



EUROPEAN PRIVATE EQUITY AND  
VENTURE CAPITAL ASSOCIATION

# AIFMD 3rd Country

A simple introduction to the impact of the EU's  
Alternative Investment Fund Managers Directive  
(AIFMD) on non-European GPs and LPs



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# Introduction

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## **How will the AIFMD affect GPs and LPs based outside Europe?**

This briefing provides a simple introduction to the impact of the EU's Alternative Investment Fund Managers Directive (AIFMD) on non-European General Partners and Limited Partners.

As with all financial regulation, the Directive introduces new responsibilities and processes that GPs will need to adopt in order to continue certain activities in the EU. However, in its ambition to create a single market for alternative investing in Europe, the Directive also provides a major potential benefit in the form of the marketing passport.

While legal uncertainties remain, EU policymakers and regulators are committed to delivering pragmatic solutions and as such LPs and GPs should be reassured that Europe is very much 'open for business'.

*Note: This briefing does not intend to give legal advice or be an exhaustive or definitive explanation of the AIFMD. For further information please visit [www.evca.eu](http://www.evca.eu).*

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# Summary

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On 22 July 2013, the AIFM Directive took effect in national law across the European Union. Pursuant to the Directive, European managers are required to obtain authorisation in order to 'passport' their services throughout the European Union.

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For **non-European managers** and for European managers marketing non-EU funds, a **third country passport** will be introduced, **but only in 2015** (at the earliest) and **only if the firm becomes authorised by a European regulator and complies fully with the AIFMD**.

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Until the phased introduction of the passport (expected in 2015), **non-European managers will be able to continue fundraising in Europe in accordance with national placement regimes** (to the extent they are kept in place by member states) provided they comply with certain AIFMD requirements and any additional conditions imposed by national law in the investor's home jurisdiction. They will also be able to **continue investing in Europe**.

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During a three-year period that will last **from 2015 to 2018**, the **third country passport will be available to non-EU managers**, in parallel<sup>1</sup> with and as an alternative to national placement regimes (to the extent they remain in place), subject to certain safeguards currently under discussion by ESMA (European Securities and Markets Authority) and non-EU regulators.

Once this three year-period has elapsed, the Directive states that the European Commission will proceed with the elimination of parallel national regimes. At that point, all EU and non-EU managers active in the EU will be subject to the same regulatory requirements and will use the same passport.

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**European LPs** may continue to **invest** with non-EU GPs **on their own initiative**, if funds are not actively marketed in the EU. This may be the only basis on which European LPs are able to access some non-EU funds.

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The Directive does **not have an immediate impact on non-European LPs**. They may continue to invest in European funds without any additional restrictions.

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<sup>1</sup> Certain member states give up the parallel national regimes already with the introduction of the EU passport (expected in 2015).

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## 1. WHAT IS THE AIFMD?

The AIFMD (Directive 2011/61/EU) creates a pan-European regulatory regime for managers of alternative investment funds, including private equity firms. The Directive provides the opportunity to market more easily across the EU through a so-called “passport”. Prior to the AIFMD, private equity managers must comply with the securities laws applicable in each EU member state where they wish to raise funds. With the passport, GPs will be able to market fund interests to institutional investors<sup>2</sup> throughout the EU under a single regime. To obtain the passport, a GP must become authorised under the AIFMD and must comply with the AIFMD in full.

AIFMD applies in all EU member states and in the three EEA countries (Norway, Iceland and Liechtenstein),<sup>3</sup> but not in Switzerland as it is not part of the EU.

## 2. WHAT IS ‘MARKETING’?

Marketing is defined as any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union.

It remains to be seen how the member states further define this definition. Some may take the view that marketing starts rather late in the process (e.g. when the PPM and LPA are being submitted to investors).

## 3. NON-EUROPEAN GPS, NON-EUROPEAN LPS

### Non-European GPs

The AIFMD is a European Union Directive. If you are a GP that does not have its registered office in the EU, you are a non-EU manager as defined by the Directive. The AIFMD could have relevance for you, depending on your activities.

The Directive does not have any relevance for you if:

- you do not manage EU-domiciled funds, and
- you do not actively market funds to EU-based investors.

In this case, should you invest in the EU you can continue to do so without any additional restrictions under the AIFMD.

However, if you are **performing fund management or marketing activities within the EU**, you will be affected by the Directive.

