

CMS Guide to Passporting – Rules on Marketing Alternative Investment Funds

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Introduction

The EU Commission promoted passporting rights as one of the key benefits for hedge, private equity, real estate and other alternative investment fund managers authorised under the Alternative Investment Fund Managers Directive (“AIFMD”).

However, we are now experiencing impediments to the passporting rights as certain domestic regulators are imposing ‘border controls’, and fund managers need to pay fees and comply with various other requirements in order to market their funds cross border.

The diversity of the domestic rules makes it challenging for AIFMD authorised managers to assess the costs and various other requirements for penetrating the EU market. This guide provides a road map, which will hopefully assist managers in understanding the costs and other requirements under AIFMD, other EU directives and domestic regulations in the countries listed in this guide.

We are grateful to the numerous contributors to this guide. If you would like more information about passporting within the AIFMD framework, you are welcome to get in touch with us or – with regard to particular jurisdictions – the relevant contributor firms (contacts detailed on pages 52 to 55).

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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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The purpose of this guide is to provide a broad overview of the key elements of passporting regulations applicable to EEA AIFs in the countries covered in this guide. The guide makes no claims as to completeness and does not constitute legal advice. In the case of AIFMs based in Non-EEA (third country) jurisdictions wishing to market their funds in the EEA, you are referred to our ‘CMS Guide to Private Placement of Funds’.

Entities marketing a passported EEA AIF 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.



Greece

1. EEA AIFMs

EEA AIFMs are regulated by Law 4209/2013 (the “**Law**”) which implemented the AIFMD in Greece. Competent national authority to carry out the implementation of the AIFMD in Greece and to assume supervisory duties with regard to AIFM activity is the Hellenic Capital Market Commission (“**HCMC**”). As per the provisions of the AIFMD, the Law introduces the principle of one AIFM per AIF.

In particular, the Law covers the following AIFMs irrespective of the form of the AIFs managed:

- 1.1 All Alternative Investment Funds Management Sociétés Anonymes (“**AIFMSAs**”) i.e. Greek AIFMs managing one or more AIFs;
- 1.2 EU or Non-EU AIFMs which manage one or more Greek AIFs; and
- 1.3 EU or Non-EU AIFMs which market one or more AIFs in Greece.

Furthermore, the Law distinguishes the activities of management and marketing of AIFs to professional investors. A further distinction is made on the basis of the entity undertaking the management and / or marketing (i.e. whether it is an AIFMSA, an EU AIFM or a Non EU AIFM) as well as on the basis of the AIFs which are managed and / or marketed (i.e. depending on whether it is an EU AIF or a Non EU AIF).

AIFMSAs are allowed to manage EU and Non EU AIFs under certain conditions. Marketing of EU AIFs in Greece by AIFMSAs is also allowed under certain conditions. Marketing in other EU States requires the prior notification of the competent supervisory authority of the relevant EU State by the HCMC. EU AIFMs duly authorised by the competent supervisory authority of their home State are allowed to manage AIFs established in Greece. Marketing of EU AIFs by EU AIFMs in Greece is allowed following receipt by the HCMC of the relevant notification from the competent supervisory authority of the home State.

On 15.04.2022 Directive (EU) 2019/1160 was transposed into Greek law (via amendments to the Law) 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 the following conditions are fulfilled:

- 1.4 the AIFMSAs or other AIFMs operating in Greece distribute units or shares of AIFs directly or via a credit institution, an investment firm or an investment intermediation firm;
- 1.5 the AIF has an operating license and is supervised by the HCMC or the competent authority of its home jurisdiction;
- 1.6 the distribution of units or shares of the AIF to retail investors is permitted by the regulatory regime of its home jurisdiction, as well as by the constitutional documents or/and the AIF regulation;
- 1.7 the retail investor undertakes to invest at least EUR 100,000 per fund; and
- 1.8 the AIFMSAs or other AIFMs operating in Greece receives information from the potential investor in respect of his knowledge, experience and risk tolerance regarding the investment in the AIF, in order to assess whether the AIF is suitable for such an investor. If, on the basis of such information, it is considered that the AIF is not suitable for the particular investor, a warning in this respect must be provided to him. If the investor does not provide sufficient information, a warning must be provided to him that an assessment of whether the AIF is suitable for him cannot

be made. The aforementioned warnings can be provided in a standardized form.

