



*cutting through complexity*

FINANCIAL SERVICES

# AIFMD: Transposition status

[kpmg.com/aifmd](http://kpmg.com/aifmd)

KPMG INTERNATIONAL

The deadline for European Union (EU) member states to transpose the Alternative Investment Fund Managers Directive (AIFMD) into national law has now passed: 22 July 2013. Since the requirements with which Alternative Investment Fund Managers (AIFMs) will need to comply will depend to a great extent on their activities, as well as where their funds and investors are located, many firms continue to struggle with questions around the transposition requirements and the associated implications for their individual firms. Specifically, questions by both EU AIFMs and non-EU AIFMs around marketing and private placement as of 22 July 2013 are frequently asked.

Until transposition actually takes place in a particular EU member state, non-EU AIFMs should be able to market their non-EU alternative investment funds to investors in that member state by use of the existing private placement regime. It is important to note, however, that some member states are contemplating the elimination of the private placement regimes at such time as the AIFMD is transposed into law. Therefore, it will be incumbent upon non-EU AIFMs to conduct their proper due diligence with respect to their marketing initiatives.

After the date of transposition, a non-EU AIFM will need to comply with a number of conditions (including new reporting and disclosure requirements) in order to continue to take advantage of the private placement regime in a given EU member state.

As of 22 July 2013, the AIFMD has been transposed by 12 out of 28 member states (in alphabetical order): Austria, Croatia, Cyprus, Denmark, Germany, Ireland, Latvia, Luxembourg, Malta, the Netherlands, Sweden, and the United Kingdom. The member states that have transposed the law, either through an active legislative procedure or through negative assurance procedures, have published information on the transitional arrangements and the majority will have transitional relief for domestic AIFMs, other EU AIFMs and non-EU AIFMs. Only the Netherlands and Latvia limit the transitional relief to (domestic) existing managers. Non-EU AIFMs who market to Malta and Ireland will be granted a 2-year relief period.

The following provides a brief overview of the impact on AIFMs in the EU:



## Belgium

At the end of May, Belgium published its draft law on the transposition of the AIFMD into local law. The consultation period is until June 2013 and the possible transposition date mentioned is January 2014. The Belgium Regulator has published a Q&A on the transitional period, highlighting the impact on Belgium, EEA and non-EU managers with regard to the fact that

Belgium has not met the transposition deadline and the concept content of the application file.

The transitional period is from 22 July 2013 until 22 July 2014. It will be split between the time until the transposition of the AIFMD into Belgium regulation and the time remaining until 22 July 2014. Until the transposition into Belgium regulation, the current regulation is supposed to be

applicable. No scope-out is expected with respect to the transitional period.

### *Domestic and EU AIFMs*

The EU passport is expected to be sufficient to market into Belgium, most likely taking into account, the notification to the Belgium regulator. The regulator will have 20 working days to review the notification report. Reporting requirements are to be defined and should be aligned to the ESMA guidelines that still need to be finalized.

### *Non-EU AIFM*

The Belgium regulator expects to continue working under the current regulation, meaning a distinction between institutional funds with limited requirements, except for the notification to the Belgium regulator, incl. sufficient cooperation between regulators, and the current regime applicable to retail funds, with additional requirements.

The Belgium regulator expects to follow the European Securities and Markets Authority (ESMA) registration requirements, which need to be developed.

## Denmark

Denmark has adopted the AIFM Directive in Act No. 598 of 12 June 2013, which will enter into force on the 22 July 2013. The Danish adoption of the Directive is very much aligned to the Directive and the wording is in many cases almost a complete copy of the Directive. The Danish authorities will therefore comply with the implementation deadline set forth in the Directive.

The Danish law requires in line with the directive that:

- All fund managers whose regular business is to manage AIFs are to be either authorized by, or registered with, the Danish Financial Services Authorities (FSA), depending on the overall size of the assets under management (AUM).
- All alternative investment funds must have an authorized or registered manager, or otherwise it will be regarded as a self-managed fund. A self-managed fund will simultaneously be considered a manager and the self-managed fund must comply with the same rules as the other AIFM's.

The Danish law hence distinguishes between registered managers and authorized managers where:

- Registered manager can manage a portfolio less than EUR100 million

or EUR500 million if the AIFs are unleveraged.

- Authorized managers may manage a portfolio whose size exceeds the above described thresholds.

All AIFMs may seek approval to manage AIFs. However, an authorized manager is subject to an initial capital requirement of EUR125,000 and self-managed funds shall have initial capital of at least EUR300,000. Registered managers will avoid the bulk of the requirements set in the AIFM law but these managers will not benefit from several rights provided by the law. For example, registered managers will not be able to get a license to market AIF to retail investors or to manage or market AIF in other European countries. The Danish FSA has issued detailed rules in a number of executive orders, just as the Commission has issued detailed rules in regulations which are directly applicable in Denmark.

The Danish FSA has furthermore published a new theme page on its website regarding the regulation of AIFM's where it is possible to read more about the law, whom it affects, and what to watch out for. At the moment the website and all the relevant documents including the Act and the executive orders

are all in Danish. However it is expected that these documents will be translated to English at a later point in time.