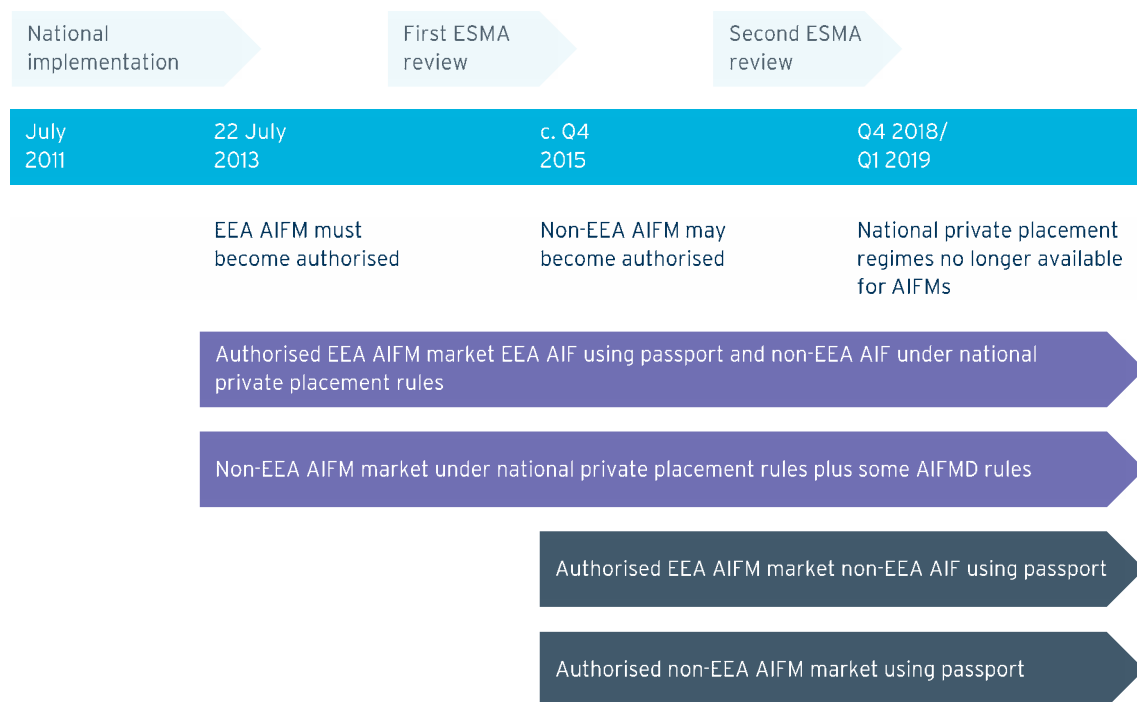
### Non-European LPs

The Directive only affects marketing to EU-based investors. Therefore, if you are a non-European LP you can continue to invest in EU domiciled funds as now.

<sup>2</sup> Individual member states may (but do not have to) allow GPs to market fund interests to retail investors, albeit potentially subject to stricter requirements than those applicable to marketing to institutional investors under the AIFMD.

<sup>3</sup> For the purposes of this briefing, references to the EU include the three EEA countries (Norway, Iceland and Liechtenstein), as well as the 27 EU member states.

## 4. TIMELINE



Period	What can you do as a non-European fund manager? Which regime applies?
<b>Up to transposition in 2013</b>	Both EU and non-EU GPs must comply with applicable securities laws in each EU member state where they market fund interests.
<b>Between 2013 and 2015</b>	<p>The marketing passport <b>will not be available for non-EU GPs</b> during this period. Non-EU GPs must continue to comply with applicable securities laws in each EU member state (many of which foresee <b>national placement regimes</b>) and must comply with the AIFMD transparency/ disclosure requirements and portfolio company provisions (see below) if the fund is marketed to EU-domiciled investors. In addition, cooperation agreements must be in place between the regulatory authority of the third country and the country in which the AIF is being marketed.</p> <p>Non-EU GPs may manage EU funds if permitted by <b>national law</b> in the relevant EU member state.</p> <p>In terms of direct investments in portfolio companies, non-EU GPs can continue to make investments throughout Europe. If the fund has been marketed to EU-domiciled investors, the GP must comply with the AIFMD portfolio company provisions.</p>

Period	What can you do as a non-European fund manager? Which regime applies?
<b>Between 2015 and 2018</b>	<p>As of the introduction of the passport (expected for 2015/2016), <b>non-EU GPs</b> will be able to opt in to the AIFMD <b>passport</b> for:</p> <ul style="list-style-type: none"> <li>• marketing funds to institutional investors in the EU; and/or</li> <li>• managing EU funds.</li> </ul> <p>Notwithstanding the foregoing, in certain member states only the passport will be available as of such date and national placement regimes will be abolished. To become passported, a non-EU GP <b>must become authorised by an EU regulator under the AIFMD and comply with the AIFMD in full.</b></p> <p>In most countries, <b>non-EU GPs may choose to continue to market fund interests in the EU under national placement regimes</b>, subject to some additional minimum AIFMD conditions (as described above).</p>
<b>After 2018</b>	<p>National placement regimes will, in principle, be withdrawn so that <b>non-EU GPs</b> will be able to market fund interests to EU-domiciled investors <b>only if</b> the GP is <b>authorised</b> under the AIFMD.</p>

## 5. CONDITIONS FOR PASSPORTING VS NATIONAL PLACEMENT REGIMES

- If you are a non-EU firm marketing/managing non-EU funds go to section A.
- If you are non-EU firm marketing/managing EU funds go to section B.

