



## Post-AIFMD marketing of non-French AIFs in France without a passport

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The Alternative Investment Fund Managers Directive (2011/61/EU) (AIFMD) was implemented into French law by an order and a decree published in the French Official Journal on 27 and 30 July 2013 respectively (together the “Implementing Texts”)<sup>1</sup>.

However, the AIFMD will be fully implemented only when the General Regulation (GR) of the French regulator, the *Autorité des Marchés Financiers* (AMF), has been amended to incorporate the requirements of the AIFMD. At the time of writing in August 2013, only part of the amendments to the GR have been published, with the remainder expected in September 2013.

The implementation of the AIFMD significantly changes the French legal framework for the marketing in France of foreign investment funds, whether established in an EU Member State or in a third country, which qualify as alternative investment funds (AIFs)<sup>2</sup>.

### Marketing foreign funds in France pre-AIFMD

Prior to the implementation of the AIFMD, marketing and distribution of foreign investment funds in France was permitted<sup>3</sup> but in practice depended on whether the fund was open-ended or closed-ended, with a separate set of applicable conditions in each case.

#### Open-ended funds

A foreign open-ended fund could only be marketed in France to retail investors or to professional investors if it had been authorized by the AMF<sup>4</sup>. In order to be authorized, the fund had to comply with certain conditions (in particular that the fund be subject to transparency and other measures equivalent to those in France and that an agreement for information exchange and mutual assistance specifically relating to asset management be in place between the AMF and the supervisory authority of the foreign fund) set out in article D.214-1 of the French Monetary and Financial Code (“MFC”). In practice, as far as we are aware, no foreign open-ended fund (other than certain Swiss UCITS-aligned funds) has really succeeded in becoming authorized to date.

#### Closed-ended funds

If the foreign fund was closed-ended, two options existed. The first was the public offer regime, which was not the route followed by foreign players in practice.

The second was the private placement regime, which permitted the private placement of foreign closed-ended funds to French professional investors. The only condition to be met in this case was for a disclaimer at the beginning of the private placement memorandum and on other documents provided to prospective investors.

### Marketing of foreign AIFs to professional investors in France post-AIFMD without a passport

#### Notification

Article L. 214-24-1 I of the MFC provides that any “*any French portfolio management company, any management company licensed in an E.U. Member State or any third country manager shall, prior to the marketing of AIFs established in an E.U. Member State or in a third country to professional clients, with or without a passport, file with the Autorité des Marchés Financiers a notification with respect to each AIF it intends to market.*”

Thus it appears that post-implementation of AIFMD any alternative investment fund manager (AIFM)<sup>5</sup> must file a notification with the AMF before marketing any AIF in France irrespective of whether the AIFM and AIF are French, EU or non-EU and also irrespective of whether the marketing is with or without a passport. However, details of the required notification (including timing, form and content) will not be available until publication of the outstanding parts of the amended GR which, as stated above, is expected in September 2013.

#### Other conditions

In addition, in order to access professional investors in France without a passport, the conditions of article D. 214-32 of the MFC must be met by EU AIFMs with non-EU AIFs and by non-EU AIFMs. The conditions are as follows:

- The AIFM must comply with the MFC provisions pertaining to AIFs and the French laws and regulations applicable to portfolio management companies (the scope of which in the context of the AIFMD has yet to be defined), with the exception of those provisions pertaining to custodians. It must, however, ensure that the tasks listed under article L. 214-24-8 of the MFC are performed by the custodian designated by the management company. These tasks pertain to cash flow monitoring, custody of assets and the verification of the compliance of certain operations (such as, for example, the issue, redemption and valuation of shares) with the laws and regulations applicable to the AIF as well as with its articles of association and prospectus. The AIFM must also inform the AMF of the identity of the custodian.
- Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards need to be in place between the AMF and the supervisory authorities of relevant third countries.
- If the AIF or AIFM is established in a third country, that third country must not be listed as non-cooperative by the Financial Action Task Force.

#### Additional condition for open-ended AIFs

A third country open-ended AIF will also, prior to being marketed in France, need to be authorized by the AMF. The conditions for being granted authorization in article D.214-32 of the MFC as amended to implement the AIFMD correspond to those of article D. 214-1 of the pre-AIFMD MFC (which, as mentioned above, as far as we are aware almost no open-ended funds succeeded in satisfying).

#### **Marketing of foreign AIFs to retail investors in France post-AIFMD without a passport**

Article L. 214-24-1 III of the MFC provides that “*any French portfolio management company, any management company licensed in an E.U. Member State or any third country manager for which France is the member state of reference shall, prior to the marketing of AIFs established in an E.U. Member State or in a third country to retail investors shall comply with the provisions set forth by the General Regulation of the AMF*”.

However, the relevant provisions of the amended GR are not yet available at the time of writing and, as stated above, these are expected in September.

#### **French application of the one-year transitional period**

The benefit of the one-year transitional period has not been extended to AIFMs marketing in France without a passport. Thus the post-AIFM marketing rules deriving from the Implementing Texts apply

immediately and the rules existing prior to the implementation of the AIFMD into French law no longer apply (albeit that pending the publication of the outstanding amendments to the GR, in our view the post-AIFMD regime remains relevant).

### Reverse solicitation in France

The AIFMD defines marketing as a direct or indirect offering or placement at the initiative of the AIFM or on its behalf of units or shares of an AIF to EU investors. Therefore, under AIFMD itself, any reverse solicitation or passive marketing whereby an investor initiates the transaction is not in scope of the AIFMD. However, very careful attention needs to be given to the differing rules and evidential requirements relating to reverse solicitation by regulators and potentially courts in each relevant jurisdiction.

Under French law, reverse solicitation is permitted so long as it does not fall within the scope of the French definition of “marketing”, which expressly excludes the sale of financial instruments in response to a client’s unsolicited request.

The French Implementing Texts do not contain any provisions that would suggest any change to the reverse solicitation regime. Therefore, professional investors in France should still have access to non-French AIFs through reverse solicitation post-AIFMD implementation, although AIFMs wishing to rely on reverse solicitation may wish to discuss the precise application of the regime with their legal advisors.

### Conclusion

The implementation of the AIFMD significantly changes the French legal framework for the marketing in France of foreign AIFs. The further amendments to the GR expected in September 2013 should provide more clarity in relation to this and therefore AIFMs wishing to market in France should monitor developments closely and may wish to discuss the impact of the new regime with their legal advisors.

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[1] The order No. 2013-676 dated 25 July 2013 and decree No. 2013-687 published in the French Official Journal on 27 and 30 July respectively.

[2] References to funds in this briefing exclude UCITS funds authorized under the UCITS Directive (2009/65/EC), for which a separate EU regime exists.

[3] In accordance with article L. 211-41 of the French Monetary and Financial Code (“MFC”), as specified by an AMF position paper on the marketing of limited partnerships in France, the “*Position AMF n° 2008-16 - La commercialisation des limited partnership en France*”.

[4] Pursuant to article L.214-1, II of the MFC.

[5] Although on its face the provision appears not to apply to non-French EU AIFMs legally structured as partnerships rather than companies in our view no exclusion is intended.