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# CMS Brief Guide to Private Placement of Funds

Accessing European Investors post AIFMD

November 2019

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# Introduction

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When implementing the Alternative Investment Fund Managers Directive (“**AIFMD**”), some EU States have tightened or severely restricted their private placement regimes, which is important when non-EU managers and funds look to access EU investors.

Our Guide briefly summarises the latest developments in relation to the private placement regimes of EU States, as well as covering certain non-EU States.

We are grateful to the numerous contributors to this guide. If you would like more information about the private placement regimes, you are welcome to get in touch with us or – with regard to particular jurisdictions – the contacts of the relevant contributor firms (detailed on pages 76–79).

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The information contained in this Guide is for general purposes only and does not purport to constitute legal or professional advice from CMS or any other firm and as a consequence may not be relied upon.

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# Austria

## Summary of private placement provisions for fund interests (if applicable)

The Austrian Alternative Investment Fund Managers Act (Alternatives Investmentfonds Manager Gesetz “**AIFMG**”) allows EU AIFs and Non-EU AIFs to be placed in accordance with a dedicated set of rules, which do not provide for a private placement exemption.

The AIFMG does not impose an obligation to draw up a prospectus. However, it requires the submission of comprehensive information to investors and the supervisory authorities. In addition, the Austrian Capital Market Act provides the requirements for public offerings of investments which also apply to AIFs.

A substantial part of the AIFMG contains provisions for the marketing of AIFs. The provisions set out complex rules and distinguish between (i) the place of marketing, (ii) whether the AIFM is licenced in Austria or in another EU Member State or is a Non-EU AIFM, and (iii) whether the AIF is an EU AIF or a Non-EU AIF. In general, an AIFM which is licenced in Austria is entitled to market EU AIFs to professional investors in Austria and in other EU Member States.

However, the marketing of AIFs to private investors and qualified private investors is possible only under certain conditions. A “qualified private investor” is a person who owns free deposits and securities of more than EUR 500,000, commits to invest at least EUR 100,000 into an AIF, does not invest more than 20% of its assets into an AIF and who is in a position to make its own investment decisions and understands the risks associated with the investment.

The following AIFs are eligible for marketing to private investors and qualified private investors:

- Real Estate Funds according to the Real Estate Fund Act (ImmoInvFG) provided that the AIFM holds a licence pursuant to Section 1 para 1 cf 13a Austrian Banking Act (Bankwesengesetz, – “**BWG**”);
- Special Funds, Other Funds and Pension Investment Funds according to the Investment Fund Act (Investmentfondsgesetz “**InvFG**”), provided that the AIFM holds a licence pursuant to Section 1 para 1 cf 13 BWG and Section 6 para 2 InvFG.
- AIF in Real Estate provided that the AIFM holds a licence according to the AIFMG;
- Managed Futures Fund subject to the conditions of Section 48 para 7 and 8 AIFMG provided that the AIFM holds a licence according to the AIFMG;
- Private Equity Umbrella Funds according to Section 48 para 8a and 8b AIFMG provided that the AIFM holds a licence according to the AIFMG;
- AIFs investing in interests of companies according to Section 48 para 8c and 8d AIFMG provided that the AIFM holds a licence according to the AIFMG; and
- Exclusively to qualified private investors, AIFs which are authorised to be marketed to professional investors and provided that they do not employ leverage exceeding 30%.

Pursuant to Section 48 para 1a AIFMG the private investor and the qualified private investors investing in AIFs have to confirm in writing that they have sufficient knowledge about the investment and the risks contained therein. The AIFM needs to be sufficiently convinced that the private investor and the qualified private investor



are able to assess the risk and the adequacy of the obligation related to the investment.

The AIFMG provides the possibility of passporting the licence for the distribution of AIFs to professional investors and qualified private investors. It also offers Non-EU AIFs the opportunity to file an application for authorisation with the Austrian Financial Market Authority (“FMA”) which can then be passported to other EU Member States, provided that Austria qualifies as a reference member state as defined in the AIFMG.

