EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL ASSOCIATION

AIFMD Implementation **Fund Marketing**

A closer look at marketing under national placement rules across Europe

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EVCA PUBLIC AFFAIRS

Introduction

The EU Alternative Investment Fund Managers Directive (Directive 2011/61/EU or AIFMD) aims to create a harmonised regulatory framework for the management and **marketing** of private equity, venture capital and other alternative investment funds (AIFs) in the European Economic Area (comprising EU and EFTA members).

The AIFMD entered into force on 22 July 2011. From that date, EU member states had 24 months to transpose the Directive into national law. The deadline for this was **22 July 2013**, the date that the **AIFMD took effect in national law across the European Union**.

This means that, as a general position, an EEA-based AIFM will need to submit an application for authorisation under the AIFMD as soon as is practicable and no later than one year after the transposition date (i.e. by 22 July 2014). On 22 July 2014 it must comply in all other respects with the Directive's requirements.

In order to maintain a level playing field it is vital that the AIFMD is consistently implemented across the member states. **This memorandum focuses on one particular aspect of the AIFMD and aims to give an overview of how the AIFMD provisions in relation to marketing private equity funds under national placement rules have been implemented and will apply across the EU.**

Four different situations are examined:

- **SCENARIO A:** Marketing non-EEA AIFs managed by non-EEA AIFMs under Article 42[1] (no passport)
- **SCENARIO B**: Marketing non-EEA AIFs managed by an EEA AIFM under Article 36
- **SCENARIO C:** Marketing by sub-threshold AIFMs
- **SCENARIO D:** EEA AIFMs managing an EEA AIF or non-EEA AIF relying on Article 61(1)

It should be noted, however, that not all countries have finalised their national transposition measures[2]. As an evolving document, the emphasis in this edition is on those countries that have completed (or are close to completing) the transposition process: Austria, the Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Romania, Slovakia, Spain, Sweden and the United Kingdom. Switzerland is also covered for comparative reasons.

Note: This briefing has been prepared in cooperation with the EVCA Tax, Legal and Regulatory Committee and the Representative Group. It does not intend to give legal advice or be an exhaustive or definitive explanation of the AIFMD marketing provisions. Some of the information remains subject to change due to the on-going negotiations on (the interpretation of the) AIFMD transposition (rules) in the member states.

[1] Full extracts of the relevant Articles from the AIFMD are available in the Glossary.

[2] Countries where transposition is delayed until at least the end of 2013 include Belgium, Bulgaria, Estonia, Greece, Hungary, Lithuania, Poland, Portugal and Slovenia.

What's inside this document?

Structure of the paper

This paper describes the circumstances under which European and non-European private equity fund managers will be able to market their funds under national placement rules across the EU as of 22 July 2013.

The information is accessible in two different formats:

This memorandum concerns (only) the marketing of interests in a private equity fund with the following features.

Structure

Closed-ended, structured as a limited partnership or similar legal arrangement.

Strategy

A typical private equity strategy (such as venture, development or growth capital or leveraged buyout).

Fund vehicle

The main fund vehicle for external investors (as opposed to staff co-investment vehicles or friends-and-family vehicles).

Prospective investors

Only institutional investors that are 'professional investors' and specifically 'per se professional clients' within the meaning of Article 4(1)(ag)[3] and the Markets in Financial Instruments Directive (2004/39/EC) (MiFID) respectively. This definition is unlikely to include high net worth individuals or most family offices.

Regulatory categorisation of the fund

An Alternative Investment Fund within the meaning of Article 4(1)(a), which is (subject to Article 61(1)) fully within the scope of the Directive. This is as opposed to the fund being subject to any transitional provision such as those in Articles 61(3) (run-off) or 61(4) (limited life).

Marketing activity

To include a number of channels over a period of time: roadshows, meetings, phone calls and mailings initiated by the manager, including in-country either at hired event spaces (such as hotels) or at the offices of prospective investors, hosted and/or attended by the manager's staff. Investors may be visited more than once. Documents will include a private placement memorandum, fund constitutional documents, subscription documents and ancillary materials, such as Powerpoint presentations. All documents will be only in English. Other information will be available on request, which may include access to a data room of documents relating to the manager and its past funds. The manager does not intend to make any personal recommendations to prospective investors (within the meaning of MiFID). There will be no offer to the public.

[3] Unless otherwise specified, reference to 'Articles' are to Articles of the Level 1 Directive text.

Section one:

Marketing in the EU according to the four scenarios

1

In this section

Marketing in the EU according to the four scenarios

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in the respective jurisdictions and/or to investors established in those jurisdictions on or after 22 July 2013?**

Country	Details
Austria[4] 	Yes, such funds can be marketed if section 47 of the Alternative Investment Fund Manager Gesetz-AIFMG (Austrian Federal Gazette I No. 135/2013 ("AIFMG")) is complied with (notification requirement by the AIFM, marketing only possible after notification by the Financial Market authority; this may take up to four months).
The Czech Republic[5] 	The Czech Republic implemented the AIFMD via the Act on Investment Companies and Investment Funds (the "AICIF") which became effective on 19 August 2013. In general, foreign funds may now be marketed in the Czech Republic as follows: (a) EEA and non-EEA funds already marketed in the Czech Republic as at 19 August 2013 may be further marketed without restrictions until 22 July 2014 (transitional provision) (b) EEA and non-EEA funds to be marketed only after 19 August 2013 may be offered only after prior registration in the registry held by the Czech National Bank. Marketing also requires the fulfillment of certain conditions (existing memoranda of cooperation between regulators, no FATF blacklist etc.).

[4] The Austrian Alternative Investment Fund Manager Gesetz-AIFMG has only been implemented very recently and there is so far no case law and very little practical experience in interpretation and application of this legal act. The statements in this report are based on a first reading of the law and preliminary general discussions with the Austrian authorities. Given that the requirements to comply with the AIFMG depend on the specifics of the fund structure and the activities conducted by the AIFM and the AIF, it is highly recommended that legal advice is sought prior to engaging in any marketing activity in Austria.

[5] The AIFMD has been recently implemented by new legislation combining UCITS, AIFMD and local regimes into one act. As a result, some issues remain unclear, including conditions for offering foreign funds in the Czech Republic.

Country	Details
The Czech Republic 	However, the regime of private placement of funds managed by non-EEA AIFMs is not yet clear. The above interpretation differs from official statements from the Ministry of Finance. The Czech Venture Capital Association is seeking a meeting with the Ministry of Finance (the author of the legislation) and the Czech National Bank (the regulator) to clarify this issue. We assume that the issue will be clarified by the end of November 2013.
Denmark 	Yes, it is possible to market subject to conditions.
Finland[6] 	Yes, it will be possible, and subject to the conditions laid down in the act implementing the Directive (see Question 7) as soon as it becomes effective. A lighter transitional period is also proposed: according to the draft AIFM law, marketing of non-EU AIFs by non-EU AIFMs to professional investors in Finland will be possible until 22 July 2014 without the restrictions otherwise provided by the law, provided that the marketing has been initiated before the AIFM law entered into force and a notification to the FIN-FSA has been made within a month after the entering into force of the AIFM law.
France[7] 	The French transposition texts are not clear in this respect. We are still waiting for the French regulator to provide guidance on how to interpret the new provisions. The regime for the marketing of AIFs by non-EU AIFMs without a passport in these circumstances is set out in Articles L. 214-24-1 I and D. 214-32 of the CMF (French *Code Monétaire et Financier*). Article L. 214-24-1 I of the CMF requires AIFMs to notify the *Autorité des Marchés Financiers* (AMF) before marketing any AIF in France. However, details of the required notification (including timing, format and content) will not be available until the publication of the outstanding parts of the amended RG (*réglement general*). In addition, Article D. 214-32 of the CMF requires compliance with the following conditions:

[6] This information is based on a draft law. The AIFMD transposition law may only be in a final form and effective as late as February 2014.

[7] The situation in France remains uncertain at this stage. The legislative process has not been fully completed and not all transposition measures have been published to date (the remaining provisions are expected in November 2013). Therefore, further guidance and/or modification of the rules should be expected.

Country	Details
France[7] 	• The AIFM must comply with the CMF provisions pertaining to AIFs and the French laws and regulations applicable to portfolio management companies (the scope of which is yet to be defined in the context of the AIFMD), with the exception of those provisions pertaining to custodians. It must, however, ensure that the tasks listed under Article L. 214-24-8 of the CMF are performed by the custodian designated by the management company. These tasks relate to cash flow monitoring, custody of assets and the verification of the compliance of certain operations (such as, for example, the issue, redemption and valuation of shares) with the laws and regulations applicable to the AIF, as well as with its articles of association and prospectus. The AIFM must also inform the AMF of the identity of the custodian. • Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards need to be in place between the AMF and the supervisory authorities of the relevant third countries, if relevant. • The third country of the AIFM and, if applicable, of the AIF must not be listed as non-cooperative by the Financial Action Task Force. • If the AIF is open-ended it will also need to be authorised by the AMF. The conditions for being granted an authorisation in Article D.214-32 of the CMF, as amended to implement the AIFMD, correspond to those of Article D. 214-1 of the pre-AIFMD CMF (and which, as far as we are aware, no open-ended funds other than certain UCITS-aligned Swiss funds succeeded in satisfying).
Germany 	Yes, subject to certain conditions.
Ireland 	Under Regulation 43 of the Irish AIFMD Regulations (referred to in the response to Question 3 below), marketing of both EEA and non-EEA (pre and post 22 January 2013) AIFs to professional investors in Ireland will be permitted. Written notification must be given to the Central Bank of Ireland (the "Central Bank") before marketing to professional investors in Ireland. Such a notification must include the name and identity of the jurisdiction of domicile of both the AIFM and the AIF. For AIFMs which were marketing in Ireland before 22 July 2013, compliance with the Irish AIFMD Regulations is required on a 'best efforts' basis and this notification must be supplied before 22 July 2014, at the latest. Regulation 43 also provides that where the Central Bank considers it necessary for the proper and orderly regulation and supervision of AIFMs, it may impose on the AIFM conditions or requirements in addition to those set out in Article 42.

Country	Details
Italy 	Under the Draft Transposition Decree, starting from the date on which the European passport for non-EU AIFMs comes into force (2015): (a) non-EU AIFMs should be authorised in Italy by the *Banca d'Italia*, if Italy is the "EU member state of reference" pursuant to the AIFMD. A regulation to be issued by the *Banca d'Italia* will set forth the conditions and procedure for such authorisation and the conditions the non-EU AIFMs authorised in Italy should comply with in order to operate in other EU member states; (b) non-EU AIFMs authorised in another EU member state pursuant to the AIFMD may market EU AIFs and non-EU AIFs in Italy to professional investors pursuant to a notification made to Consob by the home member state regulator in the same way as for the Article 32 notification; (c) should a person hold no licence in any EEA State, it will no longer be possible to market interests in a fund (whereas under the current section 42.5 of the Financial Consolidated Act of 1998 (FCA) it is possible to apply for a marketing authorisation to the *Banca d'Italia*). In light of these draft provisions, some tentative conclusions can be drawn: (a) once the European passport for non-EU AIFMs comes into force, it would be the sole avenue for non-EU AIFMs to access the Italian market (i.e. there would be no dual marketing system after 2015); (b) until the entry into force of the European passport for non-EU AIFMs, the current authorisation procedure provided for by the *Banca d'Italia* would continue to apply to non-EU AIFMs, although we note that adjustments to such procedure may be needed in order to ensure compliance with the requirements of Article 42 of the AIFMD (Conditions for the marketing in member states without a passport of AIFs managed by a non-EU AIFM). However, as the Draft Transposition Decree is not yet approved, it is impossible to give an exact answer.
Latvia 	Latvia has transposed the Directive into a new AIFM law which came into force as of 7 August 2013. When transposing the Directive Latvia decided not to exercise the discretion provided in Article 42 of the Directive. Therefore, marketing of non-EEA AIFs managed by non-EEA AIFMs is not allowed in Latvia.
Luxembourg 	Yes, marketing under the existing Luxembourg placement rules will continue to be permitted until 22 July 2014 and will not be affected by the Law of 12 July 2013 relating to alternative investment fund managers (the 2013 AIFM Law).

Country	Details
The Netherlands 	Yes
Romania[8] 	Based on the principle that Norm 13/2013 shall prospectively apply to EU AIFMs distributing EU AIFs towards professional investors, it may be construed that the distribution of non-EU AIFs by non-EU AIFMs should not fall within the scope of Norm 13/2013. Distribution of such funds should remain governed by Art. 176 Regulation 15/2004 and Art. 10 CNVM Decision 9/2010. Further, the funds must be registered with the FSA and are subject to the following conditions: • the funds must invest exclusively in certain types of asset expressly provided by law; • they must be authorised, regulated and supervised by a competent authority; • the funds must be subject to a prudential regulation and to an effective supervision equivalent to the provisions of the national regulation; • their assets must be deposited with a depositary; • a financial institution, subject to prudential supervision, established in Romania, must be assigned as a contact point with the investors; • the existence of a cooperation agreement with the competent authority from the origin state of the funds; • the establishment of a branch in Romania.

[8] Please see the Note in the Romanian country report on page 98.

Country	Details
Slovakia 	Provided that a non-European alternative investment fund is not registered as an AIF in any member state of the European Union and that a non-European alternative investment fund does not have its registered seat or headquarters in any member state of the European Union, it is considered as a non-European Alternative Investment Fund (non-EU AIF) according to the Slovak Act No. 203/2011 Coll. on Collective Investments (the "Collective Investment Act") which implemented Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (the AIFMD). Provided that non-EU AIFs are managed by managers which have their registered seat outside of the European Union and which have been granted authorisation by the local regulator in the country of their residency to act as management companies and which have not been granted any licence or any other form of permission in the Slovak Republic (non-EU managers), such managers can market non-EU AIFs in the Slovak Republic only if the following conditions are fulfilled: • in the course of marketing non-EU AIFs in the Slovak Republic, the non-EU managers should meet various conditions stipulated by the Collective Investment Act, namely: – making available an annual report for each non-EU AIF which is marketed in the Slovak Republic; – making available to investors certain information before they invest, as well as notifying them of any material changes to that information; – regular reporting by the non-EU managers to the National Bank of Slovakia, for example reporting in relation to the percentage of the non-EU AIFs' assets which are subject to special arrangements arising from their illiquid nature and also reporting in relation to the main categories of assets in which the non-EU AIFs invest; – where the non-EU AIFs acquire control over an unlisted company, the non-EU managers must make a number of disclosures to that company, its shareholders and also to the National Bank of Slovakia. • the local regulator in the country of residency of the non-EU managers has signed a cooperation agreement with the National Bank of Slovakia in line with international standards. • the country of residency of the non-EU managers is not listed as a non-cooperative country by the Financial Action Task Force.

Country	Details
Spain 	It is not clear whether non-EEA AIFs managed by non-EEA AIFMs without a passport will be regulated under the legislation implementing Directive 2011/61/EU. The implementing law may require evidence of compliance with the following requirements to be provided to the Spanish Securities Market Commission ("CNMV"): (a) That Spanish legislation regulates the same category of AIF used by the non-EEA AIFM and that the non-EEA AIF is subject to a specific norm in its home State that protects the interests of unitholders in the same way as Spanish legislation, in this area; (b) A favourable report of the home State authority responsible for monitoring and inspecting the non-EEA AIF, with respect to the development of the activities of the non-EEA AIFM; (c) That adequate arrangements are in place for cooperation between the competent authorities of the home member state of the non-EEA AIFM and the supervisory authorities of the third country in which the non-EEA AIF is established; (d) That the country in which the non-EEA AIFM is established, or if applicable, the non-EEA AIF, is not on the list of non-cooperative countries and territories set by the Financial Action Task Force on Money Laundering. Furthermore, the following information may have to be provided and registered with the CNMV: (a) identification of the non-EEA AIF that the non-EEA AIFM intends to commercialise, and the place where it is established; (b) mechanisms and methods of marketing shares or units in Spain, and when appropriate, the classes or series of shares or units; (c) management regulation of the non-EEA AIF or documents of incorporation; (d) prospectus of the non-EEA AIF or equivalent document and the latest annual report; (e) identification of the depositary of the non-EEA AIF; (f) description of the non-EEA AIF, or any other information on it, available to the investors; (g) information about the place where the main AIF is located if the non-EEA AIF to be marketed is a subordinated entity; (h) when applicable, information on the measures taken to prevent the marketing of the non-EEA AIF to retail investors; (i) registration with and delivery to the CNMV of the documents that certify the subjection of the non-EEA AIF and the stocks, shares or equity securities or assets to the applicable legal regime.

Country	Details
Spain 	For the shares or units of the non-EEA AIF to be marketed in Spain, the non-EEA AIFM must be expressly authorised for such purpose by the CNMV and registered in the CNMV records. The authorisation of a non-EEA AIFM or a non-EEA AIF may be refused (i) for prudential reasons, (ii) if Spanish AIFs or their Spanish AIFMs are not given equal treatment in its home country, (iii) for not ensuring compliance with the management standards and discipline of the Spanish securities markets, (iv) if the protection of investors resident in Spain is not sufficiently guaranteed and (v) in case of disturbances in the conditions of competition between the non-EEA AIF and AIFs authorised in Spain. Once authorised and registered in the CNMV register, the non-EEA AIF and/or the non-EEA AIFM must facilitate the shareholders and unitholders of the non-EEA AIF with the exercise of all their rights generally, and in particular with respect to payments, the acquisition by the non-EEA AIF of their shares, and the dissemination of the information to be supplied to shareholders and unitholders resident in Spain. *However, please keep in mind that these requirements may yet be modified when the implementing legislation is approved.*
Sweden 	Yes, if the AIFM qualifies for the transitional provisions it may continue to market AIFs subject to the previous legal regime. If the AIFM does not qualify for the transitional provisions marketing AIFs in Sweden will require authorisation.
The UK 	Yes, it is possible to market a fund in these circumstances, subject to certain conditions, which are outlined in further detail below.

2. Has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in the respective jurisdictions. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

Country	Details
Austria 	Marketing is to be interpreted in line with what constitutes a 'public offer' pursuant to section 1 (1) lit.1 Capital Markets Act. For purposes of the AIFMG it also constitutes private placements. Marketing would also include soft marketing and, in our view, pre-marketing if this occurs in connection with the offer of securities.

Country	Details
The Czech Republic 	The Czech Ministry of Finance has published several short guidelines in which it states that marketing includes, among others, private placement as well as public offering. The AICIF states that investing at the initiative of the investor is not considered to be marketing. The Czech Securities Commission (now replaced by the Czech National Bank) issued guidance on the meaning of public marketing under the Act on Collective Investment (replaced by the AICIF) in the past. Under this guidance 'public marketing' is any active provision or availability of information (irrespective of its form) to the public which is sufficient for a potential investor to decide on the investment. We are of the opinion that this rule should also apply to marketing under the AICIF (i.e. without the 'public' element).
Denmark 	No. According to the Danish FSA, 'marketing' includes situations where the AIF will only be established if sufficient investments are subscribed. The Danish FSA also considers marketing towards a single investor as 'marketing'.
Finland 	Yes, in the governmental bill (which is significant in respect of interpreting the act implementing the Directive) 'marketing' has been described as the direct or indirect offering of units in the AIF to investors and carried out on the initiative of the AIFM (or on its behalf). For an activity to be qualified as 'marketing' it shall always include the offering of units, the purpose of which is to conclude a binding contract/commitment. Therefore, 'soft circling', road shows or 'reverse solicitation' are not considered as marketing.
France 	We are still awaiting the position of the French regulator concerning private placement. Reverse solicitation is allowed but not explicitly foreseen in the legislation (see Question 10).
Germany 	BaFin has recently specified that it understands 'marketing' to be the act of making available fully negotiated fund documents to investors in Germany. BaFin follows this reasoning with respect to cases where the Fund is not yet set up. However, we believe that this should also apply if the Fund has already had a Closing. Marketing therefore does not commence before the PPM or LPA is available in almost final form from the perspective of the AIFM. Once the fund documents are in almost final form, marketing would be: • sending the fund documents to the investor; or • sending the investor the PPM or the LPA or a presentation/flyer on the fund if the subscription documents are available upon the investor's request.
Ireland 	The Irish AIFMD Regulations adopt the AIFMD Article 4.1(x) definition of 'marketing'. There is currently no regulatory guidance available on this topic nor any distinction between the concepts referred to in Question 2 above.

Country	Details
Italy 	No, there is no general definition of 'marketing' that could be valid for all types and number of investors. However, Article 1(1)(t) of the Financial Consolidated Act (FCA), defines an "offering to the public of financial products" as any communication to persons in any form or by any means, presenting sufficient information on conditions applying to these financial products, including placement through authorised intermediaries. We believe it would be useful and appropriate to introduce the term of 'marketing' in the definitions referred to in Article 1 of the FCA. This view has been expressed in the responses to the public consultation on the transposition of the AIFMD, launched by the Ministry of Economy and Finance. We are now waiting for a response.
Latvia 	Not applicable.
Luxembourg 	The 2013 AIFM Law defines the concept of marketing 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 registered office in the European Union". There is currently no regulatory guidance as to what constitutes pre-marketing, soft marketing or reverse solicitation in Luxembourg.
The Netherlands 	No extra definition of marketing has been given. In the Netherlands, there was already a definition of marketing (offering) in the Law on Financial Supervision (Wft) that regulated retail financial products. With the implementation of the AIFMD into this same law, this definition is now used with some very minor adjustments. The unofficial translation is: *Part 1.1.1. Definitions* *Section 1:1* *In this Act and the provisions ensuing from this Act, unless otherwise stipulated, the following terms shall have the following meaning:* *to offer:* *a. in the pursuit of a profession or business to make a sufficiently specific proposal, either directly or indirectly, to act as the other party in a contract with a consumer regarding a financial product that is not a financial instrument or insurance, or to enter into, manage or perform such a contract in the pursuit of a profession or business;*

Country	Details
The Netherlands 	*b. in the pursuit of a profession or business to make a sufficiently specific proposal, either directly or indirectly, to act as the other party in a contract regarding an insurance, or to enter into, manage or perform such a contract in the pursuit of a profession or business; or* *c. to make a sufficiently specific proposal, either directly or indirectly, to act as the other party in a contract regarding units in a collective investment scheme, or to request or acquire, either directly or indirectly, funds or other goods from a client in order to hold units in a collective investment scheme;* An unofficial translation of the full Act on Financial Supervision can be found here: http://www.rijksoverheid.nl/documenten-en-publicaties/brieven/2009/11/16/engelse-vertaling-van-de-wft.html
Romania 	1. (As opposed to the Draft Transposition Norm – see 2 below), the current legal framework (i.e. Art. 176 Regulation 15/2004, Art. 10 Decision 9/2010) does not mention a definition of 'marketing'. Certain types of marketing methods are prohibited, e.g.: • Unsolicited calls (based on Decision 9/2010); • Commercial communications through the use of automatic calling and communication systems that do not require human intervention, by fax or by electronic mail or by any other method that uses publicly available electronic communications services, unless the subscriber or user concerned has given their prior express consent to receive such communications. This rule has an exception, i.e. a person or an entity directly obtaining the e-mail address of a client, while selling goods or providing services, may use that address for the purpose of commercial communication relating to the goods which they market, subject to clearly and expressly providing the customers with the possibility to resist through a simple and free method to such use, not only when obtaining the e-mail address, but also with the occasion of each message in case the customer has not initially opposed (Art. 12 Law 506/2004); • It can be considered that marketing methods based on those prohibited shall be prohibited as well (e.g. flyers, circulating documents marked "draft" or meetings fixed based on unsolicited calls etc.); • Data protection provisions may need to be observed as well (if personal data are used). 2. The definition offered by the Draft Transposition Norm of the term 'marketing' overlaps with the definition offered to this concept by the AIFMD. Thus, the Draft Transposition Norm includes direct or indirect offering and placement in 'marketing'.

