A&L Goodbody

AIFMD - Third Countries

Directive 2011/ 61/EU on Alternative Investment Fund Managers (**AIFMD**) had to be implemented by EU member states by 22 July 2013. AIFMD is supplemented by a delegated regulation (**AIFMD Regulation**). AIFMD regulates the activities of Alternative Investment Fund Managers (**AIFM**s) and their Alternative Investment Funds (**AIF**s). AIFMD sets out detailed requirements for both AIFs and AIFMs which are not located in EU member states but to which some or all of the provisions of the AIFMD may still apply.[1] AIFMD has been implemented in Ireland by the European Union (Alternative Investment Fund Managers) Regulations 2013

Overview

Although AIFMD is a European Directive primarily aimed at regulating EU AIFMs, it also captures Non EU AIFMs managing and/or marketing EU AIFs and Non EU AIFs and EU AIFMs managing and/or marketing Non EU AIFs. The provisions of the AIFMD in respect of third countries are largely reliant on cooperation arrangements and procedures being in place between the relevant regulators.[2]

The requirements differ depending on:

- the nature of the activity involved i.e managing or marketing;
- where the activity is to be carried out.

While the AIFMD provides a passport to EU AIFMs managing or marketing EU AIFs, that passport will not be available to EU AIFMs marketing Non EU AIFs or to Non EU AIFMs managing and/or marketing EU or Non EU AIFs until at least 2015. Until that date any marketing is on the basis of existing private placement regimes which may be phased out from 2018.

EU AIFM appointed to a Non EU AIF

An EU AIFM can manage a Non EU AIF provided:

- the EU AIFM complies with all provisions of the AIFMD with the exception of the requirement for a depositary to be appointed to the Non EU AIF and to produce an annual report;
- there are cooperation arrangements in place between the regulator of the AIFM and the regulator of the Non EU AIF to ensure efficient exchange of information.

An EU AIFM can market a Non EU AIF to professional investors in an EU member state without a passport **on a private placement basis only until 2015** provided:

- the EU AIFM complies with all provisions of the AIFMD with the exception of the requirement to ensure that a depositary entity is appointed;
- the EU AIFM ensures that an entity is appointed to the Non EU AIF to carry out the oversight and monitoring activities usually carried out by the depositary;
- there are cooperation arrangements in place between the regulator of the EU AIFM and the regulator of the Non EU AIF to ensure efficient exchange of information;
- the country of establishment of the Non EU AIF is not a country which has been designated by FATF as non-cooperative and has signed a tax cooperation agreement with the member state of the EU AIFM to ensure effective exchange of information on tax matters.

Non EU AIFM appointed to EU AIF (prior to 2015)

The Central Bank has clarified that an Irish AIF can have a non-EU AIFM notwithstanding that this non-EU AIFM is not authorised (and cannot be authorised) under the AIFMD as matters currently stand (certainly pre-mid 2015). However such a non-EU AIFM will not be able to avail of the AIFMD passport. This will only apply to AIFs for Qualifying Investors (**QIAIFs**) because an AIF for retail investors (**RIAIF**) will be required to have an EU AIFM.

Any QIAIF authorised prior to 22 July 2013 with a non-EU AIFM must ensure that it has a non-EU AIFM capable of carrying out all the tasks of an authorised AIFM by 22 July 2015. The QIAIF will need to be able, at all times, to show that its management company and AIFM arrangements when considered in their entirety at least meet the standard which would have applied under the non-UCITS regime which applied in Ireland immediately prior to 22 July 2013.

Any QIAIF authorised on or after 22 July 2013 with a non-EU AIFM must ensure that the non-EU AIFM is capable of carrying out all the tasks of an authorised AIFM within two years from 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 QIAIF and its Non EU AIFM will need to comply with the provisions of the AIF Rulebook that apply in the case of QIAIFs with registered AIFMs.

The Central Bank is likely to extend this transition period to align it with the coming into effect of Article 37 of the AIFMD, unless there are strong reasons not to do so.

One point of note, though, is that the Central Bank intends to conform to any common EU position on this topic, if one emerges before July 2013 so the position set out above is subject to change before 2015.

A Non EU AIFM can market an EU AIF to professional investors in an EU member state without a passport **on a private placement basis only until 2015** provided:

- the Non EU AIFM complies with all the transparency obligations in the AIFMD and where relevant the more detailed disclosure in respect of composition of portfolio and asset stripping;
- there are cooperation arrangements in place between the regulators of the EU member states where the EU AIFs are marketed, the regulator of the EU AIFs and the regulator of the Non EU AIFM to ensure efficient exchange of information;
- the country of establishment of the Non EU AIFM is not a country which has been designated by FATF as non-cooperative;
- EU member states are permitted to impose stricter rules on the Non EU AIFM marketing the EU AIF in its territory.

Non EU AIFM appointed to Non EU AIF

A Non EU AIFM can market a Non EU AIF to professional investors in an EU member state without a passport **on a private placement basis only until 2015** provided:

- the Non EU AIFM complies with all the transparency obligations in the AIFMD and where relevant the more detailed disclosure in respect of composition of portfolio and asset stripping;
- there are cooperation arrangements in place between the regulator of the EU member states where the Non EU AIFs are marketed, the regulator of the Non EU AIFs and the regulator of the Non EU AIFM to ensure efficient exchange of information;
- the country of establishment of the Non EU AIFM is not a country which has been designated by FATF as non-cooperative; and
- EU member states are permitted to impose stricter rules on the Non EU AIFM marketing the EU AIF in its territory.

