

CMS Guide to Passporting – Rules on Private Placement of Alternative Investment Funds

December 2023

The purpose of this guide is to provide a broad overview of the key elements of the private placement of funds in the countries covered in this guide. The guide makes no claims as to completeness and does not constitute legal advice. Entities marketing a fund on a private placement basis may additionally need to comply with licence requirements and these requirements are not covered in the guide. The information contained herein is no substitute for specific legal advice. If you have any queries regarding the issues raised or other legal topics, please get in touch with your usual contact or persons mentioned in this guide.

Introduction

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 106 to 109).

Amanda Howard, Matthias Kuert and Daniel Voigt.

Information provided as of December 2023.

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.



Amanda Howard

Partner

T +44 20 7524 6342

E amanda.howard@cms-cmno.com



Matthias Kuert

Partner

T +41 44 285 11 11

E matthias.kuert@cms-vep.com



Daniel Voigt

Partner

T +49 69 71701 434

E daniel.voigt@cms-hs.com

Summary Table

Jurisdiction	Can Private Placement Rights be Exercised?	Process	Notification	Fees	Is pre-marketing permissible?
Greece	Yes	The AIFM submits separate notifications of its intent to operate a private placement for (i) professional investors and (ii) non-professional investors to the HCMC.	Notification must be accompanied by certification from the home State that the relevant EU AIFM is authorised to manage AIFs.	Notification fee of EUR 1,000 plus 2.4% stamp duty per AIF.	No



Greece

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

Law 4099/2012 (the “**Law**”) 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 Directive**”). The Law is applicable only to UCITS established within the territories of the EU member states and when enacted, the Greek legislature added a provision (Article 92) which is not included in the UCITS Directive. 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, which implemented in Greece AIFMD, is applicable to AIFMs (either EU or Non EU based) that manage and/or market 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 the Law.

On 15.04.2022 Directive (EU) 2019/1160 was transposed into Greek law (via amendments to Law 4209/2013) and introduced new rules relating to the cross-border marketing and distribution of collective investment undertakings within the EU (uniformity of marketing communications rules for UCITS and AIFs).

Regarding marketing of units or shares of AIFs by AIFMs to retail investors, the Law (article 41) provides that this is permitted only to AIFMSAs or other AIFMs operating in Greece (via passporting) as long as several conditions are fulfilled.

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 Law 4706/2020 (“**Prospectus Law**”).

Private placement in Greece is a placement that:

- (a) is addressed solely to qualified investors. As per Article 2 of Regulation 2017/1129 EU, “qualified investors” means persons or entities that are listed in points (1) to (4) of Section I of Annex II to Directive 2014/65/EU, and persons or entities who are, on request, treated as professional clients in accordance with Section II of that Annex, or recognised as eligible counterparties in accordance with Article 30 of the Directive 2014/65/EU, unless they have agreed to be treated as non professional clients in accordance with the fourth paragraph of Section I of same above Annex and/or
- (b) is addressed to fewer than 150 natural or legal persons other than qualified investors per each EU member state; and/or
- (c) 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
- (d) refers to securities whose denomination per unit amounts to at least EUR 100,000; and/or
- (e) refers to securities where the total consideration for the offer in the EU is less than EUR 5,000,000 calculated over period of twelve 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:

- (a) reverse solicitation (i.e. following a genuine unsolicited request by the investor);
- (b) 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;
- (c) shares in the capital of central banks of the EU Member States;
- (d) securities unconditionally and irrevocably guaranteed by an EU Member State;
- (e) 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
- (f) 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.

Main regulatory sanctions are:

- (a) a public statement indicating the natural person or the legal entity responsible and the nature of the infringement in accordance with Article 42 of Regulation 2017/1129 EU;
- (b) an order requiring the natural person or legal entity responsible to cease the conduct constituting the infringement and not repeat it in the future;
- (c) administrative pecuniary sanctions of at least twice the amount of the profits gained or losses avoided by the infringing parties due to the infringement, where those can be determined;

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.

