Fund marketing without a passport under the AIFMD – the emerging landscape

The transitional period provided by the Alternative Investment Managers Directive (AIFMD) comes to an end on 22 July 2014. Many fund managers have taken advantage of this 12 month 'grace period' to continue marketing their funds under pre-AIFMD regimes, rather than complying with the marketing requirements of the AIFMD. From 22 July 2014 however, this grace period will cease and managers will be required to comply with the AIFMD marketing requirements.

Although the AIFMD was intended to create a harmonised framework for marketing non-UCITS funds in Europe, marketing requirements differ, depending on whether the manager and/or the funds are established in the EU, on whether the manager is a 'full scope' or 'small AIFM' and on the type of investor (e.g. professional, semi-professional or retail). Adding to the complexity, the precise requirements can also vary from one country to the next, due to differences in national implementation (and the position still evolving as regulators issue new guidance). Likewise, what constitutes "marketing" under AIFMD varies country to country.

In this briefing, we focus on the marketing requirements for non-EU managers marketing funds to professional investors under Article 42 of the AIFMD and examine some of the practical issues that have arisen in some of Europe's major markets.

Key Issues

- Grace period ends on 22 July 2014
- AIFMD marketing requirements apply immediately
- Requirements vary across Europe
- Can include prior approval requirement
- Extensive due-diligence required as a result
- Potential criminal liability for marketing rule breach in some jurisdictions

A summary of national requirements for marketing without a passport is shown in the Table on page 4.

Similar issues will arise for EU managers marketing non-EU funds under Article 36 of the AIFMD as the basic conditions of the marketing regimes are broadly similar, although the extent of on-going obligations applicable to a manager under each regime do vary. These issues will also be relevant to third parties, such as placement agents, marketing funds on behalf of managers.

National marketing regimes

From 22 July 2014, non-EU managers marketing EU and non-EU funds must (where they are available) do so under the AIFMD rules for marketing without a passport, as implemented into national regimes.

Regulatory co-operation arrangements must be in place (between the regulators in the relevant non-EU jurisdiction(s) and the EU jurisdiction where marketing will take place). Much progress has been made this year by EU and major 'third country' fund jurisdictions in signing the necessary bi-lateral regulatory co-operation agreements, although there are still some notable exceptions. For example, Germany has not signed with BVI, Dubai, Isle of Man or Mauritius.

Some countries have imposed additional requirements in the context of regulatory co-operation. For example, the Netherlands requires an additional attestation from the non-EU regulator as to its ability to share information on the relevant non-EU manager in order to comply with the supervisory co-operation agreement. This raises a number of issues, not least of which is how this requirement can be met if the non-EU manager is not regulated in its home jurisdiction.

AIFMD requirements for marketing without a passport

- Co-operation arrangements must be in place between the regulator of the EU jurisdiction and the competent authorities of the funds and their manager.
- The jurisdictions where the funds and their manager are established must not be listed as a Non-Co-operative Country and Territory by the Financial Action Task Force.
- 'Notification' to the regulator of the EU jurisdiction by the fund's manager of the intention to market the fund.
- Compliance with the reporting and transparency requirements of Articles 22-24 of the AIFMD.

Some EU jurisdictions have 'gold-plated' these requirements.

It is also significant that European countries had the discretion not to permit marketing without a passport or to impose more stringent requirements than those set out in the AIFMD. Some countries opted to use this discretion. For example, Italy and Greece have not transposed the regime for non-EU managers, which means that, currently, reverse solicitation is the only means by which funds can be sold by non-EU managers to Italian and Greek investors. France has implemented requirements that are more stringent than Article 42 requiring non-EU managers to comply with the full requirements of the AIFMD in the same way as French portfolio management companies. In practice, this may mean that reverse solicitation is the only viable method of raising funds in France. Germany and Denmark have gone beyond the requirements of the AIFMD by requiring a depositary to be appointed. However, the precise requirements of the depositary also vary from country to country. In Germany, for example, if the manager targets semi-professional investors the depositary has to fulfill all the criteria set out in the German Capital Investment Act and the AIFMD Level 2 Regulation. If marketing is confined to professional investors only, the so called "depositary lite" regime will be sufficient.

As can be seen, therefore, national requirements vary and this divergence has lead to a 'patchwork' of marketing requirements across the EU. The requirements for 'notification' or 'registration' are examined in more detail below.

Small AIFMs

The approach taken by European countries in relation to marketing by 'small' or 'sub-threshold' AIFMs is also not uniform. This is most interesting in respect of a small EU AIFM marketing a non-EU AIF into other EU jurisdictions, which must also be undertaken using national registration regimes.