Significance of 2015

The provisions of the AIFMD which (a) permit the passport to be used by an EU AIFM to market a Non EU AIF, (b) permit a Non EU AIFM to obtain formal authorisation as an AIFM, and (c) permit a Non EU AIFM to use the passport to market an EU AIF or Non EU AIF, do not come into force until such time as ESMA has issued positive advice and an opinion to the European Parliament, the Commission and the Council. The Commission will then determine that the provisions become applicable specifying the date for all EU member states. The AIFMD prescribes that this advice and opinion will be positive where no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk impeding the application of these provisions has been identified.

Marketing to Retail Investors

EU member states have the discretion to permit EU and Non EU AIFMS to market EU and Non EU AIFs in their territories on a domestic or cross border basis and while they can impose stricter or additional requirements than imposed on AIFs marketed to professional investors, they cannot impose stricter or additional requirements on EU AIFs marketing on a cross border basis to retail investors than are imposed on domestic AIFs. EU member states which do permit this must inform the Commission and ESMA by 22 July 2014 of (a) the type of AIFS they permit and (b) any additional requirements they have imposed on such AIFs.

Private Placement Regimes

Until at least 2015, it will be possible (and in some cases it shall only be possible) to market AIFs in EU member states on the basis of the private placement regimes in place in the relevant EU member state. The AIFMD provides that in 2018, ESMA will provide an opinion to the European Parliament, the Commission and the Council on the functioning and operation of the passport and provide advice on the termination of national private placement regimes. The AIFMD prescribes that this advice and opinion will be based on a number of factors including take up of the passport, any problems in respect of cooperation between regulatory authorities and any investor protection or investor access issues.

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[1]AIFMD is a Directive with EEA relevance and is currently under consideration in the EEA Joint Committee structure. While it is not possible at this point in time to prejudge the exact date that AIFMD will be implemented in the EEA States (Iceland, Lichtenstein and Norway) we expect that all three EEA states will implement AIFMD well in advance of July 2014.

[2]The European Securities and Markets Authority (**ESMA**) has approved co-operation arrangements between EU securities regulators (the 27 EU Member States, Croatia and the European Economic Area; Iceland, Liechtenstein and Norway), with responsibility for the supervision of alternative investment funds (**AIF**s) (which include hedge funds, private equity and real estate funds), and 34 of their global counterparts (these include USA, Canada, Brazil, India, Switzerland, Australia, Hong Kong and Singapore):
▪ Alberta Securities Commission (Canada), ▪ Australian Securities and Investments Commission, ▪ Autorité des Marchés Financiers du Quebec (Canada), ▪ Bermuda Monetary Authority, ▪ British Columbia Securities Commission (Canada), ▪ British Virgin Islands Financial Services Commission, ▪ Capital Markets and Securities Authority of Tanzania, ▪ Capital Markets Authority of Kenya, ▪ Cayman Islands Monetary Authority, ▪ Comissão de Valores Mobiliários do Brasil, ▪ Conseil Déontologique des Valeurs Mobilières of Morocco, ▪ Dubai International Financial Centre Authority, ▪ Emirates Securities and Commodities Authority, ▪ Federal Reserve Board (US), ▪ Financial Services Commission of Mauritius, ▪ Financial Supervision Commission of the Isle of Man, ▪ Financial Supervisory Authority of Albania, ▪ Guernsey Financial Services Commission, ▪ Hong Kong Monetary Authority, ▪ Hong Kong Securities and Futures Commission, ▪ Israel Securities Authority, ▪ Jersey Financial Services Commission, ▪ Labuan Financial Services Authority, ▪ Monetary Authority of Singapore, ▪ Office of the Comptroller of the Currency (US), ▪ Office of the Superintendent of Financial Institutions (Canada), ▪ Ontario Securities Commission (Canada), ▪ Republic of Srpska Securities Commission, ▪ Securities and Exchange Board of India, ▪ Securities and Exchange Commission (US), ▪ Securities and Exchange Commission of Montenegro, ▪ Securities and Exchange Commission of Pakistan, ▪ Securities and Exchange Commission Thailand, and ▪ the Swiss Financial Market Supervisory Authority (FINMA).

The co-operation arrangements will apply from 22 July. ESMA is still negotiating Memoranda of Understanding (**MoU**s) with further third-countries in order to meet the 22 July deadline. The key elements of the cooperation arrangements are:
- EU and non-EU authorities will be able to supervise fund managers that operate on a cross-border basis both within the EU and outside
- The co-operation between authorities includes the exchange of information, cross-border on-site visits and assistance in the enforcement of the respective laws
- EU securities regulators will be able to share relevant information received from non-EU authorities with other EU authorities, ESMA and the European Systemic Risk Board, provided appropriate safeguards apply
- The existence of co-operation arrangements between the EU and non-EU authorities is a precondition of the AIFMD for allowing managers based outside the EU to access EU markets or perform fund management by delegation from EU managers

The co-operation arrangements are applicable from 22 July 2013 and enable cross-border management and marketing to professional investors of alternative investment funds.

While ESMA has negotiated the MoUs centrally, they are bilateral agreements that must be signed between each EU securities regulator and the non-EU authorities. The actual supervision of AIFMs lies with the national securities regulators, therefore each authority decides with which non-EU authorities it will sign an MoU. The MoUs will be available on the ESMA website.

KEY CONTACTS

Brian McDermott
Partner
+353 1 649 2307
bmcdermott@algoodbody.com

Michael Barr
Partner
+353 1 649 2327
mbarr@algoodbody.com

Mary McKenna
Partner
+353 1 649 2344
mmckenna@algoodbody.com

Niamh Ryan
Partner
+44 20 73 820 820
nryan@algoodbody.com

Elaine Keane
Partner
+353 1 649 2544
elkeane@algoodbody

Stephen Carson
Partner
+353 1 649 2317
scarson@algoodbody.com

Nollaig Greene
Professional Support Lawyer
+353 1 649 2359
ngreene@algoodbody.com