



**Financial Services  
Commission**

## **Information page**

**Alternative Investment Fund Managers Directive  
Marketing - Implications for non-EU AIFMs  
managing Gibraltar AIFs**

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*Any advice or interpretation covered in this information page represents the views of the FSC as to its expectations of how the requirements of the AIFMD are to be complied with and/or how it fails to be applied. This however is not intended as a definitive interpretation of the AIFMD which is ultimately a matter for the courts to determine. The FSC does not provide, or purport to offer, legal advice.*



## 1. Introduction

- 1.1 There are many Gibraltar Experienced Investor Funds and other Gibraltar fund vehicles, excluding UCITS, (“Gibraltar AIFs”) that are managed by a third party non-EU investment manager. The purpose of this information page is to clarify the implications that the Alternative Investment Fund Managers Directive 2011/61/EU (“AIFMD”) will have on such structures.
- 1.2 There are three time periods which are of relevance when analysing the implications of AIFMD for non-EU AIFMs managing Gibraltar AIFs. They are as follows:
  - (i) From 22 July 2013 (implementation) to the Extension Date (defined in section 2.5 below);
  - (ii) From the Extension Date to 2018; and
  - (iii) From 2018 onwards.
- 1.3 Any references to specific Articles relate to Articles in the AIFMD unless specifically stated otherwise.

## 2. Position from 22 July 2013 to the Extension Date

- 2.1 On 22 July 2013 the AIFMD will be implemented by each Member State. As from this date, EU AIFMs will be able to apply for authorisation under AIFMD and subsequently make use of the marketing passport provided for by the AIFMD.
- 2.2 However, it will not be possible for non-EU AIFMs to apply for authorisation under the AIFMD. This means that the marketing passport provided by AIFMD will not be available for non-EU AIFMs.
- 2.3 Therefore, as from 22 July 2013 to the Extension Date, non-EU AIFMs may choose to:
  - (i) market Gibraltar AIFs in the EU under the national private placement regimes (“NPPRs”) of each Member State, provided that the additional conditions set out in section 2.4 below are met; or
  - (ii) the Gibraltar AIF could be designated as a self-managed AIF and therefore become the authorised AIFM under the AIFMD. The Gibraltar AIF, which would now be the EU-AIFM, could then delegate the portfolio management and/or risk management functions to the non-EU AIFM. Such delegation would need to be in accordance with the delegation provisions of Article 20 of the AIFMD.

### *Marketing under NPPRs*

- 2.4 During this period, if a non-EU AIFM wishes to market a Gibraltar AIF within the EU, marketing will need to be carried out in each Member State in accordance with the NPPRs of that Member State. In addition to the NPPR of the Member State where it is intended to market the Gibraltar AIF, the following conditions must be satisfied – *AIFMD Art 42(1)*:
  - (i) The non-EU AIFM must comply with the transparency requirements contained in Articles 22,23 and 24 of the AIFMD; and, if applicable, with

the 'private equity provisions' contained in Articles 26 to 30 of the AIFMD.

- (ii) There must be a cooperation agreement between the country of the non-EU AIFM and the Member State in which the Gibraltar AIF is to be marketed.
  - (iii) The country of the non-EU AIFM must not be listed as non-cooperative by the Financial Action Task Force (FATF).
- 2.5 The above shall be the position of non-EU AIFMs managing Gibraltar AIFs until the Extension Date. The "Extension Date" is the date on which the European Commission extends the authorisation and marketing passport under the AIFMD to non-EU AIFMs. By the 22 July 2015, ESMA is required to prepare a report detailing its opinion on the functioning of the passporting regime for EU AIFMs and its advice on the extension of the passport to non-EU AIFMs - *Art 67(1)*. If ESMA issues a positive advice, the European Commission will adopt a delegated act, within 3 months of receiving this advice, specifying the Extension Date – *Art 67(6)*. Note that it is not certain at this stage if the advice will be positive.

#### *Designating the Gibraltar AIF as the AIFM*

- 2.6 The Gibraltar AIF could become an EU AIFM and therefore apply for authorisation under the AIFMD. Although the Gibraltar AIF would now have to comply with the requirements of the AIFMD, it would be able to benefit from the marketing passport.
- 2.7 The Gibraltar AIF may delegate the functions of portfolio management and/or risk management to the non-EU AIFM in accordance with delegation provisions of *Article 20* of the AIFMD. Please also refer to the FSC information page on "AIFMD - Delegation" for further information on this.