Currently included in the Q&A on Marketing on the website are some important topics in Denmark:

- *What will be considered as marketing of AIFs, to the extent that the Fund is only established if sufficient underwriting commitment has been obtained?*

Once a manager has been authorized or registered as manager of AIF an AIFM may market new alternative investment funds to professional investors in Denmark. It is in this context, the Danish FSA believes that it will be considered marketing even though each AIF is only established, when sufficient underwriting commitment is obtained.

- *May AIFs continue to market in the time period from 22 July 2013 until their AIFM receives a license?*

Yes, this follows from the transitional provisions in the AIFM Act. The transitional rule of § 193 of the AIFM Act includes exclusively alternative investment funds established before 22 July 2013. If an AIFM wishes to manage a new AIF, created after 22 July 2013, the AIFM must either be registered or obtain an authorization to manage AIFs.

- *May AIFs launched after 22 July 2013 be marketed during the transition period?*

The transitional rule of § 193 of the AIFM Act only covers AIFs established before 22 July 2013. If an AIFM wants to manage a new AIF, created after 22 July 2013, the AIFM must either be registered or obtain an authorization to manage AIFs. Once a manager has been authorized or registered as manager of AIFs, the AIFM may market new alternative investment funds to professional investors in Denmark.

If the AIFM wishes to market AIFs to retail investors in Denmark, the AIFM

must have an authorization to manage alternative investment funds, as well as have permission to market each AIF to retail investors in Denmark.

- *Will the private placement regime be open to non-EU AIFMs marketing non-EU AIFs to professional investors after 22 July 2013?*

Yes, this is not affected by the AIFMD (prospectus requirements etc.). However, if the non-EU AIFM wants to continue to market after 22 July 2014 it will need to comply with the registration requirements for non-EU AIFMS and acquire approval from the FSA, which will mean full compliance with the AIFMD after 22 July 2014.

- *Will approval or registration be required by the Danish financial regulator?*

If the AIFM wishes to continue to market in Denmark, an approval of the FSA is required. This approval will effectively mean full compliance with the AIFMD.

#### **Retail investors**

- *Will the private placement regime be open to non-EU AIFMs marketing non-EU AIFs to retail investors after 22 July 2013?*

Yes, this is not affected by the AIFMD (prospectus requirements etc.). However, if the non-EU AIFM wants to continue to market after 22 July 2014 it will need to comply with the registration requirements for non-EU AIFMS and acquire approval from the FSA, which will mean full compliance with the AIFMD after 22 July 2014.

- *Will authorization or registration be required by the Danish financial regulator?*

If the AIFM wishes to continue to market in Denmark, an approval is required (registration is not sufficient if the AIFM want to approach retail investors). This approval will effectively mean full compliance with the AIFMD.



## Finland

---

On 30 April 2013, the Finnish Ministry of Finance published its first draft of a new legislation implementing the EU Alternative Investment Fund Managers (AIFM) Directive.

According to the draft law, the private place placement regime with respect to marketing of non-EEA AIFs managed by non-EEA AIFMs to 'professional clients' would continue, but would be subject to certain offering rules (including the requirement to provide all material information relating to the fund), reporting obligations and obligations in relation to financial statements and audit of the financial statements. Marketing would also be subject to the existence of agreements on the exchange of information between the Finnish Financial Supervisory Authority and the regulator supervising the foreign AIFM and, with the same substance as the OECD model tax convention, between Finland and the home jurisdiction of the AIF. In addition, the marketing of non-EEA AIFs managed by EEA AIFMs

would require that the EEA AIFM provides certain information, such as information on the custodian, to the Finnish Financial Supervisory Authority before it commences the marketing of the non-EEA AIF.

The draft law still leaves some important questions, such as whether the private placement regime would continue to be available for an EU AIFM that will be subject to a licence requirement, but has not yet applied for or obtained a licence (and accordingly will not yet benefit from the AIFM marketing passport).

The draft law also includes an explicit non-solicitation exception, according to which nothing shall prevent an investor from making investments in domestic or international AIFs that the investor itself has selected. Thus, if an investor contacts an AIFM unsolicited, no regulatory obligations will be triggered. It is also expressly stated that in such cases, the AIFM may report to the investor without any specific restrictions.



## France

---

The French regulator, the Autorité des Marchés Financiers (AMF), published new regulations for alternative funds in July as part of the transposition of AIFMD into national law. According to the regulator, the new rules will have some gold plating compared to the original EU directive.

First, the range of alternative funds that can be created in France will be simplified, with categories of products being merged together and names being changed. For example, contractual

venture capital funds and contractual mutual funds will be brought together to form a new category called professional specialized funds.

The changes will apply to all new funds that are launched on or after 23 July, the date of the transposition of the AIFMD into French law. Existing alternative funds will have a year to adapt and change their names.

In addition, from 23 July, French alternative fund managers will be

able to use two liquidity management mechanisms that were previously unavailable to them: anti-dilution levies and swing pricing. These measures are designed to help protect the interest of long-term investors during periods of intense redemptions.

The AMF recently began accepting applications from alternative fund managers as part of a pre-registration process aimed at managers who want to be AIFMD-compliant by the implementation deadline. To coincide with this, the regulator published a guide aimed at helping firms comply with the directive. As well as answering any questions providers may have about implementing AIFMD, the guide aims to promote the attractiveness and competitiveness of France's alternative investment industry.

