

AIFMD 2.0 Overview

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How AIFMD 2.0 applies to non-EU AIFMs

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Executive Summary

The key policy goal behind the AIFMD was to ensure that – subject to the threshold in Article 3(2) of the AIFMD being met - **AIFs could only be managed and/or marketed in the EU if their AIFM was authorised by an EU national competent authority (NCA).**

To bed the regime in, authorisation was initially limited to AIFMs established in the EU. The aim was to expand this in time to allow AIFMs from outside the EU (so-called third countries) to also become authorised, provided ESMA had given the relevant third country a green light.

Authorisation would enable a third country AIFM to take advantage of the full range of benefits under the AIFMD, including the ‘marketing passport’

Prior to this expansion, non-EU AIFMs could either market within the EU **using National Private Placement Regimes (NPPRs)** (where these were available) on a Member State-by-Member State basis or rely on reverse solicitation (where the fact pattern permits).

The process of allowing non-EU AIFMs to become authorised, however, has been stalled since 2015.

As a result, the impact of the AIFMD on non-EU AIFMs is currently relatively limited (except where a given Member State has **gold-plated the AIFMD’s requirements**). It is applicable only to those actively marketing AIFs to EU investors under an NPPR and, even then, only certain provisions will apply to non-EU AIFMs.

This position has not been significantly altered by the political agreement reached by the European institutions - the Commission, Council and Parliament – in November 2023 to amend the existing AIFMD. A new **Amending Directive** was published in the Official Journal in March 2024.

This note sets out an overview of the changes made by the Political Agreement as they affect non-EU AIFMs.

Please note where we refer to articles of the AIFMD, we are referring to the articles as amended by the Amending Directive





Where will I find the changes?

The changes to the AIFMD which will impact **non-EU AIFMs** are set out in:

<u>Article 23</u>	Disclosure to investors
<u>Article 24</u>	Reporting obligations to competent authorities.
<u>Article 42</u>	Marketing an AIF managed by a non-EU AIFM in the EU under an NPPR.

Changes have also been made to the following Articles - these would only become effective if the authorisation regime was expanded to include non-EU AIFMs.

<u>Article 37</u>	Authorisation of non-EU AIFMs managing EU AIFs and/or marketing AIFs managed by them in the EU
<u>Article 40</u>	Marketing a non-EU AIF managed by a non-EU AIFM in the EU with a passport

Clicking on a link above will take you to the relevant section of the note.

What changes have been made?

Currently, a non-EU AIFM can only market an AIF which it manages in the EU subject to certain restrictions, as set out in Article 42.

Note, though, that the Amending Directive has made no changes to the reverse solicitation regime.

These restrictions include:

- the non-EU AIFM must comply with
 - **Article 22 (Annual report)**
 - **Article 23 (Disclosure to investors)** and
 - **Article 24 (Reporting obligations to competent authorities)**
- there must be cooperation arrangements in place between the competent / supervisory authorities of:
 - the Member States where the **AIF** is marketed
 - the Member State or third country (as applicable) in which the **AIF** concerned is established
 - the third country where the **non-EU AIFM is established**.
- the country in which the **non-EU AIFM** is established must not be listed by FATF as a **Non-Cooperative Country or Territory** – in the case of a **non-EU AIF**, this restriction also applies to its country of establishment.

These conditions have been amended by the Amending Agreement.

Marketing Conditions

Article 42 – Non-EU AIFM marketing an AIF in the EU under an NPPR

Non-Cooperative Country or Territory

The condition that the country in which the non-EU AIFM or non-EU AIF is established must not be listed by FATF as a **Non-Cooperative Country or Territory** has been amended.

Under the new rules, the third country in which the non-EU AIFM is established must, instead:

- not be a high risk third country under **the EU's Anti-Money Laundering Directive**.

Two further conditions have been **included**.

The third country in which the non-EU AIFM is established must:

- have signed an agreement with the Member State where the non-EU AIF is to be marketed, which fully complies with the standards in the **OECD Model Tax Convention** and
- not be on Annex I of the **EU's list of non-cooperative jurisdictions for tax purposes** (the so-called '**blacklist**').