### **3. Position from the Extension Date to 2018**

- 3.1 As from the Extension Date, non-EU AIFMs may choose to:
- (i) continue to market Gibraltar AIFs in the EU under the NPPRs, provided that the additional conditions set out in section 2.4 above are met;
  - (ii) apply for authorisation under the AIFMD to market Gibraltar AIFs under the passport system; or
  - (iii) the Gibraltar AIF could be designated as a self-managed AIF and therefore become the authorised AIFM under the AIFMD. The Gibraltar AIF, which would now be the EU-AIFM, could then delegate the portfolio management and/or risk management functions to the non-EU AIFM. Such delegation would need to be in accordance with the delegation provisions of Article 20 of the AIFMD.

#### *Continue to market under NPPRs*

- 3.2 During this period, non-EU AIFMs may continue to market Gibraltar AIFs in accordance with the NPPR of the Member State in which it is intended to market. The conditions listed in section 2.4 above must also be satisfied.

*Apply for authorisation under AIFMD*

- 3.3 If a non-EU AIFM wishes to benefit from the marketing passport, it will be required to obtain authorisation under AIFMD - *Art. 39(1)*.
- 3.4 Non-EU AIFMs must designate its Member State of Reference (“MSR”) which will be responsible for authorising and supervising the non-EU AIFM. The MSR is the Member State which is most closely linked with the non-EU AIFM and is determined as per *Art 37(4)*. For non-EU AIFMs managing a single or a majority of Gibraltar AIFs, the MSR will be Gibraltar.
- 3.5 Once authorised, the non-EU AIFM will need to comply with all the requirements of the AIFMD except:
- (i) Chapter VI (relating to the rights of EU AIFMs to manage and market EU AIFs in the EU); and
  - (ii) any provision of the AIFMD where the non-EU AIFM can demonstrate that compliance with such provision is incompatible with a mandatory provision of the law to which they are subject and that they are subject to, and must comply with, an equivalent rule which has the same regulatory purpose and which offers the same level of investor protection.
- 3.6 In addition to the rules applicable to EU AIFMs, non-EU AIFMs must also comply with the following requirements – *Art 37(7)*:
- (i) the non-EU AIFM must appoint a legal representative established in the MSR;
  - (ii) the legal representative shall, together with the non-EU AIFM, be the contact person of the non-EU AIFM in the EU and for the investors of the AIFs it manages, for ESMA and for the competent authorities as regards the activities for which the AIFM is authorised in the EU and shall at least be sufficiently equipped to perform the compliance function pursuant to the AIFMD;
  - (iii) appropriate cooperation arrangements must be in place between the competent authorities of the MSR, the competent authorities of the home Member State of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with the AIFMD;
  - (iv) the third country where the non-EU AIFM is established must not be listed as a Non-Cooperative Country and Territory by FATF;
  - (v) the third country where the non-EU AIFM is established must have a signed agreement with the MSR, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements; and
  - (vi) the effective exercise by the competent authorities of their supervisory functions under the AIFMD is neither prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of that third country’s supervisory authorities.



- 3.7 Importantly, non-EU AIFMs must now ensure that the EU AIFs that they manage have a depositary established in the EU AIFs' home Member State. In the case of a Gibraltar AIF managed by a non-EU AIFM with a depositary outside of Gibraltar, the Gibraltar AIF must appoint a Gibraltar depositary as from the Extension Date.

#### *Designating the Gibraltar AIF as the AIFM*

- 3.8 The Gibraltar AIF could become an EU AIFM and therefore apply for authorisation under the AIFMD. Although the Gibraltar AIF would now have to comply with the requirements of the AIFMD, it would be able to benefit from the marketing passport.
- 3.9 The Gibraltar AIF may delegate the functions of portfolio management and/or risk management to the non-EU AIFM in accordance with delegation provisions of *Article 20* of the AIFMD. Please also refer to the FSC information page on "AIFMD Delegation" for further information on this.

## **4. Position as from 2018**

- 4.1 Three years after the adoption of the delegated act specifying the Extension Date (see section 2.4 above), ESMA is required to issue a report detailing its opinion on the functioning of the passporting regime under AIFMD and its advice on the termination of the existence of the NPPRs in each Member State – *Art 68(1)*. If ESMA issues positive advice to terminate the NPPRs, the European Commission will adopt a delegated act, within three (3) months of receiving this advice, specifying the date when the NPPRs are to be terminated. It is too early to establish if positive advice will be issued by ESMA.
- 4.2 As from that date, non-EU AIFMs will only be able to market Gibraltar AIFs within the EU through the AIFMD marketing passport. Therefore, such non-EU AIFMs will be required to apply for authorisation under, and comply with all the requirements of, the AIFMD.

## **5. Summary**

- 5.1 Gibraltar AIFs with non-EU investment managers should review this information page and carry out a strategic and compliance analysis of the effects of AIFMD on their operations.
- 5.2 For further information on key topics of the AIFMD, please refer to the other AIFMD information pages available on the FSC website.



## 6. Timeline chart