2. Third country AIFMs

Non EU AIFMs are not allowed under the Law (until the enactment of a relevant delegated act by the European Commission) to manage or market any AIFs (EU or Non EU) in Greece. Marketing of Non EU AIFs in Greece without a passport is currently (until the enactment of a relevant delegated act by the European Commission) allowed only to AIFMSAs under certain conditions. Marketing of Non EU AIFs in Greece with a passport will be allowed once the European Commission has adopted the delegated Act referred to under Article 68(6) of AIFMD, and from the date disclosed therein. Also, Greece opted not to implement Article 42 of AIFMD which provides the conditions for Non EU AIFMs to make offerings to professional investors within an EU State without a passport via private placement.

3. Pre-marketing of EU AIFMs

The definition of the term “pre-marketing” is, according to article 4 of the Law “the provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with article 31 or 32, in that member state where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or that compartment’.

EU AIFMs can initiate pre-marketing as long as the information provided by them to professional investors:

- is not adequate for the latter to subscribe to the units or shares of an AIF;
- does not amount to subscription forms or similar documents (whether in draft or final form) and
- does not amount to constitutional documents, any prospectus or offering documents of a not-yet-established AIF in a final form.

Additionally, EU AIFMs should ensure that investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing can only acquire units or shares in that AIF through marketing permitted in accordance to articles 31 or 32 of the Law.

Any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, should be considered to be the result of marketing and should be subject to the applicable notification procedures referred to in articles 31 and 32 of the Law.

Within two weeks of having begun pre-marketing in Greece the AIFMSA (or other AIFM operating in Greece) must send an informal letter, in paper form or by electronic means, to the HCMC (or, in the case of other AIFM, the competent authorities of its home member state), specifying inter alia in which member states it is or has engaged in pre-marketing, the periods during which the pre-marketing is taking or has taken place and including, where relevant, a list of its AIFs and compartments of AIFs which are or were the subject of pre-marketing.

The HCMC informs promptly the competent authorities of the home member state of the EU AIFM, in which the EU AIFM is or has engaged in pre-marketing thereof. The competent authorities of the member states where the pre-marketing took/takes place, may request by the HCMC to provide further information in relation to the pre-marketing taking place in its territory (the HCMC, can also make the same request to the competent authority of the home member state of the EU AIFM).

A third party may engage in pre-marketing, on behalf of an AIFMSA or other authorized EU AIFM, only if:

In Greece, it is authorized as an investment societe anonyme (as per article 4 of law 4514/2018) or a credit institution (according to law 4261/2014) or a mutual fund management societe anonyme (as per article 3 of law 4099/2012) or an AIFMSA (according to the Law; or

In another EU member state, it is authorized as an enterprise for the provision of investment services (in accordance with Directive 2014/65/EU) or a credit institution (in accordance with Directive 2013/36/EU) or an UCITS management company (in accordance with Directive 2009/65/EC) or an AIFM (in accordance with Directive 2011/61/EU).

The aforementioned also apply to any third party acting as a tied agent (as per para. 29 of article 4 of law 4514/2018 or in accordance with Directive 2014/65/EU).

4. Fees

- An AIFM planning to market an AIF in Greece must file a prior notification to the HCMC. The notification fees are EUR 1,000, plus a 2.4%

digital transaction duty per sub-fund/compartment or AIF.

- A Greek AIFM planning to market any AIFs abroad must file a prior notification to the HCMC. The notification fees are EUR 150, plus a 2.4% digital transaction duty per AIF and per country of intended marketing.
- AIFMs also pay an annual contribution fee of EUR 1,000, plus a 2.4% digital transaction duty per sub-fund/compartment or AIF to the HCMC. The fee is payable in July of each year.

