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Fund Marketing Issues Post Brexit, SFDR, and Upcoming Changes to AIFMD - Webinar

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Agenda

Brexit - Impact on UK firms in private equity sector

SFDR – Where we are and what's coming next?

AIFMD

- Marketing regime now
- Upcoming changes to marketing regime in August 2021



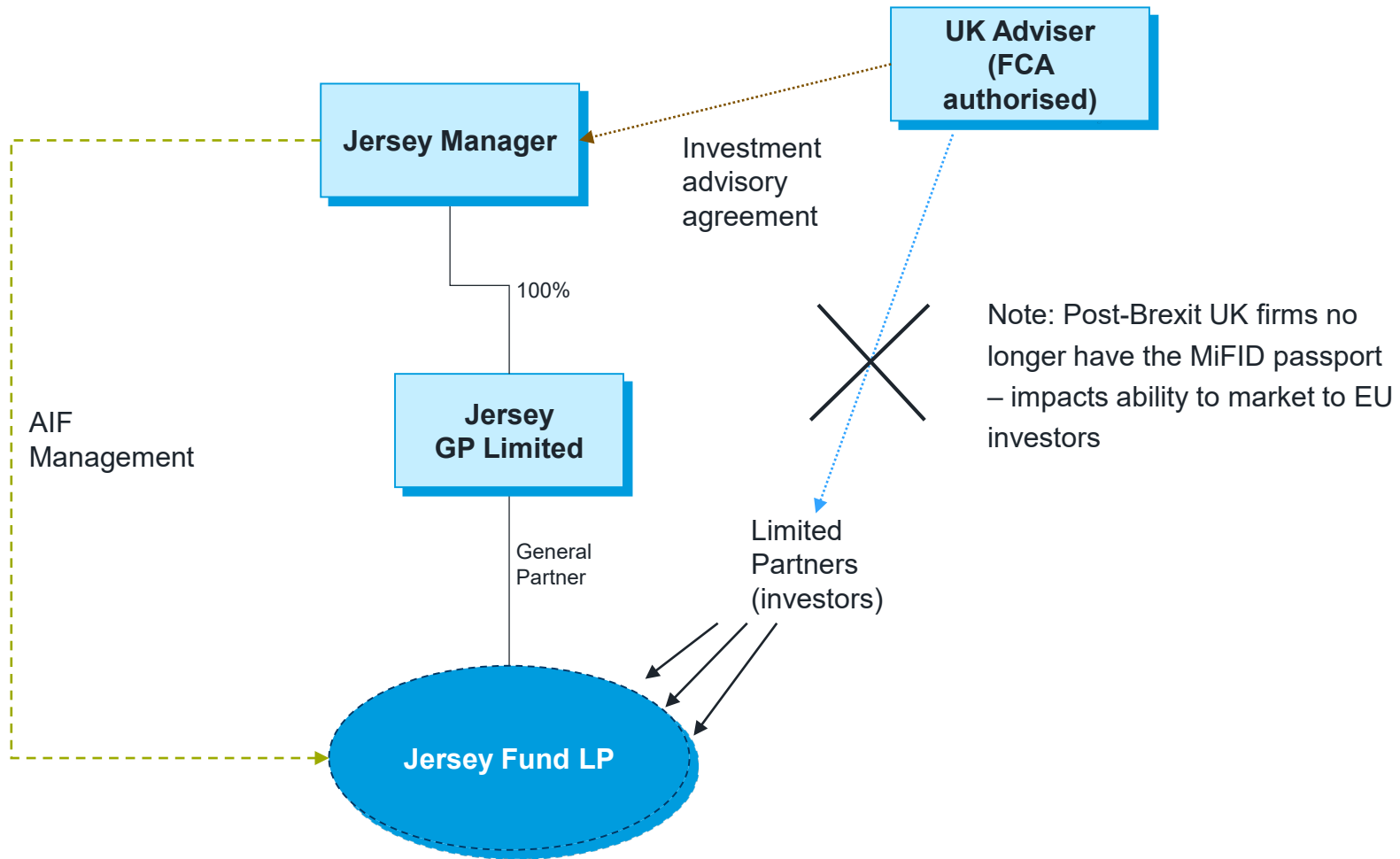
Brexit - Impact on UK firms in private equity sector