Non-EU AIFs and EU-AIFs are eligible for marketing to private investors and qualified private investors in Austria if the Non-EU AIF or EU-AIF (i) is admitted for marketing to retail investors in its home state, (ii) is admitted for marketing to professional investors in Austria and (iii) is materially equivalent to AIF-types that are admitted for the marketing to retail investors and qualified private investors in Austria.

#### **Other forms of possible placement options for fund interests outside fund regulations**

As the scope of the AIFMG is very wide it covers a wide range of funds, and hence, regulates the distribution of all kinds of AIFs. Only such investment undertakings which do not qualify as AIFs are not subject to those rules, such as operational companies or certain trust structures.

Furthermore, the AIFMG is explicitly not applicable to:

- holding companies;
- institutions providing occupational retirement provisions;
- 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;
- national central banks;
- national, regional and local governments and bodies or other institutions managing funds supporting social security and pension systems;

- employee participation schemes or employee savings schemes; and
- securitisation special purpose entities.

In addition, the AIFMG does not apply to AIFMs managing one or more AIFs whose only investors are the AIFM or the parent companies or the subsidiaries of the AIFM or other subsidiaries of those parent companies, unless one of these investors is itself an AIF.

The AIFMG defines distribution, on the initiative of the AIFM or on its behalf, as the direct or indirect offering or placement of shares in an AIF managed by the AIFM to investors whose place of residence or place of incorporation is in an EU State. Reverse solicitation is not regulated and seems to be possible. In its circular “Frequently asked Questions regarding the application of the AIFMG” the FMA states that if the investment is made at the sole initiative of the investor it is not mandatory that the AIF is licensed in Austria.

#### **Consequences of non-compliance with placement regimes for fund interests**

The distribution of fund interests in breach of the marketing regime of AIFMG could constitute an administrative offence with possible penalties of up to EUR 100,000. Other administrative and criminal sanctions are contained in different Austrian acts (e.g. Real Estate Fund Act), whose applicability is dependent on the respective type of fund interest offered.

#### **Private placement rules for non-fund investments available**

The Austrian Capital Market Act regulates the offering of securities or investments and governs exemptions for the offering of those instruments without the requirement of publishing a prospectus.

There are various exemptions from the obligation to draw up and publish a prospectus. The following refer to private placements:

- offers of securities or investments solely addressed to professional investors;
- offers whereby investors may only acquire securities or investments for a minimum amount or minimum denomination of EUR 100,000; or
- offers of securities or investments addressed to fewer than 150 investors (natural or legal persons) per EEA State that are not qualified investors.



# Belgium

Belgium has implemented AIFM Directive 2011 / 61 / EU (the “**Directive**”) into its law dated 19 April 2014 on AIF and their managers (the “**Law**”).

## **AIFM registration/ passporting**

Pursuant to the Law, an AIFM must be registered / passported in Belgium before it markets AIF units in Belgian territory, regardless of whether the offer is made to professional or retail investors. Where an AIFM plans to market AIF units to retail investors as part of a public offer (see below – private placement / public offer), the AIFM shall also register the AIF with the Belgian regulator and have a prospectus approved.

## **Private placement/ public offer**

Pursuant to the Law, the following offerings are not deemed to have a public character and do not require registration of the AIF or approval of a prospectus in Belgium (and therefore constitute a private placement of funds):

- offerings to professional investors only; and/or
- offerings to fewer than 150 natural or legal persons, other than professional investors; and/or
- offerings which need at least EUR 100,000 per investor and per security, other than collective investment funds with a variable number of participation rights; and/or
- offerings which need at least EUR 250,000 per investor and per category of a collective investment funds with a variable number of participation rights; and/or
- offerings where the amount of each unit of security (other than a security of a collective investment fund with a variable number of participation rights) is at least EUR 100,000; and/or
- offerings where the global amount is less than EUR 100,000, calculated on an annual basis.

