

AIFMD Factsheet: Member State of Reference

What is the AIFMD?

The Alternative Investment Fund Managers Directive (“**AIFMD**”) introduced a new passport system for the marketing of alternative investment funds (“**AIFs**”) in the European Union (“**EU**”). The marketing passport is automatically available to authorised EU alternative investment fund managers (“**AIFMs**”) managing EU AIFs. While the passport is not immediately available to non-EU AIFMs / non-EU AIFs, the AIFMD provides for the extension of the marketing passport to non-EU AIFMs / non-EU AIFs, subject to the European Securities and Markets Authority (“**ESMA**”) issuing a positive opinion on the passport extension and the European Commission (the “**Commission**”) adopting the necessary legislation. In July 2016, ESMA issued an opinion recommending that the passport be extended to Guernsey, Jersey and Switzerland. In July 2016, ESMA published its second set of advice indicating that the passporting regime under AIFMD should be extended to Canada and Japan, as well as Guernsey, Jersey and Switzerland. In regards to Hong Kong, Singapore and Australia, ESMA concluded that these countries had met the relevant assessment criteria, albeit with relatively minor obstacles remaining to market access. In relation to the US, ESMA noted concerns regarding reciprocal market access and a disparity of treatment which could result from extending the AIFMD passport to that jurisdiction. As such, ESMA has suggested that the AIFMD passport be extended to a restricted category of US funds. Due to the pending implementation of AIFMD-like regimes in Bermuda and the Cayman Islands, ESMA was unable to finalise its assessment of those jurisdictions. Likewise, it could also not reach a definitive assessment on the status of the Isle of Man at the time.

The Commission was due to give its final decision on extending the AIFMD passport to third countries in mid-October 2016, three months after ESMA issued its second set of advice. However, the Commission has not yet passed the necessary legislation to extend the AIFMD passport to third countries and currently there is no clear timescale for its implementation.

In the event that the passport is extended, the AIFMD provides for slightly different rules applicable to non-EU AIFMs / non-EU AIFs and a key component of these rules is the concept of a member state of reference (“**MSR**”).

Why does the MSR matter?

For EU AIFMs, the relevant regulatory authority is the home member state of the EU AIFM. However, for a non-EU AIFM, the relevant regulatory authority will be the regulatory authority of its MSR, which acts in essence as if it were the “home” member state of that non-EU AIFM. The MSR is important for several reasons, primarily because non-EU AIFMs intending to manage EU AIFs or to market non-EU AIFs with an EU passport must obtain prior authorisation from the regulatory authority of their MSR. In addition, such non-EU AIFMs must appoint a legal representative in their MSR, who will be the official contact point for the MSR regulator and will be responsible for the compliance function.

How to determine the MSR

The AIFMD provides a set of criteria to determine the MSR (these are reproduced in the chart below). In many cases, the criteria provide that more than one MSR is possible (a “**Decision Point**”) and the AIFMD sets out a process to determine which of the possible member states will be designated the MSR for any given AIFM. In this process, the AIFM is required to request the regulatory authorities of each of the possible MSRs to determine jointly which will be the MSR. The AIFMD sets out timelines for the process and provides that where a decision is not made within one month or where a decision is made but not communicated to the AIFM within seven days, the AIFM may choose the MSR itself.

In addition, an [implementing regulation](#) adopted under the AIFMD further specifies the procedure to be followed in determining the MSR of a non-EU AIFM where there are several possible MSRs.

Decision Points

In cases of conflict regarding a decision point, the MSR should be identified by reference to the member state in which the AIFM intends to develop effective marketing. As can be seen from the criteria set out in the AIFMD (and reproduced in the chart below), the concept of “developing effective marketing” is determinative in the majority of cases and so its interpretation is crucial. The implementing regulation sets out a number of indicia to demonstrate the intention to develop effective marketing, requiring the AIFM to set out the member states where distributors are going to promote units or shares of the AIFs (including the expected share, in terms of assets under management, in the overall promotion in the EU); an estimate of the expected number of target investors in each member state; the official languages of member states into which the offering and promotional documents have been or are to be translated; and the distribution of marketing activities across the member states where the AIFM intends to market its AIFs, taking into account in particular the prominence and frequency of advertisements and road shows.