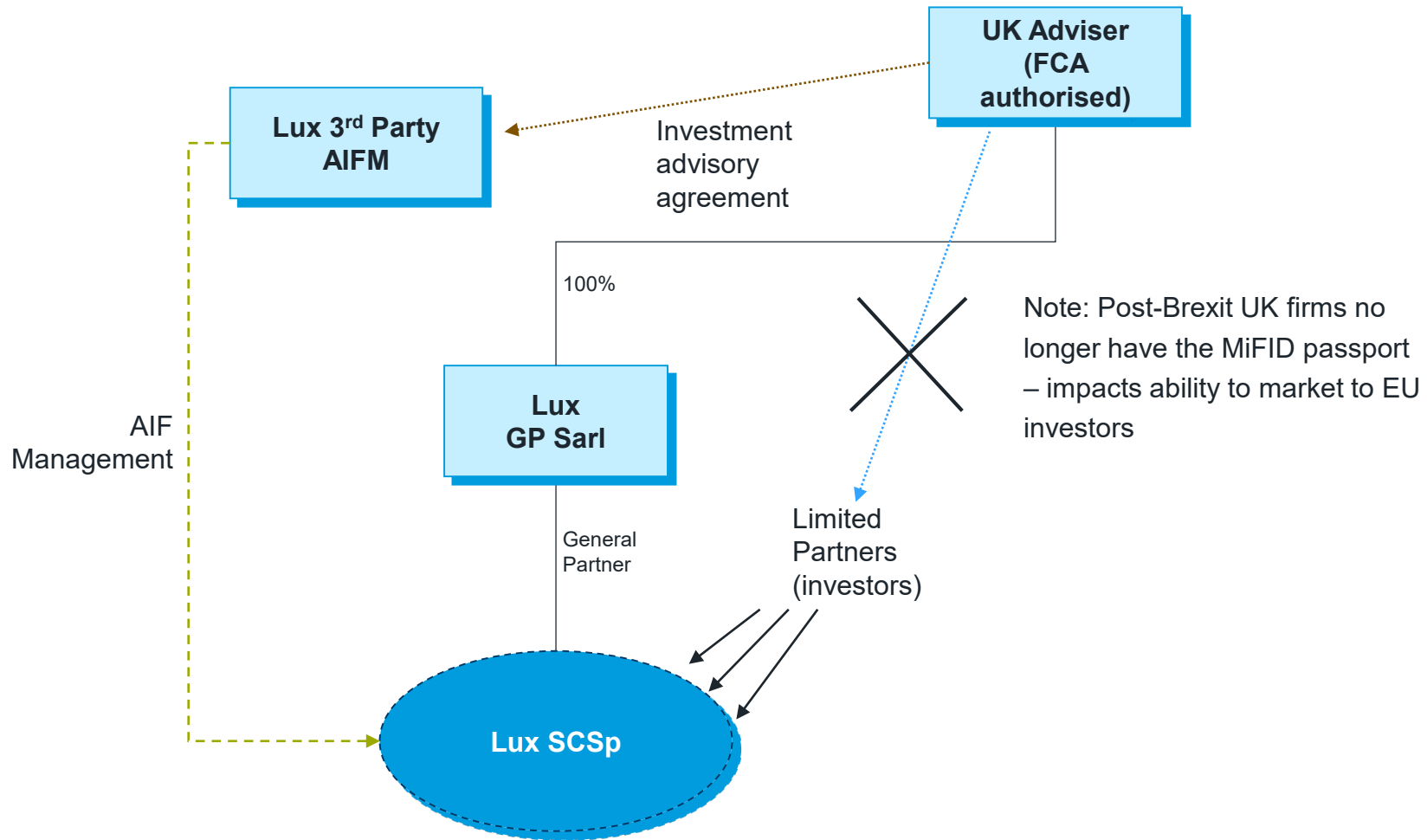


- **One Consequence:** UK firms lost their financial services passport rights into the EU

