



VENEZIANO

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Bespoke Fund Passporting

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The Alternative Investment Fund Manager Directive (AIFMD) provides authorised European Alternative Investment Fund Managers (EU AIFM) with a marketing passport. Leveraging on the very successful experience of the marketing passport introduced by the UCITS Directive, the AIFMD marketing passport allows for the marketing across Europe of EU Alternative Investment Funds (EU AIF). The AIFMD indeed contains provisions also for the extension of such marketing passport to non-EU AIFMs, upon release of positive advice from ESMA on a list of non-EU domiciles and ensuing delegated acts from the European Commission.

Whilst two sets of advice were issued by ESMA in 2015 and 2016 respectively, there is still at the date of this paper no delegated act from the European Commission on the extension of the passport, nor we can predict when any such act will be issued, if at all.

Also, after the initial enthusiasm for the extension of the marketing passport fizzled out, it emerged in more details that the process for the granting of the right to passport, once available, will entail a complete authorisation of the third country AIFM with the authority of the chosen Member State of Reference in Europe. Thus, the extension of the passport becomes the consequence of a full scope AIFM authorisation in Europe of the third country AIFM.

Because the appetite of EU investors for strategies run by non-EU managers will hardly change over time, marketing under the AIFMD Private Placement remains today the only viable option.

It is imperative to get acquainted with the dynamics of the AIFMD Private Placement in the various European domiciles where this is an option and have recourse to specialist advice and centralised cost-efficient solutions for marketing authorisations.

National Private Placement Regime

The National Private Placement Regime historically consisted of a set of safe harbour rules and exemptions from the requirement to register an offer of securities with a local regulator, subject to any such private placement being carried out in accordance with certain criteria. It was called *private* because there was no involvement of authorities. As part of the criteria, the offer had to have a certain minimum size per investor, a limited number of investors had to be approached and they had to be of a specific type – most usually professional investors or HNWI.

With the advent of AIFMD, National Competent Authorities (NCAs) of the various member states across Europe have changed the trend and started being involved in the process of national private placement regime – to a different extent depending on the degree of protectionism adopted for each relevant market – by means of introducing a *public* element in equation. Whilst NCAs of some domiciles require a mere notification of the intention to offer, some others – the more protectionist ones – require something akin to an ex-novo local authorisation process.

From a practical standpoint, the offering of funds under national private placement regime will entail now at least that an application form is filled and submitted with the relevant NCA as well as a fee for the notification is paid, if any. Also, it will require that certain disclosures are made both in the offering documents and the annual reports as well as ongoing reporting is made to local authorities.

To the contrary of the marketing passport, any Private Placement application is made directly with the NCA of the target domicile at issue. This means that non-EU AIFMs, depending on the number of domiciles targeted, will have to deal with a multitude of different, inhomogeneous and sometimes obscure regimes and requirements, with the real downside of increasing out of measure the time to get access to a specific market with their offer and increase dramatically in related costs.

Private Placement - What to Look For

Preconditions

- Transparency
- Presale Disclosure Obligations
- Ongoing Disclosure Obligations

Gold-plating at National Level

Reporting to Regulators

Marketing



Private Placement Conditions

The private placement regime is mainly governed at national level and AIFMD only imposes preconditions.

In case of Private Placement of non-EU AIFs made by non-EU AIFM these preconditions are detailed under article 42 AIFMD.

The AIFMD preconditions operate at two distinct levels. A set of conditions applies at the AIFM and AIF level and another set instead at the level of the domicile of the non- EU AIFM and AIF respectively.

Transparency Obligations

i) Disclosure Obligations – Presale

Certain pre-sale information has to be disclosed in the fund offering documentation. Article 23 AIFMD contains detailed description of disclosure requirements, such as i) legal implications of the contractual relationship entered with the AIF; ii) delegation of management function and safekeeping function; iii) valuation procedure and pricing methodology; iii) description of how fair treatment of investors is ensured and rights to preferential treatments.

ii) Disclosure Obligations – Ongoing

AIFMs are required also to disclose periodically to investors a) percentage of assets which are subject to special arrangements due to illiquidity; b) new arrangements for liquidity management; c) current risk profile and risk management systems employed.

Whilst some of the above-mentioned disclosures might already be dictated in offering documentation by standard practice in certain markets, other types of required disclosures under the AIFMD Private Placement are not. The challenge for non-EU AIFMs is to both get acquainted with the required disclosures and be able to present these in an appropriate manner in the offering documentation, taking in consideration the needs of both their EU and non-EU investor base.