### *Domestic managers*

The obtainment of a marketing passport in France should follow a parallel process compared to the AIF authorization. If the AIF follows a declaration process instead of an authorization process, the AIFM will have to ask for a passport after applying the AIF to the AMF. For French AIFs marketed in France, the standard agreement process will have to be followed (with complementary information required by the directive).

### *Domestic manager of EU AIF in EU countries*

The manager has to give the AMF a notification file for each AIF the AIFM wants to market outside France. The AMF checks this file, with a maximum review period of 20 days. If the file is in compliance with the legislation in place, the AMF gives the file to each country of the AIF and creates an agreement.

### *Other EU managers marketing in France*

The manager must give his or her home member state authority a notification file for each AIF he or she wants to market. The home member state authority will perform the necessary checks within a 20 day maximum period. If the file is compliant, the authority will submit this to AMF and create an agreement.

An AIF set up in France has to appoint a depositary, having its registered office or a branch located in France. When the AIF is set up in another EU country and its management company has been approved by the AMF, the depositary can be domiciled either in France or in the home state of the AIF. When the AIF is set up in a non-EU country and has France as a member state of reference, its depositary can be domiciled in France, in the home State of the AIF or in the home Member State of the AIFM or the member state of reference of the AIFM. The list of entities entitled to be appointed as depositaries of third countries AIF is set up by a ministerial decree.



# Germany

## Domestic managers

'Small' domestic AIFMs whose assets under management in total do not exceed a value threshold of (i) EUR€100 million, including any assets acquired by the use of leverage on the level of the fund, or (ii) EUR€500 million (unleveraged), that do not grant investors redemption rights during a period of 5 years, are subject to a restricted application of the draft KAGB. Such domestic AIFMs are free to voluntarily opt in, in which case the draft KAGB applies in its entirety.

Small other EU or non-EU AIFMs will be required to comply with the full marketing requirements under the AIFMD.

In regard to the management and the marketing of Alternative Investment Funds (AIFs), in principle, the draft KAGB distinguishes between:

- AIF-Kapitalverwaltungsgesellschaften (domestic AIFM)
- EU-AIF-Verwaltungsgesellschaften (EU AIFM)
- ausländische AIF-Verwaltungsgesellschaften (non EU AIFM).

Each of these may manage and market domestic AIF, EU-AIF or non EU AIF.

The following activities require written admission by the German regulator, the Federal Financial Supervisory Authority (BaFin).

- Business operation of a domestic AIF (Sec. 20 draft KAGB).
- The management of domestic Spezial-AIF or EU-AIF by a non EU AIFM, which has chosen Germany as its Member State of Reference (Sec. 58(1) draft KAGB).

- The marketing of units or shares in any AIF in accordance with Art. 39, 40 AIFMD by a non EU AIF which has chosen Germany as its Member State of Reference (Sec. 58(1) draft KAGB).

The application for permission to BaFin requires the submission of comprehensive information, explained in a "guideline to the approval procedure for domestic AIFM according to Sec. 22 Draft KAGB," dated 22 March 2013 (the information may include evidence regarding the required initial capital and additional own funds or a corresponding professional indemnity insurance to cover potential professional liability risks, the intended shareholding structure, investment strategies and remuneration policies and practices).

The marketing of AIF by AIFM in Germany requires a notification to BaFin. If a domestic AIFM intends to manage EU AIF by cross-border supply of services or by establishing a branch in another member state, it has to submit various information to BaFin. If there is no reason to believe that the management of the EU AIF violates provisions of the KAGB, BaFin will transmit the documentation to the competent authority of the intended host member state and will notify the AIFM about the transmission ('Notification of Transmission'). Upon receipt of the Notification of Transmission, the AIFM may begin with the management of the EU AIF in the respective host member state.

The private placement regime will be abolished and the marketing of any AIF will require the passing of a notification procedure.

### *Non-EU managers*

Generally speaking, active marketing of an open-ended non-EU AIF, which is currently licensed pursuant to the German Investment Act (Investmentgesetz - InvG) to market to professional investors by a non-EU-AIFM in Germany, will be permitted (i) until 21 July 2014 at the latest or (ii) earlier if the notification procedure for marketing such AIFs pursuant to section 330 of the future German Capital Investment Act (Kapitalanlagegesetzbuch - KAGB) has been successfully finalized. In the latter case, after successful application of the notification procedure, such AIFs may continue to be marketed in Germany. Therefore, active marketing of such AIFs will be either possible by using the current marketing approval by BaFin or the future marketing approval by BaFin. This applies mutatis mutandis to open-ended AIFs not regulated by the InvG and currently permitted to be marketed prior to 21 July 2013.

#### **General requirements (general overview)**

The non-EU AIFM complies with certain information requirements towards BaFin pursuant to Section 35 KAGB. If the AIF qualifies as a private equity fund, the non-EU AIFM adheres to the special requirements of the KAGB for such funds. The non-EU AIFM has appointed one or more depositaries for the AIF which take over responsibilities in accordance with the AIFMD. The transparency requirements need to be fulfilled (e.g. the latest financial statements and an appropriate document containing all necessary pre-investment information and information on a potential limitation of liability of the depositary in relation to potential investors).