Where the AIF to be marketed is **a non-EU AIF**, these new conditions also apply to the country in which the AIF is established.

Marketing Conditions

Conditions only applicable if the AIFMD authorisation regime is extended to non-EU countries

If the authorisation regime is ever extended to non-EU countries, AIFMs from those countries which intended to market AIFs in the EU under either:

- **Article 39** (where the AIF is an **EU AIF**); or
- **Article 40** (where the AIF is a **non-EU AIF**)

would have to obtain prior authorisation from the relevant NCA under **Article 37**.

Under **Article 39** and **Article 40**, authorisation is subject to certain restrictions and **some of these** have been amended by the Political Agreement.

We highlight below only restrictions where **changes have been made** to **Article 37** and **Article 40**.

(No changes have been made to **Article 39**.)

Conditions which have not been amended by the Amending Directive - such as those concerning cooperation arrangements and/or the OECD Model Tax Convention - are not included below **but remain relevant**.

Marketing Conditions

Conditions only applicable if the AIFMD authorisation regime is extended to non-EU countries (cont'd)

Article 37 - Authorising a non-EU AIFM managing or marketing an AIF in the EU

(a) non-EU AIFM

Under the amended rules, the third country where **the non-EU AIFM** is established must (among other things):

- not be a **high risk third country** under the EU's Anti-Money Laundering Directive and
- not be on Annex I of the EU's list of non-cooperative jurisdictions for tax purposes (the so-called '**tax blacklist**').

If the country where the **non-EU AIFM** is established was **not** on the list of high risk countries or on the blacklist at the time it was authorised but is subsequently added to either, the non-EU AIFM must take necessary measures "to rectify the situation".

It must do so "within an appropriate period of time" and, in any event, within **no more than two years**.

Marketing Conditions

Conditions only applicable if the AIFMD authorisation regime is extended to non-EU countries (cont'd)

Article 40 - Non-EU AIFM marketing a non-EU AIF with a passport

(b) non-EU AIF

Under the amended rules, the third country where the **non-EU AIF** is established must:

- not be a **high risk third country** under the EU's [Anti-Money Laundering Directive](#) and
- not be on Annex I of the [EU's list of non-cooperative jurisdictions for tax purposes](#) (the so-called '**tax blacklist**').

Transparency Conditions

As mentioned above, a **non-EU AIFM** which markets an AIF in the EU must comply with **Article 22**, **Article 23** and **Article 24** of the AIFMD.

Article 22 (Annual report) has not been amended by the Amending Directive, but changes to the **Article 23** and **Article 24** include (but are not limited to) the following:

Disclosure to investors (Article 23)

In addition to the already existing requirements, the following **information must be disclosed** to investors in respect of

- **any EU AIF** that the AIFM is **managing** and
- **any AIF (EU or non-EU)** which the AIFM **markets** in the EU.

Before the investor invests:

- the **name of the AIF**. (ESMA will develop guidelines on when an AIF's name is "unfair, unclear, or misleading")
- a description of the possibility and conditions for using the selected **liquidity management tools** and
- a list of **fees, charges and expenses** that the AIFM bears in connection with the operation of the AIF and that will be directly or indirectly allocated to the AIF.

Periodically:

- the composition of any **originated loan portfolio**
- **all fees, charges and expenses** directly or indirectly borne by investors and
- any **parent company, subsidiary or special purpose entity** utilised in relation to the AIF's investments by or on behalf of the AIFM.

The items in the second and third bullets immediately above must be **disclosed annually**. No period is specified in respect of disclosing the **composition of originated loan portfolios**.

Transparency Conditions

Reporting to NCAs (Article 24)

In addition to the existing requirements, certain information **must be provided** to the relevant NCA in respect of (a) **any EU AIF** that the AIFM is **managing** and (b) **any AIF (EU or non-EU)** which the AIFM **markets** in the EU.

This information includes (among other things):

- the **assets of each AIF** along with necessary identifiers
- the **total amount of leverage** which the AIF employs
- information on **delegation arrangements** concerning portfolio management or risk management functions, including:
 - the **delegate's name** and domicile;
 - whether the delegate has any **close links with the AIFM**
 - whether the delegate is an **authorised or regulated entity** for the purpose of asset management
 - the **supervisory authority of the delegate** (where relevant) and
 - the number of **full-time equivalent human resources** employed by the AIFM for performing day-to-day portfolio or risk management tasks within the AIFM.

