Funds Raising in Europe

Table Talks – New York May 2018

M.W. Cornish & Co.

Introduction: The Alternative Investment Fund Managers Directive (AIFMD)

This Presentation provides a high level overview of the alternatives available to non-EU Investment Managers (AIFMs) wishing to raise capital from European investors for their non-EU Funds

AIFMD provides a framework for harmonising the management and marketing of Alternative Investment Funds ("AIFs") (i.e. all "collective investment undertakings" other than EU UCITS funds) in the European Union ("EU").

Different rules apply to:

- EU managers of EU AIFs and non-EU AIFs;
- Non-EU managers managing and marketing EU AIFs to EU investors; and
- Non-EU managers marketing non-EU AIFs to EU investors.

Broadly speaking, the options for non-EU AIFMs raising capital from EU investors are:

- Rely on "Reverse Solicitation";
- Register country by country under the national private placement rules (NPPRs); or
- Set up an EU AIF and an EU manager in order to obtain the right to "passport" into all 28 EU jurisdictions
- Engage a 3rd party AIF and/or AIFM 'platform' in order to obtain the right to "passport" in all 28 EU jurisdictions.

NB marketing by 'sub-threshold' AIFMs under the NPPRs is only possible in certain countries – see below.

AIFMD Marketing

	Non-EU AIFM / non-EU AIF			Non-EU AIFM / EU AIF		
	No marketing in EU	**Marketing in EU via NPPRs**	**AIFMD Passport**	**No marketing in Member States**	**Marketing in Member States via national private placement regimes**	**AIFMD Passport**
Is AIFMD authorisation required?	Outside scope of AIFMD	Member States' national authorisation regimes apply	×	Member States' national authorisation regimes apply	Member States' national authorisation regimes apply	×
Do AIFMD requirements apply?	Outside scope of AIFMD	The following AIFMD requirements apply: - Annual reports - Disclosure to investors - Regular reporting to regulators, and - Additional requirements on AIFMs managing AIFs that acquire substantial stakes in EU companies	×	Member States' national authorisation regimes apply	The following AIFMD requirements apply: - Annual reports - Disclosure to investors - Regular reporting to regulators, and - Additional requirements on AIFMs managing AIFs that acquire substantial stakes in EU companies	×
Do any other obligations need to be satisfied?	Outside scope of AIFMD	- Information Exchange Agreements ("IAEs") must be in place between the AIFM's regulator and the supervisory authorities of the country where the AIF is established - The AIF's jurisdiction must not be a FATF NCCT - N.B. Member States may impose stricter rules	×	Member States' national authorisation regimes apply	- IAEs must be in place between the AIFM's regulator and the supervisory authorities of the country where the AIF is established - - The AIF's jurisdiction must not be a FATF NCCT - N.B. Member States may impose stricter rules	×

AIFMD Marketing

	EU AIFM / EU AIF			EU AIFM / non-EU AIF		
	No marketing in Member States	**Marketing in Member States via national private placement regimes**	**Marketing in Member States with passport**	**No marketing in Member States**	**Marketing in Member States via national private placement regimes**	**Marketing in Member States with passport**
Is AIFMD authorisation required?	AIFMD applies	×	AIFMD applies	Yes	Yes	×
Do AIFMD requirements apply?	Full AIFMD requirements	×	Full AIFMD requirements	Full AIFMD requirements but no depository and annual report requirements	Full AIFMD requirements but depository requirements reduced	×
Do any other obligations need to be satisfied?	×	×	Some countries charge fees and insist on appointment of a local paying agent	IAEs must be in place between the AIFM's regulator and the supervisory authorities of the country where the AIF is established	- IAEs must be in place between the AIFM's regulator and the supervisory authorities of the country where the AIF is established - The AIF's jurisdiction must not be a FATF Non Co-operative country and Territory ("NCCT") - N.B. Member States may impose stricter rules	×

Reverse Solicitation

- Reverse solicitation (or reverse enquiry) is not considered “marketing” under AIFMD. Non-EU AIFMs can therefore respond to unsolicited enquiries from EU investors and follow up with information memoranda, subscription forms etc. and this will not trigger an obligation to register under AIFMD whereas active “marketing” will do so.