Definitions

AAIF	Act on Alternative Investment Funds (Croatia)
AFM	Autoriteit Financiële Markten (The Netherlands)
AFMA	Alternative Fund Managers Act (Finland)
AIF	Alternative Investment Fund, defined in the AIFMD as: “A collective investment undertaking, including investment compartments of such an undertaking, which raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of these investors; and does not require authorisation pursuant to Article 5 of the UCITS directive.”
AIFA	Alternative Investment Funds Act (Norway)
AIFFM	Law on Alternative Investment Funds and Fund Managers (Latvia)
AIFM	Alternative Investment Fund Manager, defined in the AIFMD as a legal person whose regular business is managing one or more AIFs
AIF Law	Cypriot Law 131(i)/2014 on Alternative Investment Funds
AIFMD	Alternative Investment Fund Managers Directive of 8 June 2011 (2011/61/EC)
AIFMG	Alternative Investment Fund Managers Act (Austria)
AIFM Law	Cypriot Law 56 (i)/2013 on Alternative Investment Fund Managers
AIFMG-L	Alternative Investment Fund Managers Law (Liechtenstein)
AIFM Regulations	Alternative Investment Fund Managers Regulations 2013 (United Kingdom)
AIFMV	Alternative Investment Fund Managers Ordinance (Liechtenstein)
AIFR	Alternative Investment Funds Regulations (Norway)
AIM Act	Danish AIFMD regulation
AMF	Autorité des marchés financiers (France)
BoL	Bank of Latvia
CA	Companies Act (Malta)
Capital Market Law	Law no. 297/2004, implementing the Prospectus Directive (Romania)
CBI	Central Bank of Ireland
CECII	Closed-Ended Collective Investment Institutions (Spain)
CFA	Consolidated Financial Act (Legislative Decree no. 58/1998) (Italy)
CIS	Collective Investment Scheme
CISA	Collective Investment Scheme Act (Switzerland)
CISO	Collective Investment Scheme Ordinance (Switzerland)
CMA	Capital Market Act (Croatia)
CMVM	Securities Market Commission (Portugal)
COBO	Control of Borrowing (Jersey) Order 1958
Consob	Commissione Nazionale per le Società e la Borsa (Italy)
CSSF	Commission de Surveillance du SectEUR Financier (Luxembourg)
CySEC	Cyprus Securities and Exchange Commission

DFSA	Danish Financial Supervisory Authority
Draft CFA	Draft amendments to the Consolidated Financial Act (Legislative Decree no. 58/1998) (Italy)
EEA	European Economic Area
EFSA	Estonian Financial Supervision Authority
EU AIF	AIF which is registered or authorised in an EU State under the applicable national law or which is not registered or authorised in an EU State but has its registered office and/or head office in an EU State
EU AIFM	AIFM which has its registered office in an EU State
EuSEF	European Social Entrepreneurship Funds
EuVECA	European Venture Capital Companies
EWV-WPPDG	Law of 10 May 2019 implementing Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (Liechtenstein)
FATF	Financial Action Task Force
FCA	Financial Conduct Authority (United Kingdom)
FCA Handbook	FCA's handbook of rules and guidance for regulated firms (United Kingdom)
Financial Promotions Order	Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (United Kingdom)
FIN-FSA	Financial Supervisory Authority (Finland)
FINMA	Financial Market Supervisory Authority (Switzerland)
FMA	Financial Market Authority (Austria)
FSC	Financial Supervision Commission (Bulgaria)
FSJL	Financial Services (Jersey) Law 1998
FSMA	Financial Services and Markets Authority (Belgium)
FSMA	Securities Markets Act (Finland)
FTA	Swedish Financial Instruments Trading Act
GFSC	Guernsey Financial Services Commission
HCMC	Hellenic Capital Market Commission
HNWIs	High Net Worth Individuals
HUF	Hungarian Forint
ISA	Investment Services Act, Chapter 370 of the Laws of Malta
ISIN	International Securities Identification Number
IUG	Law on Investment Undertakings (Liechtenstein)
JFSC	Jersey Financial Services Commission
KIID	Key Investor Information Document (Sweden)
LECROSI	Law 22/2014, which governs venture capital entities, other closed-ended collective investment institutions and management companies of closed-ended collective investment institutions and which amends Law 35/2003, of November 4th, governing collective investment institutions. (Spain)
LMFI	Law on Market for Financial Instruments (Latvia)
MFSA	Malta Financial Services Authority
MiFID	Markets in Financial Instruments Directive of 21 April 2004 (Directive 2004/39/EC)
MiFID II	Markets in Financial Instruments Directive of 15 May 2014 (Directive 2014/65/EU)
MiFID II Law	Cypriot Law 87(i)/2017, transposing MiFID II