Country	Details
Slovakia 	According to the Collective Investment Act, marketing shall be understood as the "direct or indirect offering of units or shares of collective investment undertakings or their placing at the initiative or on behalf of a manager of such collective investment undertaking with investors with their permanent address or registered seat situated in a member state of the European Union". Apart from the implementation of the word 'marketing', there has not been any other elaboration of this term in the Slovak law.
Spain 	Currently, under applicable Spanish law, public marketing (*comercialización*) means gaining clients by means of carrying out advertising activities (*actividad publicitaria*) so as to get contributions from such clients to the collective investment scheme (whether in the form of funds, rights or assets). Advertising activities in connection with collective investment schemes means any form of communication addressed to the public in general intended to promote (whether directly or indirectly through third parties) the subscription/acquisition of financial instruments. Likewise, advertising activities shall be understood as those communications intended to attract the attention of the public about the management or marketing of collective investment schemes even if the communication does not refer individually to a specific institution. The regulation sets out a non-exhaustive list of situations which constitute such an advertisement (e.g. telephone calls initiated by the marketer, visits to the investors' home, personalised mailings and e-mails or any other communications by computer, which form part of the marketing/promotion/diffusion campaign). According to the draft implementing law, the marketing of an AIF shall be understood as the acquisition of clients through an advertising activity on behalf of the AIF or any entity acting on its behalf or on behalf of one of its traders, or customers, for their contribution to the AIF funds, assets or rights. For this purpose, advertising activity means any form of communication addressed to potential investors in order to promote, directly or through third parties acting on behalf of the AIF or the management company of AIF, the subscription or acquisition of units/shares of the AIF. In any case, there is an advertising activity when the means used to address the public are either telephone calls initiated by the AIF or its management company, home visits, personal letters, e-mail or any electronic means, which are part of a publicity campaign, marketing or promotion.

Country	Details
Spain 	The campaign will be deemed to be carried out within Spain's national territory if it is addressed to investors resident in Spain. In the case of e-mail or any electronic means, it shall be presumed that the offer is addressed to investors resident in Spain when the AIF or its management company, or any person acting on their behalf online, propose the purchase or subscription of shares or facilitate to the Spanish residents the information needed to assess the features of the issue or offer and adhere to it. However, Spain has not yet passed the laws and regulations implementing the Directive 2011/61/EU or applying the Capital Requirements Regulation (No. 575/2013), so it is not sure whether these definitions will remain.
Sweden 	The concept of marketing under the Alternative Investment Fund Managers Act ("AIFMA") implementing the Directive is broad, covering direct and indirect offerings and placements to investors domiciled or with their registered office within the EEA. This includes all sale promoting actions, i.e. advertising, telemarketing, brochures, flyers, e-mail, Internet and investor events. Notably, the preparatory works to the AIFMA express the view that marketing is not possible until the AIF actually exists. Activities that are conducted before the fund vehicle meets the criteria of an AIF should therefore not be considered as marketing for the purpose of the Directive. In relation to launching a private equity fund, it is argued that the fund vehicle would meet the definition of an AIF at the earliest by 'first closing' since there is typically nothing to be classified as an AIF nor any assets to be managed before a 'first closing'. Investor contacts or similar activities before a 'first closing' should therefore typically not be viewed as 'marketing'.
The UK 	Yes. The UK Financial Conduct Authority (FCA) has published guidance on the definition of 'marketing' in the context of the AIFMD in chapter 8 of its Perimeter Guidance Manual ("PERG"). The specific section on AIFMD marketing in PERG 8.37 is available **here**. In the FCA's view, an offering or placement takes place when a person seeks to raise capital by making an interest in an AIF available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment. An 'offer' is to the public, whereas a 'placement' is to a select group of potential investors. In the FCA's opinion, secondary trading is not caught within the definition of either an 'offer' or a 'placement' because it does not involve capital raising in that AIF, except where there is an indirect offering or placement (e.g. distribution via a chain of intermediaries). Communication in relation to draft documentation is generally not caught, but this should not be a means to avoidance. In a private equity context, this usually means circulating the final form PPM plus limited partnership agreement plus subscription document. Pre- or soft marketing is not 'marketing' but is regulated under the UK domestic financial promotion regime.

3. What is the current best estimate of when the Directive will be transposed into national law?

If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

Country	Details
Austria 	The directive has been transposed into national law through the Alternative Investment Fund Manager Gesetz-AIFMG (Austrian Federal Gazette I No. 135/2013 ("AIFMG")).
The Czech Republic 	The Directive was implemented on 19 August 2013 by way of adoption of a new act, the AICIF.
Denmark 	The Directive was implemented by law effective on 22 July 2013.
Finland 	Currently, the best estimate is in December 2013. Provided that the marketing activity will not continue after the entry into force of the new AIFM Law, our advice would be to continue as if the domestic law was unchanged. If marketing continues thereafter, transitional provisions should be evaluated (see Question 5).
France 	The AIFMD was transposed into French law by an ordinance and a decree published respectively on 27 and 30 July 2013, and amending the French *code monétaire et financier* ("CMF"). However, the AIFMD will be fully implemented only when the French regulations, the *règlement général* ("RG") of the *Autorité des Marchés Financiers* ("AMF"), the French regulator, have also been amended. Not all the amendments to the RG were published on 13 August; the remainder are expected in November 2013.
Germany 	The Directive was implemented into German law on 22 July 2013.
Ireland 	The AIFMD was transposed into Irish law in July 2013 pursuant to the European Union (Alternative Investment Fund Managers) Regulations 2013 (S.I. No. 257 of 2013) (the "Irish AIFMD Regulations").

Country	Details
Italy 	On 3 July 2013, the Italian Government (Treasury Department of the Ministry of Economy and Finance) launched a public consultation on the transposition of the AIFMD and the application of the EuVECA Regulation ("Draft Transposition Decree"). The consultation, which proposed amendments to the Italian Financial Consolidated Act, ended on 26 July 2013. The Draft Transposition Decree is said to be due to be approved by the end of 2013. On 26 July 2013 Consob and the *Banca d'Italia* issued a "Joint Resolution", introducing transposition measures, particularly as regards marketing in Italy of both EU and non-EU AIFs, which allow for an initial and partial implementation of the AIFMD (until the Draft Transposition Decree is approved). On 20 August 2013, the European Delegation Law was approved. This law provides the Italian Government with delegated powers to implement the AIFMD and to modify the financial rules according to the AIFMD. As soon as the transposition measures become law, the *Banca d'Italia* and Consob will be delegated to issue the appropriate regulations and the old regulations will apply until the new ones come into force. The 2013 *Banca d'Italia* and Consob "Joint Resolution" grants grandfathering rights to non-Italian funds authorised to be marketed in Italy as of 22 July 2013, until the new rules apply.
Latvia 	Not applicable.
Luxembourg 	The Directive was transposed into Luxembourg law on 12 July 2013.
The Netherlands 	The Directive was transposed into Dutch law on 25 June 2013.
Romania 	There is a draft norm for the transposition of the AIFMD which is currently debated by the issuing authorities ("Draft Transposition Norm"). The period of time required to complete this procedure cannot currently be determined. See "Note" on page 98.
Slovakia 	The AIFMD has already been implemented into national law through the Collective Investment Act, effective as of 22 July 2013.
Spain 	It is expected that the implementing legislation will be passed by the end of the year; this is not considered a high priority currently, but the process may be accelerated following the implementation of the AIFMD in France.

Country	Details
Sweden 	The AIFMA implementing the Directive entered into force on 22 July 2013.
The UK 	The Directive was transposed into national law on 16 July 2013 through the Alternative Investment Fund Managers Regulations 2013 (SI 2013/1773), which are available **here**. The Regulations came into force on 22 July 2013. The Alternative Investment Fund Managers (Amendment) Regulations 2013 (SI 2013/1797), which are available **here**, were made on 17 July 2013. These will implement provisions in the Directive which do not take effect until the European Commission specifies a date in a delegated act. Most of the provisions in the Amendment Regulations will therefore come into effect when the corresponding Directive provisions do so.

4. Under the domestic implementing measures, is the Directive relevant to marketing to investors established in the respective jurisdictions (within the meaning of Article 4(1)(j)) but who are not physically located in those jurisdictions at the time the marketing takes place[9]?

Country	Details
Austria 	Such persons would be covered if they have their domicile (*Wohnsitz*) or corporate seat (*Sitz*) in the European Union.
The Czech Republic 	No. Although the AICIF recognises both marketing in the Czech Republic and outside the Czech Republic, it does not specifically recognise marketing to a Czech entity physically located abroad.
Denmark 	No. The Danish law implementing the Directive restricts marketing to "investors in Denmark".
Finland 	The draft Finnish law refers only to marketing "in Finland" (without defining this in more detail).
France 	The situation is unclear at the moment. We are awaiting clarification from the French regulator and/or the French authorities.

[9] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

Country	Details
Germany 	The territorial scope of the German implementation is not yet clear. The current position of BaFin seems to be that German marketing rules only apply if and to the extent the marketing has a sufficient connection to Germany.
Ireland 	The Irish AIFMD Regulation transposing Article 42 of the AIFMD relates to marketing to professional investors in Ireland and the definition of 'marketing' refers to the domicile or registered office of the investor.
Italy 	No, it is not. The implementing measures seem to restrict marketing in Italy. Under the Draft Transposition Decree, the *Banca d'Italia*, in agreement with Consob, shall authorise marketing of AIFs managed in the EU, when Italy is the reference State. However, as the Draft Transposition Decree is yet to be approved, it is impossible to give an exact answer.
Latvia 	Not applicable.
Luxembourg 	The 2013 AIFM Law refers to marketing activities carried out in the Grand Duchy of Luxembourg. The definition of marketing further refers to the domicile of investors.
The Netherlands 	The domestic implementation of the AIFMD is relevant to investors not having a presence in the Netherlands. The implementation keeps national private placement in place which ensures continued marketing for below-threshold funds as long as the value of offerings exceeds EUR 100,000 or is to less than 150 people. For above-threshold funds, managers will have to apply for the passport.
Romania 	Art. 46 of the Draft Transposition Norm allows non-EU AIFMs to market AIFs to professional investors from Romania, even if they do not have a passport subject to certain conditions. There is no express definition of "professional investor from Romania"; there is, however, another norm (i.e. the definition of 'marketing') which refers to entities with their headquarters in Romania and individuals domiciled in Romania. So, it appears there is no distinction depending on the physical location of the investor, the only criteria being that of 'identity'. This article of the Transposition Norm appears to contradict Article 42 AIFMD, the latter establishing that marketing may be performed exclusively on the territory of the EU member state.
Slovakia 	No, marketing of alternative investment funds as such is not affected by the AIFMD in general.

Country	Details
Spain 	The draft implementing legislation seems to refer only to marketing activities addressed to residents in Spain.
Sweden 	Provided that all marketing activities take place outside of Sweden, the domicile of the investor should not be decisive. However, given the wide scope of the marketing definition, the actual activities allowed are very limited since e-mail invitations (depending on content) and telephone contacts could be considered as marketing.
The UK 	No. The UK AIFM Regulations restrict marketing "in the United Kingdom". In PERG 8.37.10, the FCA states that in addition to the requirement that the marketing must take place in the UK, the relevant investor must be domiciled in an EEA State or must have its registered office in an EEA State in order for the marketing to be caught. However, the FCA has declined to give further guidance on the definition of "domicile" for these purposes, other than to state that it must be "construed in line with its meaning under EU law".

5. Once the Directive is in effect in the respective jurisdictions, in relation to 'marketing' (as that term is understood in those jurisdictions) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Country	Details
Austria 	The wording of the AIFMG suggests that a non-EEA manager active prior to 22 July 2013 may continue to market all funds, provided that they take all necessary measures to comply with the AIFMG and file an application for approval (*Antrag auf Zulassung*) by 21 July 2014.
The Czech Republic 	See Question 1. The deadline for AIFMs being fully compliant with the AICIF is 22 July 2014.
Denmark 	Yes. Despite the fact that the Danish law implementing the Directive does not specifically extend the transitional provisions to non-EEA managers, the Danish FSA has confirmed that the transitional provision that allows managers who perform activities covered by the law before 22 July 2013 to delay compliance with the law until 21 July 2014, also applies to a non-EEA manager of a non-EEA fund.

Country	Details
Finland 	Yes, a non-EEA manager of a non-EEA fund can rely on certain transitional provisions. Provided that the marketing of an AIF has been commenced before the act coming into effect, the AIFM may continue marketing that AIF until 22 July 2014 subject to a notification to the competent authority within one month after the act has become effective. To benefit from the transitional provisions, the actions taken by the AIFM must be qualified as 'marketing' (see answer to Question 2). Such notification should provide a clearance that the AIFM complies with (i) the general principles such as 'good practice' and equal treatment of investors, (ii) good securities markets practice; and (iii) the prohibition to give false or misleading information.
France 	The transposition text does not include a grandfathering clause for the implementation and application of the Article 42 requirements.
Germany 	Yes, a non-EEA manager may rely on grandfathering provisions, so long as marketing of the relevant AIF in Germany began pre 22 July 2013. Marketing for this purpose means to have distributed at least a private placement memorandum in its almost final form to a prospective German investor. The grandfathering regime applies only to the particular AIF that has been marketed in Germany prior to 22 July 2013. In respect of a non-EEA AIF manager's fund that falls within the grandfathering regime, it is expected that there will be no on-going AIFMD disclosure obligations in respect of such fund, provided that it has admitted all its German investors by 21 July 2014.
Ireland 	See response to Question 1 above.
Italy 	The Draft Transposition Decree is yet to be approved so it is impossible to give an exact answer. At this stage, the Draft does not include any grandfathering provisions, but firms will be granted a one-year transition period to comply with the new rules.
Latvia 	Not applicable.
Luxembourg 	Yes. Marketing under the existing Luxembourg private placement rules will continue to be permitted until 22 July 2014 and during this time will not be affected by the AIFM Law.

Country	Details
The Netherlands 	Funds below the threshold can use national private placement (subject to the EUR 100,000/150 persons rule). Passive marketing, of which the definition is very unclear, may be permitted for above-threshold funds. Currently we are investigating where the Netherlands stands regarding the AIFMD cooperation agreements with non-EU countries and territories. For grandfathering, funds must meet the following criteria: • No additional investments are done after 22 July 2013. Maintenance investments are not considered as additional investments, all others are. • Marketing for the fund closed before 22 July 2011 and the fund is expected to terminate before 22 July 2016 (not considering extensions).
Romania 	Under the current applicable law, there is no such provision regulating transitional situations, given that the distribution of non-EU AIFs towards professional investors is still regulated by the domestic law, prior to any measures of implementation of the AIFMD. The Draft Transposition Norm regulates such transitional situations, implementing Article 61(1) of the AIFMD, but only concerning Romanian AIFMs and AIFs.
Slovakia 	According to the Collective Investment Act, there is no transitional provision which would be applicable to the case at hand. A transitional period of one year (counted from 22 July 2013) is applicable for non-EU AIFs managed by non-EU managers only in case it wishes to distribute the non-EU AIFs via a public offer. It seems (to us) that Article 61 (1) of the AIFMD has been implemented into the Collective Investment Act incorrectly as it applies only to Slovak AIFs. Therefore, for the purpose of ensuring that there is conformity with the EU law, interpretation of the transitional provisions of the Collective Investment Act could be in accordance with the AIFMD.
Spain 	The draft implementing legislation does not seem to include a grandfathering provision applicable to this scenario.
Sweden 	Yes. In order to qualify for the transitional provisions, the AIFM must have actively marketed an AIF at the date of implementation (i.e. 22 July 2013). It should be noted that the marketing must be in relation to an AIF which has had its 'first closing', please refer to Question 2 above. If the AIFM qualifies for the transitional provisions it may continue to market new and existing AIFs in Sweden under the previous legal regime.

Country	Details
The UK 	Yes, the UK government has taken the view that Article 61(1) applies to non-EEA managers of non-EEA funds. If a non-EEA AIFM (a) was managing an AIF (as defined) immediately before 22 July 2013 and (b) at any time prior to 22 July 2013, marketed that AIF to a professional investor anywhere in the EEA, then it may continue to market that AIF to professional investors in the UK until 21 July 2014 in accordance with pre-existing financial promotion laws (only). The same AIFM may also establish and market future funds on the same basis. For this purpose 'marketing' is as defined by the FCA (see Question 2 above) so pre- or soft marketing before 22 July 2013 is not enough to trigger the transitional provision.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of the respective jurisdictions and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

Country	Details
Austria 	Yes. The list of cooperation arrangements is published in VIII of the FAQs published by the Austrian Financial Market Supervisory Authority: http://www.fma.gv.at/typo3conf/ext/dam_download/secure.php?u=0&file=10522&t=1381237615&hash=eef4e4ea8821c005f8e7eb3bf6e4a4b4
The Czech Republic 	As of 19 August 2013 the Czech Republic had concluded 36 cooperation agreements with 27 countries. The list of cooperation agreements can be found on the webpage of the Czech National Bank although it is in Czech language and PDF version only.
Denmark 	According to the Danish FSA, cooperation arrangements have been entered into with the competent authorities of a large number of non-EEA jurisdictions. The list is scheduled to be published shortly.
Finland 	Such a list does not exist yet. After the act becomes effective the Finnish Financial Supervisory Authority ("FSA"), which is the competent authority, shall arrange requisite cooperation with the third country authorities. The FSA shall publish a list of authorities with whom it has arranged cooperation.
France 	We understand that a number of third countries have signed a cooperation arrangement with France (20 countries at the end of September 2013). However, a full list of countries is not available yet.

Country	Details
Germany 	As of 22 July 2013, BaFin had concluded Memoranda of Understanding with the following supervisory authorities: • Australia (ASIC) • Guernsey (GFSC) • Hong Kong (SFC) • Hong Kong (HKMA) • India (SEBI) • Japan (JFSA) • Japan (METI) • Japan (MAFF) • Jersey (JFSC) • Canada (AMF) • Canada (OSC) • Canada (ASC) • Canada (BCSC) • Canada (OSFI) • Switzerland (FINMA) • Singapore (MAS) • USA (SEC) • USA (CFTC) • USA (FED/CC) The published information leaflet by BaFin can be found **here**. Please note that BaFin does not automatically follow the cooperation agreements ESMA has negotiated. BaFin reserves the right to conduct due diligence with each non-EEA jurisdiction separately.
Ireland 	As at 29 October 2013, the Central Bank had signed cooperation agreements with 38 of the 40 national securities regulators who had negotiated MoUs with ESMA. As at that date, only Turkey and the Maldives were outstanding.
Italy 	No, there is still no list of cooperation arrangements. As the Draft Transposition Decree has not yet been approved, the Competent Authorities lack the power to enter into cooperation arrangements.
Latvia 	Not applicable.

Country	Details
Luxembourg 	As of 5 October 2013, the Luxembourg regulator, the CSSF, had signed cooperation agreements with 35 countries. The list can be accessed at http://www.cssf.lu/fileadmin/files/AIFM/FAQ_AIFMD.pdf
The Netherlands 	No list is currently available but more information is expected soon.
Romania 	No such list has been published on the website of the ASF.
Slovakia 	Yes. The list can be found here: http://www.nbs.sk/en/financial-market-supervision/securities-market-supervision/collective-investment/list-of-memorandums-of-understanding-under-aifmd-directive However, the MoUs are not available to the public for review.
Spain 	No such arrangements have been entered into.
Sweden 	The SFSA has signed the Memoranda of Understanding (MoUs), negotiated by the European Securities and Markets Authority (ESMA) on behalf of the EU/EEA national competent authorities, in relation to, among others, the Cayman Islands, Bermuda, Jersey and Guernsey. Please see: http://www.esma.europa.eu/node/66691
The UK 	As of August 2013, the FCA had signed agreements with 42 non-EEA supervisory authorities. A list of the relevant authorities is available **here**, under the "Update on Co-operation Agreements" heading.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Country	Details
Austria 	Yes, there is a detailed regime set out in § 47 AIFMG. An outline of the requirements cannot be briefly outlined. The fund would have to have a permanent representative in Austria and provide details regarding depositary, fund strategy, payment of fees and statement of compliance with the requirements of the AIFMG. Marketing cannot occur until approval by the Financial Market Authority.
The Czech Republic 	The option under Article 42 has not been implemented into Czech law. Therefore, the requirements are the same as in the "passport regime".
Denmark 	Yes, the law implementing the Directive empowers the Danish FSA to set out stricter rules regarding the marketing of non-EEA funds managed by non-EEA managers. The Danish FSA has introduced a requirement that the manager appoints one or more entities to carry out the depositary functions described in Article 21(7)-(9) (equivalent to Article 36(1)(a) 2nd-4th sentences) and that the non-EEA manager ensures the publication in Denmark of information and documents that the non-EEA fund (or the competent authority) is required to publish in its home country.
Finland 	According to the draft AIFM Law, marketing of fund interests will always be subject to compliance with good securities market practice and ensuring that information provided is not untrue or misleading. According to the governmental bill the requirements are based on Article 42. In general, the AIFM shall comply with: (i) general principles such as 'good practice' and equal treatment of investors; (ii) reporting obligations towards the competent authority; (iii) certain disclosures to the investors; (iv) auditing requirements; (v) 'know your customer' requirements; and (vi) with respect to each AIF managed that acquires control in non-listed companies, certain special requirements concerning such companies. (There will, however, be restrictions on marketing to non-professional investors, and non-EEA funds may not be marketed to non-professional investors).

Country	Details
France 	There is some gold-plating of the Article 42 requirements. Non-EU AIFMs must also comply with the CMF provisions pertaining to AIFs, as well as with the French laws and regulations applicable to portfolio management companies. The scope of these provisions is potentially very large. We are waiting for a position from the French regulator to further define the scope of these provisions.
Germany 	In addition to complying with the Article 42 requirements, Germany requires an entity or person to perform certain depositary functions. The depositary requirements imported into the German private placement regime are based on the requirements of Article 36(1)(a) AIFMD for marketing by EEA AIFMs without a passport. Germany therefore requires one or more entities to be appointed to carry out the following depositary functions: • monitoring of fund cash flows; • safe-keeping of custody assets/verification and record keeping of other assets; • certain general oversight functions (e.g. including oversight of subscriptions and redemptions, valuation, compliance by the fund with local laws and fund terms). The AIF can only be marketed to professional and/or semi-professional investors. If the AIF is marketed to semi-professional investors, the AIF and the manager must fully comply with the AIFMD. Professional investors constitute 'professional clients' as defined in MiFID. Semi-professional investors may comprise, amongst others: • Directors and certain employees of the manager of the AIF; • Investors that have a minimum commitment to the AIF of EUR 10,000,000; • Investors that have a minimum commitment to the AIF of EUR 200,000, who confirm they are sufficiently qualified to invest in the AIF and are assessed by the manager of the AIF (through a questionnaire) as being so.
Ireland 	Regulation 43 of the Irish AIFMD Regulations effectively mirrors the requirements of Article 42 save that there is also a notification requirement (see response to Question 1 above).
Italy 	We are waiting for the AIFMD Level 2 implementing measures. In order to comply with the AIFMD, the National Competent Authorities have to amend the *Banca d'Italia* Regulation (i.e. the regulation on the collective investment management issued on 8 May 2012) and the Consob Intermediaries Regulation. The current Draft Transposition Decree does not contain any gold-plating.
Latvia 	Not applicable.

