’?

The AIFMD defines ‘marketing’ as a ‘direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union.’ Countries have taken different approaches to defining marketing and some have taken a broader stance. For example in Sweden, ‘marketing’ covers any form of advertising and sales promotion and therefore goes beyond the concept of marketing in the Directive. In contrast, the position in the UK is that there cannot be AIFMD marketing unless documentation is in sufficiently final form for an investor to be able to make a subscription in a fund. Drawing the line between ‘pre-marketing’ and ‘marketing’ is not simple and varies from one country to the next. Lack of clear guidance or market practice on these concepts has also been an issue.

What exactly are the requirements for marketing?

Having determined that a manager is ‘AIFMD marketing’, the next step is to determine what the requirements for

marketing are, at least for those countries that have actually implemented AIFMD. This is not easy. The Directive was intended to create a harmonised and comprehensive regulatory regime for alternative fund managers in the EEA. However, this objective is not, at least at the present time, fulfilled. This is primarily for two reasons. Firstly, many EEA countries, including some important markets such as Italy and Spain, have not yet implemented AIFMD. This generally means that pre-AIFMD marketing regimes still apply in those countries. Secondly, as AIFMD was an EU directive it had to be transposed into national laws. This has resulted in diverging requirements from one country to the next, where the spectrum ranges from those countries which have not implemented Article 42 at all (e.g. Greece) to those that have taken a ‘copy-out’ approach (e.g. the UK and Luxembourg) to those countries which have ‘gold-plated’ the Article 42 requirements (e.g. France). The net result of this is that there is a ‘patchwork of requirements’ across Europe, making it impossible for managers to develop a uniform, ‘one size fits all’ compliance policy for marketing. The position must be checked for each country where

marketing is to take place and, as managers have begun to investigate this, a number of practical issues have emerged.

Key Points

- Grace Period from AIFMD application ends 22 July 2014 latest
- Be aware of specific notification or registration procedures and note practical issues that have arisen in some countries
- Investigate marketing requirements in each country where marketing is planned
- Some countries require prior approval before marketing
- Note regulator timelines for reviewing registration applications – your applications might need to be submitted far in advance of 22 July 2014
- Keep a ‘watching brief’ for those countries where ‘marketing requirements’ and timings for applications are still not settled

Cumbersome registration processes

Some countries have a more onerous registration process than others, Germany and Denmark being notable examples. Germany has a lengthy and complicated notification process. In Denmark, it might not be possible to register at all until a fund is established. The Netherlands has introduced a requirement for the Article 42 notification form to contain an attestation from the home state regulator of the manager and/or the fund, confirming that it is able to effectively comply with the co-operation agreement with the Dutch regulator in respect of the manager and the fund.

Formal approval prior to marketing

All countries that have implemented AIFMD require non-EEA managers (or EEA managers marketing non-EEA funds) to either 'notify' or 'register' their funds with the local regulator prior to marketing in that country. However, in some countries (e.g. Austria, the Czech Republic, Denmark, Finland, Germany and Sweden) marketing cannot commence until formal approval has been obtained from the local regulator. In other countries (e.g. Ireland, the Netherlands and the UK) a notification to the local regulator must be provided, but there is no need to wait for formal approval before marketing. Not only do managers need to be aware of the different procedures but, with the expiry of the grace period in sight, they also need to pay close attention to timing, as it could take several months (as in the case of Austria and Germany, for example) for approval to be obtained and for marketing to commence. Therefore, it would be prudent to submit any Article



42 notification or registration request as soon as possible and well in advance of the deadlines to ensure marketing can continue without interruption after 22 July 2014.

Another important point to remember is that the requirements are not yet clear in some countries. For example, in Luxembourg, where CSSF guidance on Article 42 procedures is expected to be issued shortly and in Spain, where prior approval will be required from the CNMV, but where there is no clear guidance at the moment as the AIFMD has not yet been implemented. In France, where there are proposed amendments to the current AIFMD implementation, it is reported that non-EEA open-ended funds would not be subject to the prior approval of the AMF. This, of course, is to be confirmed in light of the final amendments.

Co-operation Agreements

One of the pre-conditions to a non-EEA manager being able to 'notify' or 'register' for marketing under AIFMD is that a regulatory co-operation agreement is in place between the regulator of the manager's jurisdiction, the regulator of the

"It would be prudent to submit any Article 42 notification or registration request as soon as possible and well in advance of the deadlines to ensure marketing can continue without interruption after 22 July 2014."

fund's jurisdiction (should it be non-EEA) and the regulator of the EEA jurisdiction into which the manager will be marketing the fund. Many of these co-operation agreements are still being put in place, and managers cannot assume that a co-operation agreement will be in place with the regulators of those EEA jurisdictions where they would like to market. Some key offshore manager/fund jurisdictions, for example the British Virgin Islands and Isle of Man, do not yet have co-operation agreements in place with Germany. Additionally, for those jurisdictions late in implementing AIFMD, it is not clear how many co-operation agreements they will have in place with offshore regulators by the time of implementation.

“Marketing under the AIFMD is in a state of flux. The position is evolving, as regulatory guidance is issued and as market practice is established. Managers will therefore be required to keep a ‘watching brief’.”

Keep a ‘watching brief’

As has been the case for some months, the requirements for marketing under the AIFMD are in a state of flux in a number of jurisdictions. The position is evolving, as further regulatory guidance is issued and as market practice is established. However, there is still a long way to go. Managers will therefore be required to keep ‘a watching brief’ for the foreseeable future until the marketing landscape in Europe fully emerges.