Definitions

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| Act on Collective Investment | Act no. 203 / 2011 Coll. on Collective Investment (Slovakia) |
| AFM | Authority for the Financial Markets (<i>Autoriteit Financiële Markten</i>) (The Netherlands) |
| AFMA | Act on Alternative Investment Fund Managers (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”. |
| AIF Act | Act on Alternative Investment Funds (Cyprus) |
| AIFM | Alternative Investment Fund Manager, defined in the AIFMD as a legal person whose regular business is managing one or more AIFs |
| AIFM Act | Act on Alternative Investment Fund Managers (Cyprus) |
| AIFMA | Alternative Investment Fund Act (Austria) |
| AIFMD | Alternative Investment Fund Manager Directive of 8 June 2011 (2011 / 61 / EC) |
| AIFMG-L | Alternative Investment Fund Law (Liechtenstein) |
| AIFMSAs | Alternative Investment Funds Management Sociétés Anonymes (Greece) |
| AMF | French Financial Authority (<i>Autorité des Marchés Financiers</i>) |
| BaFin | Federal Financial Supervisory Authority (Germany) |
| BFSMA | Belgian Financial Services and Markets Authority |
| BoL | Bank of Lithuania |
| BoLV | Bank of Latvia |
| CBI | Central Bank of Ireland |
| CFA | Consolidated Financial Act (Italy) |
| CIS | Collective Investment Scheme(s) |
| CISOU CIA | Collective Investment Schemes and Other Undertakings for Collective Investments Act (Bulgaria) |
| CNMV | Spanish Securities Market Commission (<i>Comisión Nacional del Mercado de Valores</i>) |
| COBO | Control of Borrowing (Jersey) Order 1958 |

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| Consob | Italian Securities Market Supervisory Authority (<i>Commissione Nazionale per le Società e la Borsa</i>) |
| Cross-Border Distribution of Funds Regulation | Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings |
| CSSF | Commission de Surveillance du SectEUR Financier (Luxembourg) |
| CySEC | Cyprus Securities and Exchange Commission |
| CySEC Marketing Directive | Cyprus Securities and Exchange Commission Directive on Marketing of AIFs |
| EEA | European Economic Area |
| EEA AIF | AIF which is registered or authorised in an EEA State under the applicable national law or which is not registered in an EEA State but has its registered office and / or head office in an EEA State |
| EEA AIFM | An AIFM which has its registered office in an EEA State |
| EFSA | Estonian Financial Supervision Authority |
| EFTA | European Free Trade Association |
| EU AIF | Alternative investment fund not governed by German law but by the law of an EEA member state. |
| EU AIFM | Alternative investment fund manager which has its registered office outside of Germany but within an EEA member state and which does not fulfil the de minimis exemptions mentioned in the AIFMD. |
| FATF | Financial Action Task Force |
| FCA | Financial Conduct Authority (United Kingdom) |
| Finanstilsynet | Financial Supervisory Authority (Norway) |
| FIN-FSA | Financial Supervisory Authority (Finland) |
| FINMA | Financial Market Supervisory Authority (Switzerland) |
| FMA | Financial Market Authority (Austria) |
| FSA | Financial Supervisory Authority (Denmark) |
| FSC | Financial Supervision Commission (Bulgaria) |
| FSMA | Financial Services and Markets Act 2000 |
| GFSC | Guernsey Financial Services Commission |
| HANFA | Financial Services Supervisory Agency (<i>Hrvatska agencija za nadzor financijskih usluga</i>) (Croatia) |
| HCMC | Hellenic Capital Market Commission (Greece) |
| HMSA | Home Member State Authority |
| Investments Fund Act | Act XVI of 2014 on Collective Investment Forms and their Managers (Hungary) |
| ISA | Investment Services Act, Chapter 370 of the Laws of Malta (Malta) |

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| LAIFM | Law on Alternative Investment Funds and its Managers 2013 (Latvia) |
| LAIFMA | Luxembourg law transposing the AIFMD |
| MFSA | Malta Financial Services Authority |
| MNB | Central Bank of Hungary (<i>Magyar Nemzeti Bank</i>) |
| Non-EEA | Non-European Economic Area |
| Non-EEA AIF | An AIF not qualifying as an EEA AIF |
| Non-EU AIFM | An AIFM which has its registered office in a state which is not an EEA State |
| NPPR | National Private Placement Regime |
| Professional Investor | Professional client within the meaning of Annex II to MiFID |
| RFSA | Romanian Financial Supervisory Authority |
| SAIFM Act | Swedish Alternative Investment Act |
| Semi-Professional Investor | Investor who commits himself to invest at least EUR 200,000 and positive assessment by AIFM regarding his sufficient expertise, experience and knowledge and suitability of investment for him (for more details see Section 1 para. 19 no. 33 German Capital Investment Code) |
| SFSA | Swedish Financial Supervisory Authority |
| UCITS | Undertakings for Collective Investment in Transferable Securities |

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