Country	Details
Luxembourg 	Article 45 of the AIFM Law mirrors the requirements of Article 42 of the AIFMD. The Luxembourg rules do not foresee any gold-plating.
The Netherlands 	No gold-plating except for the EUR 100,000 or 150 persons provisions, in which case qualified investors are assumed to be aimed at. When also marketing to retail investors, a retail AIFMD top-up will apply.
Romania 	Article 46 of the Draft Transposition Norm does not establish any conditions additional to those provided by Article 42 of the AIFMD (the only difference being that the AIFMD refers to marketing within a specific territory, while the Draft Transposition Norm refers to marketing towards Romanian professional investors (as explained under Question 4)).
Slovakia 	Generally, there are no further restrictions if placed only via private placement means.
Spain 	It seems that the requirements may be those described in the answer to Question 1 above.
Sweden 	Sweden has largely adopted a 'copy-out approach', with no significant gold-plating. The disclosure requirements set out in Article 23 of the AIFMD, i.e. information that needs to be furnished to investors prior to their investment in the AIF, shall in Sweden be presented in an 'information brochure' which also needs to be included in the application for authorisation.

Country	Details
The UK 	Yes, the current UK financial promotion regime will remain in force. In summary, it is only lawful to make an invitation or inducement to engage in investment activity (including by subscribing for interests in a private equity fund) by addressing it specifically to a person who falls within an exempt category. Relevant exemptions facilitate marketing to: (a) institutions whose business it is to invest (generally, those authorised and regulated by the FCA or the UK Prudential Regulation Authority ("PRA"), such as banks, insurers, fund of funds managers) and (b) large companies or other undertakings with called up share capital or net assets of GBP 5,000,000 or more; and (c) trustees of trusts (including most occupational pension schemes) with gross assets of GBP 10,000,000 or more. If no exemption is available, the content of the communication must be approved by a person authorised and regulated by the FCA and/or PRA. Breach of this restriction may be a criminal offence and/or lead to rescission of investor commitments. **Rider:** This answer concerns only the activity of marketing the fund. If the manager were to take further steps in the UK with a view to arranging an investor's commitment to the fund (for example by negotiating the detailed terms of investment or receiving completed subscription documents in the UK) this may constitute a regulated activity for which UK Financial Conduct Authority authorisation would be required. This analysis is complicated and would turn on what activities are conducted in the UK, what presence the manager has in the UK and the authorisation status of the prospective investor.

8. Must a firm seeking to market in the respective jurisdictions in reliance on Article 42 notify, or register with, the competent authority in those jurisdictions? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Country	Details
Austria 	Yes, the required information is set out in § 47 AIFMG and Appendix 3 of the AIFMG. The notification can be submitted in English, German or other language commonly used in the financial industry pursuant to § 7b (1) Capital Markets Act. Yes, there is a public register and the fees are EUR 4,500 for the notification (EUR 1,000 for each additional AIF; and an annual fee of EUR 2,500 increased by EUR 600 for each additional AIF).
The Czech Republic 	The option under Article 42 has not been implemented into Czech law. Therefore, the requirements are the same as in the "passport regime".

Country	Details
Denmark 	Managers who seek to market in Denmark in reliance on Article 42 must notify the Danish FSA using a notification form that is available **here**. The rules do not differ as between non-EEA AIFMs which are above or below the thresholds in Article 3(2). Marketing may only begin when the manager is notified hereof by the Danish FSA. There will be no public register. There is an annual fee of DKK 2,000 per fund and an annual fee of DKK 2,000 per compartment that the manager markets in Denmark (the amounts are stated in 2004-prices and are subject to annual regulation in the Danish Finance Act).
Finland 	An AIFM seeking to market in Finland shall notify the competent authority before starting to market. For such notification, the AIFM shall provide a confirmation: (i) concerning compliance with requirements (i) – (vi) outlined in the answer to Question 7; (ii) that there are appropriate (according to international standards) cooperation arrangements between the competent authority and the supervisory authority of the AIFM in order to supervise systemic risk and secure the exchange of information; (iii) that the country where the AIFM or the AIF is established is not a non-cooperative country in terms of money laundering and terrorist financing; (iv) that there is an agreement between Finland and the third country corresponding to the OECD Model Agreement by which effective change of information in respect of tax matters is secured. There will be a public register. (A Finnish branch of a non-EEA AIFM shall pay a supervision fee of 0.34% of its revenues.)
France 	Yes. Non-EU AIFMs must obtain an authorisation to market in France from the French regulator, if the AIF managed is an open-ended AIF. There is no detailed information in the transposition texts as to how such an authorisation may be obtained (no template, no instruction).
Germany 	The AIF and the manager would need to be registered with BaFin. The manager must submit to BaFin general information on the AIF (among others LPA, PPM, annual report), certain manager-related information and statements (e.g. information on the manager's board) as well as information on the depositary (e.g. depositary agreement). Currently no form for the registration process exists. The registration process is expected to take up to four months for a feeder fund and two months for a fund which is not a feeder. There is currently no indication on what BaFin will charge with regard to a registration fee. While awaiting registration, pre-marketing could be conducted. This could include, *inter alia*, investor presentations or the distribution of term sheets.

Country	Details
Ireland 	Notification must be made to the Central Bank. Please see the details in the response to Question 1 above. There is no information available as to whether or not there will a public register or a fee will be charged etc. There is currently no notification form. Firms should simply comply with the Regulation 43 notification requirement referred to in the response to Question 1 above.
Italy 	Under the Draft Transposition Decree, the marketing in Italy, in respect of professional investors, of the units or shares of non-EU AIFs managed by a non-EU AIFM, authorised in a member state different from Italy, should be preceded by a notification to Consob by the authority of the member state of origin of each AIF subject to marketing.
Latvia 	Not applicable.
Luxembourg 	A notification procedure may be envisaged. There is no further information at this stage.
The Netherlands 	All AIFMs are required to register with the Dutch competent authority (AFM). Registration for the light regime is expected to cost EUR 1,500. Costs for a permit are about EUR 5,500. Registration involves providing: • Business plan/investment strategy • Open/closed fund • Organisation chart • Sub-funds structure • Private investments policy • Conflict of interest policy • Valuation policy • Accountant's statement • Proof of suitability of fund managers (e.g. references/proof of good conduct) • Contact details
Romania 	Under the current regime, please see answer to Question 1 above. As far as it concerns the Draft Transposition Norm, Article 46 transposing Article 42 of the AIFMD does not expressly establish the procedure to follow in order to be able to perform distribution under scenario A. However, given that existing national legislation (prior to AIFMD implementation) creates an obligation of registration and the accomplishment of other conditions, as contemplated in the answer to Question 1 above, the possibility of establishment of such additional obligations under the Transposition Norm cannot be excluded.

Country	Details
Slovakia 	Such a firm has to notify the National Bank of Slovakia of its intention to distribute non-EU AIFs in the Slovak Republic prior to distribution. The following shall be submitted to the National Bank of Slovakia: • identification data of the non-EU AIF; • statutes and founding documents of the non-EU AIF; • identification data of the depositary of the non-EU AIF; • description of the non-EU AIF; • seat of the non-EU AIF; • information about measures and steps taken in order to prevent distribution to retail investors; • other additional information required by the Slovak law; • documents demonstrating the fulfillment of the requirements as stated in the answer to Question 1 above. The registration fee amounts to EUR 1,700. The National Bank of Slovakia has a statutory period of 20 working days to decide on the application.
Spain 	Yes, as described in the answer to Question 1 above.
Sweden 	A non-EEA AIFM managing a non-EEA based AIF must obtain an authorisation from the SFSA in order to market the AIF. There will likely be a public register. The fee payable for the license is approximately SEK 16,000. No forms will be available. An application for a licence to market an AIF must contain a description of how the AIFM intends to comply with the transparency and disclosure requirements, a business plan including information on the AIF intended to be marketed and where it is established, the AIF's rules, articles of association or similar document, information on where any master fund is established, an information brochure, the latest annual report and information on the measures which have been taken in order to prevent marketing to retail investors. If the AIFM relies on the transitional provisions it may continue to market AIFs in Sweden until the application has been finally decided.

Country	Details
The UK 	The rules differ as between non-EEA AIFMs which are above or below the thresholds in Article 3(2) of the Directive but, in both cases, the manager must notify the FCA before marketing. There is no public register. Further details on notification requirements are contained in chapter 10 of the FCA's Investment Funds sourcebook ("FUND"), and in particular in FUND 10.5 which is available **here**. Notification forms for this purpose are available **here**, under the "Forms" heading. The fee for each notification is currently GBP 250 per AIF for an above-threshold non-EEA AIFM and GBP 125 per AIF for a sub-threshold non-EEA AIFM. Periodic fees are also payable on an annual basis – these are currently GBP 500 per AIF for an above-threshold non-EEA AIFM and GBP 350 per AIF for a sub-threshold non-EEA AIFM.

9. What restrictions will there be on pre-marketing[10], taking into account considerations similar to those raised in Questions 3 to 8 above?

Country	Details
Austria 	No distinction is made between 'marketing' and 'pre-marketing' under the rules.
The Czech Republic 	Not applicable. See Question 2 above.
Denmark 	Not applicable.
Finland 	The act implementing the Directive does not concern 'pre-marketing' specifically. However, promotion actions taken by the AIFM are always subject to compliance with good securities market practice and not giving any untrue or misleading information. When the threshold of 'marketing' is exceeded and when a binding commitment is made, the AIFM must be able to demonstrate that it has complied with the marketing rules.
France 	There is no information on this in the transposition texts.

[10] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

Country	Details
Germany 	Currently, the law does not foresee any regulation of pre-marketing by the manager itself (although this may change).
Ireland 	Not applicable. See response to Question 2 above.
Italy 	We are currently unable to answer this question. There is no definition of 'marketing' that allows us to understand the difference between the terms 'marketing' and 'pre-marketing' and the consequent different regulation.
Latvia 	Not applicable.
Luxembourg 	Not applicable. See Question 2 above.
The Netherlands 	Not applicable. See Question 2 above.
Romania 	Not applicable.

Country	Details
Slovakia 	Firstly, non-EU managers should make sure that none of their marketing activities constitute a public offer. Failure to do this could trigger the application of additional requirements. According to Slovak law, the expression private placement means an announcement, an offer or a recommendation addressed to investors specified in advance, which is not carried out in any of the forms below: • press, radio and television; • circulars, booklets or other written materials and durable records, if intended for the public or if intended for recipients not specified in advance; • Internet and other electronic communication or information systems, accessible to the public, or • unsolicited personal contact of non-professional investors (e.g. cold calling). Pursuant to the Slovak Act No. 566/2001 Coll. on Securities and Investment Services, as amended (the "Securities Act") which implemented Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004, on markets in financial instruments law (MIFID), the expression 'professional clients' means clients who possess the expertise, experience and knowledge to make their own investment decisions and to properly assess the risks that they incur. The following persons are to be regarded as professional clients: • stock brokerage firms, foreign stock brokerage firms, financial institutions, commodity and commodity derivatives dealers, specific financial institutions, and entities authorised to operate in the financial market by a competent authority or whose activity is separately regulated by generally binding legal regulations; • large undertakings meeting certain quantitative conditions; • state, regional or municipal authorities, state or regional authorities of other countries, the Debt and Liquidity Management Agency of the Slovak Republic, public authorities of other countries that are in charge of or intervene in public debt management, the National Bank of Slovakia, other central banks, the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations; • legal persons not mentioned above whose main activity is to invest in financial instruments, including entities that carry out the securitisation of credits and loans or other financing transactions, or • entities which may at their request be treated as professional clients under certain conditions.

Country	Details
Slovakia 	High net worth individuals may be considered as professional clients only upon their request to the non-EU manager to be treated as such, and only if the following conditions are fulfilled: • the non-EU manager has assessed the high net worth individual's expertise, experience and knowledge and has issued a written statement that these give reasonable assurance, in light of the nature of the envisaged transactions or investment or ancillary services, that the high net worth individual is capable of making his/her own investment decisions and understanding the risks involved; • the high net worth individual has stated in writing to the non-EU manager that he/she wishes to be treated as a professional client, in regard to one or several investment services, ancillary services or transactions, or to one or several types of financial instrument or transaction; • the non-EU manager has given the client a clear written warning of the protections and investor compensation rights he/she may lose; • the high net worth individual has stated in writing, in a separate document from the contract, that he/she is aware of the consequences of losing such rights. Moreover, a high net worth individual may be considered as a professional client only if at least two of the following conditions are fulfilled: • over the previous four quarters, the high net worth individual has carried out transactions in financial instruments of a significant size on the relevant market in financial instruments at an average frequency of at least ten per quarter; a transaction in financial instruments of a significant size meaning a transaction the volume of which exceeds EUR 6,000, and the relevant market meaning the regulated market, multilateral trading facility or unorganised market, where financial instruments are accepted for trading, in relation to which investment services are or are to be provided to the individual; • the size of his/her portfolio covering financial instruments and financial deposits exceeds EUR 500,000; • the high net worth individual carries out or has carried out, for at least one year, in relation to his/her employment, profession or duties, an activity in the financial market area in a position which requires knowledge of transactions or investment services provided or which are to be provided for such person. It should be distinguished whether marketing takes place towards professional clients or not. In case of marketing to professional clients, it is subject to the restrictions mentioned below.

Country	Details
Slovakia 	In the Slovak Republic, cold calls are allowed provided that such active solicitation is performed in relation to institutional investors (legal entities – it is not the same term as professional clients according to the Securities Act), subject to the following limitations: • it cannot be disseminated by an automatic telephone call system, fax or electronic mail without previous consent of the recipient of the advertisement, and • it cannot be addressed to a recipient who has a priori refused such advertising. Even if a high net worth individual is classified as a professional investor, non-EU managers cannot contact the high net worth individual by cold calls unless they have been granted prior approval for this by the high net worth individual. Please note that cold calls to retail investors are always considered as public placement, irrespective of the fact that such solicitation may be conducted solely via private placement channels. Slovak law does not specifically address unsolicited written correspondence and materials and therefore it is not subject to any restrictions, if sent physically. However, if such correspondence and materials are sent via electronic means, the same regime applies as in connection with cold calls mentioned above. In addition, it is prohibited to send an electronic mail message which does not disclose the sender's identity and address to which the recipient may send a request for such communication to cease. If non-EU managers are targeted by unsolicited requests, they can provide the requesters with any of the written marketing documents. Such request is not considered as an offer by non-EU managers. Participation in any industry events within the Slovak Republic, if connected with the promotion of non-EU AIFs is likely to be viewed as a form of public offering. This is mainly due to the reason that the visitors of such conferences are most likely not specified in advance and therefore non-EU managers, when promoting non-EU AIFs, target an unspecified circle of potential investors. Non-EU managers can freely meet with potential investors either in the Slovak Republic or abroad provided that the invitation for an arrangement of such meetings does not constitute public offering in the Slovak Republic.
Spain 	No such distinction seems to be made in the draft implementing legislation.
Sweden 	As stated above, the AIFMA expresses the view that marketing is not at hand before an AIF is established, i.e. normally before the 'first closing' of the AIF. Investor contacts and similar actions prior to this point are therefore not considered as marketing.
The UK 	Invitations or inducements to engage in investment activity falling short of 'marketing' as described in the answer to Question 2 will be subject to the financial promotion regime mentioned in Question 7.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in the respective jurisdictions to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

Country	Details
Austria 	The AIFMG does not provide for a special regime regarding passive marketing. The fact that an investment occurs solely at the initiative of the investor does not necessarily mean that the AIF is permitted to operate in Austria.
The Czech Republic 	Investing at the initiative of the investor is not considered to be marketing under the AICIF. However, the law does not describe what it means and no interpretation is currently available.
Denmark 	Under the Danish law implementing the Directive, 'marketing' does not include placement made at the initiative of the investor. The Danish FSA has not given guidance on how it is demonstrated that a placement was made at the initiative of the investor.
Finland 	It has been expressly stated in the governmental bill that Finnish investors may still contact the foreign AIFM or investment service provider to express their interest to invest in a specific target and this shall not be considered as offering AIF interests in Finland (reverse solicitation). There is still however some unclarity as to what extent disclosure obligations apply in that case. It has also been expressly stated that after the establishment of the client relationship the AIF may also provide information on other investment objects and provide the client with non-specific presentations. However, the provision of investment recommendations, negotiating or drafting agreements without the prior request of the investor would be seen as the offering of interests.
France 	Reverse solicitation may be relied upon. However, the French regulator has not provided any guidance on reverse solicitation in relation to the AIFMD. More generally speaking for the financial sector, the 'passive marketing' exception in French law has been defined as being based on an express request from the investor for a specifically determined fund and without any product advertising (as opposed to institutional advertising) or solicitation. The AMF provided some further guidance in this respect by differentiating between marketing and passive marketing. The AMF has specified that marketing "does not concern the sale of financial instruments in response to a client's unsolicited request to purchase a specifically designated financial instrument".
Germany 	With regard to professional and semi-professional investors, it will not be considered marketing if the investor (or a third party agent of the investor) approaches the AIF manager at its sole initiative. The exact scope of this 'reverse solicitation' concept is still unclear.

Country	Details
Ireland 	There is no Irish regulatory interpretation of these concepts.
Italy 	Consob has not yet issued any guidance on the interpretation and the use of reverse solicitation.
Latvia 	According to the AIFM law, marketing is defined as "distribution" which means "initial placement or offering of investment units, made by the manager or on behalf of the manager, to the investors domiciled or having a registered office in the member state". Since the AIFM law does not expressly state that Latvian investors may not contact a foreign AIFM, it can be concluded that 'passive' marketing by foreign AIFMs is allowed in Latvia, i.e. Latvian investors may contact a foreign AIFM to express their interest to invest in a specific target and this shall not be considered as offering AIF interests in Latvia.
Luxembourg 	These concepts are currently not addressed by the supervisory authority. We are not expecting formal guidance on the issue from the CSSF.
The Netherlands 	No definition is given.
Romania 	The term 'reverse solicitation' (by which we understand the situation where the investor approaches the AIFM) is not defined as such, neither by the Draft Transposition Norm nor by the current legal regime, consisting of Art. 176 Regulation 15/2004, Art. 10 Decision 9/2010 and Norm 13/2013. So, it can be construed that if the client is the one approaching the AIFM, this should not fall within the scope of the prohibition listed above under the answer to Question 2. However, we are not aware of an official interpretation of the term 'reverse solicitation'.
Slovakia 	Please see the answer to Question 9 above.
Spain 	There is no reference in the current draft legislation.

Country	Details
Sweden 	With reference to Recital 70 of the Directive, the preparatory work of the AIFMA states that reverse solicitation is not considered marketing. While there are no clear rules as to what would be considered as reverse solicitation, the preparatory works to the AIFMA exemplify a few situations that typically would not constitute marketing, e.g. if an investor on its own initiative contacts the AIFM to subscribe for units (e.g. on the company's website, provided that the website is not specifically directed to Swedish investors), or if an investor contacts an investment firm to execute or transmit an order of units or shares of an AIF which are not part of any offer from the investment firm. In order for the activities to be deemed taken at the investor's own initiative, neither the AIFM nor any other party (e.g. an investment firm) may initiate any contacts with the Swedish investor.
The UK 	As a matter of UK implementation, marketing at the initiative of the investor is not 'marketing' for the purposes of the Directive (but it is likely to involve a financial promotion (see Question 7 above)). The FCA has given guidance in PERG 8.37.11 (available **here**) that a confirmation from the investor that the offering or placement of interests in an AIF was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, managers should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of the Directive.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEU AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

Country	Details
Austria 	There is a special regime set out in § 38 AIFMG. Therefore, the answers to Questions 7 and 8 would be different because these funds are subject to different notification requirements and fees.
The Czech Republic 	The option under Article 36 has not been implemented into Czech law.
Denmark 	Question 7: As an additional domestic requirement to those in Article 36, the EU manager must ensure publication in Denmark of information and documents that the non-EEA fund (or the competent authority) is required to publish in its home country. Question 8: The same notification form and fees apply.
Finland 	In addition to the items listed in Question 8 (ii) – (vi) the notification shall provide certain information regarding compliance with: (i) general principles such as 'good practice' and equal treatment of investors; (ii) certain disclosure and reporting obligations towards the investors; (iii) 'know your customer' requirements; and (iv) any decrees issued by the Ministry of Finance and any regulations issued by the Finnish Financial Supervisory Authority and with any delegated acts adopted by the Commission (stipulating in more detail disclosure requirements applicable to marketing, and requirements on risk management and know your client requirements).
France 	EU AIFMs with non-EU AIFs do not have access to the AIFMD passport and can now only market under the new regime for marketing without a passport. The regime for the marketing of AIFs by non-EU AIFMs without a passport is set out in Articles L. 214-24-1 I and D. 214-32 of CMF as set out above, with application from the date of the EU AIFM's authorisation.
Germany 	Yes with regard to Question 7: The AIFM and the managing of the AIF must comply with the AIFMD implementation requirements of the home member state of the AIFM. The depositary requirements, however, are similar to the depositary requirements explained under Question 7.

Country	Details
Ireland 	The transitional provisions are the same as for AIFMs marketing under Article 42. As in the case of Article 42 marketing, the Central Bank must be notified before marketing takes place or, in the case of an AIFM marketing in Ireland prior to 22 July 2013, it must comply with the Irish AIFMD Regulations on a 'best efforts' basis and comply with the notification requirements by 22 July 2014, at the latest. The AIFM must also ensure that one or more persons are appointed to perform the depositary functions as specified in Article 21(7) to (9). In addition, the Central Bank may impose additional conditions or requirements similar to those which it may impose on AIFMs under Article 42 (see response to Question 1 above).
Italy 	Under the Draft Transposition Decree, the marketing in Italy, in respect of professional investors, of the units or shares of non-EU AIFs managed by an EU AIFM, authorised in a member state different from Italy, should be preceded by a notification to Consob by the authority of the member state of origin of each AIF subject to marketing.
Latvia 	Latvia has decided not to exercise the discretion provided in Article 36 of the Directive. Therefore, marketing non-EEA AIFs without a passport is not allowed in Latvia.
Luxembourg 	Transitional provisions will apply until 22 July 2014, whereupon the provisions of Article 37 of the AIFM Law will apply, notably that the AIFM complies with all the requirements contained in the AIFM Law with the exception of Article 21 relating to the depositary function.
The Netherlands 	No.
Romania 	The option under Article 36 of the AIFMD has not been implemented into Romanian law – see our comments on the status of the Draft Transposition Norm. However, Article 38 of the Draft Transposition Norm overlaps with Article 36 of the AIFMD. Given that Article 38 of the Draft Transposition Norm does not establish any additional conditions to the ones established by Article 36 of the AIFMD, the answers offered above in relation with non-EU AIFs are likely to apply to scenario B as well.
Slovakia 	In such case, EU passporting based on the notification procedure should apply. Please note that a simple notification procedure applies only in case of private placement to professional investors.