A. Non-EU firm marketing/managing non-EU funds	
National placement regimes	Passport (from 2015)
<p>Until 2018, EU member states may – but are not required to – permit non-EU GPs to market fund interests to investors domiciled or with their registered office in that jurisdiction.</p> <p>Those jurisdictions that offer national placement regimes may impose specific requirements for that jurisdiction. These may be procedural (e.g. a requirement to register with the regulator before marketing) or other substantive requirements.</p> <p>At a minimum, national placement regimes must require non-EU GPs to comply with the following provisions of the AIFMD:</p> <p><b>Chapter IV: Transparency requirements</b></p> <ul style="list-style-type: none"> <li>• The GP will need to <b>disclose to its investors</b> <i>inter alia</i> information about the fund's investment policy and performance, investor protection measures, leverage, liquidity and service providers (like the depositary). The disclosures must be made prior to investment and updated on any material change.</li> <li>• The GP will need to produce an <b>annual report</b> for each fund, containing audited financials, a narrative report on the fund's activities over the year, aggregated remuneration disclosures and details of any material changes to the investor disclosures.</li> <li>• The GP will be subject to <b>regulatory reporting obligations</b> in each member state in which funds are actively marketed according to a pro-forma reporting template. Frequency of reporting will depend on a number of factors such as the value of assets under management.</li> </ul>	<p>To benefit from the passport, the GP must become authorised by an EU regulator on the same basis as an EU firm, and must comply with the AIFMD in full.<sup>4</sup></p> <p>In addition, the following conditions must be met:</p> <ul style="list-style-type: none"> <li>• Appropriate cooperation arrangements are in place between the regulator(s) in the jurisdiction(s) where the GP and the fund are established and the regulator in the EU member state in which the GP has obtained authorisation.</li> <li>• The jurisdiction(s) where the GP and the fund are established must not be listed as a non-cooperative country or territory by the FATF on anti-money laundering and terrorist financing.</li> <li>• A tax information sharing agreement which fully complies with standards of the OECD Model Tax Convention is in place between the countries where the fund and the GP are established and the EU member state in which the GP has obtained authorisation, and between the country where the fund is established and all EU member states into which it is to be marketed.</li> <li>• Domestic law and regulation applicable to the GP must not prevent the relevant EU regulator from supervising the GP effectively.</li> <li>• The non-EU GP must appoint a legal representative in the member state in which it has obtained authorisation.</li> </ul>

<sup>4</sup> There is a very limited power to derogate if the GP can demonstrate that AIFMD compliance is incompatible with a mandatory legal requirement to which it is subject and that other requirement has the same regulatory purpose and offers the same level of investor protection as the AIFMD provision.

## A. Non-EU firm marketing/managing non-EU funds

### National placement regimes

#### Chapter V: Portfolio Company requirements<sup>5</sup>

- Notification of acquisitions. The GP must make a basic regulatory filing when the voting percentage held by the fund exceeds or falls below 10%, 20%, 30%, 50% or 75%.
- Disclosures on acquisition of control:<sup>6</sup> Additional disclosures to regulators, other shareholders and the portfolio company's board of directors and employees of information including the identity of the managers of the fund that has taken control, intentions with regard to the future business of the company and likely impact on employment and changes to conditions to employment.
- Where the fund has control, additional **annual report** information reviewing the last financial year, important post-year end events and likely future development.
- Anti-asset stripping: For the first two years after control has been acquired, the GP must not facilitate, support, instruct or vote in favour of any distribution to shareholders, capital reduction, share redemption or acquisition of own shares by the portfolio company that would (broadly speaking) result in a reduction in the company's net assets or be made otherwise than out of distributable profits.

National placement regimes will only be available in relation to those non-EU jurisdictions where:

- Appropriate cooperation arrangements for systemic risk oversight are in place between the regulator in each member state where the fund is marketed and the supervisory authorities of the jurisdiction(s) where the GP and the fund are established.
- The jurisdiction(s) where the GP and the fund are established must not be listed as a non-cooperative country or territory by the FATF on anti-money laundering and terrorist financing.