Gold-plating

The AIFMD also rules that Member States can impose additional and stricter conditions on non-EU AIFMs in respect of the marketing of units or shares of non-EU AIFs to investors in their respective territories. This practice is called *Gold-plating* and reflects in certain instances a more protectionist approach of a Member State towards its local market. Gold-plating can be anything that is over and above the requirements imposed by AIFMD article 42.

Amongst the examples of Gold-plating adopted across Europe, we see varying requirements ranging from the appointment of a depositary-lite entity to the request of reciprocity statements from home state NCAs of the non-EU AIFMs.

AIFMs have to be able to map out domiciles where Gold-plating is adopted as well as analyse in advance any additional requirements under local Gold-plating regimes. As distribution becomes regulation driven under AIFMD, the main challenge for managers remains to assess feasibility of distribution projects in the markets of interest even before commencing design of a fund product.

Reporting to Regulators

Non-EU AIFMs marketing funds under the AIFMD Private Placement have to report to NCAs of the EU domiciles where their funds are marketed to allow for monitoring of systemic risk. The so-called Annex IV report is per se complex exercise and requires that AIFMs provide a significant amount of data and information on exposures, assets under management, profiles of liquidity, description of investments etc. The frequency of the report varies and it is dictated by assets under management, types of investments as well as nature of the AIF (leveraged or not).

The challenge for non-EU AIFMs not only lies in the ability to extract and compile required data, but also in dealing with the overlap that the Annex IV report may generate with other reports that especially US AIFMs are required to produce (Form PF). AIFMs also face additional complexities in their exercise when carrying out multi-jurisdictional reports directly with the NCAs of the various member states where they privately place their AIFs, because the format of the report varies slightly depending on the jurisdiction.

Marketing

A definition of marketing is contained under the AIFMD 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 of an AIF it manages to or with investors domiciled or with a registered office in the Union.* Level 2 AIFMD implementing regulation, whose task was to provide more details to resolve the issues latent in level 1 AIFMD, is silent on any further guidance on the topic.

It is with AIFMD that we have the first ever definition of marketing at the level of a European directive. Even though there have been discussions around the possibility of a European directive purely on marketing, this doesn't seem to be a possibility in the near future.

Marketing is consequently left to be disciplined entirely at local level with its rules most typically hidden under uncodified administrative practices of the NCAs of various European member states. Also, to complicate the matter even more, there are certain marketing activities that fall under the sub-categories of *pre-marketing* and *soft-marketing*. Depending on the domicile at issue, these activities may not trigger a requirement for immediate registration of a non-EU AIF under Private Placement.

Non- EU AIFMs will find extremely advantageous to have recourse to specialist consultants who can shed light on the do's and the don'ts when it comes at marketing AIFs under the AIFMD private placement regime across Europe.



European Fund Distribution Induction Programme

The decision to enter the European fund distribution arena is always a crucial one, both for U.S. fund managers and broadly for non-EU fund managers. It is the beginning of an exciting journey through a challenging path towards the global success of existing investment strategies, dramatic increase in assets under management and international prestige over time.

Veneziano & Partners is a niche in the niche firm in this sense. We recognise – for having done this already successfully with many fund managers – that there are many moving parts and increasing regulations involved within a successful European cross-border fund distribution project. Not all of them are apparent, easy to source or within immediate reach.

Leveraging on years of experience and long-term history of success, Veneziano & Partners is proud to offer a strategic advisory and advocacy service tailored to make the dream of European cross-border fund distribution become true.



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Veneziano & Partners

Veneziano & Partners is an international consulting boutique specialised in the European regulation of cross-border fund distribution. In catering to a selected group of investment managers, hedge fund managers and financial institution worldwide, the firm offers a custom-made global fund registration service, enabling its clients to gain competitive advantage in an ever increasingly regulated environment.

Attilio Veneziano is a dual qualified lawyer with more than 15 years international experience. Starting as a practitioner in European extradition law, through a career in-house at major financial institutions in the offshore investment funds industry, Attilio founded Veneziano & Partners in London in 2013 to respond to the rising demand by global fund managers for a centralised solution for European cross-border fund distribution compliance in the aftermath of AIFM directive implementation.

Veneziano & Partners excels at interpreting the needs and ambitions of each one of its clients and aims at establishing durable business relationships based on trust. In order to do so, the services offered are performed by experienced professionals, whose exclusive aim is to deliver a business partnership support rather than an off-the-shelf mainstream solution.



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