

# UK Legislation Addresses Brexit Implications of Alternative Investment Fund Managers Directive

October 12, 2018

As things stand, it remains unclear whether the United Kingdom and the EU will be able to reach a Withdrawal Agreement in time for the United Kingdom's expected departure from the European Union on 29 March 2019. If an agreement is reached, it will include a transitional period, which will effectively preserve the status quo for financial services regulation until the end of 2020. For that transitional period, UK-regulated firms will continue to operate under the same rules as now and passporting rights will continue for authorised investment firms or fund managers.

**Debevoise  
& Plimpton**

However, firms, regulators and governments are busy preparing for the other possible outcome: that there is a "cliff-edge" Brexit in March 2019 that brings an immediate end to passporting rights for UK firms. To prepare for that possibility, the process to "onshore" existing EU law into the UK (effectively preserving the current rulebook and to make sure it works as expected after Brexit) is well underway. The European Union (Withdrawal) Act 2018 gave the UK government powers to create statutory instruments to achieve this goal and to modify the law as far as necessary to correct deficiencies arising from the UK's departure. In addition, the UK government previously announced that it wants to ensure continuity for non-UK managers as far as possible, and that it will introduce a "temporary permissions regime" to enable non-UK firms that are currently passporting into the UK to continue to do so for a limited period after Brexit, giving them time to adjust to a new regime.

The UK Government's publication on 8 October of a draft version of the [Alternative Investment Fund Managers \(Amendment\) \(EU Exit\) Regulations 2018](#) provides more clarity for UK and other European Economic Area ("EEA") alternative investment fund managers regarding the precise terms of the law in the UK after Brexit and the scope of that temporary permissions regime. Consistent with the government's earlier statements, this legislation preserves existing EU law relating to the management and marketing of alternative investment funds and mitigates the disruption that could follow an abrupt departure from the EU. The changes outlined in the Regulations will only take effect in March 2019 if no transitional period is agreed, and the date on which they come into effect is called "exit day".

---

Under the onshoring process, the UK will treat states in the EEA (excluding the UK and Gibraltar) as “third country” states, the term currently used for states outside the EEA. Subject to the transitional arrangements in the Regulations, no EEA firm will have any right to market a fund on a passported basis in the UK. This will mirror the position elsewhere in the EEA: assuming that no EEA state puts in place equivalent transitional arrangements, no UK firm will have any right to market a fund on a passported basis in the EEA. As a consequence of treating EEA states as third country states, all EEA (non-UK) funds, including funds established under the EU UCITS (Undertakings for Collective Investment in Transferable Securities) Directive, will be defined as alternative investment funds (“AIFs”).

The legislation (insofar as it relates to the temporary permission to market a fund) also covers managers of European Venture Capital Funds (EuVECA), European Social Entrepreneurship Funds (EuSEF), European Long-term Investment Funds (ELTIFs) and Money Market Funds (MMFs) which use an AIF structure. Separate legislation is being prepared to address “onshoring” of the rules relating to management of these vehicles.

The legislation also covers the transfer to the UK Treasury of functions that were previously exercised by the European Commission (typically by publication of delegated acts). Powers to make technical standards previously exercised by the European Securities and Markets Authority (“ESMA”) are transferred to the FCA.

**Transitional marketing arrangements.** As mentioned above, and in line with the government’s earlier indications, the legislation includes a “temporary permissions regime,” which will enable EEA alternative investment fund managers (“AIFMs”) to continue to market their funds on a passported basis into the UK. This is conditional on EEA AIFMs notifying the FCA, before exit day, of their intention to market in the UK using the passport (requiring the fund to be established and the documentation to be in advanced form) and informing the FCA that it wishes the relevant fund to use the temporary permission to be marketed in the UK. The regime will last for three years after exit day.

We set out below how the ability of various types of EEA and non-EEA AIFMs and funds to market in the UK will be affected.