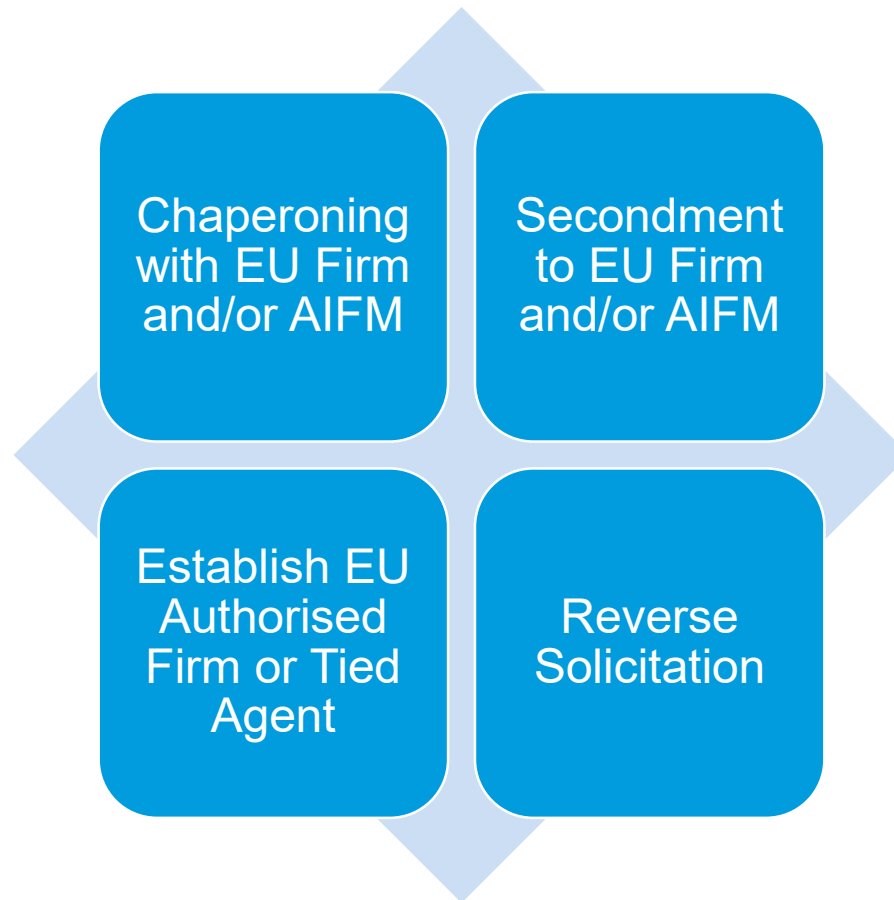
Brexit – Impact on UK Firms in PE sector

- **UK Alternative Investment Fund Managers (AIFMs):**
 - No longer manage EU AIFs cross-border management passport
 - No longer market their EU/UK AIFs under the marketing passport - must do so under the National Private Placement Regime (NPPR)
- **UK MiFID Investment Firms (not the AIFM)**
 - No longer carry out investment activities or services in the EU under the MiFID services or branch passport
 - UK MiFID firms limited in fund marketing activity in EU as this is considered a MIFID activity (reception and transmission of orders) in majority of EU Member States





Post Brexit Marketing “Solutions” for UK firms



- Each solutions carries an element of risk and market practice has yet to develop
- No expectation that EU Commission will grant equivalence to UK MiFID Firms such that they would have access to EU



SFDR – where are we and what's next?

Sustainable Finance Package (SFDR)

- New European ESG regime will affect fund managers, portfolio managers and investment advisors (EEA and non-EEA)
- Key legislation: “**Disclosure Regulation, “SFDR”** (2019/2088) – **Applied from 10 March 2021**
- Firms in scope to integrate ESG factors into their investment decision-making processes, as part of their duties towards investors and beneficiaries.
- More onerous requirements for firms or products that are marketed as having an ESG investment strategy (e.g., "Impact Funds")
- Key Requirements:
 - Website disclosures
 - Incorporation of ESG factors in policies
 - Pre-contractual disclosures
 - Periodic reports

Sustainable Finance Package (Taxonomy regulation)