Mini-AIFM Law	Cypriot Law 81 (i)/2020 on Mini Alternative Investment Fund Managers, regulating sub threshold AIFMs
Mini-AIFM	Sub threshold Cypriot AIFMs or Cypriot Investment Firms authorised by CySEC in accordance to MiFID II Law
MTF	Multilateral Trading Facility
NAV	Net asset value
NCCT	Non Cooperative Country and Territory
New IFA	New Investment Funds Act (Estonia)
NOK	Norwegian Krone
Non EEA	Non European Economic Area
Non EU AIF	AIF not qualifying as an EU-AIF
Non EU AIFM	AIFM which has its registered office in a state which is not an EU State
OEICII	Open-Ended Collective Investment Institutions (Spain)
PDR	Prospectus (Directive) Regulations 2005 (Ireland)
POI Law	Protection of Investors (Bailiwick of Guernsey) Law
Prospectus Directive	Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading
Prospectus Law	Cypriot Law 114(i)/2005, transposing the Prospectus Directive
Prospectus Law	Greek law implementing Directive 2003/71/EC, as amended (law 3401/2005 as amended by law 4099/2012)
Qis	Qualified Investors (for Swiss law purposes)
Romanian FSA	Romanian Financial Supervisory Authority
SAIFM Act	Swedish Act on Alternative Investment Fund Managers
SEC	Securities and Exchange Commission (United States of America)
SFSA	Swedish FSA
SICAR	Société d'Investissement en Capital A Risque (Luxembourg)
SIF	Specialised Investment Fund (Luxembourg)
SMA	Securities Market Act
Small AIFM	AIFM managing AIFs whose assets under management, calculated in accordance with Article 2 of the AIFMD Level 2 Regulation: do not exceed EUR 500m in total in cases where the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of five years following the date of initial investment in each AIF; or do not exceed EUR 100m in total in other cases, including any assets acquired through the use of leverage.
Third Country Regulations	The Investment Services Act (Alternative Investment Fund Manager) Regulations (Malta)
UCIS	Unregulated Collective Investment Schemes
UCITS	Undertakings for Collective Investment in Transferable Securities
UCITS Act	Swedish UCITS Act
UK AIFM	AIFM which has its registered office in the United Kingdom
VCE	Venture Capital Entities
ZISDU-2	Investment Trusts and Management Companies Act (Slovenia)
ZTFI	Financial Instruments Market Act (Slovenia)

Contacts

Greece

Bahas, Gramatidis & Partners

26 Filellinon Street 10558 Athens, Greece

T +30 210 3318 170

F +30 210 3318 171

Dimitris Emvalomenos

E d.emvalomenos@bahagram.com

Maria Tranoudi

E m.tranoudi@bahagram.com

CMS Law-Now™

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It was prepared in co-operation with local attorneys.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices; details can be found under "legal information" in the footer of cms.law.

CMS Locations: Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Cúcuta, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tel Aviv, Tirana, Vienna, Warsaw, Zagreb and Zurich.

cms.law