Clifford Chance contacts

Lucio Bonavitacola

Partner, Milan
T: +39 028063 4238
E: lucio.bonavitacola@cliffordchance.com

Xavier Comaills

Partner, Paris
T: +33 14405 5166
E: xavier.comaills@cliffordchance.com

Simon Crown

Partner, London
T: +44 20 7006 2944
E: simon.crown@cliffordchance.com

Lounia Czupper

Partner, Brussels
T: +32 2533 5987
E: lounia.czupper@cliffordchance.com

Joëlle Hauser

Partner, Luxembourg
T: +352 485050 203
E: joelle.hauser@cliffordchance.com

Ate Veenstra

Partner, Amsterdam
T: +31 20711 9711
E: ate.veenstra@cliffordchance.com

Nick O'Neill

Partner, New York
T: +1 212 878 3119
E: nick.oneill@cliffordchance.com

Monica Sah

Partner, London
T: +44 20 7006 1103
E: monica.sah@cliffordchance.com

Mark Shipman

Partner, Hong Kong
T: +852 2852 8992
E: mark.shipman@cliffordchance.com

Sven Zeller

Partner, Frankfurt
T: +49 697199 1280
E: sven.zeller@cliffordchance.com

Natalia López

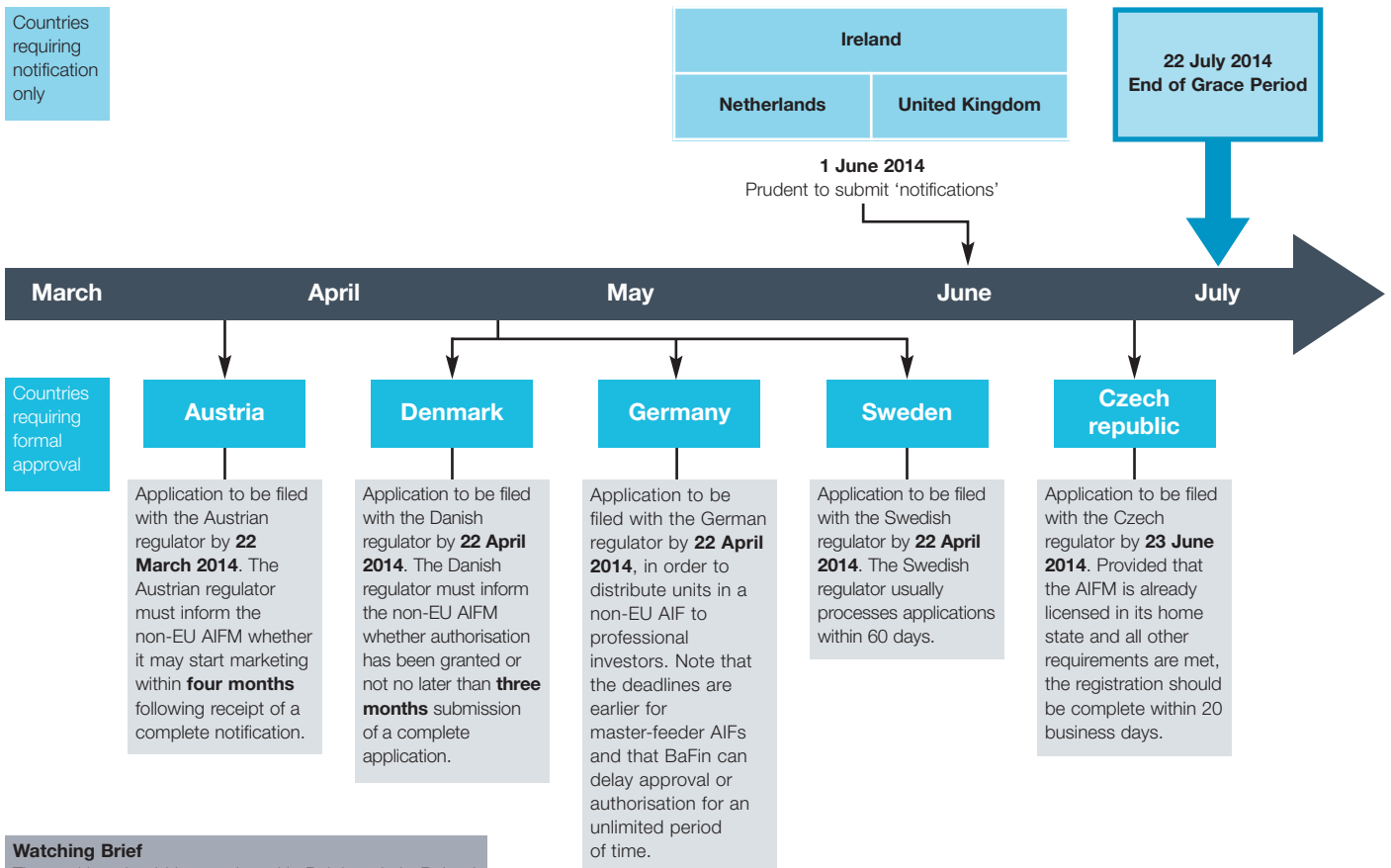
Counsel, Madrid
T: +34 91590 9410
E: natalia.lopez@cliffordchance.com

Owen Lysak

Senior Associate, London
T: +44 20 7006 2904
E: owen.lysak@cliffordchance.com

Figure 1
AIFMD: timeline for submitting Article 42 notifications

Notification or registration applications should be submitted **as soon as possible**, even where prior approval for marketing is not necessary, so that marketing can continue after 22 July 2014 without interruption. For those countries where formal approval is required before marketing, application processing times need to be factored in as indicated below.



Watching Brief
 The position should be monitored in Belgium, Italy, Poland and Spain where AIFMD is yet to be implemented. In addition, further guidance from regulators in Finland, Luxembourg and France is expected shortly.

© Clifford Chance, March 2014

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ.

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or contact our database administrator by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.