Country	Details
Spain 	For Question 5, it is expected that AIFMs of AIFs authorised before the entry into force of the law, shall adapt to the new regulation before 22 July 2014. However, in relation to cross-border trading, the implementing law will not be applied to the marketing of AIF shares that are subject to a current public offer under a prospectus prepared and published in accordance with the Law 24/1988 of Stock Market before 22 July 2013, but only during the validity of such prospectus. Moreover, those AIFMs that manage an AIF before 22 July 2013 may continue to operate such an AIF without the authorisation required under the new law if no new investments are made after 22 July 2013. Additionally, AIFMs, in so far as they manage AIFs whose subscription period for investors has expired before 22 July 2013 and that are constituted for a period ending no later than three years after that date, may continue to manage such AIFs without complying with the provisions of the new law, except for the requirements to submit an annual report and obligations related to corporate takeover stated in the draft law. *However, Spain has not yet passed the laws and regulations implementing Directive 2011/61/EU or applying the Capital Requirements Regulation (No. 575/2013), so it is not sure whether these will remain.*
Sweden 	Marketing of non-EEA AIFs to professional investors in Sweden by an EEA AIFM duly licensed in its home member state will require an authorisation from the SFSA. The requirements to obtain such authorisation differ slightly from the requirements for a non-EEA AIFM. In order to obtain the authorisation, the conditions corresponding to the provisions in Article 36 must be satisfied. In brief, these conditions include that: (i) it can be expected that the AIFM will comply with all the applicable rules under the Directive; (ii) appropriate cooperation arrangements are in place between the SFSA and the supervisory authority in the country where the AIF is established; and (iii) the country in which the AIF is established has taken adequate measures to prevent money laundering and terrorist financing. The application shall contain *a certificate*, issued by the home member state authority, evidencing that the AIFM is licensed to manage AIFs in its home member state, a business plan including information on the AIF intended to be marketed and where it is established, the AIF's rules or similar documents, information on where any master fund is established, information on the *identity of the AIF's depositary* (or the entity that has been appointed to carry out the depositary duties), the information set out in Article 23 of the AIFMD, i.e. the information that the AIFM must furnish to investors prior to their investments in the AIF; and information on the measures which have been taken in order to prevent marketing to retail investors (an AIFM with a licence to market AIFs to professional investors only must ensure that no marketing activities are directed to retail investors, e.g. by including a disclaimer in marketing materials).

Country	Details
The UK 	The condition for the application of the transitional relief is merely that the EU AIFM was managing an AIF before 22 July 2013. After the expiry of the transitional provision, or where it does not apply, an AIFM may market in the UK in these circumstances, provided it notifies the FCA in advance. The relevant notification form is available **here**, under the "Forms" heading. The provisions of Article 36 apply, so that an AIFM need not comply with the requirements of Article 21, provided that the AIFM ensures that one or more persons are appointed to perform the depositary functions specified in Articles 21(7) to (9) and notifies the FCA of the identity of such persons.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in the respective jurisdictions? How would the answers above be different in this scenario?

Country	Details
Austria 	The AIFM would need to be registered with the FMA and may only start its activities after registration. Details for such funds are set out in § 1 (5) AIFMG.
The Czech Republic 	No. At least a basic level of registration with the Czech National Bank is required.
Denmark 	No, currently the Danish law implementing the Directive does not allow for such an AIFM to market in Denmark. The Danish FSA has indicated that this may be changed in the autumn of 2013 when an amendment of the law is scheduled.
Finland 	Yes, to professional investors, provided that the AIFM, in addition to the requirements set out in Question 7, shall also comply with any decrees issued by the Ministry of Finance and any regulations issued by the Finnish Financial Supervisory Authority and with any delegated acts adopted by the Commission.
France 	AIFMs must obtain an authorisation in order to market national AIFs below the AIFMD threshold in France *(this remains subject to change depending on further rules from the regulator)*. There is no information in the transposition texts regarding other AIFs.
Germany 	Yes. Sub-threshold EEA AIFMs would have to go through a notification process as described under Question 7. However, the notification requirements are broadly reduced if the home member state of the EEA AIFM allows marketing of AIFs managed by German sub-threshold AIFMs without imposing stricter requirements than Germany ("reciprocity").
Ireland 	A sub-threshold AIFM can only market to investors in Ireland subject to private placement rules.
Italy 	Currently all funds (UCITS or alternative funds) are subject to the same rules and the concept of 'sub-threshold funds' does not exist. The Draft Transposition Decree states that Italy should maintain, wherever possible, the stricter national rules and, by way of example, indicates the intention to keep the restriction on sub-threshold AIFs. Under the Draft Transposition Decree it will no longer be possible to market interests in a fund for managers without a licence in any EEA State (among which there are sub-threshold AIFMs), because section n. 42.5 of the Financial Consolidated Act of 1998 (FCA) has been removed (cf. Answer to Question 1).

Country	Details
Latvia 	Yes, to professional investors, provided that the Latvian Financial and Capital Market Commission (FCMC) has adopted a decision to allow the respective EU AIFM to market the EU AIF in Latvia. The AIFM should submit to the FCMC: 1. an application for authorisation to market the EU AIF managed by it to professional investors in Latvia; 2. a confirmation issued by the supervisory authorities of the home member states of the AIFM and AIF that the AIFM and AIF have been registered with the supervisory authorities of the member states, in accordance with the procedure stated in the regulatory enactments of the member states, and that they are subject to the supervision requirements applicable in the respective member states; 3. a confirmation of the AIFM and the supervisory authority of the home member state of the AIF addressed to the FCMC supporting that the supervisory authorities and the FCMC will cooperate in respect of the supervision of the AIF and the AIFM and information exchange matters; 4. information on the contact person responsible for the marketing of the AIF in Latvia and authorised to represent the interests of the AIF and the AIFM before state agencies, investors and third parties in Latvia; 5. the contract dealing with the marketing of the AIF; and 6. the following documents: (a) programme of activity setting out the information on the AIF which the AIFM wishes to market; (b) information about the place of incorporation of the AIF; (c) documents of incorporation of the AIF; (d) operating rules of the AIF; (e) information about the depositary of the AIF; (f) information on the place where the master fund is established if the fund is a feeder fund; (g) the most recent annual report and consolidated annual report if such are drawn up, information on the most recent calculated net asset value of the AIF or the most recent calculated value or market price of the investment unit (share); (h) the procedure under which the marketing of the AIF only to professional investors will be ensured.

Country	Details
Luxembourg 	The relevant AIFM will be able to access Luxembourg domiciled investors by virtue of the Luxembourg private placement rules only.
The Netherlands 	Yes, if offering stakes of more than EUR 100,000 or to less than 150 people.
Romania 	Under the current legal regime – not applicable. Under the Draft Transposition Norm – no. Article 5 of the Draft Transposition Norm establishes a general obligation of authorisation by the ASF, which is different depending on the 'nationality' of the AIFM and the AIF – under scenario C, a notification from the competent authority of the home member state is necessary, according to Article 37 of the Draft Transposition Norm. Article 3(2) of the AIFM is transposed in the Draft Transposition Norm under Article 2(2) but only concerning Romanian AIFMs.
Slovakia 	AIFMs falling within Article 3(2) are not required to obtain a Slovak licence, but are required to register into the register of AIFMs kept by the National Bank of Slovakia.
Spain 	Nothing is expressly established in the draft.
Sweden 	An EEA sub-threshold AIFM subject to domestic registration or authorisation may market certain closed-ended AIFs to professional investors and semi-professional investors in Sweden after authorisation by the SFSA. The fund must satisfy the following conditions (i) there is no right to redemption for at least five years from the initial investment, and (ii) the AIF (under its investment policy) generally invests in issuers or non-listed companies, in each case in order to acquire control according to provisions corresponding to Articles 26-30 of the AIFMD.
The UK 	Marketing in these circumstances is subject only to the financial promotion regime (see Question 7 above).

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in the respective jurisdictions? How would the answers above be different in this scenario?

Country	Details
Austria 	EEA AIFMs who market prior to 22 July 2013 have to take all necessary steps to comply with the AIFMG by 21 July 2014. The Austrian transitional provisions cannot be relied on if no marketing activities have taken place prior to 22 July 2013. If the fund starts to market in Austria after 22 July 2013 then the local and Austrian transitional provisions cannot be relied on and the relevant fund will have to comply with the AIFMG immediately. If no marketing occurs in Austria, then the AIFMG will not have to be complied with.
The Czech Republic 	The "Czech" transitional period applies only to AIFs and AIFMs that had been authorised by the Czech National Bank before 19 August 2013. This means that other AIFs and AIFMs are not entitled to benefit from the "Czech" transitional period. As we are not aware of any provision of the AICIF recognising another EEA member state's transitional period it seems such marketing will not be possible.
Denmark 	Yes. Despite the fact that the Danish law implementing the Directive does not specifically extend the transitional provisions to managers from other EEA member states, the Danish FSA has confirmed (see Question 5) that the transitional provision that allows managers that perform activities covered by the law before 22 July 2013 to delay compliance with the law until 21 July 2014 also applies to managers from other EEA member states.
Finland 	Yes, to professional investors, provided that the AIFM, in addition to the requirements set out in Question 7, shall also comply with any decrees issued by the Ministry of Finance and any regulations issued by the Finnish Financial Supervisory Authority and with any delegated acts adopted by the Commission (stipulating in more detail disclosure requirements applicable to marketing, and requirements on risk management and know your client requirements).
France 	Yes (Article 61 AIFMD has been transposed through Article 33 of the *Ordonnance*).

Country	Details
Germany 	It seems that the EEA AIFM can market in Germany relying on transitional relief only if the AIFM complies with the transitional relief provisions for marketing (see answer to Question 5).
Ireland 	An EEA AIFM relying on transitional relief may market in Ireland. See response to Question 11 above.
Italy 	EU AIFs that have been authorised in Italy before 22 July 2013, may continue to be marketed in Italy to professional investors. By 22 July 2014, their managers shall take all measures necessary to comply with the provisions transposing the AIFMD and maintain, through the competent authorities of the State of origin, the notification required by Article 32, of the AIFMD, once the authorisation is granted in accordance with such Directive. Failing this, marketing will be suspended. However, as the Draft Transposition Decree is not yet approved, it is impossible to give an exact answer.
Latvia 	According to the Latvian AIFM law the transitional relief is only applicable in relation to domestic AIFMs.
Luxembourg 	Yes, marketing under the existing Luxembourg placement rules will continue to be permitted until 22 July 2014.
The Netherlands 	Yes, if below the threshold, subject to the EUR 100,000 or 150 persons rule. No, if above the threshold. Then AIFMD permit/EuVECA is required. Passive marketing is an untested strategy.
Romania 	Under the current legal regime – not applicable. Under the Draft Transposition Norm, the "Romanian" transitional period applies only to Romanian AIFs and AIFMs which have been authorised before 22 July 2013. This provision can be interpreted as meaning that other AIFs and AIFMs cannot benefit from the "Romanian" transitional period. As we are not aware of any provision recognising another EU member state's transitional period it seems such marketing will not be possible.
Slovakia 	No. The Collective Investment Act explicitly states that only EU managers with an authorisation pursuant to the AIFMD can distribute units and shares of AIFs in the Slovak Republic.

Country	Details
Spain 	According to the draft implementing legislation, an EEA AIFM of an EEA AIF relying on transitional relief can market in Spain provided that a written notification is submitted to the CNMV containing the following information: (a) identification of the EEA AIF that the AIFM intends to market, and where both of them are established; (b) rules and procedures for the marketing of shares or units in Spain, and when appropriate, the classes or series of shares or units; (c) the management regulations of the EEA AIF or instruments of incorporation of the same entity; (d) the prospectus of the EEA AIF and the latest annual report; (e) identification of the depositary of the EEA AIF; (f) a description of the EEA AIF, or any information on it, available to investors; (g) information about the location of the main EEA AIF, if the EEA AIF to be marketed is a subordinate; (h) where applicable, information on the measures taken to prevent the marketing of shares of the EEA AIF to retail investors. A subordinate EEA AIF can only be marketed in Spain if the main entity is domiciled in the European Union and is managed by an AIFM authorised under Directive 2011/61/EU. Moreover, the competent authorities of the EU member state where the AIFM is established shall attach a certificate to confirm that the AIFM is authorised by Directive 2011/61/EU to manage AIFs with a particular investment strategy. For those cases involving a non-EEA AIFM of an EEA AIF please refer to Question 11.
Sweden 	In order to market AIFs in Sweden while relying on the transitional provisions, the AIFM must have been actively marketing an AIF (which has had its first closing) in Sweden at the date of implementation. The fact that the AIFM qualifies for the transitional provisions in another EEA member state will be irrelevant when determining if the transitional provisions will apply for marketing in Sweden.
The UK 	Yes. An AIFM in another EEA member state which was managing an AIF immediately before 22 July 2013 may market in the UK subject only to the pre-existing financial promotion restriction (see Question 7) until 21 July 2014.

Section two:

Marketing in the EU on a country-by-country basis

2

In this section

Marketing in the EU on a country-by-country basis

1. Austria

Note:
The Austrian Alternative Investment Fund Manager Gesetz-AIFMG has only been implemented very recently and there is so far no case law and very little practical experience in interpretation and application of this legal act. The statements in this report are based on a first reading of the law and preliminary general discussions with the Austrian authorities.

Given that the requirements to comply with the AIFMG depend on the specifics of the fund structure and the activities conducted by the AIFM and the AIF, it is highly recommended that legal advice is sought prior to engaging in any marketing activity in Austria.

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. Will it be possible in some manner to market a fund in the circumstances described above, in Austria and/or to investors established in Austria on or after 22 July 2013?

Yes, such funds can be marketed if § 47 of the Alternative Investment Fund Manager Gesetz-AIFMG (Austrian Federal Gazette I No. 135/2013 ("AIFMG")) is complied with (notification requirement by the AIFM, marketing only possible after notification by the Financial Market authority; this may take up to four months).

2. In Austria, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Austria.
Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

Marketing is to be interpreted in line with what constitutes a 'public offer' pursuant to section 1 (1) lit.1 Capital Markets Act. For purposes of the AIFMG it also constitutes private placements. Marketing would also include soft marketing and, in our view, pre-marketing if this occurs in connection with the offer of securities.

3. What is the current best estimate of when the Directive will be transposed into national law in Austria? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The directive has been transposed into national law through the Alternative Investment Fund Manager Gesetz-AIFMG (Austrian Federal Gazette I No. 135/2013 ("AIFMG")).

4. Under the domestic implementing measures of Austria, is the Directive relevant to marketing to investors established in Austria (within the meaning of Article 4(1)(j)) but who are not physically located in Austria at the time the marketing takes place[11]?

Such persons would be covered if they have their domicile (*Wohnsitz*) or corporate seat (*Sitz*) in the European Union.

5. Once the Directive is in effect in Austria, in relation to 'marketing' (as that term is understood in Austria) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

The wording of the AIFMG suggests that a non-EEA manager active prior to 22 July 2013 may continue to market all funds, provided that they take all necessary measures to comply with the AIFMG and file an application for approval (*Antrag auf Zulassung*) by 21 July 2014.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Austria and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

Yes. The list of cooperation arrangements is published in VIII of the FAQs published by the Austrian Financial Market Supervisory Authority;

http://www.fma.gv.at/typo3conf/ext/dam_download/secure.php?u=0&file=10522&t=1381237615&hash=eef4e4ea8821c005f8e7eb3bf6e4a4b4

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Yes, there is a detailed regime set out in § 47 AIFMG. An outline of the requirements cannot be briefly outlined. The fund would have to have a permanent representative in Austria and provide details regarding depositary, fund strategy, payment of fees and statement of compliance with the requirements of the AIFMG. Marketing cannot occur until approval by the Financial Market Authority.

[11] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

8. Must a firm seeking to market in Austria in reliance on Article 42 notify, or register with, the competent authority in Austria? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Yes, the required information is set out in § 47 AIFMG and Appendix 3 of the AIFMG. The notification can be submitted in English, German or other language commonly used in the financial industry pursuant to § 7b (1) Capital Markets Act.

Yes, there is a public register and the fees are EUR 4,500 for the notification (EUR 1,000 for each additional AIF; and an annual fee of EUR 2,500 increased by EUR 600 for each additional AIF).

9. What restrictions will there be on pre-marketing[12], taking into account considerations similar to those raised in Questions 3 to 8 above?

No distinction is made between 'marketing' and 'pre-marketing' under the rules.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Austria to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

The AIFMG does not provide for a special regime regarding passive marketing. The fact that an investment occurs solely at the initiative of the investor does not necessarily mean that the AIF is permitted to operate in Austria.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

There is a special regime set out in § 38 AIFMG. Therefore, the answers to Questions 7 and 8 would be different because these funds are subject to different notification requirements and fees.

[12] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Austria? How would the answers above be different in this scenario?

The AIFM would need to be registered with the FMA and may only start its activities after registration. Details for such funds are set out in § 1 (5) AIFMG.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Austria? How would the answers above be different in this scenario?

EEA AIFMs who market prior to 22 July 2013 have to take all necessary steps to comply with the AIFMG by 21 July 2014.

The Austrian transitional provisions cannot be relied on if no marketing activities have taken place prior to 22 July 2013. If the fund starts to market in Austria after 22 July 2013 then the local and Austrian transitional provisions cannot be relied on and the relevant fund will have to comply with the AIFMG immediately. If no marketing occurs in Austria, then the AIFMG will not have to be complied with.

2. The Czech Republic

Note:
The AIFMD has been recently implemented by new legislation combining UCITS, AIFMD and local regimes into one act. As a result, some issues remain unclear, including conditions for offering foreign funds in the Czech Republic.

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. Will it be possible in some manner to market a fund in the circumstances described above, in the Czech Republic and/or to investors established in the Czech Republic on or after 22 July 2013?

The Czech Republic implemented the AIFMD via the Act on Investment Companies and Investment Funds (the "AICIF") which became effective on 19 August 2013.

In general, foreign funds may now be marketed in the Czech Republic as follows:

(a) EEA and non-EEA funds already marketed in the Czech Republic as at 19 August 2013 may be further marketed without restrictions until 22 July 2014 (transitional provision)

(b) EEA and non-EEA funds to be marketed only after 19 August 2013 may be offered only after prior registration in the registry held by the Czech National Bank. Marketing also requires the fulfillment of certain conditions (existing memoranda of cooperation between regulators, no FATF blacklist etc.).

However, the regime of private placement of funds managed by non-EEA AIFMs is not yet clear. The interpretation above differs from official statements from the Ministry of Finance.

The Czech Venture Capital Association is seeking a meeting with the Ministry of Finance (the author of the legislation) and the Czech National Bank (the regulator) to clarify this issue. We assume that the issue will be clarified by the end of November 2013.

2. In the Czech Republic, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in the Czech Republic. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

The Czech Ministry of Finance has published several short guidelines in which it states that marketing includes, among others, private placement as well as public offering.

The AICIF states that investing at the initiative of the investor is not considered to be marketing.

The Czech Securities Commission (now replaced by the Czech National Bank) issued guidance on the meaning of public marketing under the Act on Collective Investment (replaced by the AICIF) in the past. Under this guidance 'public marketing' is any active provision or availability of information (irrespective of its form) to the public which is sufficient for a potential investor to decide on the investment. We are of the opinion that this rule should also apply to marketing under the AICIF (i.e. without the 'public' element).

3. What is the current best estimate of when the Directive will be transposed into national law in the Czech Republic? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The Directive was implemented on 19 August 2013 by way of adoption of a new act, the AICIF.

4. Under the domestic implementing measures of the Czech Republic, is the Directive relevant to marketing to investors established in the Czech Republic (within the meaning of Article 4(1)(j)) but who are not physically located in the Czech Republic at the time the marketing takes place[13]?

No. Although the AICIF recognises both marketing in the Czech Republic and outside the Czech Republic, it does not specifically recognise marketing to a Czech entity physically located abroad.

5. Once the Directive is in effect in the Czech Republic, in relation to 'marketing' (as that term is understood in the Czech Republic) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

See Question 1.

The deadline for AIFMs being fully compliant with the AICIF is 22 July 2014.

[13] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of the Czech Republic and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

As of 19 August 2013 the Czech Republic had concluded 36 cooperation agreements with 27 countries.

The list of cooperation agreements can be found on the webpage of the Czech National Bank although it is in Czech language and PDF version only.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

The option under Article 42 has not been implemented into Czech law. Therefore, the requirements are the same as in the "passport regime".

8. Must a firm seeking to market in the Czech Republic in reliance on Article 42 notify, or register with, the competent authority in the Czech Republic? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

The option under Article 42 has not been implemented into Czech law.

Therefore, the requirements are the same as in the "passport regime".

9. What restrictions will there be on pre-marketing[14], taking into account considerations similar to those raised in Questions 3 to 8 above?

Not applicable. See Question 2 above.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in the Czech Republic to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

Investing at the initiative of the investor is not considered to be marketing under the AICIF. However, the law does not describe what it means and no interpretation is currently available.

[14] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

The option under Article 36 has not been implemented into Czech law.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in the Czech Republic? How would the answers above be different in this scenario?

No. At least a basic level of registration with the Czech National Bank is required.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in the Czech Republic? How would the answers above be different in this scenario?

The "Czech" transitional period applies only to AIFs and AIFMs that had been authorised by the Czech National Bank before 19 August 2013. This means that other AIFs and AIFMs are not entitled to benefit from the "Czech" transitional period. As we are not aware of any provision of the AICIF recognising another EEA member state's transitional period it seems such marketing will not be possible.

3. Denmark

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. Will it be possible in some manner to market a fund in the circumstances described above, in Denmark and/or to investors established in Denmark on or after 22 July 2013?

Yes, it is possible to market subject to conditions.

2. In Denmark, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Denmark. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

No. According to the Danish FSA, 'marketing' includes situations where the AIF will only be established if sufficient investments are subscribed. The Danish FSA also considers marketing towards a single investor as 'marketing'.

3. What is the current best estimate of when the Directive will be transposed into national law in Denmark? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The Directive was implemented by law effective on 22 July 2013.

4. Under the domestic implementing measures of Denmark, is the Directive relevant to marketing to investors established in Denmark (within the meaning of Article 4(1)(j)) but who are not physically located in Denmark at the time the marketing takes place[15]?

No. The Danish law implementing the Directive restricts marketing to "investors in Denmark".

[15] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

5. Once the Directive is in effect in Denmark, in relation to 'marketing' (as that term is understood in Denmark) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Yes. Despite the fact that the Danish law implementing the Directive does not specifically extend the transitional provisions to non-EEA managers, the Danish FSA has confirmed that the transitional provision that allows managers that perform activities covered by the law before 22 July 2013 to delay compliance with the law until 21 July 2014 also applies to a non-EEA manager of a non-EEA fund.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Denmark and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

According to the Danish FSA, cooperation arrangements have been entered into with the competent authorities of a large number of non-EEA jurisdictions. The list is scheduled to be published shortly.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Yes, the law implementing the Directive empowers the Danish FSA to set out stricter rules regarding the marketing of non-EEA funds managed by non-EEA managers. The Danish FSA has introduced a requirement that the manager appoints one or more entities to carry out the depositary functions described in Article 21(7)-(9) (equivalent to Article 36(1)(a) 2nd-4th sentences) and that the non-EEA manager ensures the publication in Denmark of information and documents that the non-EEA fund (or the competent authority) is required to publish in its home country.