## **Other forms of possible placement options for fund interests outside fund regulations**

Reverse solicitation is not deemed to constitute a public offering of a fund interest in Belgian territory and, in such context the fund does not need to be registered or have a prospectus approved in Belgium.

## **Consequences of non-compliance with placement regimes for fund interests**

Besides contractual and extra-contractual liability, there are also regulatory and criminal penalties.

## **Private placement rules for non-fund investments available**

These include:

- Securities, debt instruments, warrants of ordinary companies; and Futures, swaps, forward rate agreements, equity swaps, and derivatives on raw material.
- Under the EU Prospectus Regulation and Belgian prospectus law dated 11 July 2018, the following offerings do not require approval of a prospectus in Belgium (and therefore constitute a private placement of non-fund investments):
  - offerings only addressed to qualified investors;
  - offerings only addressed to 150 legal or natural persons other than qualified investors per EEA State;
  - offerings requiring a counterparty of EUR 100,000 minimum per investor and per offer;
  - offerings where the nominal value is EUR 100,000 minimum;
  - offerings where the total amount is EUR 100,000 maximum;

- offerings in the EU for an amount below EUR 5,000,000 (in this case, an information note must be prepared and filed with the Belgian regulator for publication purposes only (no approval required)).

As a consequence, any of the following offerings will fall under the private placement exemption:

- offerings to qualified investors only;
- offerings to natural or legal persons when the offer is addressed to fewer than 150 persons other than qualified investors, this per EEA State;

- offerings where more than EUR 100,000 per investor and per distinct offer is required;
- offerings where the unit value of the security is more than EUR 100,000;
- offerings where the total investment is less than EUR 100,000;
- offerings in the EU for an amount below EUR 5,000,000 provided that an information note is filed with the Belgian regulator.

In Belgium, a qualified investor means:

- Professional clients under MiFID;
- Eligible counterparts under MiFID.



# Bulgaria

## Summary of private placement provisions for fund interests (if applicable)

The offering of securities which do not require the publication of a prospectus are not expressly named as “private placements” under Bulgarian law. The exemptions regarding the obligation to publish a prospectus when offering securities under Bulgarian law are aligned with those contained in the Prospectus Directive. These exemptions, which may be seen as “private placements” under Bulgarian law, include any offering of securities:

- addressed solely to professional investors;
- addressed to less than 150 individuals or legal entities in Bulgaria and in any other EU State, which are not professional investors;
- which may be acquired for at least EUR 100,000 per investor, per offer;
- the nominal value per unit of which amounts to at least EUR 100,000;
- with a total consideration in the EU of less than EUR 100,000, calculated over a period of 12 months.

A fund would have been covered by the private placement rules provided that it met one or more of the criteria listed above.

At the end of 2013, Bulgaria implemented AIFMD imposing regulation for EU and Non-EU AIFs and for their managers. Most importantly, under the said rules:

1. AIFMs established in Bulgaria (Bulgarian AIFMs) who wish to market in Bulgaria:
  - AIFs established in Bulgaria (Bulgarian AIFs) or in another EU Member States (EU AIFs), and/ or AIFs established in a Non-EU Member State (Non-EU AIFs) will be able to do so only upon prior notification of such marketing to the Bulgarian regulator –

the Bulgarian Financial Supervision Commission (“FSC”). The FSC is obliged to approve or disapprove the notified marketing within 20 business days of receipt of the notification. The FSC can disapprove of the proposed marketing if it considers that this will be in violation of the Bulgarian Collective Investment Schemes and Other Undertakings for Collective Investments Act (which implements the provisions of AIFMD). Where the FSC disapproves, the AIFM would not be allowed to complete the notified marketing.