- Key legislation: “**Taxonomy Regulation**, “**SFDR**” (2019/2088) – will begin to apply from 1 January 2022
- Like SFDR, will affect fund managers, portfolio managers and investment advisors (EEA and non-EEA) to “financial products” made available by them. “Financial products” include (amongst other things) alternative investment funds (“**AIFs**”) managed by AIFMs and portfolios managed by MiFID firms
- Requirements relating to certain environmental objectives are due to apply from 1 January 2022 and others from 1 January 2023
- Fund managers will be required to disclose the degree of environmental sustainability of funds / segregated mandates which are promoted as environmentally sustainable and include disclaimers where they do not

Sustainable Finance (ESG)

- **Brexit**
 - UK to develop its own taxonomy
 - AIFMs will likely adopt SFDR required disclosures for both EEA and UK investors
- **Action points:**
 - Assess how firm is in scope of new regime
 - Assess whether firm or its products are currently promoted as ESG or sustainable product
 - Consider impact of Level 2 measures (applying from January 2022)
 - Consider impact of Taxonomy Regulation
- **General action points for our clients:**
 - Engage in ESG industry discussion
 - Consider approach to:
 - Pre-contractual disclosures
 - Website disclosures
 - Principal adverse impacts- applicability and approach
 - Develop new or update existing policies to:
 - Integrate sustainability risks to investment decision making process
 - Describe how remuneration is consistent with sustainability risks



Current AIFMD Marketing Regime



Path 1 - Reverse solicitation

- Reverse solicitation – investor (or its agent) takes the initiative and requests information on the fund
- It is fact dependent
- Two risks associated with:
 - Investor subsequently claims mis-selling of the fund and argues no reverse solicitation
 - Regulator brings action against AIFM or its agents arguing that facts do not support reverse solicitation - so marketing without AIFMD approval
- Supportive evidential trail should be obtained (emails / letter)

Path 2 - AIFMD Pre-Marketing / Marketing Approval

- **Pre-marketing** – Certain promotional activity can be carried out in Member States prior needing an AIFMD marketing approval. This currently varies from country to country e.g. UK, Luxembourg and Germany, references to a specific fund and draft fund documents are permitted as pre-marketing, in others not so.
- **Marketing** – after the limits of permitted pre-marketing has been reached, AIFM must apply for marketing approval. Two options:

