

# AIFMD: Twelve months on

## Background

The Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (AIFMD) brought with it significant changes for the regulation of the funds industry in Europe and here we take a look at events since implementation twelve months on from the close of the transitional period, focusing on the AIFMD regime in Ireland.

## Ireland: Implementation and regulatory guidance for AIFMs and AIFs

Ireland implemented AIFMD by adopting Irish AIFM Regulations on 16 July 2013.

The Central Bank of Ireland (**Central Bank**) has also made available a number of publications setting out its guidance in for AIFMs and AIFs regulated in Ireland and marketing into Ireland. These publications include:

- the *AIF Rulebook*. The AIF Rulebook is the Central Bank's rulebook in relation to AIFMs and AIFs which contains chapters concerning Retail Investor AIF, Qualifying Investor AIF, AIF Management Companies, Fund Administrators, Alternative Investment Fund Managers and AIF Depositories. The Central Bank published the latest version of the AIF Rulebook on 12 June 2015.
- *guidance* on a number of topics to assist users of the AIF Rulebook.
- a regularly updated AIFMD question and answer document (**Central Bank AIFMD Q&A**) which is a primary source of updated policy and guidance from the Central Bank in relation to AIFMD. The content is aligned with the Q&A issued by the European Securities and Markets Authority (**ESMA**) on AIFMD. The latest version of the *Central Bank AIFMD Q&A* was published on 12 August 2015.
- *application forms* to allow AIFMs and AIFs to apply for authorisation.
- *guidance and forms* relating to (a) the marketing of AIFs to professional investors in Ireland and (b) marketing of AIFs in the EU by Irish authorised AIFMs.

All the above publications are available on the [Central Bank website](#).

## AIFMs in Ireland: The numbers to date

As at 4 September 2015 the Central Bank has authorised 138 internally and externally managed AIFMs. This figure includes fully authorized and registered AIFMs. Registered AIFMs are those which can avail of the lighter AIFMD regime, but not the AIFMD passport, because their cumulative assets under management fall below €100 million (or €500 million if unleveraged and do not provide redemption rights for 5 years).

There are also currently 415 EU and non-EU AIFM branches operating in Ireland or operating pursuant to the freedom to provide services.

As at June 2015, the Irish funds industry services over €1 trillion in AIF assets. Over 40% of global hedge fund assets are under administration in Ireland and the number of AIFs established in Ireland has grown to over 2,200.

## Post AIFMD: Significant changes for Irish AIFs

The benefits that Irish AIFMs and AIFs have experienced since full implementation of AIFMD include the option to avail of pan-European AIFMD passport. Further, the Central Bank has taken the opportunity to update its non-UCITS regulatory regime for example, removing the promoter regime (€635k in shareholders' funds requirement) and old

regulatory guidance and restrictions. It has also introduced product enhancements to facilitate property and private equity funds and a new product by issuing rules for establishing loan originating AIFs.

## Marketing, passporting, private placement and reverse solicitation

The pan-European passport was one of the main selling points of AIFMD compliance. However, some EU member states have "gold-plated" AIFMD requirements and impose additional registration processes.

Currently, only EU-authorized firms can use the passport to distribute funds to professional investors in Europe. Non-EU firms rely on national private placement regimes to distribute alternative funds in Europe, although it is contemplated that these will be abolished by 2018. The deadline for the call for evidence on the AIFMD non-EU passport was 8 January 2015 and ESMA was expected to publish its opinion on extending the passport to so-called third countries on 22 July 2015 but instead announced that it was still in the "process of finalising its opinion and advice". The advice will look at each third-country jurisdiction individually, instead of introducing a third-party regime as was first envisaged. On 30 July 2015, ESMA published its advice following assessment of 6 jurisdictions, Guernsey, Hong Kong, Jersey, Singapore, Switzerland and the United States of America, concluding that that no obstacles exist to the extension of the passport to Guernsey and Jersey, while Switzerland will remove any remaining obstacles with the enactment of pending legislation. No definitive view has been reached on Hong Kong, Singapore and the USA due to concerns related to competition, regulatory issues and a lack of sufficient evidence to properly assess the relevant criteria.

ESMA's advice and opinion have been sent to the European Commission, Parliament and Council for their consideration on whether to activate the relevant provision in the AIFMD extending the passport through a delegated act. However, ESMA suggests that the institutions may wish to consider waiting until ESMA has delivered positive advice on a sufficient number of non-EU countries, before introducing the passport in order to avoid any adverse market impact that a decision to extend the passport to only a few non-EU countries might have. ESMA aims to finalise the assessments of Hong Kong, Singapore and the USA as soon as practicable and to assess further groups of non-EU countries until it has provided advice on all the non-EU countries that it considers should be included in the extension of the passport.