- A Bulgarian AIFM may, subject to the FSC’s prior approval, market shares in EU and Non-EU AIFs in the territory of Bulgaria only to ‘professional investors’. Should the Bulgarian AIFM wish to market shares to non-professional investors, it may do so on the basis of a prospectus.
2. Bulgarian AIFMs marketing in another EU Member State:
    - Bulgarian AIFs and/ or EU AIFs, and/ or Non-EU AIFs will be able to do so only upon prior notification to the FSC of such marketing. Within 20 business days, the FSC will notify the respective EU Member State regulatory body where the AIF will be marketed confirming that the AIFM is duly licenced under Bulgarian law. The FSC may refuse to submit the notification and the attached information to the respective EU Member State in cases where the FSC is unable to confirm that the marketed AIF is being managed in compliance with the requirements of the applicable Bulgarian law (i.e. the Collective Investment Schemes and Other Undertakings for Collective Investments Act, among others) in terms of its administrative structure, financial standing etc.



- A Bulgarian AIFM may, subject to the preceding paragraph, market shares in another EU Member State only to 'professional investors', unless the respective regulatory body of the accepting EU Member State allows for marketing of AIFs to 'non-professional investors' as well.
3. AIFMs established in another EU Member State (EU AIFMs) marketing in the territory of Bulgaria:
- (a) Bulgarian AIFs and/ or EU AIFs
  - (b) Non-EU AIFs provided that the FSC has received a notification from the competent regulatory body in the country of origin of the AIFM confirming that the respective AIFM is duly licenced in its country of origin.
  - Marketing of the AIF in Bulgaria is performed in compliance with the requirements of Bulgarian law.
  - EU AIFMs may, subject to the FSC's notification, market shares in EU and Non-EU AIFs in the territory of Bulgaria only to 'professional investors'. Should it wish to market shares in AIFs to 'non-professional investors', it may do so provided that a prospectus has been made and offered.
4. AIFMs established in a Non-EU member state (Non-EU AIFMs) marketing in the territory of Bulgaria:
- AIFs which are not being offered in another EU member state provided that certain requirements are met, among others, existence of cooperation agreements between Bulgaria and the AIF's and/ or AIFM's country of origin, the non-EU AIFM has been licenced by the FSC, etc.
  - The FSC would issue permission for the proposed marketing.

In general, the implementation of AIFMD in Bulgaria has not required publishing a prospectus for the purpose of marketing shares in AIFs when such shares are marketed to 'professional investors'. Rather, in such cases the respective AIFM is required to notify and obtain approval from the FSC. Failure to obtain FSC approval results in the AIFM being unable to market the proposed AIF. However, the legislation requires preparing a prospectus where marketing of shares in AIFs is directed at 'non-professional investors'. Hence, the regime of private placement of funds has become stricter.

In light of the above, it should be noted that under Bulgarian law 'professional investors' are:

- (a) entities for which granting of authorisation is required for conduct of business on the financial markets or whose activity is regulated otherwise by the national law of an EU Member State, as well as persons which are granted authorisation for conduct of said business or regulated otherwise by the national law of a third country, as follows:
  - (i) credit institutions;
  - (ii) investment intermediaries;
  - (iii) other institutions subject to authorisation or regulation;
  - (iv) insurance companies;
  - (v) collective investment schemes and their management companies;
  - (vi) pension funds and pension insurance companies;
  - (vii) commodity dealers;
  - (viii) legal entities which provide investment services or perform investment activities consisting exclusively in dealing on own account in markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such entities is assumed by clearing members of the same markets;
  - (ix) other institutional investors.
- (b) companies which meet at least two of the following conditions: (i) total assets amount to at least EUR 20m; (ii) net turnover is at least EUR 40m; (iii) own fund amounts of at least EUR 2m.
- (c) national and regional government bodies, public bodies charged with or intervening in the management of the public debt, central banks, international and supranational institutions such as the World Bank, the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations.
- (d) other institutional investors whose primary business is investment in financial instruments, *inter alia* persons dealing in securitisation of assets or other financial transactions.
- (e) clients which are considered professional clients at their request should meet at least two of the following criteria: (i) in the last year the person has concluded on average ten large-scale transactions per quarter on a relevant market; (ii) the value of the investment portfolio of the person, which

consists of financial instruments and cash deposits, exceeds EUR 500,000; (iii) the person works or has worked in the financial sector for at least one year in a position which requires knowledge of the relevant transactions or services.