8. Must a firm seeking to market in Denmark in reliance on Article 42 notify, or register with, the competent authority in Denmark? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Managers who seek to market in Denmark in reliance on Article 42 must notify the Danish FSA using a notification form that is available **here**. The rules do not differ as between non-EEA AIFMs which are above or below the thresholds in Article 3(2). Marketing may only begin when the manager is notified hereof by the Danish FSA. There will be no public register.

There is an annual fee of DKK 2,000 per fund and an annual fee of DKK 2,000 per compartment that the manager markets in Denmark (the amounts are stated in 2004-prices and are subject to annual regulation in the Danish Finance Act).

9. What restrictions will there be on pre-marketing[16], taking into account considerations similar to those raised in Questions 3 to 8 above?

Not applicable.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Denmark to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

Under the Danish law implementing the Directive, 'marketing' does not include placement made at the initiative of the investor. The Danish FSA has not given guidance on how it is demonstrated that a placement was made at the initiative of the investor.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

Question 7: As an additional domestic requirement to those in Article 36, the EU manager must ensure publication in Denmark of information and documents that the non-EEA fund (or the competent authority) is required to publish in its home country.

Question 8: The same notification form and fees apply.

[16] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Denmark? How would the answers above be different in this scenario?

No, currently the Danish law implementing the Directive does not allow for such an AIFM to market in Denmark. The Danish FSA has indicated that this may be changed in the autumn of 2013 when an amendment of the law is scheduled.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Denmark? How would the answers above be different in this scenario?

Yes. Despite the fact that the Danish law implementing the Directive does not specifically extend the transitional provisions to managers from other EEA member states, the Danish FSA has confirmed (see Question 5) that the transitional provision that allows managers that perform activities covered by the law before 22 July 2013 to delay compliance with the law until 21 July 2014 also applies to managers from other EEA member states.

4. Finland

Note:
This information is based on a draft law. The AIFMD transposition law may only be in a final form and effective as late as February 2014.

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. Will it be possible in some manner to market a fund in the circumstances described above, in Finland and/or to investors established in Finland on or after 22 July 2013?

Yes, it will be possible, and subject to the conditions laid down in the act implementing the Directive (see Question 7) as soon as it becomes effective.

A lighter transitional period is also proposed: according to the draft AIFM law, marketing of non-EU AIFs by non-EU AIFMs to professional investors in Finland will be possible until 22 July 2014 without the restrictions otherwise provided by the law, provided that the marketing has been initiated before the AIFM law entered into force and a notification to the FIN-FSA has been made within a month after the entering into force of the AIFM law.

2. In Finland, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Finland.
Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

Yes, in the governmental bill (which is significant in respect of interpreting the act implementing the Directive) 'marketing' has been described as the direct or indirect offering of units in the AIF to investors and carried out on the initiative of the AIFM (or on its behalf). For an activity to be qualified as 'marketing' it shall always include the offering of units, the purpose of which is to conclude a binding contract/commitment. Therefore, 'soft circling', road shows or 'reverse solicitation' are not considered as marketing.

3. What is the current best estimate of when the Directive will be transposed into national law in Finland? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

Currently, the best estimate is in December 2013.

Provided that the marketing activity will not continue after the entry into force of the new AIFM Law, our advice would be to continue as if the domestic law was unchanged. If marketing continues thereafter, transitional provisions should be evaluated (see Question 5).

4. Under the domestic implementing measures of Finland, is the Directive relevant to marketing to investors established in Finland (within the meaning of Article 4(1)(j)) but who are not physically located in Finland at the time the marketing takes place[17]?

The draft Finnish law refers only to marketing "in Finland" (without defining this in more detail).

5. Once the Directive is in effect in Finland, in relation to 'marketing' (as that term is understood in Finland) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Yes, a non-EEA manager of a non-EEA fund can rely on certain transitional provisions. Provided that the marketing of an AIF has been commenced before the act coming into effect, the AIFM may continue marketing that AIF until 22 July 2014 subject to a notification to the competent authority within one month after the act has become effective. To benefit from the transitional provisions, the actions taken by the AIFM must be qualified as 'marketing' (see answer to Question 2).
Such notification should provide a clearance that the AIFM complies with (i) the general principles such as 'good practice' and equal treatment of investors, (ii) good securities markets practice; and (iii) the prohibition to give false or misleading information.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Finland and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

Such a list does not exist yet. After the act becomes effective the Finnish Financial Supervisory Authority ("FSA"), which is the competent authority, shall arrange requisite cooperation with the third country authorities. The FSA shall publish a list of authorities with whom it has arranged cooperation.

[17] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

According to the draft AIFM Law, marketing of fund interests will always be subject to compliance with good securities market practice and ensuring that information provided is not untrue or misleading.

According to the governmental bill the requirements are based on Article 42. In general, the AIFM shall comply with:

(i) general principles such as 'good practice' and equal treatment of investors;

(ii) reporting obligations towards the competent authority;

(iii) certain disclosures to the investors;

(iv) auditing requirements;

(v) 'know your customer' requirements; and

(vi) with respect to each AIF managed that acquires control in non-listed companies, certain special requirements concerning such companies.

(There will, however, be restrictions on marketing to non-professional investors, and non-EEA funds may not be marketed to non-professional investors).

8. Must a firm seeking to market in Finland in reliance on Article 42 notify, or register with, the competent authority in Finland? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

An AIFM seeking to market in Finland shall notify the competent authority before starting to market. For such notification, the AIFM shall provide a confirmation:

(i) concerning compliance with requirements (i) – (vi) outlined in the answer to Question 7;

(ii) that there are appropriate (according to international standards) cooperation arrangements between the competent authority and the supervisory authority of the AIFM in order to supervise systemic risk and secure the exchange of information;

(iii) that the country where the AIFM or the AIF is established is not a non-cooperative country in terms of money laundering and terrorist financing;

(iv) that there is an agreement between Finland and the third country corresponding to the OECD Model Agreement by which effective change of information in respect of tax matters is secured.

There will be a public register.

(A Finnish branch of a non-EEA AIFM shall pay a supervision fee of 0.34% of its revenues.)

9. What restrictions will there be on pre-marketing[18], taking into account considerations similar to those raised in Questions 3 to 8 above?

The act implementing the Directive does not concern 'pre-marketing' specifically. However, promotion actions taken by the AIFM are always subject to compliance with good securities market practice and not giving any untrue or misleading information. When the threshold of 'marketing' is exceeded and when a binding commitment is made, the AIFM must be able to demonstrate that it has complied with the marketing rules.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Finland to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

It has been expressly stated in the governmental bill that Finnish investors may still contact the foreign AIFM or investment service provider to express their interest to invest in a specific target and this shall not be considered as offering AIF interests in Finland (reverse solicitation). There is still however some unclarity as to what extent disclosure obligations apply in that case. It has also been expressly stated that after the establishment of the client relationship the AIF may also provide information on other investment objects and provide the client with non-specific presentations. However, the provision of investment recommendations, negotiating or drafting agreements without the prior request of the investor would be seen as the offering of interests.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

In addition to the items listed in Question 8 (ii) – (vi) the notification shall provide certain information regarding compliance with: (i) general principles such as 'good practice' and equal treatment of investors; (ii) certain disclosure and reporting obligations towards the investors; (iii) 'know your customer' requirements; and (iv) any decrees issued by the Ministry of Finance and any regulations issued by the Finnish Financial Supervisory Authority and with any delegated acts adopted by the Commission (stipulating in more detail disclosure requirements applicable to marketing, and requirements on risk management and 'know your client' requirements).

[18] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Finland? How would the answers above be different in this scenario?

Yes, to professional investors, provided that the AIFM, in addition to the requirements set out in Question 7, shall also comply with any decrees issued by the Ministry of Finance and any regulations issued by the Finnish Financial Supervisory Authority and with any delegated acts adopted by the Commission.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Finland? How would the answers above be different in this scenario?

Yes, to professional investors, provided that the AIFM, in addition to the requirements set out in Question 7, shall also comply with any decrees issued by the Ministry of Finance and any regulations issued by the Finnish Financial Supervisory Authority and with any delegated acts adopted by the Commission (stipulating in more detail disclosure requirements applicable to marketing, and requirements on risk management and 'know your client' requirements).

5. France

Note:
Please note that the situation in France remains uncertain at this stage. The legislative process has not been fully completed and not all transposition measures have been published to date (the remaining provisions are expected in November 2013). Therefore, further guidance and/or modification of the rules should be expected.

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in France and/or to investors established in France on or after 22 July 2013?**

The French transposition texts are not clear in this respect. We are still waiting for the French regulator to provide guidance on how to interpret the new provisions.

The regime for the marketing of AIFs by non-EU AIFMs without a passport in these circumstances is set out in Articles L. 214-24-1 I and D. 214-32 of the CMF (French *Code Monétaire et Financier*).

Article L. 214-24-1 I of the CMF requires AIFMs to notify the *Autorité des Marchés Financiers* (AMF) before marketing any AIF in France. However, details of the required notification (including timing, format and content) will not be available until the publication of the outstanding parts of the amended RG (*réglement general*). In addition, Article D. 214-32 of the CMF requires compliance with the following conditions:

- The AIFM must comply with the CMF provisions pertaining to AIFs and the French laws and regulations applicable to portfolio management companies (the scope of which is yet to be defined in the context of the AIFMD), with the exception of those provisions pertaining to custodians. It must, however, ensure that the tasks listed under Article L. 214-24-8 of the CMF are performed by the custodian designated by the management company. These tasks relate to cash flow monitoring, custody of assets and the verification of the compliance of certain operations (such as, for example, the issue, redemption and valuation of shares) with the laws and regulations applicable to the AIF, as well as with its articles of association and prospectus. The AIFM must also inform the AMF of the identity of the custodian.
- Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards need to be in place between the AMF and the supervisory authorities of the relevant third countries, if relevant.
- The third country of the AIFM and, if applicable, of the AIF must not be listed as non-cooperative by the Financial Action Task Force.
- If the AIF is open-ended it will also need to be authorised by the AMF. The conditions for being granted an authorisation in Article D.214-32 of the CMF as amended to implement the AIFMD correspond to those of Article D. 214-1 of the pre-AIFMD CMF (and which, as far as we are aware, no open-ended funds other than certain UCITS-aligned Swiss funds succeeded in satisfying).

2. In France, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in France. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

We are still awaiting the position of the French regulator concerning private placement.

Reverse solicitation is allowed but not explicitly foreseen in the legislation (see Question 10).

3. What is the current best estimate of when the Directive will be transposed into national law in France? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The AIFMD was transposed into French law by an ordinance and a decree published respectively on 27 and 30 July 2013, and amending the French *code monétaire et financier* ("CMF").

However, the AIFMD will be fully implemented only when the French regulations, the *règlement general* ("RG") of the *Autorité des Marchés Financiers* ("AMF"), the French regulator, have also been amended. Not all the amendments to the RG were published on 13 August; the remainder are expected in November 2013.

4. Under the domestic implementing measures of France, is the Directive relevant to marketing to investors established in France (within the meaning of Article 4(1)(j)) but who are not physically located in France at the time the marketing takes place[19]?

The situation is unclear at the moment. We are awaiting clarification from the French regulator and/or the French authorities.

5. Once the Directive is in effect in France, in relation to 'marketing' (as that term is understood in France) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

The transposition text does not include a grandfathering clause for the implementation and application of the Article 42 requirements.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of France and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

We understand that a number of third countries have signed a cooperation arrangement with France (20 countries at the end of September 2013). However, a full list of countries is not available yet.

[19] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

There is some gold-plating of the Article 42 requirements. Non-EU AIFMs must also comply with the CMF provisions pertaining to AIFs, as well as with the French laws and regulations applicable to portfolio management companies. The scope of these provisions is potentially very large.

We are waiting for a position from the French regulator to further define the scope of these provisions.

8. Must a firm seeking to market in France in reliance on Article 42 notify, or register with, the competent authority in France? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Yes. Non-EU AIFMs must obtain an authorisation to market in France from the French regulator, if the AIF managed is an open-ended AIF.

There is no detailed information in the transposition texts as to how such an authorisation may be obtained (no template, no instruction).

9. What restrictions will there be on pre-marketing[20], taking into account considerations similar to those raised in Questions 3 to 8 above?

There is no information on this in the transposition texts.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in France to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

Reverse solicitation may be relied upon. However, the French regulator has not provided any guidance on reverse solicitation in relation to the AIFMD.

More generally speaking for the financial sector, the 'passive marketing' exception in French law has been defined as being based on an express request from the investor for a specifically determined fund and without any product advertising (as opposed to institutional advertising) or solicitation.

The AMF provided some further guidance in this respect by differentiating between marketing and passive marketing. The AMF has specified that marketing "does not concern the sale of financial instruments in response to a client's unsolicited request to purchase a specifically designated financial instrument".

[20] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

EU AIFMs with non-EU AIFs do not have access to the AIFMD passport and can now only market under the new regime for marketing without a passport. The regime for the marketing of AIFs by non-EU AIFMs without a passport is set out in Articles L. 214-24-1 I and D. 214-32 of CMF as set out above, with application from the date of the EU AIFM's authorisation.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in France? How would the answers above be different in this scenario?

AIFMs must obtain an authorisation in order to market national AIFs below the AIFMD threshold in France (this remains subject to change depending on further rules from the regulator).

There is no information in the transposition texts regarding other AIFs.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in France? How would the answers above be different in this scenario?

Yes (Article 61 AIFMD has been transposed through Article 33 of the *Ordonnance*).

6. Germany

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in Germany and/or to investors established in Germany on or after 22 July 2013?**

Yes, subject to certain conditions.

2. **In Germany, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?**

   Questions 3 to 8 below relate to 'marketing' as that term is understood in Germany. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

BaFin has recently specified that it understands 'marketing' to be the act of making available fully negotiated fund documents to investors in Germany. BaFin follows this reasoning with respect to cases where the Fund is not yet set up. However, we believe that this should also apply if the Fund has already had a Closing. Marketing therefore does not commence before the PPM or LPA is available in almost final form from the perspective of the AIFM. Once the fund documents are in almost final form, marketing would be:

- sending the fund documents to the investor; or
- sending the investor the PPM or the LPA or a presentation/flyer on the fund if the subscription documents are available upon the investor's request.

3. **What is the current best estimate of when the Directive will be transposed into national law in Germany? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?**

The Directive was implemented into German law on 22 July 2013.

4. Under the domestic implementing measures of Germany, is the Directive relevant to marketing to investors established in Germany (within the meaning of Article 4(1)(j)) but who are not physically located in Germany at the time the marketing takes place[21]?

The territorial scope of the German implementation is not yet clear. The current position of BaFin seems to be that German marketing rules only apply if and to the extent the marketing has a sufficient connection to Germany.

5. Once the Directive is in effect in Germany, in relation to 'marketing' (as that term is understood in Germany) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Yes, a non-EEA manager may rely on grandfathering provisions, so long as marketing of the relevant AIF in Germany began pre 22 July 2013. Marketing for this purpose means to have distributed at least a private placement memorandum in its almost final form to a prospective German investor.

The grandfathering regime applies only to the particular AIF that has been marketed in Germany prior to 22 July 2013.

In respect of a non-EEA AIF manager's fund that falls within the grandfathering regime, it is expected that there will be no on-going AIFMD disclosure obligations in respect of such fund, provided that it has admitted all its German investors by 21 July 2014.

[21] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Germany and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

As of 22 July 2013, BaFin had concluded Memoranda of Understanding with the following supervisory authorities:

- Australia (ASIC)
- Guernsey (GFSC)
- Hong Kong (SFC)
- Hong Kong (HKMA)
- India (SEBI)
- Japan (JFSA)
- Japan (METI)
- Japan (MAFF)
- Jersey (JFSC)
- Canada (AMF)
- Canada (OSC)
- Canada (ASC)
- Canada (BCSC)
- Canada (OSFI)
- Switzerland (FINMA)
- Singapore (MAS)
- USA (SEC)
- USA (CFTC)
- USA (FED/CC)

The published information leaflet by BaFin can be found **here**.

Please note that BaFin does not automatically follow the cooperation agreements ESMA has negotiated. BaFin reserves the right to conduct due diligence with each non-EEA jurisdiction separately.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

In addition to complying with the Article 42 requirements, Germany requires an entity or person to perform certain depositary functions.

The depositary requirements imported into the German private placement regime are based on the requirements of Article 36(1)(a) AIFMD for marketing by EEA AIFMs without a passport. Germany therefore requires one or more entities to be appointed to carry out the following depositary functions:

- monitoring of fund cash flows;
- safe-keeping of custody assets/verification and record keeping of other assets;
- certain general oversight functions (e.g. including oversight of subscriptions and redemptions, valuation, compliance by the fund with local laws and fund terms).

The AIF can only be marketed to professional and/or semi-professional investors. If the AIF is marketed to semi-professional investors, the AIF and the manager must fully comply with the AIFMD.

Professional investors constitute 'professional clients' as defined in MiFID. Semi-professional investors may comprise, amongst others:

- Directors and certain employees of the manager of the AIF;
- Investors that have a minimum commitment to the AIF of EUR 10,000,000;
- Investors that have a minimum commitment to the AIF of EUR 200,000, who confirm they are sufficiently qualified to invest in the AIF and are assessed by the manager of the AIF (through a questionnaire) as being so.

8. Must a firm seeking to market in Germany in reliance on Article 42 notify, or register with, the competent authority in Germany? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

The AIF and the manager would need to be registered with BaFin. The manager must submit to BaFin general information on the AIF (among others LPA, PPM, annual report), certain manager-related information and statements (e.g. information on the manager's board) as well as information on the depositary (e.g. depositary agreement).

Currently no form for the registration process exists. The registration process is expected to take up to four months for a feeder fund and two months for a fund which is not a feeder. There is currently no indication on what BaFin will charge with regard to a registration fee.

While awaiting registration, pre-marketing could be conducted. This could include, *inter alia*, investor presentations or the distribution of term sheets.

9. What restrictions will there be on pre-marketing[22], taking into account considerations similar to those raised in Questions 3 to 8 above?

Currently, the law does not foresee any regulation of pre-marketing by the manager itself (although this may change).

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Germany to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

With regard to professional and semi-professional investors, it will not be considered marketing if the investor (or a third party agent of the investor) approaches the AIF manager at its sole initiative. The exact scope of this 'reverse solicitation' concept is still unclear.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

Yes with regard to Question 7: The AIFM and the managing of the AIF must comply with the AIFMD implementation requirements of the home member state of the AIFM. The depositary requirements, however, are similar to the depositary requirements explained under Question 7.

[22] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Germany? How would the answers above be different in this scenario?

Yes. Sub-threshold EEA AIFMs would have to go through a notification process as described under Question 7. However, the notification requirements are broadly reduced if the home member state of the EEA AIFM allows marketing of AIFs managed by German sub-threshold AIFMs without imposing stricter requirements than Germany ("reciprocity").

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Germany? How would the answers above be different in this scenario?

It seems that the EEA AIFM can market in Germany relying on transitional relief only if the AIFM complies with the transitional relief provisions for marketing (see answer to Question 5).

7. Ireland

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in Ireland and/or to investors established in Ireland on or after 22 July 2013?**

Under Regulation 43 of the Irish AIFMD Regulations (referred to in the response to Question 3 below), marketing of both EEA and non-EEA (pre and post 22 January 2013) AIFs to professional investors in Ireland will be permitted.

Written notification must be given to the Central Bank of Ireland (the "Central Bank") before marketing to professional investors in Ireland. Such a notification must include the name and identity of the jurisdiction of domicile of both the AIFM and the AIF.

For AIFMs which were marketing in Ireland before 22 July 2013, compliance with the Irish AIFMD Regulations is required on a 'best efforts' basis and this notification must be supplied before 22 July 2014, at the latest.

Regulation 43 also provides that where the Central Bank considers it necessary for the proper and orderly regulation and supervision of AIFMs, it may impose on the AIFM conditions or requirements in addition to those set out in Article 42.

2. **In Ireland, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft-marketing' or 'reverse solicitation'?**

   Questions 3 to 8 below relate to 'marketing' as that term is understood in Ireland. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

The Irish AIFMD Regulations adopt the AIFMD Article 4.1(x) definition of 'marketing'. There is currently no regulatory guidance available on this topic nor any distinction between the concepts referred to in Question 2 above.

3. **What is the current best estimate of when the Directive will be transposed into national law in Ireland? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?**

The AIFMD was transposed into Irish law in July 2013 pursuant to the European Union (Alternative Investment Fund Managers) Regulations 2013 (S.I. No. 257 of 2013) (the "Irish AIFMD Regulations").

4. Under the domestic implementing measures of Ireland, is the Directive relevant to marketing to investors established in Ireland (within the meaning of Article 4(1)(j)) but who are not physically located in Ireland at the time the marketing takes place[23]?

The Irish AIFMD Regulation transposing Article 42 of the AIFMD relates to marketing to professional investors in Ireland and the definition of 'marketing' refers to the domicile or registered office of the investor.

5. Once the Directive is in effect in Ireland, in relation to 'marketing' (as that term is understood in Ireland) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

See response to Question 1 above.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Ireland and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

As at 29 October 2013, the Central Bank had signed cooperation agreements with 38 of the 40 national securities regulators who had negotiated MoUs with ESMA. As at that date, only Turkey and the Maldives were outstanding.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Regulation 43 of the Irish AIFMD Regulations effectively mirrors the requirements of Article 42 save that there is also a notification requirement (see response to Question 1 above).

8. Must a firm seeking to market in Ireland in reliance on Article 42 notify, or register with, the competent authority in Ireland? What kind of information will be required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Notification must be made to the Central Bank. Please see the details in the response to Question 1 above. There is no information available as to whether or not there will a public register or a fee will be charged etc. There is currently no notification form. Firms should simply comply with the Regulation 43 notification requirement referred to in the response to Question 1 above.

[23] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

9. What restrictions will there be on pre-marketing[24], taking into account considerations similar to those raised in Questions 3 to 8 above?

Not applicable. See response to Question 2 above.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Ireland to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

There is no Irish regulatory interpretation of these concepts.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

The transitional provisions are the same as for AIFMs marketing under Article 42. As in the case of Article 42 marketing, the Central Bank must be notified before marketing takes place or, in the case of an AIFM marketing in Ireland prior to 22 July 2013, it must comply with the Irish AIFMD Regulations on a 'best efforts' basis and comply with the notification requirements by 22 July 2014, at the latest. The AIFM must also ensure that one or more persons are appointed to perform the depositary functions as specified in Article 21(7) to (9). In addition, the Central Bank may impose additional conditions or requirements similar to those which it may impose on AIFMs under Article 42 (see response to Question 1 above).

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home Member State market in Ireland? How would the answers above be different in this scenario?

A sub-threshold AIFM can only market to investors in Ireland subject to private placement rules.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Ireland? How would the answers above be different in this scenario?

An EEA AIFM relying on transitional relief may market in Ireland. See response to Question 11 above.

[24] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

8. Italy

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in Italy and/or to investors established in Italy on or after 22 July 2013?**

Under the Draft Transposition Decree, starting from the date on which the European passport for non-EU AIFMs comes into force (2015):

(a) non-EU AIFMs should be authorised in Italy by the *Banca d'Italia*, if Italy is the "EU member state of reference" pursuant to the AIFMD. A regulation to be issued by the *Banca d'Italia* will set forth the conditions and procedure for such authorisation and the conditions the non-EU AIFMs authorised in Italy should comply with in order to operate in other EU member states;

(b) non-EU AIFMs authorised in another EU member state pursuant to the AIFMD may market EU AIFs and non-EU AIFs in Italy to professional investors pursuant to a notification made to Consob by the home member state regulator in the same way as for the Article 32 notification;

(c) should a person hold no licence in any EEA State, it will no longer be possible to market interests in a fund (whereas under the current section 42.5 of the Financial Consolidated Act of 1998 (FCA) it is possible to apply for a marketing authorisation to the *Banca d'Italia*).