- A number of jurisdictions have issued guidance on when reverse solicitation can be relied upon – for example, a requirement that the solicitation must be specific to the fund in question, rather than a general approach to the manager. However, there are currently no harmonised rules as to what “reverse solicitation” means and so what may work in one EU state may not necessarily be acceptable in another EU state.

- Reverse solicitation is intended to be a narrow exemption and requires that there has been no “direct or indirect” solicitation by or on behalf of the AIFM. AIFMs therefore must implement procedures and keep records designed to ensure no-one in their organisation (or any third party placement agent etc.) has undertaken any promotion which has triggered an enquiry. This could include material on websites etc.

Reverse Solicitation

- Although there is no detailed guidance from ESMA, the EU Regulator (or a significant number of other EU regulators) in respect of reverse solicitation, ESMA recently published a proposal for a new Directive which would harmonise the meaning of "pre-marketing" and which would have the effect that any investor who is approached on a 'pre-marketing basis' may never be admitted to ***any*** fund of that manager which has the same or a similar investment strategy unless such fund is registered in the relevant jurisdiction. This would in practice significantly restrict the scope of reverse solicitation. As drafted the proposed harmonised new rules would only apply to EU AIFMs but it would be expected that many EU states would apply a similar interpretation to non-EU AIFMs also.

- Reverse solicitation therefore has significant limitations, is not a 'marketing strategy' and should be considered on a case by case basis. The evidential burden will be on the AIFM and there are criminal sanctions and fines for non-compliance and investors effectively have a "free put" if they were illegally approached and lost money.

REVERSE SOLICITATION

Country	Official guidance	Must be Product specific?	Other marketing allowed?	Separate enquiry for each transaction
Austria	No	Yes	Yes	No
Belgium	No	Yes	Yes	Yes
Denmark	No	No	No	No
Finland	No	No	No	Yes
France	Yes	Yes	Yes	No
Germany	Yes	Yes	Yes	Yes
Ireland	No	No	Yes	No
Italy	No	No	Yes	No
Luxembourg	No	No	Yes	No
Netherlands	No	Yes	Yes	Yes
Norway	No	Yes	Yes	No
Spain	No	No	No	No
Sweden	No	Yes	Yes	No
Switzerland	Yes	Yes	Yes	No
UK	Yes	No	Yes	No

Colour Coding: Green = No issues Blue = Proceed with caution, restrictions apply Red = Significant problems

Pre-Marketing

- “Pre-marketing” is generally considered to refer to activities which fall short of making a formal offer to potential investors – e.g. by presenting offering memoranda, subscription documents or other materials which would allow investors to make a decision to invest or to actually do so.

- The UK regulator, the Financial Conduct Authority (FCA), has stated that arranging meetings and undertaking other activities merely to sound out investor enthusiasm for a proposed product, including handing over/circulating presentations and other materials does not technically constitute “marketing” under AIFMD as “marketing” triggers a filing obligation under AIFMD and such filings can only be made once a final offer document is available. Note that even ‘pre-marketing’ is likely to be considered a regulated activity (e.g. in the U.K. it would fall under our Financial Promotions Regime) and must be conducted in compliance with local rules. It is just that such activity currently does not trigger a registration/notification obligation under AIFMD and therefore trigger fee and other obligations

Pre-Marketing

- The proposal states that information provided to an investor in the pre-marketing phase must not:

  - Relate to or contain reference to an existing fund;

  - Enable investors to make a commitment of investing in a particular fund; or

- - "Amount to a prospectus, constitutional documents of a not-yet-established AIF, offering documents, subscription forms or similar documents whether in a draft or a final form allowing investors to take an investment decision".