An adequate cooperation agreement between BaFin and the home state authority of the non-EU AIFM needs to be in place and, as the case may be, the home state authority of the AIF.

Neither the home state of the non-EU AIFM nor the home state of the non-EU AIF should be on the Financial Action Task Force blacklist of Non-Cooperative Countries or Territories. And appropriate measures to prevent marketing of the AIF to retail investors needs to be implemented.

#### **Application form (general overview), needs to contain the following information:**

- business plan, containing information regarding the notified AIF and its registered office
- investment conditions, articles of association and partnership agreement of the notified AIF, respectively
- name of the depositary
- description of the AIF and any information on the AIF available to the investor
- information listed in Section 307 KAGB
- information on the arrangements that have been taken to prevent units or shares of the AIF to be marketed to retail investors
- significant information concerning the AIFM and its committees and with regard to the depositary or appointed trustees
- statement of the non-EU AIFM committing itself (i) to submit the AIF's audited annual report to BaFin 6 months after the end of each fiscal year at the latest; (ii) to inform BaFin of all material changes; and (iii) to provide information and submit documents to BaFin at its request and to comply with the notification and information duties regarding the management of the AIF
- proof of payment of the fee for the notification procedure
- any documents in a foreign language must be translated either into German or provided in English.

The approval procedure may take 3 months, with a three months extension period.





# Ireland

## *Domestic managers*

In accordance with Article 61(1) of AIFMD, an AIFM performing activities before 22 July 2013 shall take all necessary measures to comply with national implementing legislation and submit an application for authorization within 1 year. The European Commission has stated, as its interpretation of this article, that during the 1-year transitional period, AIFMs are expected to comply on a 'best efforts' basis with national law.

In the case of an existing Irish AIFM with an existing AIF, the intention of the Central Bank is that the NU Series of Notices, which have been imposed prior to 22 July 2013, will continue to apply to the AIF until the AIFM is authorized, at which point the AIF Rulebook will become applicable to both the AIFM and its AIFs. This is the case for both external AIFMs and self-managed AIFs.

An existing Irish AIFM with an existing umbrella AIF can establish a new sub-fund, notwithstanding that the AIFM has not yet submitted its application for authorization/registration under the AIFM Regulations. A new sub-fund may be established and will, pending manager's authorization/registration as an AIFM under the AIFM regulations, be subject to the NU Series of Notices. Once there is authorization/registration under the AIFM regulations as its AIFM, the AIF Rulebook will apply to it. This is the case for both external AIFMs and self-managed AIFs.

An existing Irish AIFM may establish a new AIF during the transitional period. In this case, the AIF Rulebook will apply to the AIF. The AIFM must comply on a 'best efforts' basis. The depositary will, pending authorization of the AIFM, be permitted to comply with the depositary regime applicable to start-up Qualifying

Investor Alternative Investment Funds (QIAIFs) as set out in the Rulebook. AIFMs in this situation are advised to pay particular attention to ensuring that their planning towards compliance with the AIFMD takes fully into account the complex compliance challenges they face in achieving best efforts. 'Start-up AIFMs' refers to the regime applicable to new QIAIFs which have registered AIFMs. These QIAIFs must appoint an authorized AIFM within 2 years of their launch date. During the start-up period, depositaries of start-up QIAIFs must comply with the AIFMD depositary regime except in relation to depositary liability.

## *Other EU managers*

A non-Irish EU AIFM with an existing Irish AIF (or Irish UCITS) may continue to act for that AIF, establish new sub-funds if it is an umbrella fund and establish new Irish AIF under the same conditions as are applied to Irish AIFM. Once authorized in its home member state, the Central Bank will expect to receive a passporting notification in accordance with Article 33 of the AIFMD.

A non-Irish EU Investment Manager performing investment management functions for an Irish AIF can be the designated AIFM for that Irish AIF from 22 July 2013, provided he or she is availing of a transition period in the home member state. At the end of the transition period in the home member state (or at the time of their authorization if that is earlier), a passport notification in accordance with Article 33 of AIFMD should be issued.

## *Non-EU managers*

An existing non-EU Investment Manager operating as the delegate of the management company for non-UCITS

funds or a self-managed investment company may continue to operate for so long as the AIF to which they provide services is authorized to continue.

An existing non-EU AIFM operating as the delegate of the management company for non-UCITS funds or a self-managed investment company can be the designated AIFM from July 2013 for a QIAIF. They cannot be the designated AIFM for a Retail Investor Alternative Investment Fund (RIAIF).

The fact that the QIAIF would have a non-EU AIFM will not be an obstacle to its application for authorization from July 2013 from being processed. Notwithstanding this approach, the Central Bank would intend to conform to any common EU position on this, if one were to emerge before July 2013.

Non-EU AIFMs do not have to immediately fulfill all of the obligations imposed on AIFMs. The Central Bank of Ireland will allow a transition benefit to non-EU AIFMs. Any QIAIF which was authorized prior to 22 July 2013 and which designates a non-EU entity as its AIFM will only be obliged to ensure that it has an AIFM capable of carrying out all the tasks of an authorized AIFM by 22 July 2015.

