

# Brexit Update: Impact on Fund Managers from 31 January 2020 and Beyond

January 31, 2020

## Introduction

At 11pm (local time) on 31 January 2020, the United Kingdom ("**UK**") will leave the European Union ("**EU**"), an event often referred to as "Brexit". A transitional period will take effect as of this date and will last until 31 December 2020 (the "**Implementation Period**"), unless extended. During this Implementation Period, EU law will continue to have the same effect in the UK as it currently does, thereby allowing for a continuation of the UK's participation in the EU single market. This will allow UK firms to continue to access the EU under relevant financial services passports (including under the Alternative Investment Fund Managers Directive ("**AIFMD**")) until 31 December 2020.

The position post-31 December 2020 remains uncertain. The UK government and the EU will seek to negotiate a trade deal during the Implementation Period which would set out the terms of the new relationship between the EU and the UK after the Implementation Period. However, it is not clear whether such a deal will be agreed and what such a trade deal (if agreed) would look like. There is a risk that no deal will be agreed between the UK and the EU by the end of the Implementation Period and that no extension of the Implementation Period will be agreed. Such an outcome would, amongst other things, cause disruption to UK fund managers and investment firms operating on a cross-border basis into the EU under one or more financial services passports. Similarly, it would affect EU firms operating in the UK under such passports.

Firms which rely on the financial services passports should be taking the necessary steps (if they have not already) to ensure they have contingency plans in place to minimize the potential negative consequences arising at the end of the Implementation Period.

## 1. Marketing under the AIFMD during the Implementation Period

Under the AIFMD, there are three broad categories of fund manager:

- (a) full-scope alternative investment fund managers ("**AIFMs**") established in the EU;
- (b) sub-threshold AIFMs established in the EU; and
- (c) AIFMs not established in the EU (such AIFMs are referred to as "third country AIFMs" under the AIFMD).

The Pre-Brexit rules allowing for EU and UK AIFMs to market their funds across the EU and the UK will continue to apply during the Implementation Period as if the UK was still a member of the EU. This position is as follows:

*(a) Marketing by full-scope EU or UK AIFMs:*

- Full scope EU or UK AIFMs which manage alternative investment funds ("**AIFs**") established in an EU Member State or the UK will continue to benefit from the cross-border AIFMD passport. This allows such AIFMs to manage AIFs that are established in any other EU Member State or the UK and also allows for such AIFMs to market such EU/UK AIFs to professional investors throughout the EU and UK.
- If a full-scope EU or UK AIFM manages an AIF established in a country outside the EU or UK then it will not be able to market that AIF in the EU or UK under the AIFMD marketing passport. Instead, the AIFM would need to market the AIF under the national private placement regime ("**NPPR**") by making a notification to the regulator in each EU Member State and/or in the UK that it wants to market into. However, the process differs between Member States and it is not feasible to make NPPR notifications in certain Member States.[\[1\]](#)

*(b) Sub-threshold EU or UK AIFMs*

- Sub-threshold EU or UK AIFMs do not have the benefit of the AIFMD passport. As such, the ability of such AIFMs to market their funds in other EU Member States is dependent on the national law of the relevant Member States.
- The exception to this is where a sub-threshold EU or UK AIFM registers its EU or UK AIF under the European Venture Capital Funds Regulation ("**EuVECA**") or the European Social Entrepreneurship Funds Regulation ("**EuSEF**"). In these circumstances, the AIFM is able to market its registered AIF across the EU and UK via the EuVECA or EuSEF passport respectively.

*(c) Third Country AIFMs*

- Third Country AIFMs (*i.e.*, AIFMs which have their registered office outside the European Economic Area[\[2\]](#) ("**EEA**") do not have access to the AIFMD passport nor do they have access to the EuVECA or EuSEF passport. These AIFMs can only

market their funds in the EU under the NPPR regime. For the duration of the Implementation Period, the UK will not be treated as a Third Country and so UK AIFMs will continue to have access to the AIFMD passport as described above.