#### **Other forms of possible placement options for fund interests outside fund regulations**

In Bulgaria there are no other placement options which are not covered by fund regulations.

#### **Consequences of non-compliance with placement regimes for fund interests**

Non-compliance with placement regimes for fund interests under Bulgarian law is punishable by a fine, the amount of which depends on whether the non-complying person is an individual or a legal entity as well as whether the non-compliance has occurred repeatedly. The maximum fine for individuals is circa EUR 50,000, unless the violation is a criminal offence. The maximum fine for violation of the placement regimes by legal entities is circa EUR 100,000.

In addition, the FSC may require the AIFM to abide by a specific line of conduct or may ban the AIFM from performing further activities in Bulgaria.

#### **Private placement rules for non-fund investments available**

Under Bulgarian law, in respect of non-fund investments, private placement covers:

- offerings only addressed to professional investors;
- offerings only addressed to 150 legal or natural persons other than professional investors per EU Member State;
- offerings requiring a counterparty of a minimum of EUR 100,000 per investor and per offer;
- offerings which nominal value is of a minimum of EUR 100,000;
- offerings where the total amount is of a maximum of EUR 100,000.

Bulgarian law does not require publication of a prospectus with respect to offers to the public of the following types of securities:

- shares issued in substitution for shares of the same class already issued, if the issuance of such new shares does not involve any increase in the issued capital;
- securities offered in connection with a takeover by means of an exchange offer;
- securities offered or to be allotted in connection with a merger, demerger, or spin-off;

- dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid;
- securities offered, allotted or to be allotted to existing and / or former members of the management and supervisory bodies and/ or employees by their employer or by an affiliated undertaking provided that the company has its registered office or seat in the EU;
- securities offered, allotted or to be allotted to existing and / or former members of the management and supervisory bodies and/ or employees by their employer, provided that the company is established outside the EU and whose securities are admitted to trading either on a regulated market or on a third-country market recognised as equivalent to a regulated market by the European Commission upon the request of the Member State competent authority.

No prospectus is required to be published for admission to trading on a regulated market of the following types of securities:

- shares representing less than 10% of the number of shares of the same class already admitted to trading on the same regulated market over a period of 12 months;
- shares issued in substitution for shares of the same class already admitted to trading on the same regulated market, if the issuing of such shares does not involve any capital increase;
- securities offered in connection with a takeover by means of an exchange offer;
- shares offered, allotted or to be allotted in relation to merger, demerger, or spin-off;
- shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid;
- securities offered, allotted or to be allotted to existing and/ or former members of the management and supervisory bodies and / or employees by their employer or by an affiliated undertaking provided that the securities are of the same class as the ones already admitted for trading at the same regulated market, the company has its registered office or seat in the EU;
- shares which are a result of their converting or replacement with other securities;
- securities admitted for trading at a regulated market provided such securities meet certain requirements.

Other exemptions include those under Article 2(3) of AIFMD, such as holding companies, institutions for occupational retirement provision, supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, national central banks, governmental institutions, etc.

Non-funds which are subject to the private placement provisions include:

- Professional investors;
- Natural or legal persons when the offer is addressed to less than 150 persons other than professional investors, and this per EU Member State;
- Investments for more than EUR 100,000 per investor and per distinct offer;
- Investments where the unit value of the security is more than EUR 100,000;
- Investments where the total investment is less than EUR 100,000.

The professional investors in scope of private placement exemptions are those listed in the summary of private placement (above).

Bulgarian law does not provide for a definition of “private placement” either in respect of funds or non-funds. The exceptions from the obligation to publish a prospectus have been discussed in the summary of private placement provisions.



# The Channel Islands

## Summary of private placement provisions for fund interests (if applicable)

Jersey and Guernsey are not EU Member States and therefore funds may be marketed into both jurisdictions in the same manner as prior to the AIFMD.