For more detail on the new rules on **reporting obligations in respect of delegation arrangements**, see our note "**Authorisation of an AIFM and Delegation**" in this series.

By **16 April 2027** (i.e., three years after the Amending Directive **entered into force**), ESMA must develop draft Level 2 **regulatory technical standards (RTS)** and **implementing technical standards (ITS)** specifying, among other things, the "**appropriate level of standardisation**" of the information to be reported on delegation arrangements. ESMA cannot, though, introduce any additional reporting requirements.

Note: The Amending Directive **entered into force** on **15 April 2024**. Its provisions **become effective on 16 April 2026**.

Simmons Talking Points

Marketing

- It is important to keep up to date with the periodic changes made either to the EU's **list of high risk countries** for AML or to its **tax blacklist**, as these may affect jurisdictions in which third country AIFMs or AIFs are typically based.
- For example, **as at October 2023**:
 - the **list of non-cooperative tax jurisdictions** (adopted in **October 2023**) contains American Samoa, Anguilla, Fiji, Guam, Palau, Panama, Russia, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu) while
 - the list of **high risk countries for the purposes of the EU's AML Directive** currently no longer includes any significant funds jurisdiction - **Cayman**, for example, was removed from the list in **December 2023** and **Gibraltar** in **June 2025**.

Reporting

- It's possible that there may be a timing issue when it comes to what an AIFM needs to report under the **Annex IV reporting regime**.
- As mentioned above, (see **Reporting to NCAs (Article 24)**, above), ESMA has been mandated to draft **Level 2 RTS** and **ITS** to clarify what must be reported, how often and when.

Simmons Talking Points

Reporting (cont'd)

However, given that:

- the changes made in the Amending Directive will apply from **16 April 2027** and
- the draft RTS and ITS aren't due to be submitted to the Commission until **the same date**

it remains to be seen how the EU intends to explain what AIFMs should do during the period between the new provisions applying and AIFMs being told what it is that they have to report.

Grandfathering

For the revised list of **Article 23 disclosures**, other than new guidelines on AIF names (see above), there's no indication yet that ESMA will be asked to provide any further measures specifying, for example:

- when the new rules would come into effect or
- whether existing funds will be able to make use of any grandfathering provisions.

We'll be monitoring the point as the new regime gets closer and reporting on any developments.

Delegation

Note that the Amending Directive also makes changes to **the delegation regime** under AIFMD.

See our Overviews note, "**Authorisation of an AIFM and delegation**" for further details.

Simmons Talking Points

The powers of ESMA

- A new Article 47(4)(d) empowers ESMA to request the NCA of a non-EU AIFM's Member State of Reference to **require the AIFM to activate or deactivate the suspension of redemptions or subscriptions** in respect of an AIF it manages.
- ESMA could only do so "**in exceptional circumstances**", where investor protection or financial stability risks make it necessary and after consulting the AIFM.
- However, the drafting of Article 47(4)(d) suggests (as makes sense) that this provision will only come into consideration **where a non-EU AIFM becomes authorised** under the AIFMD (at which point, it would need to select a Member State of Reference).
- As mentioned above, the **process of allowing non-EU AIFMs to become authorised** has been stalled since 2015 and there seems to be no political will to progress it in the immediate future.

The AIFMD in the UK

- In light of the policy decisions flagged by HM Government as part of its Edinburgh Reforms, it seems highly unlikely that the changes made to the EU's AIFMD regime will be replicated in the UK equivalent version.
- As a result, non-EU firms which market in **both the EU and the UK** will need to deal with **two parallel sets** of slightly different rules.

Where can I find more information?

See the other notes in our [Overview of AIFMD 2.0](#) series:

- [The Loan Origination regime](#)
- [Authorisation of an AIFM and delegation](#)
- [Liquidity Management Tools](#)
- [Depositaries](#)

These are available online [here](#) – or ask your usual contact at Simmons & Simmons for a copy

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