Any QIAIF which is authorized on or after 22 July 2013 on the basis of designating a non-EU AIFM must only ensure that the non-EU AIFM is capable of carrying out all the tasks of an authorized AIFM within 2 years of the QIAIF's date of launch (i.e. the date when the initial offer period closes or, where there are multiple closings, the date of first closing).

The Central Bank will keep the extent of this transition under review in order to extend the transition period to align with the coming into effect of Article 37 of the AIFMD, unless there are strong reasons not to do so in the light of intervening experience in relation to the regulation of AIFs which have non-EU AIFMs.

QIAIFs authorized before 22 July 2013 which designate a non-EU AIFM will be allowed to take advantage of the relevant transition period outlined above provided

that, at all times, the QIAIF can show its management company and AIFM that arrangements, when considered in their entirety, meet the standard that would have applied under the non-UCITS regime, which applied in Ireland immediately prior to 22 July 2013.

A QIAIF authorized on or after the 22 July 2013, which designates a non-EU AIFM, will be allowed to take advantage of the transition period provided that it and its non-EU AIFM comply with the provisions of the AIF Rulebook that apply in the case of QIAIFs with registered AIFMs.

A RIAIF must have an authorized AIFM. A non-EU AIFM cannot become an authorized AIFM before Article 37 is effective.

Existing AIFMs do not have to notify the Central Bank of their intention to use the transitional arrangements under Article 61 of AIFMD.

A non-EU AIFM does not have to immediately fulfil all the obligations imposed on AIFMs. The Central Bank of Ireland will allow a transition benefit to non-EU AIFMs. Any QIAIF which was authorized prior to 22 July 2013 and which designates a non-EU entity as its AIFM will only be obliged to ensure that it has an AIFM capable of carrying out all the tasks of an authorized AIFM and an authorized depositary capable of providing the required depositary services in accordance with the requirements of AIFMD by 22 July 2015. Up until this date, the depositary will continue to provide services in accordance with the requirements of the NU Notices.

Forms: application/authorization The CBI is currently accepting applications for authorizations under the AIFMD. The CBI has applied a transitional period which extends to the 22nd of July 2014, and they have not suggested a turnaround time frame for AIFM authorizations. Their only guidance is to submit early in order to avoid bottleneck. Although they have said that they will prioritize the most urgent applications, in so far as practical.

An application for authorization as an AIFM must be made by submitting:

- (a) completed application form signed by two directors of the applicant AIFM
- (b) completed individual questionnaires (IQ) in respect of:
  - each director and senior manager
  - each individual who has a direct or indirect holding of shares or other interest in the proposed AIFM, which represents 10 percent or more of the capital or voting rights in the AIFM
  - any other individual who is in a position to exercise a significant influence over the management of the AIFM.
- (c) a program of activity setting out the organizational structure of the AIFM, including information on how
  - the AIFM intends to comply with its obligations under the provisions of the AIFMD regulations, which implement Chapters II, III, IV (and where applicable) Chapters V, VI, VII and VIII of the AIFMD
  - (d) information on the remuneration policies and practices pursuant to the AIFMD regulations\*
  - (e) information on arrangements made for the delegation and sub-delegation to third parties of functions as referred to in the AIFMD regulations
  - (f) information on the AIFs it intends to manage as specified in the AIFMD regulations\*
  - (g) the statement of responsibility referenced in paragraph 4 of section iii (organizational requirements) of the AIFM chapter, if applicable

\*refers to European Union (Alternative Investment Fund Managers) Regulations 2013



## Luxembourg

### *Domestic managers*

The country's financial regulator, the Commission de Surveillance du Secteur Financier (CSSF), has been accepting AIFM application files since 1 March 2013. Existing Luxembourg AIFMs can benefit from the 1-year transitional period and have until 22 July 2014 to submit their application file to the CSSF while the below threshold AIFM's have to register immediately. The 'application questionnaire' and 'declaration' for AIFMs falling under the authorization or the registration regime are available on the CSSF website <http://www.cssf.lu/aifm/> (in English). There is no gold plating of authorization requirements and these are in line with the requirements outlined in the directive. All existing AIFM's in Luxembourg have to declare themselves with the CSSF before 16 August 2013.

During the transitional period, an existing AIFM is permitted to continue to launch new funds and new sub-funds in an existing umbrella structure.

There are no transitional provisions for new AIFMs, meaning that an entity that intends to manage AIFs for the first time after 22 July 2013 will have to apply to the CSSF for authorization or registration as an AIFM prior to starting the activities.

An authorized AIFM will be able to market in the EU using the marketing passport via the regulator-to-regulator notification mechanism, which has a 20 working day time limit. The Luxembourg AIFM will have to initiate the request with the CSSF. The CSSF is ready to process the marketing notifications on behalf of Luxembourg AIFMs.

### Other EU managers

Other EU managers that benefit from the 1-year transitional provisions may continue to manage Luxembourg AIFs. The other EU-authorized AIFM will need to ensure that the CSSF receives a management passport notification from its home regulator as soon as it is authorized to continue managing Luxembourg AIFs.

Other EU managers can continue marketing AIFs under the existing Luxembourg placement rules until 22 July 2014.

### Non-EU managers

Non-EU managers can continue to manage Luxembourg AIFs from 22 July 2013. There will be no marketing passport available to these managers prior to the coming into force of Article 37 of the Directive.