In light of these draft provisions, some tentative conclusions can be drawn:

(a) once the European passport for non-EU AIFMs comes into force, it would be the sole avenue for non-EU AIFMs to access the Italian market (i.e. there would be no dual marketing system after 2015);

(b) until the entry into force of the European passport for non-EU AIFMs, the current authorisation procedure provided for by the *Banca d'Italia* would continue to apply to non-EU AIFMs, although we note that adjustments to such procedure may be needed in order to ensure compliance with the requirements of Article 42 of the AIFMD (Conditions for the marketing in member states without a passport of AIFs managed by a non-EU AIFM).

However, as the Draft Transposition Decree is not yet approved, it is impossible to give an exact answer.

2. In Italy, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Italy. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

No, there is no general definition of 'marketing' that could be valid for all types and number of investors.

However, Article 1(1)(t) of the Financial Consolidated Act (FCA), defines an "offering to the public of financial products" as any communication to persons in any form or by any means, presenting sufficient information on conditions applying to these financial products, including placement through authorised intermediaries.

We believe it would be useful and appropriate to introduce the term of 'marketing' in the definitions referred to in Article 1 of the FCA. This view has been expressed in the responses to the public consultation on the transposition of the AIFMD, launched by the Ministry of Economy and Finance. We are now waiting for a response.

3. What is the current best estimate of when the Directive will be transposed into national law in Italy? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

On 3 July 2013, the Italian Government (Treasury Department of the Ministry of Economy and Finance) launched a public consultation on the transposition of the AIFMD and the application of the EuVECA Regulation ("Draft Transposition Decree"). The consultation, which proposed amendments to the Italian Financial Consolidated Act, ended on 26 July 2013. The Draft Transposition Decree is said to be due to be approved by the end of 2013.

On 26 July 2013 Consob and the *Banca d'Italia* issued a "Joint Resolution", introducing transposition measures, particularly as regards marketing in Italy of both EU and non-EU AIF's, which allow for an initial and partial implementation of the AIFMD (until the Draft Transposition Decree is approved).

On 20 August 2013, the European Delegation Law was approved. This law provides the Italian Government with delegated powers to implement the AIFMD and to modify the financial rules according to the AIFMD.

As soon as the transposition measures become law, the *Banca d'Italia* and Consob will be delegated to issue the appropriate regulations and the old regulations will apply until the new ones come into force.

The 2013 *Banca d'Italia* and Consob "Joint Resolution" grants grandfathering rights to non-Italian funds authorised to be marketed in Italy as of 22 July 2013, until the new rules apply.

4. Under the domestic implementing measures of Italy, is the Directive relevant to marketing to investors established in Italy (within the meaning of Article 4(1)(j)) but who are not physically located in Italy at the time the marketing takes place[25]?

No, it is not. The implementing measures seem to restrict marketing in Italy.

Under the Draft Transposition Decree, the *Banca d'Italia*, in agreement with Consob, shall authorise marketing of AIFs managed in the EU, when Italy is the reference State.

However, as the Draft Transposition Decree is yet to be approved, it is impossible to give an exact answer.

5. Once the Directive is in effect in Italy, in relation to 'marketing' (as that term is understood in Italy) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

The Draft Transposition Decree is yet to be approved so it is impossible to give an exact answer.

At this stage, the Draft does not include any grandfathering provisions, but firms will be granted a one-year transition period to comply with the new rules.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Italy and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

No, there is still no list of cooperation arrangements. As the Draft Transposition Decree has not yet been approved, the Competent Authorities lack the power to enter into cooperation arrangements.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

We are waiting for the AIFMD Level 2 implementing measures. In order to comply with the AIFMD, the National Competent Authorities have to amend the *Banca d'Italia* Regulation (i.e. the regulation on the collective investment management issued on 8 May 2012) and the Consob Intermediaries Regulation.

The current Draft Transposition Decree does not contain any gold-plating.

[25] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

8. Must a firm seeking to market in Italy in reliance on Article 42 notify, or register with, the competent authority in Italy? What kind of information will be required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Under the Draft Transposition Decree, the marketing in Italy, in respect of professional investors, of the units or shares of non-EU AIFs managed by a non-EU AIFM, authorised in a member state different from Italy, should be preceded by a notification to Consob by the authority of the member state of origin of each AIF subject to marketing.

9. What restrictions will there be on pre-marketing[26], taking into account considerations similar to those raised in Questions 3 to 8 above?

We are currently unable to answer this question. There is no definition of 'marketing' that allows us to understand the difference between the terms 'marketing' and 'pre-marketing' and the consequent different regulation.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Italy to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

Consob has not yet issued any guidance on the interpretation and the use of reverse solicitation.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

Under the Draft Transposition Decree, the marketing in Italy, in respect of professional investors, of the units or shares of non-EU AIFs managed by an EU AIFM, authorised in a member state different from Italy, should be preceded by a notification to Consob by the authority of the member state of origin of each AIF subject to marketing.

[26] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Italy? How would the answers above be different in this scenario?

Currently all funds (UCITS or alternative funds) are subject to the same rules and the concept of 'sub-threshold funds' does not exist.

The Draft Transposition Decree states that Italy should maintain, wherever possible, the stricter national rules and, by way of example, indicates the intention to keep the restriction on sub-threshold AIFs.

Under the Draft Transposition Decree it will no longer be possible to market interests in a fund for managers without a licence in any EEA State (among which there are sub-threshold AIFMs), because section n. 42.5 of the Financial Consolidated Act of 1998 (FCA) has been removed (cf. Answer to Question 1).

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Italy? How would the answers above be different in this scenario?

EU AIFs that have been authorised in Italy before 22 July 2013, may continue to be marketed in Italy to professional investors. By 22 July 2014, their managers shall take all measures necessary to comply with the provisions transposing the AIFMD and maintain, through the competent authorities of the State of origin, the notification required by Article 32, of the AIFMD, once the authorisation is granted in accordance with such Directive. Failing this, marketing will be suspended.

However, as the Draft Transposition Decree is not yet approved, it is impossible to give an exact answer.

9. Latvia

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in Latvia and/or to investors established in Latvia on or after 22 July 2013?**

Latvia has transposed the Directive into a new AIFM law which came into force as of 7 August 2013. When transposing the Directive Latvia decided not to exercise the discretion provided in Article 42 of the Directive. Therefore, marketing of non-EEA AIFs managed by non-EEA AIFMs is not allowed in Latvia.

2. **In Latvia, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked ''draft'', 'pre-marketing', 'soft marketing' or 'reverse solicitation'?**

   Questions 3 to 8 below relate to 'marketing' as that term is understood in Latvia.
   Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

Not applicable.

3. **What is the current best estimate of when the Directive will be transposed into national law in Latvia? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?**

Not applicable.

4. **Under the domestic implementing measures of Latvia, is the Directive relevant to marketing to investors established in Latvia (within the meaning of Article 4(1)(j)) but who are not physically located in Latvia at the time the marketing takes place[27]?**

Not applicable.

5. **Once the Directive is in effect in Latvia, in relation to 'marketing' (as that term is understood in Latvia) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?**

Not applicable.

[27] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Latvia and those of non EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

Not applicable.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Not applicable.

8. Must a firm seeking to market in Latvia in reliance on Article 42 notify, or register with, the competent authority in Latvia? What kind of information will be required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Not applicable.

9. What restrictions will there be on pre-marketing[28], taking into account considerations similar to those raised in Questions 3 to 8 above?

Not applicable.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Latvia to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

According to the AIFM law, marketing is defined as "distribution" which means "initial placement or offering of investment units, made by the manager or on behalf of the manager, to the investors domiciled or having a registered office in the member state". Since the AIFM law does not expressly state that Latvian investors may not contact a foreign AIFM, it can be concluded that 'passive' marketing by foreign AIFMs is allowed in Latvia, i.e. Latvian investors may contact a foreign AIFM to express their interest to invest in a specific target and this shall not be considered as offering AIF interests in Latvia.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

Latvia has decided not to exercise the discretion provided in Article 36 of the Directive. Therefore, marketing non-EEA AIFs without a passport is not allowed in Latvia.

[28] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Latvia? How would the answers above be different in this scenario?

Yes, to professional investors, provided that the Latvian Financial and Capital Market Commission (FCMC) has adopted a decision to allow the respective EU AIFM to market the EU AIF in Latvia. The AIFM should submit to the FCMC:

1. an application for authorisation to market the EU AIF managed by it to professional investors in Latvia;
2. a confirmation issued by the supervisory authorities of the home member states of the AIFM and AIF that the AIFM and AIF have been registered with the supervisory authorities of the member states in accordance with the procedure stated in the regulatory enactments of the member states and is subject to the supervision requirements applicable in the respective member states;
3. a confirmation of the AIFM and the supervisory authority of the home member state of the AIF addressed to the FCMC supporting that the supervisory authorities and the FCMC will cooperate in respect of the supervision of the AIF and the AIFM and information exchange matters;
4. information on the contact person responsible for the marketing of the AIF in Latvia and authorised to represent the interests of the AIF and the AIFM before state agencies, investors and third parties in Latvia;
5. the contract dealing with the marketing of the AIF; and
6. the following documents:
   (a) programme of activity setting out the information on the AIF which the AIFM wishes to market;
   (b) information about the place of incorporation of the AIF;
   (c) documents of incorporation of the AIF;
   (d) operating rules of the AIF;
   (e) information about the depositary of the AIF;
   (f) information on the place where the master fund is established if the fund is a feeder fund;
   (g) the most recent annual report and consolidated annual report if such are drawn up, information on the most recent calculated net asset value of the AIF or the most recent calculated value or market price of the investment unit (share);
   (h) the procedure under which the marketing of the AIF only to professional investors will be ensured.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Latvia? How would the answers above be different in this scenario?

According to the Latvian AIFM law the transitional relief is only applicable in relation to domestic AIFMs.

10. Luxembourg

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. Will it be possible in some manner to market a fund in the circumstances described above, in Luxembourg and/or to investors established in Luxembourg on or after 22 July 2013?

Yes, marketing under the existing Luxembourg placement rules will continue to be permitted until 22 July 2014 and will not be affected by the Law of 12 July 2013 relating to alternative investment fund managers (the 2013 AIFM Law).

2. In Luxembourg, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Latvia.
Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

The 2013 AIFM Law defines the concept of marketing 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 registered office in the European Union".

There is currently no regulatory guidance as to what constitutes pre-marketing, soft marketing or reverse solicitation in Luxembourg.

3. What is the current best estimate of when the Directive will be transposed into national law in Luxembourg? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The Directive was transposed into Luxembourg law on 12 July 2013.

4. Under the domestic implementing measures of Luxembourg, is the Directive relevant to marketing to investors established in Luxembourg (within the meaning of Article 4(1)(j)) but who are not physically located in Luxembourg at the time the marketing takes place[29]?

The 2013 AIFM Law refers to marketing activities carried out in the Grand Duchy of Luxembourg.

The definition of marketing further refers to the domicile of investors.

[29] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

5. Once the Directive is in effect in Luxembourg, in relation to 'marketing' (as that term is understood in Luxembourg) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Yes. Marketing under the existing Luxembourg private placement rules will continue to be permitted until 22 July 2014 and during this time will not be affected by the AIFM Law.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Luxembourg and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

As of 5 October 2013, the Luxembourg regulator, the CSSF, had signed cooperation agreements with 35 countries. The list can be accessed at http://www.cssf.lu/fileadmin/files/AIFM/FAQ_AIFMD.pdf

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Article 45 of the AIFM Law mirrors the requirements of Article 42 of the AIFMD. The Luxembourg rules do not foresee any gold-plating.

8. Must a firm seeking to market in Luxembourg in reliance on Article 42 notify, or register with, the competent authority in Luxembourg? What kind of information will be required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

A notification procedure may be envisaged. There is no further information at this stage.

9. What restrictions will there be on pre-marketing[30], taking into account considerations similar to those raised in Questions 3 to 8 above?

Not applicable. See Question 2 above.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Luxembourg to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

These concepts are currently not addressed by the supervisory authority. We are not expecting formal guidance on the issue from the CSSF.

[30] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

Transitional provisions will apply until 22 July 2014, whereupon the provisions of Article 37 of the AIFM Law will apply, notably that the AIFM complies with all the requirements contained in the AIFM Law with the exception of Article 21 relating to the depositary function.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Luxembourg? How would the answers above be different in this scenario?

The relevant AIFM will be able to access Luxembourg domiciled investors by virtue of the Luxembourg private placement rules only.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Luxembourg? How would the answers above be different in this scenario?

Yes, marketing under the existing Luxembourg placement rules will continue to be permitted until 22 July 2014.

11. The Netherlands

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in the Netherlands and/or to investors established in the Netherlands on or after 22 July 2013?**

Yes.

2. **In the Netherlands, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?**

   Questions 3 to 8 below relate to 'marketing' as that term is understood in the Netherlands. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

No extra definition of marketing has been given. In the Netherlands, there was already a definition of marketing (offering) in the Law on Financial Supervision (Wft) that regulated retail financial products. With the implementation of the AIFMD into this same law, this definition is now used with some very minor adjustments.

The unofficial translation is:

Part 1.1.1. Definitions

Section 1:1

In this Act and the provisions ensuing from this Act, unless otherwise stipulated, the following terms shall have the following meaning:

to offer:

(a) in the pursuit of a profession or business to make a sufficiently specific proposal, either directly or indirectly, to act as the other party in a contract with a consumer regarding a financial product that is not a financial instrument or insurance, or to enter into, manage or perform such a contract in the pursuit of a profession or business;

(b) in the pursuit of a profession or business to make a sufficiently specific proposal, either directly or indirectly, to act as the other party in a contract regarding an insurance, or to enter into, manage or perform such a contract in the pursuit of a profession or business; or

(c) to make a sufficiently specific proposal, either directly or indirectly, to act as the other party in a contract regarding units in a collective investment scheme, or to request or acquire, either directly or indirectly, funds or other goods from a client in order to hold units in a collective investment scheme;

A whole unofficial translation of the Act on Financial Supervision can be found **here**.

3. What is the current best estimate of when the Directive will be transposed into national law in the Netherlands? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The Directive was transposed into Dutch law on 25 June 2013.

4. Under the domestic implementing measures of the Netherlands, is the Directive relevant to marketing to investors established in the Netherlands (within the meaning of Article 4(1)(j)) but who are not physically located in the Netherlands at the time the marketing takes place[31]?

The domestic implementation of the AIFMD is relevant to investors not having a presence in the Netherlands. The implementation keeps national private placement in place which ensures continued marketing for below-threshold funds as long as the value of offerings exceeds EUR 100,000 or is to less than 150 people. For above-threshold funds, managers will have to apply for the passport.

5. Once the Directive is in effect in the Netherlands, in relation to 'marketing' (as that term is understood in the Netherlands) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Funds below the threshold can use the national private placement (subject to the EUR 100,000/ 150 persons rule).

Passive marketing, of which the definition is very unclear, may be permitted for above-threshold funds.

Currently we are investigating where the Netherlands stands regarding the AIFMD cooperation agreements with non-EU countries and territories.

For grandfathering, funds must meet the following criteria:

- No additional investments are done after 22 July 2013. Maintenance investments are not considered as additional investments, all others are.
- Marketing for the fund closed before 22 July 2011 and the fund is expected to terminate before 22 July 2016 (not considering extensions).

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of the Netherlands and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

No list is currently available but more information is expected soon.

[31] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

No gold-plating except for the EUR 100,000 or 150 persons provisions, in which case qualified investors are assumed to be aimed at. When also marketing to retail investors, a retail AIFMD top-up will apply.

8. Must a firm seeking to market in the Netherlands in reliance on Article 42 notify, or register with, the competent authority in the Netherlands? What kind of information will be required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

All AIFMs are required to register with the Dutch competent authority (AFM). Registration for the light regime is expected to cost EUR 1,500. Costs for a permit are about EUR 5,500. Registration involves providing:

- Business plan/investment strategy
- Open/closed fund
- Organisation chart
- Sub-funds structure
- Private investments policy
- Conflict of interest policy
- Valuation policy
- Accountant's statement
- Proof of suitability of fund managers (e.g. references/proof of good conduct)
- Contact details

9. What restrictions will there be on pre-marketing[32], taking into account considerations similar to those raised in Questions 3 to 8 above?

Not applicable. See Question 2 above.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in the Netherlands to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

No definition is given.

[32] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

No.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in the Netherlands? How would the answers above be different in this scenario?

Yes, if offering stakes of more than EUR 100,000 or to less than 150 people.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in the Netherlands? How would the answers above be different in this scenario?

Yes, if below the threshold subject to the EUR 100,000 or 150 persons rule.

No, if above the threshold. Then AIFMD permit/EuVECA is required. Passive marketing is an untested strategy.

12. Romania

Note:
The information below is based on the current status of AIFMD implementation in Romania.

As at the date of this paper, please note that:

- *The AIFMD has not yet been transposed in Romania; however, there is a draft norm for transposition which is currently being debated by the relevant authorities ("Draft Transposition Norm"). The period of time required to complete this procedure cannot currently be determined.*
- *The main legal provisions applicable to date are Art. 176 Regulation 15/2004 and Art. 10 Decision 9/2010, both issued by the National Commission of Securities ("CNVM"). Also, a norm regulating the Transitional Period (i.e. the period until the AIFMD is transposed in Romanian legislation) has recently been adopted (9 October 2013) by the Romanian Financial Surveillance Authority ("FSA"). This norm has entered into force by its publication in the Romanian Official Gazette on 5 November ("Norm 13/2013", as approved by FSA's Decision 52/24.10.2013).*

The main principles governing Norm 13/2013 are:

(a) Norm 13/2013 shall apply to EU AIFMs distributing EU AIFs towards Romanian professional investors. There is an article in the Norm based on which it appears that the Norm could be applicable to other situations (i.e. EU funds distributed to professionals via other means, not via EU AIFMs). However, the drafting is unclear and, given that the Norm was issued recently, there is currently no experience or practical guidance as to the exact scope of application.

(b) The distribution of non-EU AIFs (to retail and/or professionals) and the distribution of EU AIFs to retail investors (i.e. non-professional) does not fall within the scope of Norm 13/2013. They continue to be governed by Art. 176 Regulation 15/2004 and Art. 10 Decision 9/2010.

Both (a) and (b) shall apply until the adoption of the Draft Transposition Norm.

Similar to the definition in the Markets in Financial Instruments Directive no. 2004/39/EC ("MiFID"), professional investors are defined by CNVM Regulation 32/2006 as the clients who have the skills and capacity to take professional investment decisions and to evaluate the risks thereof ("professional investors"). Such investors include:

- *Entities which need to be authorised or regulated in order to be able to operate on the financial markets, which shall include:*
  - *credit institutions;*
  - *financial investment services companies;*
  - *other authorised or regulated financial institutions;*
  - *insurance companies;*
  - *collective investment structures and their management companies;*
  - *pension funds and their management companies;*
  - *traders;*
  - *other institutional investors.*
- *Any companies that meet two of the following requirements:*
  - *total balance sheet: EUR 20,000,000*
  - *net turnover: EUR 40 million*
  - *equity: EUR 2,000,000*
- *National and regional governments, public bodies that manage public debt, central banks, international and supranational institutions such as the World Bank, International Monetary Fund, European Central Bank, European Investment Bank and other similar international organisations.*
- *Other institutional investors whose main activity is investment in financial instruments, including entities dedicated to the securitisation of assets or other financial transactions.*

Before entering into a professional relationship, such entities need to be informed by the AIFM about their likelihood to qualify as a professional investor. Some may choose not to be treated as a professional investor. On the other hand, retail clients may choose to be treated as professional investors. So 'professional investor' status is assessed on a case-by-case basis.

The definition of professional investors is likely to be subject to changes following the adoption of the Draft Transposition Norm.

The responses below do not represent legal advice and they express an assessment as lawyers without the guarantee that an authority or a court of law would have the same interpretation. Given the lack of practice with Norm 13/2013 and the changing and overlapping current legal framework, it is recommended to obtain an update to this report, possibly after the Draft Transposition Norm will be adopted and entered into force.

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in Romania and/or to investors established in Romania on or after 22 July 2013?**

Based on the principle that Norm 13/2013 shall prospectively apply to EU AIFMs distributing EU AIFs towards professional investors, it may be construed that the distribution of non-EU AIFs by non-EU AIFMs should not fall within the scope of Norm 13/2013. Distribution of such funds should remain governed by Art. 176 Regulation 15/2004 and Art. 10 CNVM Decision 9/2010.

Further, the funds must be registered with the FSA and are subject to the following conditions:

- the funds must invest exclusively in certain types of asset expressly provided by law;
- they must be authorised, regulated and supervised by a competent authority;
- the funds must be subject to a prudential regulation and to an effective supervision equivalent to the provisions of the national regulation;
- their assets must be deposited with a depositary;
- a financial institution, subject to prudential supervision, established in Romania must be assigned as a contact point with the investors;
- the existence of a cooperation agreement with the competent authority from the origin state of the funds;
- the establishment of a branch in Romania.

2. In Romania, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Romania. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

1. (As opposed to the Draft Transposition Norm – see 2 below), the current legal framework (i.e. Art. 176 Regulation 15/2004, Art. 10 Decision 9/2010) does not mention a definition of 'marketing'. Certain types of marketing methods are prohibited, e.g.:
   - Unsolicited calls (based on Decision 9/2010);
   - Commercial communications through the use of automatic calling and communication systems that do not require human intervention, by fax or by electronic mail or by any other method that uses publicly available electronic communications services, unless the subscriber or user concerned has given their prior express consent to receive such communications. This rule has an exception, i.e. a person or an entity directly obtaining the e-mail address of a client, while selling goods or providing services, may use that address for the purpose of commercial communication relating to the goods which they market, subject to clearly and expressly providing the customers with the possibility to resist through a simple and free method to such use, not only when obtaining the e-mail address, but also with the occasion of each message in case the customer has not initially opposed (Art. 12 Law 506/2004);
   - It can be considered that marketing methods based on those prohibited shall be prohibited as well (e.g. flyers, circulating documents marked "draft" or meetings fixed based on unsolicited calls etc.);
   - Data protection provisions may need to be observed as well (if personal data are used).
2. The definition offered by the Draft Transposition Norm of the term 'marketing' overlaps with the definition offered to this concept by the AIFMD. Thus, the Draft Transposition Norm includes direct or indirect offering and placement in 'marketing'.

3. What is the current best estimate of when the Directive will be transposed into national law in Romania? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

There is a draft norm for the transposition of the AIFMD which is currently debated by the issuing authorities ("Draft Transposition Norm"). The period of time required to complete this procedure cannot currently be determined. See "Note" on page 98.

4. Under the domestic implementing measures of Romania, is the Directive relevant to marketing to investors established in Romania (within the meaning of Article 4(1)(j)) but who are not physically located in Romania at the time the marketing takes place[33]?

Art. 46 of the Draft Transposition Norm allows non-EU AIFMs to market AIFs to professional investors from Romania, even if they do not have a passport, subject to certain conditions. There is no express definition of "professional investor from Romania"; there is, however, another norm (i.e. the definition of 'marketing') which refers to entities with their headquarters in Romania and individuals domiciled in Romania.

