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# CMS Brief Guide to Private Placement of Funds

Accessing European Investors post AIFMD

November 2019



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# Contents

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Introduction .....	1	Liechtenstein .....	41
Austria .....	2	Lithuania .....	43
Belgium .....	4	Luxembourg .....	44
Bulgaria .....	6	Malta .....	46
The Channel Islands .....	10	The Netherlands .....	49
Croatia .....	12	Norway .....	51
Cyprus .....	16	Poland .....	53
Czech Republic .....	19	Portugal .....	54
Denmark .....	21	Romania .....	56
Estonia .....	23	Slovakia .....	59
Finland .....	25	Slovenia .....	61
France .....	28	Spain .....	63
Germany .....	30	Sweden .....	65
Greece .....	32	Switzerland .....	67
Hungary .....	34	United Kingdom .....	70
Ireland .....	36	Definitions .....	72
Italy .....	38	Contacts .....	76
Latvia .....	40		

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# Introduction

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When implementing the Alternative Investment Fund Managers Directive (“**AIFMD**”), some EU States have tightened or severely restricted their private placement regimes, which is important when non-EU managers and funds look to access EU investors.

Our Guide briefly summarises the latest developments in relation to the private placement regimes of EU States, as well as covering certain non-EU States.

We are grateful to the numerous contributors to this guide. If you would like more information about the private placement regimes, you are welcome to get in touch with us or – with regard to particular jurisdictions – the contacts of the relevant contributor firms (detailed on pages 76–79).

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The information contained in this Guide is for general purposes only and does not purport to constitute legal or professional advice from CMS or any other firm and as a consequence may not be relied upon.

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# Greece

## Summary of private placement provisions for fund interests (if applicable)

Law 4099 / 2012 (effective from 20 December 2012) implemented in Greece Directive 2009 / 65 of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (“**UCITS**”). Law 4099 / 2012 is applicable only to UCITS established within the territories of the EU member states. However, when enacting Law 4099 / 2012, the Greek legislature added a provision (Article 92) which is not included in Directive 2009 / 65. Article 92 provides, *inter alia*, that any undertaking for collective investments that is seated in a Non-EU member state needs to be licensed by the Hellenic Capital Market Commission (“**HCMC**”) before making offerings in Greece.

Moreover, Law 4209 / 2013 (effective from 21 November 2013, except for some interim provisions that have different effective dates) implemented Directive 2011 / 61 of the European Parliament and of the Council on Alternative Investment Fund Managers (“**AIFM**”). Law 4209 / 2013 is applicable to AIFMs (either EU or Non-EU based) which manage and/ or market alternative investment funds (“**AIFs**”) in the EU. However, Greece opted not to implement Article 42 of Directive 2011 / 61 which provides the conditions for Non-EU AIFMs to make offerings to professional investors within an EU member state.

In light of the above non-EU funds are governed by the special provision of Article 92 of Law 4099 / 2012.

The AIFMD, which came into force on 22 July 2013, seeks to establish a harmonised regulatory framework for firms that manage or market AIFs in the EU. An AIF has been defined broadly and catches a variety of non-UCITS investment

vehicles such as closed-end listed vehicles (e.g., investment trusts) and private equity, real estate and hedge funds.

AIFMD is likely to affect most private equity fund managers who manage funds or have investors in the EU if they are identified as the AIFM of a particular fund or funds. Limited grandfathering provisions apply, generally exempting closed-end funds which will end prior to 2016 or are fully invested by 2013. Those EU funds with non-EU managers may be required to become authorised by 2015. AIFMs managing funds below *de minimis* aggregate thresholds may only be subject to lighter touch requirements, which include registration with regulators, notification of investment strategies, and certain investment reporting.

There is no specific definition of private placement under Greek law but the concept of “private placement” is determined by opposition to public offer and by referring to the exemption from the requirement to publish a prospectus under the provisions of the law implementing Directive 2003 / 71 / EC, as amended (Law 3401 / 2005 as in force – “Prospectus Law”).

Private placement in Greece is a placement that:

- is addressed solely to qualified investors. As per Article 1 of Directive 2010 / 73 EU “qualified investors” means persons or entities that are described in points (1) to (4) of Section I of Annex II to Directive 2004 / 39 / EC, and persons or entities who are, on request, treated as professional clients in accordance with Annex II to Directive 2004 / 39 / EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004 / 39 / EC unless they have requested that they be treated as non-professional clients – these provisions have been implemented in Greece; and/ or



- is addressed to fewer than 150 natural or legal persons other than qualified investors per each EU member state; and/or
- is addressed to investors who acquire securities for a total consideration of at least EUR 100,000 per investor, for each separate offer; and/ or
- refers to securities whose denomination per unit amounts to at least EUR 100,000; and/ or
- refers to securities with a total consideration of less than EUR 100,000 calculated over a period of 12 months.

If a fund meets any one (or more) of the above criteria then it is subject to private placement provisions.

#### **Other forms of possible placement options for fund interests outside fund regulations**

The following fall outside of the scope of the law covering the placement of fund interests:

- reverse solicitation (i.e. following a genuine unsolicited request by the investor);
- non-equity securities issued by an EU Member State or by public international bodies of which one or more EU Member States are members or by the European Central Bank or by the central banks of the EU Member States;
- shares in the capital of central banks of the EU Member States;
- securities unconditionally and irrevocably guaranteed by an EU Member State;
- securities included in an offer where the total consideration for the offer in the EU is less than

EUR 5m calculated over a one-year period; and

- non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration for the offer in the EU is less than EUR 75m calculated over a one-year period, provided that those securities are not subordinated, convertible or exchangeable and that they do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument.

#### **Consequences of non-compliance with placement regimes for fund interests**

If there is a violation of private placement provisions, the contract may be declared null and void under the applicable provisions of the Greek Civil Code. A breach of the applicable laws and regulations creates civil liability to fully indemnify any injured party.

Regulatory sanctions include a fine of up to EUR 1m. Criminal charges may be pressed, with the possibility of imprisonment for up to five years.

#### **Private placement rules for non-fund investments available**

Non-fund investments which are generally subject to private placement opportunities outside fund regulation include financial instruments such as shares in companies; bonds or other forms of securitised debt; certain other securities; units in collective investment undertakings; options, futures and swaps and other derivative contracts. These financial instruments are subject to private placement provisions when the exemptions from the duty to publish a prospectus apply.

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