  The latter means that by negotiating a draft term sheet with potential investors, or by circulating to potential investors a draft term sheet, a draft partnership agreement or PPM may trigger a "marketing" notification as such documents will have exceeded the limits of permissible under "pre-marketing" even though such documents will not have been finalised or even negotiated.

- The conditions under which pre-marketing is permissible only apply to fully authorised EU AIFMs (and EuVECA and EuSEF managers) and the position of non-EU AIFMs and sub-threshold EU AIFMs is uncertain. It is to be hoped any final Directive is less onerous than the draft proposals as they would have a significant impact on the way AIFs are promoted currently.

PRE-MARKETING

Country	Formal guidance	Pre-offer docs allowed?	Type of investor who can be approached
Austria	Yes	No	N/a
Belgium	No	No	N/a
Denmark	Yes	Yes but very restricted.	Professional investors as defined under MiFID; or to persons permitted under private placement rules if closed end fund being broadly, professional institutional investors; offerings with a minimum commitment per investor of at least EUR100,000 and offerings to less than 150 individuals (other than qualified investors) in Denmark.
Finland	No	Yes but no offering memoranda or subscription agreements.	Professional investors as defined under MiFID.
France	Yes	Yes but only in very limited circumstances.	1. Professional investment managers in the context of a portfolio management agreement for a third party, provided that such financial instruments are allowed/authorised in the management of the portfolio of the investor; 2. French funds provided that such financial instruments are allowed to be included in the assets of the AIF. So in practice pre-marketing in very restricted.
Germany	Yes	Yes	Professional investors as defined under MiFID; marketing to semi-professional investors can only take place once there is a fully AIFMD-compliant AIFM.

Colour Coding: Green = No issues Blue = Proceed with caution Restrictions apply Red = No go area/significant problems

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PRE-MARKETING

Country	Formal guidance	Pre-offer docs allowed?	Type of investor who can be approached
Ireland	No	No	N/a
Italy	No	No	N/a
Luxembourg	No	Yes	Closed ended funds they must comply with the Luxembourg regulator of the financial sector ("**CSSF**") requirements under AIFMD and Luxembourg's prospectus rules: • the offer is made to EU professional investors (as defined under annex II of directive 2004/39/EC (MiFID)); • the securities have a high nominal amount (equivalent or in excess of EUR 125,000); • the offer is made to a small circle of persons (the CSSF will consider cases on an individual basis, there is no maximum number of investors to fulfil the criteria) • the form of the offer must be appropriate - e.g., targeting existing customers, high sales amount, no general advertising; The CSSF requires to be informed in advance of the marketing of any closed ended AIF by an EU AIFM within Luxembourg territory.

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PRE-MARKETING

Country	Formal guidance	Pre-offer docs allowed?	Type of investor who can be approached
Netherlands	No	Yes	1. Professional investors as defined under MiFID; and 2. For closed ended funds, other persons subject to a minimum commitment per investor of at least EUR 100,000 and offerings to less than 150 individuals (other than professional investors) in the Netherlands.
Norway	No	No	N/a
Spain	No	No	N/a
Sweden	No	Yes **provided the AIF does not exist.**	Professional investors as defined under 2007 Swedish Securities Market Act.
Switzerland	Yes	Yes.	To 'regulated qualified investors'; and 'unregulated qualified investors' provided a Swiss representative and paying agent is appointed in the case of 'unregulated qualified investors'.
United Kingdom	Yes	Yes subject to compliance with UK 'financial promotion' rules.	Professional investors, large corporations and 'sophisticated' and other qualifying individuals if marketed by an FCA authorised firm.