## **2. Marketing under the AIFMD after the Implementation Period**

At this stage, it is unclear whether or not a trade deal will be agreed between the UK and the EU during the Implementation Period. If no deal is agreed (commonly referred to as a "hard Brexit"), the rules allowing for AIFMs to market their funds across the EU are as follows:

### *(a) Marketing by full-scope AIFMs after the Implementation Period*

- UK full-scope AIFMs would no longer be able to use the AIFMD management passport nor the marketing passport. Instead, they would need to market into other EEA Member States (where it is feasible to do so) through the NPPR notification process as a Third Country firm. As stated above, this process varies between different Member States.
- Full-scope AIFMs in other EU Member States would not be permitted to market in the UK or manage AIFs in the UK under the cross-border AIFMD passport. Such firms would need to market in the UK under the UK NPPR regime – fortunately, this is a relatively straightforward process. The UK Government confirmed in a recent explanatory [memorandum](#) that it will still apply a Temporary Permissions Regime ("TPR") (which was previously intended to be introduced in the event of a "hard Brexit" with no Implementation Period from 31 January) allowing for EU AIFMs to be able to continue to market or manage their AIFs in the UK while they seek local authorisation. The statutory amendments to the TPR will delay its application until the end of the Implementation Period.

### *(b) Marketing by sub-threshold EU AIFMs after the Implementation Period*

- Sub-threshold EU AIFMs do not have access to the AIFMD passport currently and, therefore, there should be no significant impact on these firms unless they had registered (or planned to register) their AIF(s) for marketing under the EuVECA or EuSEF regimes.
- For AIFMs registered under the EuVECA or EuSEF regime, the cross-border marketing passport would no longer be available from or into the UK, although the UK Government has introduced a TPR applicable to such firms (as described above).
- As the UK will be a "third-country", UK sub-threshold AIFMs will likely be able to market in some EU Member States under the NPPR regime (which is currently

available to third-country AIFMs) following the Implementation Period, which is something UK sub-threshold AIFMs are not currently able to do. It will therefore be easier for sub-threshold UK AIFMs to market funds across the EU.

*(c) Marketing by Third Country firms after the Implementation Period*

- There should be little, if any, impact on third-country AIFMs. Such firms would still need to make NPPR notifications in order to market their AIFs in the EU or the UK.

### **3. Contingency planning**

As mentioned above, firms which currently rely on the AIFMD passport should be taking steps to ensure they have contingency plans in place to mitigate against any negative consequences arising following the Implementation Period.

In our alert of 14 September 2018 ("[6 Months to Brexit: Implications and Contingency Planning for Fund Managers](#)"), we provided a detailed note as to the advantages and disadvantages of the various contingency planning options available to full-scope EU and UK AIFMs in the event of a "hard Brexit". The same contingency options will be relevant at the end of the Implementation Period. In summary, the options available to these firms are as follows:

*(a) For UK full-scope AIFMs wishing to market their AIFs across the EU:*

- Rely on the NPPR regime (where feasible);
- Establish an AIFM in an EU Member State and delegate portfolio management back to the UK;
- Establish an AIFM in an EU Member State and provide investment advice to this EU AIFM; or
- Appoint a Third Party AIFM in an EU Member State and provide either delegated portfolio management services or investment advice to such AIFM in relation to the relevant AIF.

*(b) For UK full-scope AIFMs wishing to manage their AIFs in EU Member States:*

- Firms will need to consider the legal regime of the Member State in which the AIF is established to determine whether or not it is permissible for a third country AIFM to manage AIFs in that country. This is currently only possible in some Member States (e.g., Luxembourg).

*(c) Full-scope EU AIFMs wishing to market their AIFs in the UK:*

- Firms should wait to see what regime the UK Government may put in place for EU AIFMs seeking to carry on activities into the UK. As stated above, the UK Government intends to apply a TPR (as described above) which would allow EU AIFMs to continue to passport into the UK for a further period of time.
- As an alternative, it should be possible for EU AIFMs to rely upon on the NPPR regime as implemented into the UK (which is a relatively straightforward process).

### **Hope for the best but prepare for the worst**

While AIFMs in the UK and the rest of the EU may hope for a post-Implementation Period trade deal that would allow for a continuation of the cross-border access as is currently enjoyed by the UK and EU respectively, they should be making contingency plans to cover all potential scenarios, including a worst-case, no-deal post-Implementation Period scenario at the end of 2020.

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[\[1\]](#) In particular, France, Spain, Austria and Italy where the NPPR has not been fully implemented or registration is not practical.

[\[2\]](#) The European Economic Area currently is made up of all 28 EU Member States plus Iceland, Liechtenstein and Norway.

#### **Related Professionals**

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- **John Verwey**  
Partner