The UK and Germany for example have notification requirements. In contrast, in Sweden, only non-EU funds satisfying certain criteria can be marketed by a small EU AIFM. In some cases (e.g. Netherlands), the small AIFM regime is only available for Dutch small AIFMs.

Marketing registration procedures

Generally speaking, marketing without a passport will involve some sort of notification or approval procedure, often referred to as 'marketing registration procedures'. The precise requirements vary from country to country, ranging from 'notification' at one end of the spectrum, to 'approval' or 'authorisation' at the other.

In some countries (e.g. the UK) the notification requirements are relatively straightforward, such as requiring the manager to submit a notification form to the local regulator in the country where marketing is to take place. In many other countries in Europe, formal approval is required prior to marketing – see Table below. This means that managers must check the requirements in each country in which they intend to raise funds prior to commencing marketing.

In July 2013, very few countries had a specific form for 'Article 42 notifications'. As the grace period draws to a close this has changed. As can be seen from the Table below, a number of countries (e.g. the UK, Luxembourg and the Netherlands) now have prescribed forms for Article 42 notifications.

As mentioned above, in some European countries (e.g. the Netherlands and the UK) managers will be required to *notify* the local regulator prior to marketing but do not need to wait for formal approval before commencing. Contrast this with countries such as Denmark, Germany and Sweden. Where prior approval is needed, managers will need to be mindful of the time it takes for approval to be granted as, in some cases, this can take several months – see Table below.

A watching brief – still necessary

One year on, most European countries have now transposed the AIFMD. However, some have not, notably Spain, Portugal and Poland and in these countries the pre-AIFMD rules apply. Even where the AIFMD has been transposed, marketing requirements are evolving as further regulatory guidance is issued and as market practice is established. Managers are, therefore, still required to keep a 'watching brief' as there is still much to be done before complete clarity emerges.

That said, progress has been made and as the grace period comes to an end the landscape for marketing without a passport is emerging. The key message for fund managers is to undertake careful due diligence at the outset. Marketing regimes are not fully harmonised as there are significant procedural differences from one country to the next. Fund managers seeking to raise funds in Europe must therefore tread carefully.

This briefing is a high level summary of the position only and is subject to change. It should not be relied on as legal advice.

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Fund marketing to professional investors without a passport – a snapshot of national requirements on 22 July 2014

Non-EU AIFMs (Article 42 AIFMD)

Issues	Belgium	Czech Republic	Denmark	Finland	France	Germany	Italy	Luxembourg	Netherlands	Norway	Sweden	United Kingdom
Marketing under Article 42 available?	Y	Y	Y	Y	Y[1]	Y	N[2]	Y	Y	Y	Y	Y
Approval before marketing required or just notification?	Approval	Approval	Approval	Approval	Approval	Approval	N/A	Notification	Notification	Approval	Approval	Notification
Approval lead-time	No statutory time period	20 business days	Regulator has up to 3 months	No statutory time period[6]	2 months	2-4 months[4]	N/A	N/A	N/A	No statutory time period[6]	60 days	N/A
Commencement of marketing	From approval	From approval	From approval	From approval	From approval	From approval	N/A	From notification	From notification	From approval	From approval	From notification
Specified form or letter?	Letter	Form	Form	Letter	Form	Letter	N/A	Form	Form	Letter	Letter	Form
Depositary required?	N	Y	Y	N	N[7]	Y	N/A	N	N	N	N	N
Regulatory Co-operation Attestation Requirement	N	N	N	N	N	N	N/A	N	Y	N	N	N
Examples of co-operation agreements not in place[5]	Turkey, Egypt, Kenya, Vietnam	Kenya, India, Vietnam	Maldives	Mauritius, Turkey, UAE	Mauritius	BVI, Dubai, Isle of Man, Mauritius, Vietnam	Bermuda, BVI, Cayman Islands, Guernsey	None	None	None	None	None

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1 France has implemented Article 42. However, the requirements are onerous, requiring full AIFMD compliance by the non-EU manager and it is not clear how practically this can work.

2 Reverse solicitation only for non-EU managers.

4 2 months where distribution is to professional investors and 4 months if also to semi-professional investors. Assumes no master-feeder structure involved. BaFin can delay approval indefinitely.

5 Based on ESMA list of AIFMD MOUs signed by EU authorities dated 17 July 2014.

6 Could be 1-4 months.

7 It is still necessary to ensure certain tasks are carried out for the fund by a custodian.

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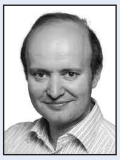

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