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The National Private Placement Regimes

- AIFMD does not implement a harmonised regime for privately placing AIFs in the EU.
- Rather, each Member State is permitted to retain its own domestic rules which means it is necessary to consider and take advice country by country as to what forms and methods of marketing are permitted.
- AIFMD does impose a harmonised obligation, however, to register non-EU AIFs marketed by EU and non-EU AIFMs to EU investors in each EU state and to comply with various information and ongoing reporting obligations.
- In practice so-called 'sub-threshold' AIFMs cannot register in a large number of countries and some of those that do allow this require a depository to be appointed. Registration by sub-threshold AIFMs therefore only works smoothly in 5 countries – Ireland, Luxembourg, Netherlands, Sweden and the UK – as Austria, Denmark and Germany require a depository to be appointed.
- To emphasise the inconsistency of approach, only a small number of EU countries have adopted AIFMD on a 'minimalist' basis. The United Kingdom and the Netherlands are examples of such an approach and, subject to compliance with the new AIFMD registration and information provisions, marketing in these jurisdictions is relatively straightforward and can be commenced immediately following registration.

The National Private Placement Regimes

- Other jurisdictions, however, only allow marketing to commence after a specified period. A number of the Nordic countries have followed this route. While the applications are not unduly cumbersome, approval can take several months to achieve, thus potentially impacting upon marketing and closing timetables.

- Moreover, a small number of jurisdictions have "gold-plated" the AIFMD by introducing significant additional requirements. The most obvious examples are Austria, Denmark and Germany which, as previously mentioned, require the appointment of a depository to the AIF and which has not only has custodial type obligations but also regulatory oversight responsibilities. This obviously adds to operational costs

- Finally, some jurisdictions effectively ban private placements of non-EU 'unregulated' funds: for example, Italy, France and Spain.

- As a result of the initial and ongoing cost of registering state by state, complying with national reporting obligations and the inability to access investors in certain countries at all, some non-EU AIFMs are opting to avoid marketing in the EU completely or restricting marketing to a very small number of jurisdictions, typically the U.K., the Netherlands and Switzerland (which is of course a non-EU country and which has its own separate registration regime); whilst others are forming EU AIFs and EU AIFMs or 'outsourcing' to 3rd party platforms offering EU AIFs and/or EU AIFM facilities.

AIFMD NATIONAL PRIVATE PLACEMENT RULES

Country	Marketing effective immediately?	Gold plating?	Fees
Austria	No - up to 4 months	Yes – full depo and local legal agent.	Application fees: EUR 4,500 Annual supervision fee: EUR 2,500 pa
Belgium	No	No	Application fees: none Annual supervision fee: none
Denmark	No	Yes –depo lite and additional publication requirements. Closed ended funds may also be subject to prospectus regulations.	Application fees: DKK 5,000 Annual supervision fee: DKK 5,000 pa
Finland	Yes	Yes. Additional publication and audit requirements.	Application fees: EUR 2,600 Annual supervision fee: EUR 2,600 pa
France	No	Yes. Non-AIFM must comply with same regulations as EU AIFM. Non-EU open ended funds generally cannot comply with French rules on equivalency. Must appoint a local agent to deal with subscriptions and redemptions.	Application fees: EUR 2,000 Annual supervision fee: EUR 2,000 pa Local agent EUR 2,000
Germany	No – up to 5 months	Yes - depo lite; evidence of how marketing will be conducted to avoid retail; appointment of local tax agent. Non-EU AIFM must be regulated on home state.	Application fees: EUR 6,852 Annual supervision fee: EUR 6,852 pa
Ireland	Yes	No	Application fees: none Annual supervision fee: none
Italy	No	Yes – non-EU AIFMs cannot market in Italy.	N/a

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AIFMD NATIONAL PRIVATE PLACEMENT RULES

Country	Marketing effective immediately?	Gold plating?	Fees
Luxembourg	No	No	Application fees: EUR 2,650 – 5,000 Annual supervision fee: EUR 500 pa
Netherlands	No	No	Application fees: EUR 1,500 Annual supervision fee: EUR 1,500 pa
Norway	No	Yes. Non-EU AIFM must be regulated in home state.	Application fees: none Annual supervision fee: none
Spain	No	Yes. Significant additional information required by CNMY regarding 'equivalency' of non-EU jurisdiction.	EUR 1,800 – 72,000 (for umbrella funds)
Sweden	No	Yes. Must evidence how marketing will be conducted to avoid retail.	Up to SEK 16,000
Switzerland	Yes	Yes. Marketing restricted to 'regulated qualified investors'; "unregulated qualified investors can only be approached if a Swiss representative and paying agent is appointed.	Swiss rep: SFR 8,500 – 12,500 Paying agent: SFR 1,500
United Kingdom	Yes	No, but UK financial promotions rules must be complied with.	Application fees: Full scope - £250 Sub-threshold - £125 Annual supervision fee: £0-£500 pa