Unfortunately, it is not clear that the indicia are suited to providing one objectively certain response; instead they appear to have the potential to yield several competing answers. AIFMs may target investors in several member states and it may be difficult to assess

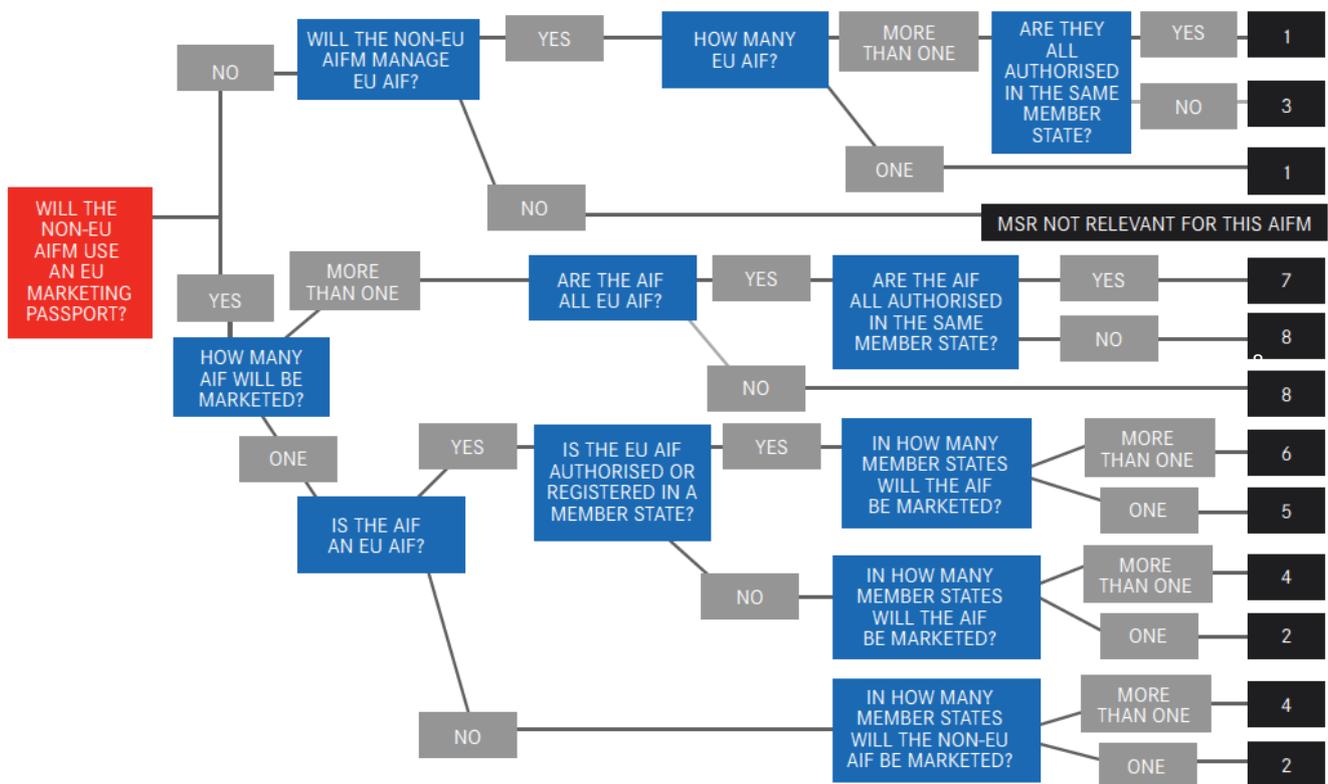
objectively the extent to which investors in any one member state have been targeted. In addition, an AIFM may legitimately target investors in two or more member states equally and may legitimately change, to any extent and at any time or over a period of time, the investors it targets.

While the AIFMD does provide that an AIFM will be “able to prove” its intention to develop effective marketing in a particular member state by disclosing its marketing strategy to the competent authorities, this does not appear to permit an AIFM to prove the particular member state where it intends to develop effective marketing for most of its AIF. This will be up to the regulatory authorities of the particular MSRs to decide and there is no requirement on them to disclose the reasons for their decision, nor is there any mechanism for appeal.

Comment

A non-EU investment manager that wishes to become an authorised AIFM will need to understand and negotiate the MSR rules. However, if a non-EU investment manager simply wishes to manage an EU AIF, it could avoid the issues of authorisation and the MSR rules by doing so as the delegate of an authorised AIFM. In the Irish context, a particularly useful entity to act as the AIFM is the self-managed qualifying investor alternative AIF (“**QIAIF**”). In that scenario, the fund itself acts as the AIFM (and is authorised as such) and delegates investment management to the non-EU investment manager.

Identifying the MSR



1. The MSR is the home member state of the AIF(s) that is/are being managed.
2. The MSR is the member state where the AIFM intends to market the AIF.
3. The MSR is either: (i) the member state where most of the AIFs are authorised; or (ii) the member state where the largest amount of assets is being managed. (Decision Point)
4. The MSR is one of the member states in which the AIF is being marketed. (Decision Point)
5. The MSR is either: (i) the home member state of the AIF; or (ii) the member state where the AIF will be marketed. (Decision Point)
6. The MSR is either: (i) the home member state of the AIF; or (ii) one of the member states where the AIFM intends to develop effective marketing. (Decision Point)

7. The MSR is either: (i) the home member state of the AIFs; or (ii) the member state where the AIFM intends to develop effective marketing for most of the AIFs. (Decision Point)
8. The member state where the AIFM intends to develop effective marketing for most of the AIFs. (Decision Point)

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team can be accessed at www.matheson.com.

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