### Jersey

Under the Control of Borrowing (Jersey) Order 1958 (“**COBO**”), the consent of the Jersey Financial Services Commission (“**JFSC**”) will generally be needed in order to raise money in Jersey or make offers to invest in a fund in Jersey, for example, by circulating that fund’s prospectus in the Island. If marketing materials which do not constitute an offer are circulated, this will fall outside the scope of COBO.

Exemptions to COBO are available for funds structured as companies and unit trusts, but not limited partnerships. In summary, those exemptions require that the fund has no relevant connection with Jersey (for example, the management and control of the fund or, in the case of a unit trust, certain service providers, is carried out in Jersey) and the offer to invest is circulated to fewer than 50 prospective investors in Jersey or otherwise is valid in the UK or Guernsey and circulated to similar investors and in a similar manner to that made in the UK or Guernsey (as applicable).

The JFSC generally processes applications for COBO consent within five working days, and a regulatory fee (currently GBP 440) is payable. Applications made in relation to UCITS funds are particularly straight-forward, as the JFSC treats such funds with a ‘light touch’.

In terms of the distribution/ marketing of the fund in Jersey, either (i) a Jersey licenced distributor or (ii) a person who falls within the ‘overseas persons’ exemption should be appointed. In order

to fall within the ‘overseas persons’ exemption, a distributor must be supervised in its home jurisdiction and have no place of business in Jersey, the fund will need to qualify as a UCITS fund or otherwise fall within certain regulatory categories and there is a ‘reverse solicitation’ requirement that offers be initiated by the Jersey party rather than the distributor (or otherwise be in response to an advertisement meeting certain content requirements).

If neither of the above applies, marketing activities should be kept to a minimum such that they fall outside the scope of the Financial Services (Jersey) Law 1998, as amended (the “**FSJL**”).

### Guernsey

As a general principal under Guernsey law, the “promotion” of fund interests is a restricted activity which requires a licence from the Guernsey Financial Services Commission (“**GFSC**”), pursuant to the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (as amended) (the “**POI Law**”). However, there are certain exemptions:

1. If the promotion is being aimed at “Relevant Licence” holders (i.e. those holding a licence under the POI law, or under one of Guernsey’s other regulatory laws), the promotion to such institutions is not regarded as an activity requiring a licence under the POI Law.
2. The promotion of UK authorised collective investment schemes, Jersey recognised funds, Isle of Man authorised collective investment schemes and Republic of Ireland authorised UCITS funds can be freely promoted provided the promoter has registered with the GFSC with a Form EX.
3. If the promotion is to investors other than Relevant Licence holders and the funds to be promoted are not exempted as provided for in



the above paragraph, a person may still be able to market such products without needing a POI Licence on the basis that they are an “Overseas Person” and are not carrying on the restricted activity of promotion in connection with controlled investments in or from the Bailiwick of Guernsey.

The GFSC have drawn a distinction between “passive” promotion, which may be undertaken by an Overseas Person without a POI Licence, and “active” promotion which, subject to exceptions, may not.

- “Active” promotion is where an Overseas Person specifically targets potential investors in the Bailiwick e.g. by sending promotional material, cold-calling or advertising in the local press.
- “Passive” promotion includes any type of promotional activity which is not specifically targeted at Bailiwick residents (i.e. advertisements in the international press) and responding to queries from Bailiwick residents.

#### **Other forms of possible placement options for fund interests outside fund regulations**

Not applicable in either Jersey or Guernsey (please see above for exemptions which may apply).

#### **Consequences of non-compliance with placement regimes for fund interests**

##### **Jersey**

It is a criminal offence (punishable by a prison term and/ or a fine) to contravene the COBO legislation or to carry out/ hold oneself as carrying out unauthorised fund services business under the FSJL. Directors of companies which do so also risk being prosecuted.

The JFSC may also publish regulatory statements to warn potential investors from dealing with such persons.