So, it appears there is no distinction depending on the physical location of the investor, the only criteria being that of 'identity'. This article of the Transposition Norm appears to contradict Article 42 AIFMD, the latter establishing that marketing may be performed exclusively on the territory of the EU member state.

5. Once the Directive is in effect in Romania, in relation to 'marketing' (as that term is understood in Romania) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Under the current applicable law, there is no such provision regulating transitional situations, given that the distribution of non-EU AIFs towards professional investors is still regulated by the domestic law, prior to any measures of implementation of the AIFMD.

The Draft Transposition Norm regulates such transitional situations, implementing Article 61(1) of the AIFMD, but only concerning Romanian AIFMs and AIFs.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Romania and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

No such list has been published on the website of the ASF.

[33] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Article 46 of the Draft Transposition Norm does not establish any conditions additional to those provided by Article 42 of the AIFMD (the only difference being that the AIFMD refers to marketing within a specific territory, while the Draft Transposition Norm refers to marketing towards Romanian professional investors (as explained under Question 4)).

8. Must a firm seeking to market in Romania in reliance on Article 42 notify, or register with, the competent authority in Romania? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Under the current regime, please see answer to Question 1 above.

As far as it concerns the Draft Transposition Norm, Article 46 transposing Article 42 of the AIFMD does not expressly establish the procedure to follow in order to be able to perform distribution under scenario A.

However, given that existing national legislation (prior to AIFMD implementation) creates an obligation of registration and the accomplishment of other conditions, as contemplated in the answer to Question 1 above, the possibility of establishment of such additional obligations under the Transposition Norm cannot be excluded.

9. What restrictions will there be on pre-marketing[34], taking into account considerations similar to those raised in Questions 3 to 8 above?

Not applicable

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Romania to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

The term 'reverse solicitation' (by which we understand the situation where the investor approaches the AIFM) is not defined as such, neither by the Draft Transposition Norm nor by the current legal regime, consisting of Art. 176 Regulation 15/2004, Art. 10 Decision 9/2010 and Norm 13/2013. So, it can be construed that if the client is the one approaching the AIFM, this should not fall within the scope of the prohibition listed above under the answer to Question 2. However, we are not aware of an official interpretation of the term 'reverse solicitation'.

[34] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

The option under Article 36 of the AIFMD has not been implemented into Romanian law – see our comments on the status of the Draft Transposition Norm.

However, Article 38 of the Draft Transposition Norm overlaps with Article 36 of the AIFMD.

Given that Article 38 of the Draft Transposition Norm does not establish any additional conditions to the ones established by Article 36 of the AIFMD, the answers offered above in relation with non-EU AIFs are likely to apply to scenario B as well.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Romania? How would the answers above be different in this scenario?

Under the current legal regime – not applicable.

Under the Draft Transposition Norm – no. Article 5 of the Draft Transposition Norm establishes a general obligation of authorisation by the ASF, which is different depending on the 'nationality' of the AIFM and the AIF – under scenario C, a notification from the competent authority of the home member state is necessary, according to Article 37 of the Draft Transposition Norm.

Article 3(2) of the AIFM is transposed in the Draft Transposition Norm under Article 2(2) but only concerning Romanian AIFMs.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Romania? How would the answers above be different in this scenario?

Under the current legal regime – not applicable.

Under the Draft Transposition Norm, the "Romanian" transitional period applies only to Romanian AIFs and AIFMs which have been authorised before 22 July 2013. This provision can be interpreted as meaning that other AIFs and AIFMs cannot benefit from the "Romanian" transitional period.

As we are not aware of any provision recognising another EU member state's transitional period it seems such marketing will not be possible.

13. Slovakia

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in Slovakia and/or to investors established in Slovakia on or after 22 July 2013?**

Provided that a non-European alternative investment fund is not registered as an AIF in any member state of the European Union and that a non-European alternative investment fund does not have its registered seat or headquarters in any member state of the European Union, it is considered as a non-European Alternative Investment Fund (non-EU AIF) according to the Slovak Act No. 203/2011 Coll. on Collective Investments (the "Collective Investment Act") which implemented Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (the AIFMD).

Provided that non-EU AIFs are managed by managers which have their registered seat outside of the European Union and which have been granted authorisation by the local regulator in the country of their residency to act as management companies and which have not been granted any licence or any other form of permission in the Slovak Republic (non-EU managers), such managers can market non-EU AIFs in the Slovak Republic only if the following conditions are fulfilled:

- in the course of marketing non-EU AIFs in the Slovak Republic, the non-EU managers should meet various conditions stipulated by the Collective Investment Act, namely:
  - making available an annual report for each non-EU AIF which is marketed in the Slovak Republic;
  - making available to investors certain information before they invest, as well as notifying them of any material changes to that information;
  - regular reporting by the non-EU managers to the National Bank of Slovakia, for example reporting in relation to the percentage of the non-EU AIFs' assets which are subject to special arrangements arising from their illiquid nature and also reporting in relation to the main categories of assets in which the non-EU AIFs invest;
  - where the non-EU AIFs acquire control over an unlisted company, the non-EU managers must make a number of disclosures to that company, its shareholders and also to the National Bank of Slovakia.
- the local regulator in the country of residency of the non-EU managers has signed a cooperation agreement with the National Bank of Slovakia in line with international standards.
- the country of residency of the non-EU managers is not listed as a non-cooperative country by the Financial Action Task Force.

2. In Slovakia, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Slovakia. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

According to the Collective Investment Act, marketing shall be understood as the "direct or indirect offering of units or shares of collective investment undertakings or their placing at the initiative or on behalf of a manager of such collective investment undertaking with investors with their permanent address or registered seat situated in a member state of the European Union".

Apart from the implementation of the word 'marketing', there has not been any other elaboration of this term in Slovak law.

3. What is the current best estimate of when the Directive will be transposed into national law in the Slovak Republic? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The AIFMD has already been implemented into national law through the Collective Investment Act, effective as of 22 July 2013.

4. Under the domestic implementing measures of Slovakia, is the Directive relevant to marketing to investors established in Slovakia (within the meaning of Article 4(1)(j)) but who are not physically located in Slovakia at the time the marketing takes place[35]?

No, marketing of alternative investment funds as such is not affected by the AIFMD in general.

5. Once the Directive is in effect in Slovakia, in relation to 'marketing' (as that term is understood in Slovakia) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

According to the Collective Investment Act, there is no transitional provision which would be applicable to the case at hand.

A transitional period of one year (counted from 22 July 2013) is applicable for non-EU AIFs managed by non-EU managers only in case it wishes to distribute the non-EU AIFs via a public offer.

It seems (to us) that Article 61(1) of the AIFMD has been implemented into the Collective Investment Act incorrectly as it applies only to Slovak AIFs.

Therefore, for the purpose of ensuring that there is conformity with the EU law, interpretation of the transitional provisions of the Collective Investment Act could be in accordance with the AIFMD.

[35] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Slovakia and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

Yes. The list can be found here:
http://www.nbs.sk/en/financial-market-supervision/securities-market-supervision/collective-investment/list-of-memorandums-of-understanding-under-aifmd-directive

However, the MoUs are not available to the public for review.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Generally, there are no further restrictions if placed only via private placement means.

8. Must a firm seeking to market in Slovakia in reliance on Article 42 notify, or register with, the competent authority in Slovakia? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Such a firm has to notify the National Bank of Slovakia of its intention to distribute non-EU AIFs in the Slovak Republic prior to distribution. The following shall be submitted to the National Bank of Slovakia:

- identification data of the non-EU AIF;
- statutes and founding documents of the non-EU AIF;
- identification data of the depositary of the non-EU AIF;
- description of the non-EU AIF;
- seat of the non-EU AIF;
- information about measures and steps taken in order to prevent distribution to retail investors;
- other additional information required by the Slovak law;
- documents demonstrating the fulfillment of the requirements as stated in the answer to Question 1 above.

The registration fee amounts to EUR 1,700.

The National Bank of Slovakia has a statutory period of 20 working days to decide on the application.

9. What restrictions will there be on pre-marketing[36], taking into account considerations similar to those raised in Questions 3 to 8 above?

Firstly, non-EU managers should make sure that none of their marketing activities constitute a public offer. Failure to do this could trigger the application of additional requirements.

According to Slovak law, the expression private placement means an announcement, an offer or a recommendation addressed to investors specified in advance, which is not carried out in any of the forms below:

- press, radio and television;
- circulars, booklets or other written materials and durable records, if intended for the public or if intended for recipients not specified in advance;
- Internet and other electronic communication or information systems, accessible to the public, or
- unsolicited personal contact of non-professional investors (e.g. cold calling).

Pursuant to the Slovak Act No. 566/2001 Coll. on Securities and Investment Services, as amended (the "Securities Act") which implemented Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004, on markets in financial instruments law (MIFID), the expression 'professional clients' means clients who possess the expertise, experience and knowledge to make their own investment decisions and to properly assess the risks that it incurs. The following persons are to be regarded as professional clients:

- stock brokerage firms, foreign stock brokerage firms, financial institutions, commodity and commodity derivatives dealers, specific financial institutions, and entities authorised to operate in the financial market by a competent authority or whose activity is separately regulated by generally binding legal regulations;
- large undertakings meeting certain quantitative conditions;
- state, regional or municipal authorities, state or regional authorities of other countries, the Debt and Liquidity Management Agency of the Slovak Republic, public authorities of other countries that are in charge of or intervene in public debt management, the National Bank of Slovakia, other central banks, the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations;
- legal persons not mentioned above whose main activity is to invest in financial instruments, including entities that carry out the securitisation of credits and loans or other financing transactions, or
- entities which may at their request be treated as professional clients under certain conditions.

[36] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

High net worth individuals may be considered as professional clients only upon their request to the non-EU manager to be treated as such, and only if the following conditions are fulfilled:

- the non-EU manager has assessed the high net worth individual's expertise, experience and knowledge and has issued a written statement that these give reasonable assurance, in light of the nature of the envisaged transactions or investment or ancillary services, that the high net worth individual is capable of making his/her own investment decisions and understanding the risks involved;
- the high net worth individual has stated in writing to the non-EU manager that he/she wishes to be treated as a professional client, in regard to one or several investment services, ancillary services or transactions, or to one or several types of financial instrument or transaction;
- the non-EU manager has given the client a clear written warning of the protections and investor compensation rights he/she may lose;
- the high net worth individual has stated in writing, in a separate document from the contract, that he/she is aware of the consequences of losing such rights.

Moreover, a high net worth individual may be considered as a professional client only if at least two of the following conditions are fulfilled:

- over the previous four quarters, the high net worth individual has carried out transactions in financial instruments of a significant size on the relevant market in financial instruments at an average frequency of at least ten per quarter; a transaction in financial instruments of a significant size meaning a transaction the volume of which exceeds EUR 6,000, and the relevant market meaning the regulated market, multilateral trading facility or unorganised market, where financial instruments are accepted for trading, in relation to which investment services are or are to be provided to the individual;
- the size of his portfolio covering financial instruments and financial deposits exceeds EUR 500,000;
- the high net worth individual carries out or has carried out, for at least one year, in relation to his/her employment, profession or duties, an activity in the financial market area in a position which requires knowledge of transactions or investment services provided or which are to be provided for such person.

It should be distinguished whether marketing takes place towards professional clients or not. In case of marketing to professional clients, it is subject to the restrictions mentioned below.

In the Slovak Republic, cold calls are allowed provided that such active solicitation is performed in relation to institutional investors (legal entities – it is not the same term as professional clients according to the Securities Act), subject to the following limitations:

- it cannot be disseminated by an automatic telephone call system, fax or electronic mail without previous consent of the recipient of the advertisement, and
- it cannot be addressed to a recipient who has a priori refused such advertising.

Even if a high net worth individual is classified as a professional investor, non-EU managers cannot contact the high net worth individual by cold calls unless they have been granted prior approval for this by the high net worth individual. Please note that cold calls to retail investors are always considered as public placement, irrespective of the fact that such solicitation may be conducted solely via private placement channels.

Slovak law does not specifically address unsolicited written correspondence and materials and therefore it is not subject to any restrictions, if sent physically. However, if such correspondence and materials are sent via electronic means, the same regime applies as in connection with cold calls mentioned above. In addition, it is prohibited to send an electronic mail message which does not disclose the sender's identity and address to which the recipient may send a request for such communication to cease.

If non-EU managers are targeted by unsolicited requests, they can provide the requesters with any of the written marketing documents. Such request is not considered as an offer by non-EU managers.

Participation in any industry events within the Slovak Republic, if connected with the promotion of non-EU AIFs is likely to be viewed as a form of public offering. This is mainly due to the reason that the visitors of such conferences are most likely not specified in advance and therefore non-EU managers, when promoting non-EU AIFs, target an unspecified circle of potential investors.

Non-EU managers can freely meet with potential investors either in the Slovak Republic or abroad provided that the invitation for an arrangement of such meetings does not constitute public offering in the Slovak Republic.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Slovakia to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

Please see the answer to Question 9 above.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

In such case, EU passporting based on the notification procedure should apply. Please note that a simple notification procedure applies only in case of private placement to professional investors.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Slovakia? How would the answers above be different in this scenario?

AIFMs falling within Article 3(2) are not required to obtain a Slovak licence, but are required to register into the register of AIFMs kept by the National Bank of Slovakia.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Slovakia? How would the answers above be different in this scenario?

No. The Collective Investment Act explicitly states that only EU managers with an authorisation pursuant to the AIFMD can distribute units and shares of AIFs in the Slovak Republic.

14. Spain

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. Will it be possible in some manner to market a fund in the circumstances described above, in Spain and/or to investors established in Spain on or after 22 July 2013?

It is not clear whether non-EEA AIFs managed by non-EEA AIFMs without a passport will be regulated under the legislation implementing Directive 2011/61/EU. The implementing law may require evidence of compliance with the following requirements to be provided to the Spanish Securities Market Commission ("CNMV"):

(a) That Spanish legislation regulates the same category of AIF used by the non-EEA AIFM and that the non-EEA AIF is subject to a specific norm in its home State that protects the interests of unitholders in the same way as Spanish legislation, in this area;

(b) A favourable report of the home State authority responsible for monitoring and inspecting the non-EEA AIF, with respect to the development of the activities of the non-EEA AIFM;

(c) That adequate arrangements are in place for cooperation between the competent authorities of the home member state of the non-EEA AIFM and the supervisory authorities of the third country in which the non-EEA AIF is established;

(d) That the country in which the non-EEA AIFM is established, or if applicable, the non-EEA AIF, is not on the list of non-cooperative countries and territories set by the Financial Action Task Force on Money Laundering.

Furthermore, the following information may have to be provided and registered with the CNMV:

(a) identification of the non-EEA AIF that the non-EEA AIFM intends to commercialise, and the place where it is established;

(b) mechanisms and methods of marketing shares or units in Spain, and when appropriate, the classes or series of shares or units;

(c) management regulation of the non-EEA AIF or documents of incorporation;

(d) prospectus of the non-EEA AIF or equivalent document and the latest annual report;

(e) identification of the depositary of the non-EEA AIF;

(f) description of the non-EEA AIF, or any other information on it, available to the investors;

(g) information about the place where the main AIF is located if the non-EEA AIF to be marketed is a subordinated entity;

(h) when applicable, information on the measures taken to prevent the marketing of the non-EEA AIF to retail investors;

(i) registration with and delivery to the CNMV of the documents that certify the subjection of the non-EEA AIF and the stocks, shares or equity securities or assets to the applicable legal regime.

For the shares or units of the non-EEA AIF to be marketed in Spain, the non-EEA AIFM must be expressly authorised for such purpose by the CNMV and registered in the CNMV records.

The authorisation of a non-EEA AIFM or a non-EEA AIF may be refused (i) for prudential reasons, (ii) if Spanish AIFs or their Spanish AIFMs are not given equal treatment in its home country, (iii) for not ensuring compliance with the management standards and discipline of the Spanish securities markets, (iv) if the protection of investors resident in Spain is not sufficiently guaranteed and (v) in case of disturbances in the conditions of competition between the non-EEA AIF and AIFs authorised in Spain.

Once authorised and registered in the CNMV register, the non-EEA AIF and/or the non-EEA AIFM must facilitate the shareholders and unitholders of the non-EEA AIF with the exercise of all their rights generally, and in particular with respect to payments, the acquisition by the non-EEA AIF of their shares, and the dissemination of the information to be supplied to shareholders and unitholders resident in Spain.

However, please keep in mind that these requirements may yet be modified when the implementing legislation is approved.

2. In Spain, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Spain. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

Currently, under applicable Spanish law, public marketing (*comercialización*) means gaining clients by means of carrying out advertising activities (*actividad publicitaria*) so as to get contributions from such clients to the collective investment scheme (whether in the form of funds, rights or assets). Advertising activities in connection with collective investment schemes means any form of communication addressed to the public in general intended to promote (whether directly or indirectly through third parties) the subscription/acquisition of financial instruments. Likewise, advertising activities shall be understood as those communications intended to attract the attention of the public about the management or marketing of collective investment schemes even if the communication does not refer individually to a specific institution. The regulation sets out a non-exhaustive list of situations which constitute such an advertisement (e.g. telephone calls initiated by the marketer, visits to the investors' home, personalised mailings and e-mails or any other communications by computer, which form part of the marketing/promotion/diffusion campaign).

According to the draft implementing law, the marketing of an AIF shall be understood as the acquisition of clients through an advertising activity on behalf of the AIF or any entity acting on its behalf or on behalf of one of its traders, or customers, for their contribution to the AIF funds, assets or rights.

For this purpose, advertising activity means any form of communication addressed to potential investors in order to promote, directly or through third parties acting on behalf of the AIF or the management company of AIF, the subscription or acquisition of units/shares of the AIF. In any case, there is an advertising activity when the means used to address the public are either telephone calls initiated by the AIF or its management company, home visits, personal letters, e-mail or any electronic means, which are part of a publicity campaign, marketing or promotion.

The campaign will be deemed to be carried out within Spain's national territory if it is addressed to investors resident in Spain. In the case of e-mail or any electronic means, it shall be presumed that the offer is addressed to investors resident in Spain when the AIF or its management company, or any person acting on their behalf online, propose the purchase or subscription of shares or facilitate to the Spanish residents the information needed to assess the features of the issue or offer and adhere to it.

However, Spain has not yet passed the laws and regulations implementing Directive 2011/61/EU or applying the Capital Requirements Regulation (No. 575/2013), so it is not sure whether these definitions will remain.

3. What is the current best estimate of when the Directive will be transposed into national law in Spain? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

It is expected that the implementing legislation will be passed by the end of the year; this is not considered a high priority currently, but the process may be accelerated following the implementation of the AIFMD in France.

4. Under the domestic implementing measures of Spain, is the Directive relevant to marketing to investors established in Spain (within the meaning of Article 4(1)(j)) but who are not physically located in Spain at the time the marketing takes place[37]?

The draft implementing legislation seems to refer only to marketing activities addressed to residents in Spain.

5. Once the Directive is in effect in Spain, in relation to 'marketing' (as that term is understood in Spain) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

The draft implementing legislation does not seem to include a grandfathering provision applicable to this scenario.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Spain and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

No such arrangements have been entered into.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

It seems that the requirements may be those described in the answer to Question 1 above.

8. Must a firm seeking to market in Spain in reliance on Article 42 notify, or register with, the competent authority in Spain? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

Yes, as described in the answer to Question 1 above.

[37] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

9. What restrictions will there be on pre-marketing[38], taking into account considerations similar to those raised in Questions 3 to 8 above?

No such distinction seems to be made in the draft implementing legislation.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Spain to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

There is no reference in the current draft legislation.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EAA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

For Question 5, it is expected that AIFMs of AIFs authorised before the entry into force of the law, shall adapt to the new regulation before 22 July 2014.

However, in relation to cross-border trading, the implementing law will not be applied to the marketing of AIF shares that are subject to a current public offer under a prospectus prepared and published in accordance with the Law 24/1988 of Stock Market before 22 July 2013, but only during the validity of such prospectus.

Moreover, those AIFMs that manage an AIF before 22 July 2013 may continue to operate such an AIF without the authorisation required under the new law if no new investments are made after 22 July 2013.

Additionally, AIFMs, in so far as they manage AIFs whose subscription period for investors has expired before 22 July 2013 and that are constituted for a period ending no later than three years after that date, may continue to manage such AIFs without complying with the provisions of the new law, except for the requirements to submit an annual report and obligations related to corporate takeover stated in the draft law.

However, Spain has not yet passed the laws and regulations implementing Directive 2011/61/EU or applying the Capital Requirements Regulation (No. 575/2013), so it is not sure whether these will remain.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Spain? How would the answers above be different in this scenario?

Nothing is expressly established in the draft.

[38] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Spain? How would the answers above be different in this scenario?

According to the draft implementing legislation, an EEA AIFM of an EEA AIF relying on transitional relief can market in Spain provided that a written notification is submitted to the CNMV containing the following information:

(a) identification of the EEA AIF that the AIFM intends to market, and where both of them are established;

(b) rules and procedures for the marketing of shares or units in Spain, and when appropriate, the classes or series of shares or units;

(c) the management regulations of the EEA AIF or instruments of incorporation of the same entity;

(d) the prospectus of the EEA AIF and the latest annual report;

(e) identification of the depositary of the EEA AIF;

(f) a description of the EEA AIF, or any information on it, available to investors;

(g) information about the location of the main EEA AIF, if the EEA AIF to be marketed is a subordinate;

(h) where applicable, information on the measures taken to prevent the marketing of shares of the EEA AIF to retail investors.

A subordinate EEA AIF can only be marketed in Spain if the main entity is domiciled in the European Union and is managed by an AIFM authorised under Directive 2011/61/EU.

Moreover, the competent authorities of the EU member state where the AIFM is established shall attach a certificate to confirm that the AIFM is authorised by Directive 2011/61/EU to manage AIFs with a particular investment strategy.

For those cases involving a non-EEA AIFM of an EEA AIF please refer to Question 11.

15. Sweden

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. Will it be possible in some manner to market a fund in the circumstances described above, in Sweden and/or to investors established in Sweden on or after 22 July 2013?

Yes, if the AIFM qualifies for the transitional provisions it may continue to market AIFs subject to the previous legal regime. If the AIFM does not qualify for the transitional provisions marketing AIFs in Sweden will require authorisation.

2. In Sweden, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?

Questions 3 to 8 below relate to 'marketing' as that term is understood in Sweden. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

The concept of marketing under the Alternative Investment Fund Managers Act ("AIFMA") implementing the Directive is broad, covering direct and indirect offerings and placements to investors domiciled or with their registered office within the EEA. This includes all sale promoting actions, i.e. advertising, telemarketing, brochures, flyers, e-mail, Internet and investor events.

Notably, the preparatory works to the AIFMA express the view that marketing is not possible until the AIF actually exists. Activities that are conducted before the fund vehicle meets the criteria of an AIF should therefore not be considered as marketing for the purpose of the Directive. In relation to launching a private equity fund, it is argued that the fund vehicle would meet the definition of an AIF at the earliest by 'first closing' since there is typically nothing to be classified as an AIF nor any assets to be managed before a 'first closing'. Investor contacts or similar activities before a 'first closing' should therefore typically not be viewed as 'marketing'.

3. What is the current best estimate of when the Directive will be transposed into national law in Sweden? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The AIFMA implementing the Directive entered into force on 22 July 2013.