## Depository

Asset segregation under AIFMD has been another topic of debate. ESMA published a consultation on asset segregation under AIFMD on 1 December 2014 which closed on 30 January 2015. ESMA initially aimed to publish a final report on the asset segregation guidelines in the second quarter of 2015, but this has been delayed due to significant industry and stakeholder consultation with ESMA. Representatives of Irish Funds met with ESMA at ESMA's offices in April 2015 to express industry views on the need for a more market-specific approach to asset segregation in recognition of local legal, regulatory and operational arrangements and protections as well as record-keeping and reconciliation arrangements put in place under custody models. Since then, the European Commission has requested submissions from European industry bodies to make the case that further account segregation was not required or appropriate. A collaborative submission to this effect was made in June 2015 by industry bodies, including Irish Funds. At the suggestion of the European Commission, a joint advocacy approach is underway

between industry and national regulators and we understand that ESMA will now wait until the Commission finalises its position before issuing its guidelines.

### AIFMD Regulatory reporting (Annex IV Reporting)

The reporting to national competent authorities for AIFMs – or so-called Annex IV reporting – presented a challenge for AIFMs and AIFs, and also for national regulators. The sheer volume and detail of data required, its multiplicity of sources for each individual AIFM and AIF, queries over interpretation of the reporting requirements themselves and presentation and communication to national regulators are some of the key issues which have caused difficulty. Most AIFs and AIFMs have gone through at least two reporting cycles at this stage, with January 2015 having been the first cycle for which almost all AIFMs has to produce a report. AIFMs are devoting a large amount of additional resources in order to comply with the reporting requirements.

The Central Bank has issued guidance to its online filing procedure which is continually updated via the Central Bank AIFMD Q&A. European regulators continue to develop their IT infrastructure to enable them to accept AIFMD reports, while some experienced problems with their systems. ESMA, in furtherance of its objective to help it and national regulators “fulfil their obligations in terms of monitoring and limiting systemic risks” is developing a system to allow national regulators to pass on data collected from the firms they supervise to a central database. With reports of small differences in interpretation for the different reporting fields amongst regulators, this should be beneficial in standardizing information required.

### Remuneration

Both internally and externally managed AIFMs are required to comply with the ESMA remuneration guidelines and must have remuneration policies and practices which do not encourage risk taking which would be inconsistent with the risk profiles of the AIFs it manages. Compliance with the ESMA remuneration guidelines has generated much discussion for AIFMs, in particular the areas of identification of relevant staff, delegation, proportionality, type of remuneration in scope and disclosure. A helpful clarification was made by ESMA (and echoed by the Central Bank) in the context of an AIFM’s obligation to ensure its delegates comply with relevant AIFMD remuneration requirements. The delegate can be subject to regulatory requirements which are “equally as effective” as those applicable under the ESMA remuneration guidelines. This includes CRD/MiFiD firms and non-EU firms which are subject to group remuneration policies that are equally as effective as MiFiD or CRD.

For those existing AIFMs who manage AIFs for which disclosure on remuneration in financial statements applies, there were questions about when those disclosures should first appear. ESMA clarified that where an AIFM’s accounting period ends on 31 December and it submitted its application for authorisation before 22 July 2014 and obtained authorisation after that date, the AIFMD rules should apply to the calculation of payments relating to the 2015 accounting period.

ESMA issued a consultation on sound remuneration policies under the UCITS Directive and AIFMD on 23 July 2015. While the primary objective of the consultation is to produce remuneration guidelines for UCITS, it is worth noting that the draft UCITS guidelines are based on the AIFMD remuneration guidelines and that in developing the draft UCITS guidelines, ESMA co-operated with the European Banking Authority with the objective of aligning guidance on remuneration across financial sectors. The consultation paper also proposes a revision to the AIFMD remuneration guidelines by clarifying that in a group context, non-AIFM sectoral prudential supervisors of group entities may deem certain staff of an AIFM in that group to be identified staff for the purpose of their sectoral remuneration rules. ESMA aims to finalise the UCITS remuneration guidelines by Q1 2016 and it is expected that this final report will also include the revision of the AIFMD remuneration guidelines.

### Further Information

You can access other recent news, insights and publications from the [A&L Goodbody Asset Management & Investment Funds team here](#). We will be working closely with our clients in relation to the impact of all AIFMD developments. In the meantime, if you have any queries, please contact one of the partners listed or your usual contact at A&L Goodbody.

The contents of this note are necessarily expressed in broad terms and limited to general information rather than detailed analyses or legal advice. Specialist professional advice should always be obtained to address legal and other issues arising in specific contexts.

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