Non-EU managers can continue marketing AIFs under the existing Luxembourg placement rules.

## The Netherlands

The Dutch law has been adjusted to incorporate the AIFMD and is now in force. The transitional year will be applicable for existing managers under the current regime. The Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten or AFM) has opened its digital portal and has started to accept applications for authorization.

The law introduces a Dutch local private placement regime comprising of (i) some exemptions comparable to the exemptions available under the present Dutch private placement regime and (ii) the so-called designated states regime (aangewezen statenbeleid) with respect to certain non-EU AIFMs.

### Exemptions

Under the former Dutch private placement regime, it was generally prohibited to offer interests in an investment fund in the Netherlands without its manager or, in the case of a self-managed investment fund with legal personality, the investment fund itself having obtained a license

to that effect granted by the AFM. Several exemptions from said licensing requirement existed, of which the following were the most frequently used:

- (i) an offer in the Netherlands of interests solely to qualified investors within the meaning of FSA
- (ii) an offer in the Netherlands of interests to less than 150 persons
- (iii) an offer in the Netherlands of interests with a nominal value of at least EUR100,000 or its foreign currency equivalent, or offers of interests in smaller denominations, provided the consideration payable per investor is still at least equal to EUR100,000 (or its foreign currency equivalent).

It is important to note that these exemptions can only be relied upon by non-EU AIFMs and 'small EU AIFMs', i.e. EU AIFMs managing (i) AIFs with assets under management (the AuM) that do not exceed a threshold of EUR100 million, irrespective of whether such AuM are wholly or partly acquired through use of

leverage; or (ii) AIFs with AuM that do not exceed a threshold of EUR500 million, provided that such AuM are unleveraged and have a lock-in of at least 5 years.

In addition, AIFMs that wish to rely on these exemptions need to register with the AFM, perform regular filings concerning their activities and notify the AFM if they no longer meet the conditions for exemption.

### *Non-EU AIFM: Designated states regime*

Based on the designated states regime, investment funds and managers from certain designated states do not require a license to offer interests in the Netherlands, as they are assumed to be

subject to adequate supervision in their home state. The current designated states are France, Ireland, Luxembourg, Malta, the UK, Guernsey, Jersey and the US (provided the manager is SEC registered). The law provides that AIFMs and AIFs from Guernsey, Jersey and the US can still rely on the designated states regime after the law comes into effect. Since the AIFMD harmonizes the marketing of investment funds in the EU to professional investors, there is no longer the need to appoint France, Ireland, Luxembourg, Malta and the UK as the designated state. The AFM is currently reviewing whether there needs to be further adjustments to the Designated states regime in order to include all possible scenarios of non-EU AIFMs and their marketing activities in the Netherlands.



On 16 May 2013, the Spanish Ministry of Economy and Competitiveness presented two draft bills to implement the AIFMD which will imply:

- The amendment of Act 35/2003, of 4 November, on Collective Investment Institutions, in order to implement the AIFMD rules to CIS Management Companies.
- The substitution of the current Spanish act regarding private capital vehicles and its management companies, implementing a completely new regulation on alternative investment funds and its fund managers, in accordance with the AIFMD.

The public consultation period ended on 3 June 2013.

Aimed transposition of the Directive will be in Q4 of 2013 or in Q1 of 2014.

Although Spain has not met the deadline for the implementation of the AIFMD (which was established at 22 July 2013), the Spanish National Stock Exchange Commission ("CNMV") has drafted an implementation guidance in order to provide illustrative criteria on how the AIFMD will be transposed into Spanish law. In accordance to such guidance, once the formal implementation of the AIFMD into Spanish law is effective, the CNMV will require ESMA's prior authorization in order to grant the passport for commercialization purposes of AIF authorized in Spain.



## Sweden

On 2 July 2013, the Swedish-FSA announced their regulations filling (Rulebook) the regulatory gap in relations to the Act and AIFMD (FFFS 2013:9 - FFFS 2013:22), which will

enter into force 22 July 2013. The main regulation will be FFFS 2013:10. On 19 June 2013, the AIFM law has been published in the Official Journal (Swedish Code of Status).

Type of Fund	Non-professional (Retail)	Professional investors
<b>AIF</b>	Units of AIFs should be admitted to trading on a regulated market Fact sheet containing an easily understandable summary of the basic information	No specific rules in Sweden
<b>Special Fund</b>	Remains more or less as the current regulation, based upon UCITS requirements UCITS firms may manage AIF as non-core service MiFID firms not allowed to manage Special Funds, may manage portfolios of Special Funds on a discretionary basis	Not dissimilar
<b>Venture Capital Funds</b>	Defined as in draft EU VC Directive. May be marketed if: * Investment above EUR100,000 * Subscriber acknowledges risks * Fund invests in non-listed equities	Private placement can be used

Source: KPMG International, 2013

For AIF's marketed to non-professionals as well as to professionals a number of regulatory prerequisites are suggested, that go beyond the directive.

Shares or units of the AIF should be admitted to trading on a regulated market. The aim is to set requirements on liquidity, i.e. investors' ability to transform their fund units into cash, equal to the liquidity requirements that apply to special funds, in that it must be possible to redeem such funds.