4. Under the domestic implementing measures of Sweden, is the Directive relevant to marketing to investors established in Sweden (within the meaning of Article 4(1)(j)) but who are not physically located in Sweden at the time the marketing takes place[39]?

Provided that all marketing activities take place outside of Sweden, the domicile of the investor should not be decisive. However, given the wide scope of the marketing definition the actual activities allowed are very limited since e-mail invitations (depending on content) and telephone contacts could be considered as marketing.

5. Once the Directive is in effect in Sweden, in relation to 'marketing' (as that term is understood in Sweden) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Yes. In order to qualify for the transitional provisions, the AIFM must have actively marketed an AIF at the date of implementation (i.e. 22 July 2013). It should be noted that the marketing must be in relation to an AIF which has had its 'first closing', please refer to Question 2 above. If the AIFM qualifies for the transitional provisions it may continue to market new and existing AIFs in Sweden under the previous legal regime.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of Sweden and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

The SFSA has signed the memoranda of understanding (MoUs), negotiated by the European Securities and Markets Authority (ESMA) on behalf of the EU/EEA national competent authorities, in relation to, among others, the Cayman Islands, Bermuda, Jersey and Guernsey. Please see:

http://www.esma.europa.eu/node/66691

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Sweden has largely adopted a 'copy-out approach', with no significant gold-plating. The disclosure requirements set out in Article 23 of the AIFMD, i.e. information that needs to be furnished to investors prior to their investment in the AIF, shall in Sweden be presented in an 'information brochure' which also needs to be included in the application for authorisation.

[39] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

8. Must a firm seeking to market in Sweden in reliance on Article 42 notify, or register with, the competent authority in Sweden? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

A non-EEA AIFM managing a non-EEA based AIF must obtain an authorisation from the SFSA in order to market the AIF. There will likely be a public register. The fee payable for the license is approximately SEK 16,000. No forms will be available.

An application for a licence to market an AIF must contain a description of how the AIFM intends to comply with the transparency and disclosure requirements, a business plan including information on the AIF intended to be marketed and where it is established, the AIF's rules, articles of association or similar document, information on where any master fund is established, an information brochure, the latest annual report and information on the measures which have been taken in order to prevent marketing to retail investors.

If the AIFM relies on the transitional provisions it may continue to market AIFs in Sweden until the application has been finally decided.

9. What restrictions will there be on pre-marketing[40], taking into account considerations similar to those raised in Questions 3 to 8 above?

As stated above, the AIFMA expresses the view that marketing is not at hand before an AIF is established, i.e. normally before the 'first closing' of the AIF. Investor contacts and similar actions prior to this point is therefore not considered as marketing.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in Sweden to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

With reference to Recital 70 of the Directive, the preparatory work of the AIFMA states that reverse solicitation is not considered marketing.

While there are no clear rules as to what would be considered as reverse solicitation, the preparatory works to the AIFMA exemplify a few situations that typically would not constitute marketing, e.g. if an investor on its own initiative contacts the AIFM to subscribe for units (e.g. on the company's website, provided that the website is not specifically directed to Swedish investors), or if an investor contacts an investment firm to execute or transmit an order of units or shares of an AIF which are not part of any offer from the investment firm. In order for the activities to be deemed taken at the investor's own initiative, neither the AIFM nor any other party (e.g. an investment firm) may initiate any contacts with the Swedish investor.

[40] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EEA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

Marketing of non-EEA AIFs to professional investors in Sweden by an EEA AIFM duly licensed in its home member state will require an authorisation from the SFSA. The requirements to obtain such authorisation differ slightly from the requirements for a non-EEA AIFM.

In order to obtain the authorisation, the conditions corresponding to the provisions in Article 36 must be satisfied. In brief, these conditions include that: (i) it can be expected that the AIFM will comply with all the applicable rules under the Directive; (ii) appropriate cooperation arrangements are in place between the SFSA and the supervisory authority in the country where the AIF is established; and (iii) the country in which the AIF is established has taken adequate measures to prevent money laundering and terrorist financing.

The application shall contain *a certificate*, issued by the home member state authority, evidencing that the AIFM is licensed to manage AIFs in its home member state, a business plan including information on the AIF intended to be marketed and where it is established, the AIF's rules or similar documents, information on where any master fund is established, information on the *identity of the AIF's depositary* (or the entity that has been appointed to carry out the depositary duties), the information set out in Article 23 of the AIFMD, i.e. the information that the AIFM must furnish to investors prior to their investments in the AIF; and information on the measures which have been taken in order to prevent marketing to retail investors (an AIFM with a licence to market AIFs to professional investors only must ensure that no marketing activities are directed to retail investors, e.g. by including a disclaimer in marketing materials).

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in Sweden? How would the answers above be different in this scenario?

An EEA sub-threshold AIFM subject to domestic registration or authorisation may market certain closed-ended AIFs to professional investors and semi-professional investors in Sweden after authorisation by the SFSA.

The fund must satisfy the following conditions (i) there is no right to redemption for at least five years from the initial investment, and (ii) the AIF (under its investment policy) generally invests in issuers or non-listed companies, in each case in order to acquire control according to provisions corresponding to Articles 26-30 of the AIFMD.

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in Sweden? How would the answers above be different in this scenario?

In order to market AIFs in Sweden while relying on the transitional provisions, the AIFM must have been actively marketing an AIF (which has had its first closing) in Sweden at the date of implementation. The fact that the AIFM qualifies for the transitional provisions in another EEA member state will be irrelevant when determining if the transitional provisions will apply for marketing in Sweden.

16. Switzerland

1. Private placement

Unregulated private placement of funds is still possible, however, restricted to a limited group of regulated entities, such as banks, insurance companies, collective investment fund managers, regulated managers of foreign collective investment funds and the central bank. Through banks and other financial intermediaries and subject to conditions, private placement is possible in relation to certain high net worth individuals.

2. Distribution to qualified investors

All marketing and distribution activities are subject to regulation other than if directed to the restricted group under 1) above. Except for items not applicable to private equity funds (e.g. publication of prices) there are no sub-threshold marketing activities any more. In relation to qualified investors the following applies:

Qualified investors such as pensions and certain high net worth individuals must only be approached under the distribution rules for qualified investors. Note that family offices and the like are not deemed qualified investors.

Whilst the fund must not be authorised in Switzerland, it must appoint a Swiss representative (i.e. a regulated person) and a Swiss paying agent (i.e. a bank). The distributor/fund raiser/placement agent must be a financial intermediary that is regulated in Switzerland or in an equivalent way in its home jurisdiction (we suspect that an AIFM, certain MiFID firms, a bank, etc. would qualify, however, a sub-threshold AIFM would not). The financial intermediary must enter into a formal agreement with the Swiss representative and the paying agent of the fund.

Transitional rules allow for a grace period until 1 March 2015 until when foreign funds must have appointed the representative and paying agent.

Non-regulated foreign distributors are banned from distribution immediately, whilst unregulated Swiss distributors must register with the FINMA before 1 March 2015 unless they failed to register for the grace period by the 1 September 2013 deadline.

Distribution to non-qualified investors is subject to additional rules though they do not appear to be relevant in the typical private equity fund raising context.

17. The United Kingdom

SCENARIO A: MARKETING NON-EEA AIFS MANAGED BY NON-EEA AIFMS UNDER ARTICLE 42 (NO PASSPORT)

Further assumptions for the purpose of Scenario A only

Licensing

No person concerned has any form of licence in the target market, or any EEA licence which entitles it to a passport.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager (AIFM) of the AIF. There is no placement agent or other intermediary involved.

1. **Will it be possible in some manner to market a fund in the circumstances described above, in the United Kingdom and/or to investors established in the United Kingdom on or after 22 July 2013?**

Yes, it is possible to market a fund in these circumstances, subject to certain conditions, which are outlined in further detail below.

2. **In the United Kingdom, has there been any local elaboration on what constitutes 'marketing' within the meaning of Article 4(1)(x)? If not, what is the better interpretation of that term? For example, are distinctions made between concepts such as 'making the fund available for investment', 'offering', 'placing', circulating documents marked "draft", 'pre-marketing', 'soft marketing' or 'reverse solicitation'?**

Questions 3 to 8 below relate to 'marketing' as that term is understood in the United Kingdom. Question 9 relates to pre-marketing, if relevant. Question 10 relates to reverse solicitation.

Yes. The UK Financial Conduct Authority (FCA) has published guidance on the definition of 'marketing' in the context of the AIFMD in chapter 8 of its Perimeter Guidance Manual ("PERG"). The specific section on AIFMD marketing in PERG 8.37 is available **here**.

In the FCA's view, an offering or placement takes place when a person seeks to raise capital by making an interest in an AIF available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment. An 'offer' is to the public, whereas a 'placement' is to a select group of potential investors. In the FCA's opinion, secondary trading is not caught within the definition of either an 'offer' or a 'placement' because it does not involve capital raising in that AIF, except where there is an indirect offering or placement (e.g. distribution via a chain of intermediaries).

Communication in relation to draft documentation is generally not caught, but this should not be a means to avoidance. In a private equity context, this usually means circulating the final form PPM plus limited partnership agreement plus subscription document. Pre- or soft marketing is not 'marketing' but is regulated under the UK domestic financial promotion regime.

3. What is the current best estimate of when the Directive will be transposed into national law in the United Kingdom? If later than 22 July 2013, as a matter of local law, is the best advice generally to proceed as if the Directive were transposed, or as if the domestic law was unchanged?

The Directive was transposed into national law on 16 July 2013 through the Alternative Investment Fund Managers Regulations 2013 (SI 2013/1773), which are available **here**. The Regulations came into force on 22 July 2013.

The Alternative Investment Fund Managers (Amendment) Regulations 2013 (SI 2013/1797), which are available **here**, were made on 17 July 2013. These will implement provisions in the Directive which do not take effect until the European Commission specifies a date in a delegated act. Most of the provisions in the Amendment Regulations will therefore come into effect when the corresponding Directive provisions do so.

4. Under the domestic implementing measures of the United Kingdom, is the Directive relevant to marketing to investors established in the United Kingdom (within the meaning of Article 4(1)(j)) but who are not physically located in the United Kingdom at the time the marketing takes place[41]?

No. The UK AIFM Regulations restrict marketing "in the United Kingdom".

In PERG 8.37.10, the FCA states that in addition to the requirement that the marketing must take place in the UK, the relevant investor must be domiciled in an EEA State or must have its registered office in an EEA State in order for the marketing to be caught. However, the FCA has declined to give further guidance on the definition of "domicile" for these purposes, other than to state that it must be "construed in line with its meaning under EU law".

5. Once the Directive is in effect in the United Kingdom, in relation to 'marketing' (as that term is understood in the United Kingdom) can a non-EEA manager of a non-EEA fund rely on a transitional (or 'grandfathering') provision, for example a transitional provision implementing Article 61(1) to delay compliance with the requirements of Article 42? If it can, what conditions must be met? If the conditions are met, what limits are there on marketing (for example is it possible only to market a fund which was being actively marketed before 22 July 2013 or also other funds managed by the same manager)?

Yes, the UK government has taken the view that Article 61(1) applies to non-EEA managers of non-EEA funds. If a non-EEA AIFM (a) was managing an AIF (as defined) immediately before 22 July 2013 and (b) at any time prior to 22 July 2013, marketed that AIF to a professional investor anywhere in the EEA, then it may continue to market that AIF to professional investors in the UK until 21 July 2014 in accordance with pre-existing financial promotion laws (only). The same AIFM may also establish and market future funds on the same basis.

For this purpose 'marketing' is as defined by the FCA (see Question 2 above) so pre- or soft marketing before 22 July 2013 is not enough to trigger the transitional provision.

[41] Article 2(1)(c) may be interpreted as restricting the territorial scope of the Directive in relation to Article 42 firms.

6. Is there any list published of the cooperation arrangements which have been entered into (i.e. signed by both parties and dated) between the competent authorities of the United Kingdom and those of non-EEA jurisdictions for the purposes of Article 42(1)(b)? What is expected to happen in future?

As of August 2013, the FCA had signed agreements with 42 non-EEA supervisory authorities. A list of the relevant authorities is available **here**, under the "Update on Co-operation Agreements" heading.

7. After the expiry of any transitional provision, is there to be any gold-plating of the requirements of Article 42? In other words, will there be additional domestic restrictions on or conditions for marketing fund interests? Or is it necessary only to consider local implementation of Article 42? There might be restrictions on the type or number of investors who may be approached, or other conditions. For example, in the UK, it will continue to be necessary to comply with the pre-existing financial promotion regime, which (in theory) further restricts the category of 'per se professional client'. In Germany, it will be a requirement that the non-EEA fund has a depositary performing functions specified under Article 21.

Yes, the current UK financial promotion regime will remain in force. In summary, it is only lawful to make an invitation or inducement to engage in investment activity (including by subscribing for interests in a private equity fund) by addressing it specifically to a person who falls within an exempt category. Relevant exemptions facilitate marketing to: (a) institutions whose business it is to invest (generally, those authorised and regulated by the FCA or the UK Prudential Regulation Authority ("PRA"), such as banks, insurers, fund of funds managers) and (b) large companies or other undertakings with called up share capital or net assets of GBP 5,000,000 or more; and (c) trustees of trusts (including most occupational pension schemes) with gross assets of GBP 10,000,000 or more.

If no exemption is available, the content of the communication must be approved by a person authorised and regulated by the FCA and/or PRA. Breach of this restriction may be a criminal offence and/or lead to rescission of investor commitments.

Rider:

This answer concerns only the activity of marketing the fund. If the manager were to take further steps in the UK with a view to arranging an investor's commitment to the fund (for example by negotiating the detailed terms of investment or receiving completed subscription documents in the UK) this may constitute a regulated activity for which UK Financial Conduct Authority authorisation would be required.

This analysis is complicated and would turn on what activities are conducted in the UK, what presence the manager has in the UK and the authorisation status of the prospective investor.

8. Must a firm seeking to market in the United Kingdom in reliance on Article 42 notify, or register with, the competent authority in the United Kingdom? What kind of information is required, will there be a public register, what fee will be charged etc.? Is there an online notification or registration form? What can be done while awaiting registration (if relevant)?

The rules differ as between non-EEA AIFMs which are above or below the thresholds in Article 3(2) of the Directive but, in both cases, the manager must notify the FCA before marketing. There is no public register. Further details on notification requirements are contained in chapter 10 of the FCA's Investment Funds sourcebook ("FUND"), and in particular in FUND 10.5 which is available **here**.

Notification forms for this purpose are available **here**, under the "Forms" heading. The fee for each notification is currently GBP 250 per AIF for an above-threshold non-EEA AIFM and GBP 125 per AIF for a sub-threshold non-EEA AIFM. Periodic fees are also payable on an annual basis – these are currently GBP 500 per AIF for an above-threshold non-EEA AIFM and GBP 350 per AIF for a sub-threshold non-EEA AIFM.

9. What restrictions will there be on pre-marketing[42], taking into account considerations similar to those raised in Questions 3 to 8 above?

Invitations or inducements to engage in investment activity falling short of 'marketing' as described in the answer to Question 2 will be subject to the financial promotion regime mentioned in our answer to Question 7.

10. Whether marketing (as defined) is banned or restricted by Article 42 or otherwise, what interpretation is given in the United Kingdom to the concept of 'reverse solicitation', 'reverse enquiry' or marketing at the initiative of the investor, within the meaning of Recital 70?

As a matter of UK implementation, marketing at the initiative of the investor is not 'marketing' for the purposes of the Directive (but it is likely to involve a financial promotion (see Question 7)).

The FCA has given guidance in PERG 8.37.11 (available **here**) that a confirmation from the investor that the offering or placement of interests in an AIF was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, managers should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of the Directive.

[42] This assumes that the answer to Question 2 distinguished between 'marketing' (as defined) and pre-marketing.

SCENARIO B: MARKETING NON-EEA AIFS MANAGED BY AN EAA AIFM UNDER ARTICLE 36

Further assumptions for the purpose of Scenario B only

Licensing

The AIFM is a fully authorised AIFM in its home member state.

Who markets?

The legal person engaging in marketing is the Alternative Investment Fund Manager of the AIF. There is no placement agent or other intermediary involved.

11. Would any of the answers under Scenario A be different in relation to Scenario B?

The condition for the application of the transitional relief is merely that the EU AIFM was managing an AIF before 22 July 2013.

After the expiry of the transitional provision, or where it does not apply, an AIFM may market in the UK in these circumstances, provided it notifies the FCA in advance. The relevant notification form is available **here**, under the "Forms" heading. The provisions of Article 36 apply, so that an AIFM need not comply with the requirements of Article 21, provided that the AIFM ensures that one or more persons are appointed to perform the depositary functions specified in Articles 21(7) to (9) and notifies the FCA of the identity of such persons.

SCENARIO C: MARKETING BY SUB-THRESHOLD AIFMS

12. Can an AIFM which falls within Article 3(2) and is subject to domestic registration or authorisation only in its home member state market in the United Kingdom? How would the answers above be different in this scenario?

Marketing in these circumstances is subject only to the financial promotion regime (see Question 7).

SCENARIO D: EEA AIFMS MARKETING AN EEA AIF OR NON-EEA AIF RELYING ON ARTICLE 61(1)

Further assumptions for the purpose of Scenario D

Licensing

In its home EEA member state, the manager is entitled to rely on transitional relief implementing Article 61(1) and need not apply for authorisation or comply with the other provisions of the Directive until 21 July 2014.

13. Can an EEA AIFM relying on transitional relief market in the United Kingdom? How would the answers above be different in this scenario?

Yes. An AIFM in another EEA member state which was managing an AIF immediately before 22 July 2013 may market in the UK subject only to the pre-existing financial promotion restriction (see Question 7 above) until 21 July 2014.

Section three:
Glossary

3

In this section

Glossary – List of abbreviations and references to AIFMD articles

This Glossary includes a list of abbreviations, as well as direct extracts of the relevant articles from the AIFMD.

AIFMD – Alternative Investment Fund Managers Directive (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010)

AIF – Alternative Investment Fund

AIFM – Alternative Investment Fund Manager

EEA – European Economic Area

ESMA – European Securities and Markets Authority

EuVECA – Regulation (345/2013) of the European Parliament and of the Council of 17 April 2013 on European venture capital funds

(http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0001:0017:EN:PDF)

Recital 70

(70) This Directive should not affect the current situation, whereby a professional investor established in the Union may invest in AIFs on its own initiative, irrespective of where the AIFM and/or the AIF is established.

Article 2 Scope

1. Subject to paragraph 3 of this Article and to Article 3, this Directive shall apply to:
   (a) EU AIFMs which manage one or more AIFs irrespective of whether such AIFs are EU AIFs or non-EU AIFs;
   (b) non-EU AIFMs which manage one or more EU AIFs; and
   (c) non-EU AIFMs which market one or more AIFs in the Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs.

(...)

3. This Directive shall not apply to the following entities:
   (a) holding companies;
   (b) institutions for occupational retirement provision which are covered by Directive 2003/41/EC, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in Article 2(1) of that Directive or the investment managers appointed pursuant to Article 19(1) of that Directive, in so far as they do not manage AIFs;
   (c) supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, the European Development Finance Institutions and bilateral development banks, the World Bank, the International Monetary Fund, and other supranational institutions and similar international organisations, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
   (d) national central banks;
   (e) national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;
   (f) employee participation schemes or employee savings schemes;
   (g) securitisation special purpose entities.

(...)

Article 3 Exemptions

1. This Directive shall not apply to AIFMs in so far as they manage one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.

2. Without prejudice to the application of Article 46, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs:

   (a) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or

   (b) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

(...)

Article 4 Definitions

1. For the purpose of this Directive, the following definitions shall apply:

   (a) 'AIFs' means collective investment undertakings, including investment compartments thereof, which:

      i. raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and

      ii. do not require authorisation pursuant to Article 5 of Directive 2009/65/EC;

(...)

   (j) 'established' means:

      i. for AIFMs, 'having its registered office in';

      ii. for AIFs, 'being authorised or registered in', or, if the AIF is not authorised or registered, 'having its registered office in';

      iii. for depositaries, 'having its registered office or branch in';

      iv. for legal representatives that are legal persons, 'having its registered office or branch in';

      v. for legal representatives that are natural persons, 'domiciled in';

(...)

   (x) 'marketing' means a 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;

(...)

   (ag) 'professional investor' means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC.

Article 36 Conditions for the marketing in member states without a passport of non-EU AIFs managed by an EU AIFM

1. Without prejudice to Article 35, member states may allow an authorised EU AIFM to market to professional investors, in their territory only, units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1), provided that:

   (a) the AIFM complies with all the requirements established in this Directive with the exception of Article 21. That AIFM shall however ensure that one or more entities are appointed to carry out the duties referred to in Article 21(7), (8) and (9). The AIFM shall not perform those functions. The AIFM shall provide its supervisory authorities with information about the identity of those entities responsible for carrying out the duties referred to in Article 21(7), (8) and (9);

   (b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home member state of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows the competent authorities of the home member state of the AIFM to carry out their duties in accordance with this Directive;

   (c) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

2. Member states may impose stricter rules on the AIFM in respect of the marketing of units or shares of non-EU AIFs to investors in their territory for the purpose of this Article.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

4. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

Article 42 Conditions for the marketing in member states without a passport of AIFs managed by a non-EU AIFM

1. Without prejudice to Articles 37, 39 and 40, member states may allow non-EU AIFMs to market to professional investors, in their territory only, units or shares of AIFs they manage subject at least to the following conditions:

   (a) the non-EU AIFM complies with Articles 22, 23 and 24 in respect of each AIF marketed by it pursuant to this Article and with Articles 26 to 30 where an AIF marketed by it pursuant to this Article falls within the scope of Article 26(1). Competent authorities and AIF investors referred to in those Articles shall be deemed those of the member states where the AIFs are marketed;

   (b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the member states where the AIFs are marketed, in so far as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant member states to carry out their duties in accordance with this Directive;

   (c) the third country where the non-EU AIFM or the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set out in point (b) of the first subparagraph within a reasonable period of time, the competent authorities of the member state where the AIF is intended to be marketed may refer the matter to ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

2. Member states may impose stricter rules on the non-EU AIFM in respect of the marketing of units or shares of AIFs to investors in their territory for the purpose of this Article.
3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.
4. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

Article 61 Transitional provisions

1. AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date.
2. Articles 31, 32 and 33 shall not apply to the marketing of units or shares of AIFs that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC before 22 July 2013 for the duration of validity of that prospectus.
3. AIFMs in so far as they manage AIFs of the closed-ended type before 22 July 2013 which do not make any additional investments after 22 July 2013 may however continue to manage such AIFs without authorisation under this Directive.
4. AIFMs in so far as they manage AIFs of the closed-ended type whose subscription period for investors has closed prior to the entry into force of this Directive and are constituted for a period of time which expires at the latest 3 years after 22 July 2013, may, however, continue to manage such AIFs without needing to comply with this Directive except for Article 22 and, where relevant, Articles 26 to 30, or to submit an application for authorisation under this Directive.
5. The competent authorities of the home member state of an AIF or in case where the AIF is not regulated the competent authorities of the home member state of an AIFM may allow institutions referred to in point (a) of Article 21(3) and established in another member state to be appointed as a depositary until 22 July 2017. This provision shall be without prejudice to the full application of Article 21, with the exception of point (a) of paragraph 5 of that Article on the place where the depositary is to be established.

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