Marketing passport

- EEA AIFM managing EEA AIF

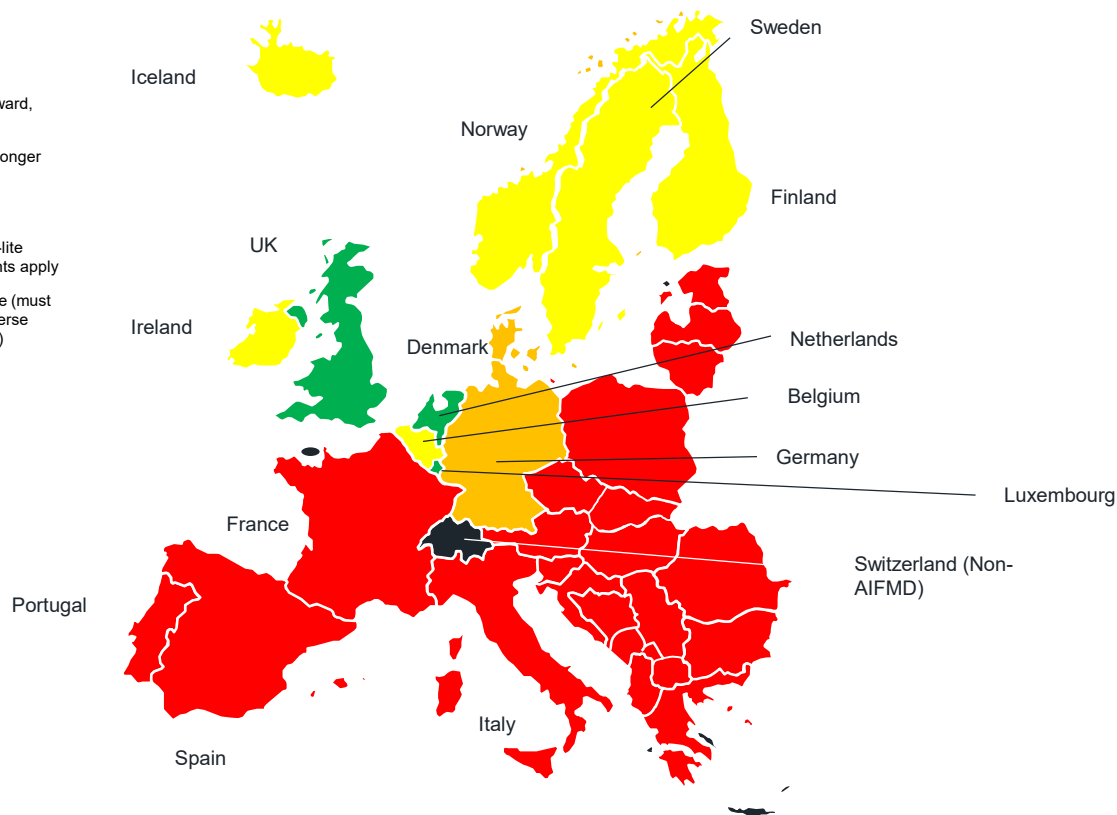
National Private Placement Regime

- EEA AIFM managing non-EEA AIF (Article 36)
- Non-EEA AIFM managing an AIF (Article 42)

NPPR Feasibility - Non-EEA AIFM or AIF

Key

Green	Available, straightforward, process
Yellow	Available, longer application process
Orange	Available, depositary-lite requirements apply
Red	Not feasible (must rely on reverse solicitation)



Note: the information on this map represents our understanding of the marketing regimes in some of the key EEA Member States. For formal advice on the requirements in the relevant EEA Member States, local counsel in these jurisdictions should be instructed.

Key Takeaway - Must determine if the fundraising can be carried out within the limitations of the NPPR regime

Brexit Note: UK still has an NPPR regime despite Brexit




AIFMD Marketing Regime - Upcoming Changes in August 2021

Changes to AIFMD Marketing Rules from 2 August 2021

New rules come into force across **all** EU Member States (not UK)


1. New harmonised definition of “pre-marketing” – broadening the scope. Draft documents are ok, but must include appropriate disclaimers included and does not amount to an “offer or placement” (i.e. no sub docs).



2. “Pre-marketing” notification to regulator by EU AIFMs (by way of an “informal letter” in paper form or by electronic means) within two weeks of having commenced “pre-marketing” in any Member State.



3. Tightening on use of reverse solicitation where there is a subscription within 18 months of any “pre-marketing” activity then reverse solicitation cannot be relied on.



4. Additional “facilities” requirements if marketing to retail investors– need to facilitate information to retail investors in a particular Member State where marketing (does not need to be a physical presence); Member States may require these to be in local language

Restrictions on non-AIFM marketers from 2 August 2021:

Pre-Marketing/Marketing by non-AIFMs (e.g. placement agents and fund advisers):

Where pre-marketing is not being done by the AIFM, the AIFM will have to ensure that the third party is itself one of the following:

EU authorised MiFID firm;

EU authorised credit institution;

EU authorised UCITS management company;

EU authorised AIFM; or

EU tied agent of an EU MIFID investment firm.

Potential Impacts of the AIFMD Changes and Key Takeaway

- **Impact on Non-EU AIFMs uncertain but assumed to apply**
 - Most regulators have not issued guidance yet, confirmed that BaFin will apply these rules to non-EU AIFMs. Prudent to assume new rules will apply to non-EU AIFMs
- **Solution needed for firms other than AIFMs seeking to market in EU**
 - Will need to be done via a regulated EU firm
- **Birth of “pre-pre-marketing”**
 - Information that does not relate to a particular fund, investment strategy or idea will not constitute “pre-marketing” and so no notification is need. When pre-marketing must submit a letter
- **Reverse solicitation**
 - Can still be relied but no pre-marketing 18 months prior to subscription
- **Key Takeaway** – must plan for fundraising strategy for EU investors in advance and must factor in new rules !



Questions?

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