Furthermore, there must be a fact sheet containing an easily understandable summary of the basic information needed by investors to assess the fund and the risks associated with investing in it. In form and content, this fact sheet should correspond to those required for special funds and, as for special funds, should be made available to investors in good time before agreements to purchase fund units are entered into. Fund managers may get exceptions from the additional provisions above,

but then they may only market their funds to professionals.

Going forward the bill indicates that "special funds" fall under the new act. However, the actual requirement on the fund remains in general the same, e.g. diversification, right to redemptions and transparency. These special funds could be an existing Swedish special fund, a fund based in some other EU country or outside EU if you meet equivalent requirements.

A third type of fund, that fulfill the following requirements, can also be marketed to non-professionals (follows the current EU draft venture capital directive):

- investment is above 100 000 euro,
- the subscriber acknowledge the risks associated with the fund, and
- the fund invests in non-listed equities.

The bill also includes provisions concerning registration requirements and certain disclosure obligations, which

apply to AIFMs managing portfolios of AIFs whose assets under management in total do not exceed certain thresholds, should not apply to managers of special funds, regardless of the investor category to which they are marketed. Nor should these provisions apply to AIFMs managing AIFs other than special funds, if these are to be marketed to non-professional investors. All managers falling below the threshold will need to

register themselves with the Swedish regulator.

With respect to the private placement regime, no changes are suggested in acts (i.e. simultaneously as implementing AIFMD) but it is recognized that changes will be needed in 2015 when the EU Commission have presented their report regarding third countries. The prospective directive is as of today in force in Sweden. A local authorization to market AIFs in Sweden will be required.



## United Kingdom

The UK has provided full transitional relief to all firms either marketing AIFs or managing AIFs in the UK. Therefore, the marketing restrictions do not apply to an AIFM until they are authorized, which will occur as of 22 July 2014. For approvals, the Financial Conduct Authority (FCA) generally has 20 working days to respond. No timeline has been indicated for the non-European Economic Area AIFM route yet.

Regulation 49 and 50 set the landscape for an AIFM marketing an AIF in the UK. Where regulation 49 or 50 requires a condition to be met before an AIFM may market an AIF, an investment firm may not market the AIF unless it also meets the conditions (Regulation 51). Certain categories of AIF cannot be marketed in the UK unless certain conditions are met.

The conditions that need to be met vary depending whether the AIF falls within the definition set out in Regulation 57(1).

- AIFs that fall within the regulation 57(1) are:
  - i. A feeder AIF that is a UK AIF or EEA AIF, the master AIF of which managed by a non-EEA AIF or is a non-EEA AIF.
  - ii. A non-EEA AIF
    - The above-mentioned AIFs are not entitled to benefit from the marketing passport under

AIFMD and therefore need to rely on a National Private Placement Regime (NPPR).

- Anything that is not ‘marketing’ under the AIFMD will be subject to the financial promotion regime and the promotion of collective investment schemes regime.

### Professional investors

- A full-scope EEA AIFM may market an EU AIF utilizing the marketing passport to professional clients in the UK, provided the FCA has received a regulator’s notice in relation to the marketing of the AIF in accordance with Schedule 3 of FSMA 2000.
- A non-EEA AIFM may market under Article 42 of the Directive (NPPR) and Regulation 59 where a notification to the FCA and a self-certification as to compliance with certain conditions and cooperation agreements are in place. In order to market, the AIFM will need to provide a statement confirming the AIFM is the person responsible for complying with the implementing provisions relating to the marketing of the AIF. The AIFM will have to comply with the requirements of Articles 22 to 24 of AIFMD (reporting requirements) in so far as such provisions are relevant to the AIFM and the AIF to be marketed. Cooperation agreements

must be in place between the local regulator and the FCA if the AIF is in a country that is FATF-compliant. The AIFM must also comply with the asset-stripping provisions of AIFMD as well, if applicable. The AIFM must comply with the requirements in relation to Articles 22 to 24 of AIFMD from the time the notification is sent to the regulator until marketing ceases or all UK investors have redeemed out of the fund.

wants to market to retail investors. In such a case, it can apply to the FCA for specific consent to market to retail investors (Regulation 54).

- A non-EEA AIFM may market under Article 42 of the directive (NPPR) and Regulation 59 where a notification to the FCA and a self-certification as to compliance with certain conditions and cooperation agreements are in place. The requirements for notification are listed above in the professional investor section.

**Retail investors**

- A full scope EEA AIFM may exercise its marketing passport to market to professional investors and then market to retail investors in accordance with the UK financial promotion regime (Regulation 49). In order to market to retail investors, it will need to receive consent from the FCA.
- A full scope EEA AIFM need not exercise its passport right if it only

**Marketing by AIFMs of other AIFs**

Please refer to the below table. An AIFM described in column A of table below may not market in the UK an AIF that is described in the column B entry of the same row unless the condition in column C in the same row is met. This applies to professional investors, unless stated otherwise.