### Passport (from 2015)

The passport only entitles GPs to market fund interests to institutional investors. EU jurisdictions may impose additional restrictions on marketing to retail investors.

#### NOTE:

In most countries the use of the passport will be voluntary in the sense that until late 2018/early 2019, non-EU firms should have a choice between becoming authorised and benefitting from the passport on the one hand, and continuing to market under national placement regimes on the other hand. In some countries national regimes will be abolished and marketing will only be available under the passport.

If national placement regimes are terminated in 2018/19, authorisation will be the legal regime applicable for all firms that want to actively solicit EU investors.

<sup>5</sup> SME portfolio companies are excluded.

<sup>6</sup> Additional obligations are set in case of EU portfolio companies where AIFM takes control (50% of voting rights for unlisted companies, 30%-33% on a take-private).



## B. Non-EU firm marketing/managing EU funds

National placement regimes (until 2015)	Passport (from 2015)
<p>Until the introduction of the passport (expected in 2015/2016), a non-EU GP may manage an EU fund if permitted by national law in the relevant EU jurisdiction.</p> <p>Until the introduction of the passport, the fund may be marketed to EU investors under national placement regimes on the same basis as a non-EU fund (see Section A above) provided however that the EU fund must have appointed one or several persons assuming depositary functions. The passport will not be available until 2015.</p>	<p>A non-EU GP managing an EU fund <b>will be required to obtain authorisation under the AIFMD as soon as the regime for non-EU GPs becomes available</b> in 2015.<sup>7</sup> Once authorised, the GP must comply with the AIFMD in full.<sup>8</sup></p> <p>A GP authorised under AIFMD will be entitled to passport its fund management services (i.e. will not need to be separately licensed in each EU jurisdiction in which it manages funds), and will also benefit from the marketing passport.</p> <p>In addition, the following conditions must be fulfilled:</p> <ul style="list-style-type: none"> <li>• Appropriate cooperation arrangements are in place between the regulator in the country where the GP is established and the regulator in the EU member state in which the GP has obtained authorisation (and, if different, the regulator in the EU member state in which the fund is established).</li> <li>• The jurisdiction where the GP is established must not be listed as a non-cooperative country or territory by the FATF on anti-money laundering and terrorist financing.</li> <li>• A tax information sharing agreement which fully complies with standards of the OECD Model Tax Convention is in place between the country where the GP is established and the EU member state in which the GP has obtained authorisation.</li> <li>• Domestic law and regulation applicable to the GP must not prevent the relevant EU regulator from supervising the GP effectively.</li> <li>• The non-EU GP must appoint a legal representative in the member state in which it has obtained authorisation.</li> </ul>

<sup>7</sup> There are detailed rules that determine the EU jurisdiction in which the GP should seek authorisation.

<sup>8</sup> There is a very limited power to derogate if the GP can demonstrate that AIFMD compliance is incompatible with a mandatory legal requirement to which it is subject and that other requirement has the same regulatory purpose and offers the same level of investor protection as the AIFMD provision.

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## 6. NATIONAL PLACEMENT REGIMES

The AIFMD leaves flexibility to member states to impose stricter rules than the minimum prescribed by the AIFMD in respect of non-EU GPs marketing to investors on their territory.

In the majority of member states, national placement regimes should effectively be available but the content and conditions for using such regimes are not always fully determined yet.

Set out below is an overview of the status of implementation across EU member states:

Transposition completed	Transposition delayed
Austria	Belgium
Croatia	Bulgaria
Cyprus	Estonia
Czech Republic	Finland
Denmark	Greece
France (not fully)	Hungary
Germany	Italy
Ireland	Lithuania
Latvia	Poland
Luxembourg	Portugal
Malta	Romania
Netherlands	Slovenia
Slovak Republic	Spain
Sweden	
United Kingdom	

Finally, whether an AIFM will be able to continue to market under the national placement regimes will be conditional on the regulatory cooperation agreements being in place in due time with all relevant EU jurisdictions (as well as disclosure and anti-asset stripping rules).

### Cooperation agreements

ESMA has recently published a table showing the state of play of Memoranda of Understanding (MoUs) signed by EU national supervisors.

<http://www.esma.europa.eu/news/ESMA-publishes-signed-AIFMD-cooperation-agreements?t=326&o=home>

The cooperation agreements will facilitate the exchange of information, cross-border on-site visits and mutual assistance in the enforcement of respective supervisory laws. They cover third-country AIFMs that market AIFs in the EU and EU AIFMs that manage or market AIFs outside the EU. The agreements also cover cooperation in the cross-border supervision of depositaries and AIFMs' delegates.