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The AIFMD Passport

- Fully compliant AIFMD managers get the benefit of a "passport" enabling EU AIFMs of EU AIFs to market such AIFs to professional investors throughout the EU by making a single notification to their Home State regulator and avoiding country by country filing. "Professional investors" are those that are defined as such under MiFID.

- At present the AIFMD passport option is only open to EU AIFMs managing and marketing EU AIFs.

- Whilst establishing an EU fund is not particularly onerous for non-EU managers, the requirement that they also have an EU AIFM just to access the passport is often a step too far. Such managers can however avail themselves of services offered by various EU based 3rd party AIF and AIFM 'platform' providers.

- Essentially the 3rd party operates as the AIFM of the EU fund but delegates management back to the non-EU manager. Under AIFMD an AIFM is permitted to delegate management provided it retains risk management responsibility.

- Some platform providers also offer a fund platform so that external managers can form a separate sub-fund within their platform fund and which can save time and costs.

- One downside for non-EU managers in forming their own standalone fund is that it cannot operate as a feeder back into the managers onshore (say Delaware or Cayman) fund as 'feeder funds' (as defined) into non-EU funds are not entitled to the passport.

The AIFMD Passport

- Using a 3rd party platform can solve this problem as they will often fail the 'feeder fund' test.

- Alternatively, non-EU managers may be able to structure their EU funds in a manner which ensures they are not feeder funds as defined – e.g. if the EU fund has two or more sub-funds which invest in two or more non-EU funds with different strategies. Some placement agents have also structured funds in this manner so as to be able to use the AIFMD passport and target investors in jurisdictions which they cannot access under the NPPRs – i.e. Italy, France and Spain – or to simply save time, costs and administrative nuisance associated with having a large number of NPPR registrations.

Extension of the AIFMD Passport to Non-EU AIFs and AIFMs

AIFMD envisages the AIFMD passport will be made available to non-EU AIFMs and non-EU AIFs on a voluntary opt-in basis from 2018 but this now seems highly unlikely and the timing of any such extension is uncertain.

In July 2015, ESMA issued an 'Opinion' and 'Advice' to the EU Parliament, Council and Commission on the extension of the passport to such non-EU AIFMs and non-EU AIFs and on 19 July 2016 ESMA issued further 'Advice' in relation to the following 12 countries:

Australia	Bermuda	Canada	Cayman Islands
Guernsey	Hong Kong	Isle of Man	Japan
Jersey	Singapore	Switzerland	USA

Extension of the AIFMD Passport to Non-EU AIFs and AIFMs

ESMA's Conclusions

1. Canada, Guernsey, Hong Kong, Japan, Jersey, Singapore and Switzerland

ESMA concluded no significant obstacles regarding investor protection, competition, market disruption and the monitoring of systemic risk impeding the application of the AIFMD passport to these jurisdictions.

2. Australia

ESMA concluded that there are no significant obstacles provided that the Australian Securities and Investment Committee ("ASIC") extends to all EU Member States the 'class order relief' currently available only to the United Kingdom and Germany. ASIC has confirmed that it is 'willing to discuss extending 'class order relief' to EU AIFMs and UCITS managers from EU member states more generally on a reciprocal basis.

3. **United States of America**

ESMA considered a potential extension of the AIFMD passport to the US risks an un-level playing field between EU and non-EU AIFMs. This is a surprising conclusion when one reads the detail and compares it to the more favourable conclusion ESMA reached on other judication's.