##### **Guernsey**

The POI Law makes it a criminal offence, subject to certain exceptions, for any person to carry on or hold himself out as carrying on any controlled investment business in or from the Bailiwick of Guernsey without a licence issued by the GFSC. In addition to the direct penalties for unlicensed promotion set out in the POI Law, any contract

with an investor which is agreed in contravention of the POI Law is unenforceable and the investor is entitled to a return of any subscription monies paid.

A person is treated as carrying on controlled investment business if they engage by way of business in any of the restricted activities specified in the POI Law (i.e. promotion, subscription, registration, dealing, management, administration, advising and custody) in connection with any controlled investment (which includes open and closed-ended collective investment schemes).

#### **Private placement rules for non-fund investments available**

##### **Jersey**

The COBO regime applies equally to non-fund securities, such as shares in listed or non-listed companies.

Please note that the recommendation of securities to prospective investors may constitute “investment business” under the FSJL, in which case a licence would need to be obtained (unless an appropriate exemption applies).

##### **Guernsey**

The promotion of securities to prospective investors may constitute controlled investment business under the POI Law in which case a licence would need to be obtained (unless an appropriate exemption applies).

The Prospectus Rules 2018 (the “Rules”) also apply in respect of offers to the public in the Bailiwick of Guernsey of general securities and derivatives (wherever the offeror is domiciled). A person wanting to market a non-fund investment to “the public” in Guernsey would need to prepare a prospectus containing the disclosures as set out in the Rules and register the prospectus with the GFSC prior to circulation. This is in addition to the general restrictions on promotion.

The Rules provide that an investment is not promoted to the public by a promotion directly communicated to an identifiable category of persons not exceeding 50 in number if those persons are in possession of sufficient information to be able to make a reasonable evaluation of any offer included in the promotion and are the only persons who may accept such an offer.



# Croatia

## Summary of private placement provisions for fund interests (if applicable)

### Definition of a “private placement”

According to the Croatian Act on Alternative Investment Funds (“AAIF”), the term “private placement” is defined as any notice in any given form and by any means, which contains enough information about the conditions of the offer and about offered shares in AIFs, based on which the investor can decide to subscribe to those shares, and which is according to some of its characteristics conditioned by, for example, the minimum investment amount; target group of investors; or by the number of investors.

### Type of funds subject to private placement provisions

Alternative investment funds which can be established as an open-ended or close-ended fund without legal personality or as a close-ended fund in the form of a joint-stock company or a limited-liability company.

### Type of investors in scope of private placement exemptions

According to the AAIF, the following investors fall within the scope of private placement exemptions:

- qualified investors; and
- professional investors and persons treated as such at their own request under the Croatian Capital Market Act (“CMA”).

According to the AAIF, qualified investors are defined as investors which:

- undertake to pay a minimum one-time payment of HRK 400,000 or the equivalent in another currency for the purpose of investing in the units of one AIF;

- the value of their net assets is at least HRK 3,000,000 or the equivalent in another currency; and
- the AIFM estimates to have sufficient experience and expertise to be able to understand the risks involved and that the investment in the AIF is in line with their investment objectives.

According to the CMA, professional investors are defined as clients who possess the experience, knowledge and expertise to make their own investment decisions and properly assess the risks that these incur (such clients include: investment companies, credit institutions, insurance companies, collective investment schemes and management companies of such schemes, pension funds and management companies of such funds, pension insurance companies, commodity and commodity derivatives dealers, and local firms).

The following legal persons are also considered professional investors if they, in relation to the previous financial year, meet at least two of the following requirements:

- total assets of at least HRK 150,000,000;
- net income of at least HRK 300,000,000; or
- own funds of at least HRK 15,000,000.

The following entities are also considered professional investors: national and regional governments, public bodies that manage public debt, central banks, international and supranational institutions such as the World Bank, the International Monetary Fund, the European Central bank, the European Investment Bank and similar international organisations as well as other institutional investors whose main activity is investing in financial instruments without any need for obtaining relevant approvals or supervision of their activities, including entities incorporated for the

purposes of securitization of assets or other finance transactions.