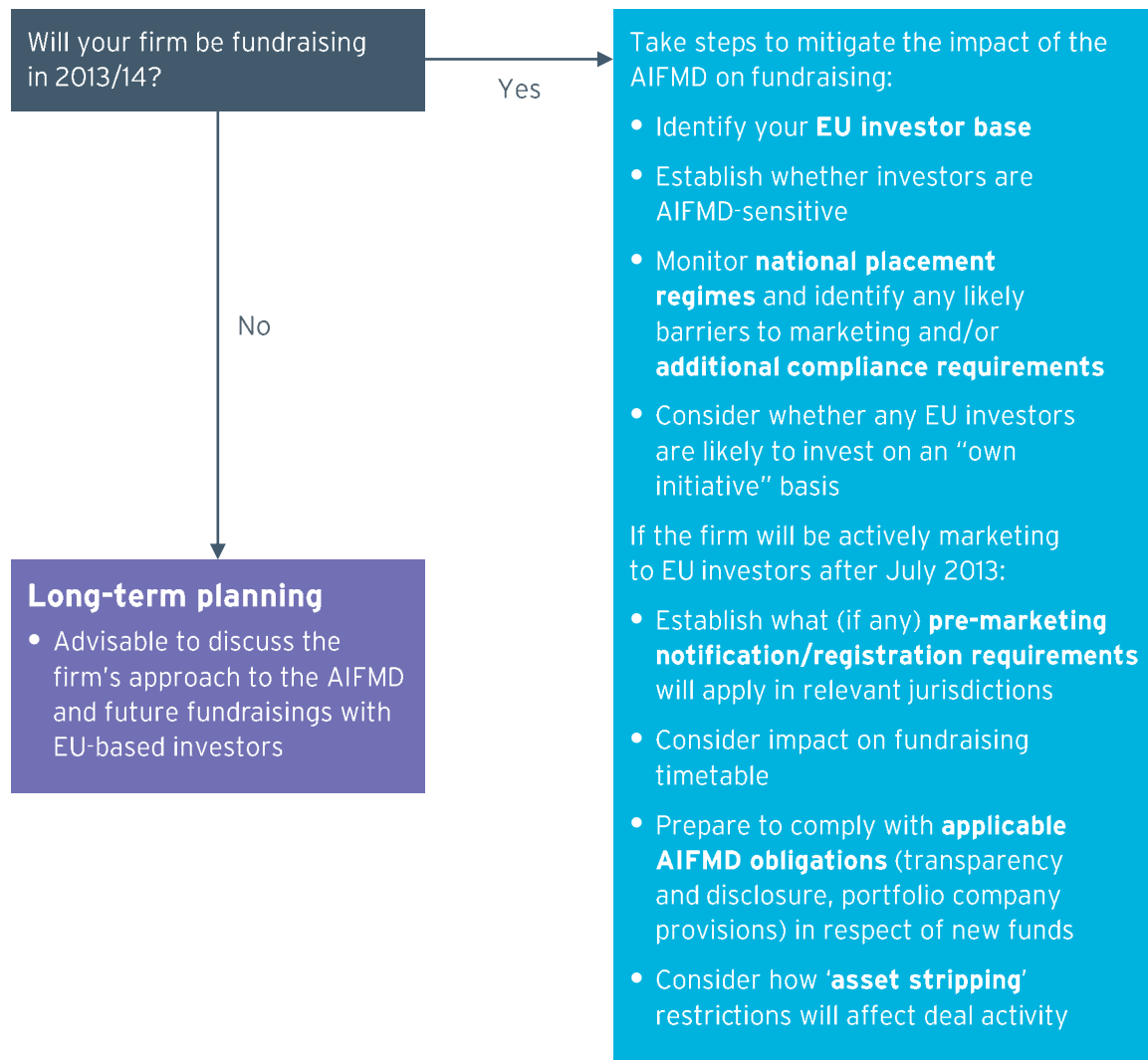
ESMA had negotiated the agreements on behalf of all 28 EU member state securities regulators as well as the authorities from Iceland, Liechtenstein and Norway. This has been done through a common Memorandum of Understanding (MoU), based on IOSCO's Principles Regarding Cross-Border Supervisory Cooperation.

It should be noted that, while ESMA negotiated the MoU centrally on behalf of the EU competent authorities, they are formally bilateral agreements and so each national competent authority, as the supervisor of AIFMs, must sign a separate agreement with the relevant third country.

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## 7. CONCLUSION: THINGS TO DO NOW AS A NON-EU GP

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