4. Bermuda, Cayman Islands and the Isle of Man - ESMA noted each country had not finalised legislation implementing AIFMD equivalent legislation and so could not approve them at this time

5. Other Countries – clearly a significant number of other countries had not even be considered at this time.

Despite approving the 7 countries mentioned above ESMA recommended the Commission and Parliament should not formally implement pass porting at this time as it did not want to create an unlevel playing field. It appears Brexit has now further slowed down this process meaning it is unlikely a passport will be available until Brexit terms have been negotiated expected to be no earlier than Q1 2019 but quite possibly much later. Non-EU managers and promoters of non-EU funds should therefore proceed on the basis that a passport will not be available in the foreseeable future.

Switzerland

Switzerland is an important fund raising jurisdiction but as a non-EU country it has its own private placement regime.

- Non-Swiss persons can market to “Tier 1 Qualified Investors" without making any local notifications or registrations etc. Such investors are regulated financial intermediaries such as banks, broker-dealers, fund management companies and asset managers of collective investment schemes (but not asset managers generally) and regulated insurance companies.

- Non-Swiss persons cannot market to ‘retail investors’ and can only market to “Tier 2 Qualified Investors” if they appoint a local paying agent and distributor. Tier 2 Qualified Investors include: (a) Public law corporations, pension funds and corporations, in each case which cash is managed on a professional basis; (b) high net worth individuals who ask in writing to be treated as such (opting in); and (c) high net worth individuals whose assets are managed under a written discretionary mandate with a bank, broker-dealer or fund manager or with an independent asset manager (x) who is a financial intermediary subject to the Swiss Anti-money Laundering Act, (y) who is a member of an SRO approved by the Swiss regulator (FINMA) and (z) whose discretionary asset management agreement complies with the standard issued by the FINMA approved SRO.

Conclusion

- Raising money for ‘alternative investment funds in Europe is complex and managers and placement agents should take professional advice well in advance of making any approaches to European investors so as to avoid potentially precluding their ability to accept ‘reverse enquiries’ or triggering registrations when these might otherwise be avoided or delayed
- Reverse solicitation is not a marketing strategy and should be relied upon only in respect of countries where no active marketing is planned
- Even ‘pre-marketing’ is not accepted in several European countries and can trigger registration obligations; even where permitted the marketing person will need to comply with local laws – e.g. in the UK under our ‘financial promotions’ regime. In some countries such activities must be carried out by a locally licensed institution whilst in any overseas person conducting such activities must be appropriately licensed in their home jurisdiction
- Active marketing will trigger an AIFMD registration requirement in each country in which such marketing takes place. It is critical to work out in advance whether such marketing is permitted and the extent of ‘gold-plating’ which may make such marketing very costly or involve timetabling issues
- If compliance with the NPPRs is not possible or practical in all countries managers should consider launching an EU based fund of their own or via a third party platform.
- MW Cornish & Co. has advised on novel solutions to these issues which minimise compliance and other obligations otherwise applicable to EU AIFMs and AIFs.

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Martin is widely recognised as a leading fund management and financial services regulatory lawyer with over 25 years experience.

Martin's practice encompasses all forms of alternative investment funds and acts for both managers and investors as well as proprietary traders, brokers and dealers.

Martin was previously a partner at a leading U.K. 'silver circle' law firm, partner in charge of fund management at two US/Global law firms, European Legal Director of an international investment bank.

His recent deals and accomplishments include:

- Launch of 'seed capital/accelerator' Luxembourg hedge fund for US client including seed capital agreement with seed provider to U.K. LLP management company and executing first investment by the Fund into a third party Cayman CTA Fund
- Advising on establishment of a Luxembourg carbon emissions investment fund
- Advising on the establishment of a novel platform solution to marketing alternative investment funds in the EU/EEA under the Alternative Investment Fund Manager Directive
- Advising on the establishment of a Guernsey Real Estate Fund
- Advising LPs in numerous private equity, real estate and hedge funds including negotiation of terms and side letters.