**EEA AIFM of EEA fund.** As noted above, an EEA AIFM of an EEA fund can use the temporary permissions regime to continue to market the fund on a passported basis in the UK by notifying the FCA before exit day that it wishes to use the temporary permissions regime. If the AIFM establishes a fund after exit day, the only route to market the fund into the UK will be private placement, which will require a separate notification to the FCA. Co-operation arrangements will also be required - ESMA Chair

---

Steven Maijoor recently confirmed that these should be in place between the FCA, ESMA and the appropriate EU authorities in case of a “no deal” Brexit, although that is still not completely certain.

Under the temporary permissions regime, supervision of the incoming manager’s marketing into the UK will switch from home member EEA state to the UK. This means, for example, that both the UK and home regulator will need to be notified of any changes to the documentation of the fund.

**UK AIFM of EEA fund.** It is intended that a UK AIFM of an EEA fund can likewise use the temporary permissions regime to continue marketing the fund in the UK.<sup>1</sup> As above, if the AIFM establishes the fund after exit day, the only route to market that fund into the UK is private placement, requiring a separate notification to the FCA. As above, cooperation arrangements will be required.

Whether management of the non-UK fund (which is currently done under the passport) will require a local license will be a matter of local law. For example, Luxembourg counsel have generally indicated that a UK AIFM of a Luxembourg fund will be treated in the same way as a non-EEA AIFM, meaning that no license will be required from a Luxembourg point of view. However, the UK will require cooperation arrangements to be in place in order for a UK AIFM to continue to manage an EEA fund—a requirement that would cause considerable disruption if there were any delay in finalising cooperation arrangements.

In the longer term, if the “third country” passport in the Alternative Investment Fund Managers Directive is granted to managers at some point in the future, the UK AIFM (in line with other non-EEA AIFMs) will need to obtain authorisation under the AIFMD procedure envisaged for third country managers in order to manage an EEA fund.

As the UK AIFM will no longer have the benefit of the EEA marketing passport, UK managers would market the EEA fund into the EEA through private placement, requiring state-by-state registrations or notifications (assuming that EEA states do nothing to accommodate UK managers with marketing permissions granted before Brexit).

**UK AIFM of UK fund.** A UK AIFM of a UK fund will continue to market its fund in the UK on the same basis as before exit day—by completing the FCA’s notification of

---

<sup>1</sup> The current draft of the legislation does not appear to contemplate UK AIFMs of EEA funds using the temporary permissions regime. This point may be clarified in the final draft.

---

intention to market an AIF in the UK. As above, the UK AIFM will have no ability to market the fund on a passport basis in the EEA.

**UK AIFM of non-EEA fund.** A UK AIFM of a non-EEA fund will continue to market in the UK on a private placement basis.

**EEA AIFM of non-EEA fund.** An EEA AIFM of a non-EEA fund will continue to market on a private placement basis into the UK. EEA AIFMs with existing permissions to market in the UK will need to use the temporary permissions regime (and notify the FCA before exit day) to keep their marketing permission. AIFMs which raise funds after exit day will apply to the FCA for marketing on a private placement basis, although the conditions that apply regarding marketing into the UK may change.

**AIFMD obligations on acquisition of control of EEA company.** In accordance with the principle that, after Brexit, the FCA will only supervise firms' activities in the UK and not the rest of the EEA, the obligations in the AIFMD following acquisition of control of an EEA company (covering disclosures and anti-asset stripping) will now only apply to a UK AIFM (or non-UK AIFM marketing in the UK under private placement) when it acquires control of a UK company, as opposed to an EEA company. Acquisitions of EEA companies will be supervised by the relevant competent authority of the state in which the UK AIFM has marketed the fund. The degree to which ongoing obligations in the EU which were acquired under passport marketing will continue to be enforced by EU authorities is uncertain.

\* \* \*

Please do not hesitate to contact us with any questions.

**LONDON**

Patricia Volhard  
pvolhard@debevoise.com

Simon Witney  
switney@debevoise.com

John Young  
jyoung@debevoise.com

Gabriel Cooper-Winnick  
gcooperwinnick@debevoise.com

Philip Orange  
porange@debevoise.com