A - AIFM	B - AIF	C - Condition
<b>Full scope UK AIFM</b>	UK AIF or EEA AIF	FCA has approved marketing of the AIF in accordance with regulation 54. This requires the AIFM to apply for approval. For retail UK AIFs this will need to comply with the equivalent UK standard for marketing AIFs., this is section 242 of FSMA if it is a Unit Trust or section 262 of FSMA if it is an OEIC. For an individually recognized overseas scheme it must comply with section 272 of FSMA, the protection for UK retail investors will need to be comparable in that jurisdiction. This primarily applies to EEA member states and designated overseas territories such as Channel Islands, Isle of Man and Gibraltar.
<b>Full scope UK AIFM</b>	An AIF that is a third-country AIF of a UK AIF or an EEA AIF that is a feeder AIF, the master AIF of which is either managed by a third country AIFM or is a third country AIF.	The AIFM has notified the FCA in accordance with regulation 57 and meets the condition at regulation 57(4)(a)-(c) and the FCA has not suspended or revoked the AIFM's entitlement to market the AIF. Specifically, the AIF is in a country that is FATF compliant and the local regulator has in place a cooperation agreement. The AIF must also have an entity(ies) in place to undertake cash-flow monitoring, oversight and safe-keeping of assets.
<b>Full scope EEA AIFM</b>	An AIF that is a third-country AIF or a UK AIF or an EEA AIF that is a feeder AIF, the master AIF of which is either managed by a third country AIFM or is a third country AIF.	The AIFM has notified the FCA in accordance with regulation 57 and meets the condition at regulation 57(4)(a)-(c) and the FCA has not suspended or revoked the AIFM's entitlement to market the AIF. Specifically, the AIF is in a country that is FATF compliant and the local regulator has in place a cooperation agreement. The AIF must also have an entity(ies) in place to undertake cash-flow monitoring, oversight and safe-keeping of assets.
<b>Small third country AIFM</b>	UK AIF, EEA AIF or third country AIF	The AIFM has notified the FCA in accordance with regulation 58 and meets the conditions at regulation 58(2)(a) and (b) and the FCA has not suspended or revoked the AIFM's entitlement to market the AIF. The notification must include a statement indicating that the AIFM is person responsible for complying with marketing provisions and is a small AIF.
<b>Third country AIFM that is not a small AIFM</b>	UK AIF, EEA AIF or third country AIF	The AIFM has notified the FCA in accordance with regulation 59 and meets the conditions at regulation 59(2)(a) to (e) and the FCA has not suspended or revoked the AIFM's entitlement to market the AIF. The notification must include a statement indicating that the AIFM is person responsible for complying with marketing provisions. Further information on instruments traded, principal exposures, and concentrations.



## ESMA update on cooperation agreements

The European Securities and Markets Authority (ESMA) has approved another seven cooperation arrangements between EU securities regulators and their global counterparts with responsibility for the supervision of alternative investment funds, including hedge funds, private equity and real estate funds.

At its July meeting, ESMA's Board of Supervisors approved Memoranda of Understanding (MoUs) with authorities from the Bahamas, Japan, Malaysia, Mexico and the United States, including the Commodity Futures Trading Commission (CFTC).

ESMA has now negotiated 38 agreements on behalf of the 31 EU/EEA national competent authorities for securities markets supervision. The cooperation agreements allow for the exchange of information, cross-border on-site visits and mutual assistance in the enforcement of respective supervisory laws. ESMA had earlier approved 31 MoUs with other non-EU regulators in May.

The agreements cover third-country AIFMs that market AIFs in the EU and EU AIFMs that manage or market AIFs outside the EU. The agreements also cover cooperation in the cross-border supervision of depositaries and AIFMs' delegates.

National securities regulators in the EU, as the supervisors of AIFMs, are in the process of signing MoUs with those jurisdictions relevant to their market.

The cooperation arrangements are applicable from 22 July and will enable cross-border marketing of AIFs to professional investors between jurisdictions. This is subject to the non-EU jurisdiction not being listed as a non-cooperative jurisdiction by the Financial Action Task Force and, as from the entry into force of the passport for non-EU managers, having cooperation agreements in place with EU member states regarding the exchange of information on tax matters.

The content of the ESMA MoUs follows the IOSCO Principles on Cross-Border Supervisory Cooperation of 2010 and complements the terms and conditions of the IOSCO Multilateral MoU Concerning Consultation and Cooperation and the Exchange of Information of 2002 (MMoU).

ESMA had originally contacted all of the authorities that signed the IOSCO MMoU of 2002. ESMA has now approved MoUs with those 42 authorities that responded to ESMA's call. ESMA continues to negotiate the MoU with the Chinese authority.

**Contact us:**

**Georges Bock**  
**Global Sponsor of AIFMD**  
**KPMG in Luxembourg**  
**T:** +352 22 51 51 5522  
**E:** georges.bock@kpmg.lu

**Heleen Rietdijk**  
**Global Leader of AIFMD**  
**KPMG in the UK**  
**T:** +44 20 7694 4510  
**E:** heleen.rietdijk@kpmg.co.uk

[kpmg.com/aifmd](http://kpmg.com/aifmd)

[kpmg.com/socialmedia](http://kpmg.com/socialmedia)



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2013 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved.

The KPMG name, logo and "cutting through complexity" are registered trademarks or trademarks of KPMG International.

Designed by Evalueserve.

Publication name: AIFMD: Transposition status

Publication number: 130438

Publication date: August 2013