There are clients (including public institutions, local and regional municipalities, legal and natural persons) which can be considered professional investors upon their request, if they meet two out of three prescribed conditions, such as:

- the client has carried out transactions of significant value on the relevant market at an average frequency of ten per quarter over the previous 12 months;
- the size of the client's financial instrument portfolio exceeds HRK 4,000,000; or
- the client works or has worked in the financial sector for at least one year, on the position which requires knowledge of the transactions or services envisaged.

### **Potential changes of private placement rules**

AIFMD is implemented in Croatia through the AAIF. The AAIF, enacted in January 2013 was replaced with the new AAIF that came into force on 10 March 2018 and sets out additional rules for the private placement. Amendments to the AAIF to align it with subsequently adopted EU Regulations and Directives, are currently undergoing legislative procedure which may change the rules of private placement further.

### **Other forms of possible placement options for fund interests outside fund regulations**

Under the CMA, reverse solicitation is allowed. However, the CMA does not define reverse solicitation.

### **Consequences of non-compliance with placement regimes for fund interests**

#### **Mandatory contractual consequences**

The AAIF does not explicitly provide for mandatory contractual consequences but does provide that, without prejudice to the possibility of resolving disputes before a court or other competent authority, an AIFM has to provide the conditions for out-of-court settlement of disputes through arbitration between the AIFM and investors in the AIF, which are managed by the AIFM. AIFM might also be held liable for damages arising from the breach of AAIF and ordinances.

#### **Regulatory sanctions**

According to the AAIF, the Croatian Financial Services Supervisory Agency may impose the following sanctions on the UAIF:

- recommendation to the management board;
- a warning;

- an order to eliminate irregularities;
- specific supervision measures; and
- revocation of licence for all or for individual activities to manage all or certain AIF's.

### **Penal sanctions**

Depending on the type of violation of the AAIF, the UAIF may be ordered to pay a fine in the amount of HRK 50,000 – 500,000. Natural persons may be fined HRK 10,000 – 100,000.

According to the CMA, a fine of HRK 50,000 – 1,000,000 is prescribed for a legal person where it:

- fails to notify the Croatian Financial Services Supervisory Agency of the use of the exception from the obligation to publish the prospectus regarding a public offer;
- fails to submit the prospectus to the Croatian Financial Services Supervisory Agency in the prescribed form within the prescribed period or ensure compliance with prospectus requirements; or
- offers securities to the public without having published a valid prospectus before such public offering, and the publication of prospectus was required under the CMA.

### **Private placement rules for non-fund investments available**

#### **Non-fund investments subject to private placement opportunities outside fund regulation**

The CMA does not recognise the term "private placement".

According to the CMA, a public placement will be exempted from the prospectus requirement if, among others, (i) it is addressed solely to qualified investors (e.g. professional entities), (ii) addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors, (iii) addressed to investors who acquire securities for a total consideration of at least EUR 100,000 per investor (in Croatian Kuna), for each separate offer, (iv) an offer of securities whose denomination per unit amounts to at least EUR 100,000 (in Croatian Kuna), (v) an offer of securities with a total consideration in the EU of less than EUR 100,000 (in Croatian Kuna), which is calculated over a period of 12 months, (vi) in case of an offer with the total consideration for the securities in the EU of less than EUR 5,000,000 (in Croatian Kuna), which is calculated over a period of 12 months in accordance with the Directive 2017/1129; (viii) an offer of shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in

the share capital of the company, (vii) an offer of securities in connection with a takeover by means of an exchange offer, under certain conditions, (viii) an offer of securities which shall be allotted in connection with a merger or division under certain conditions, (ix) shares which are issued to the existing shareholders, based on an increase in the share capital from the company's assets, or shares issued to existing shareholders instead of remuneration or dividend paid in the form of shares, (x) securities offered to former or existing members of the board or employees, or executive directors under certain conditions and (xi) shares of the company in the pre-bankruptcy and bankruptcy proceeding offered to creditors under certain conditions as well as financial restructuring under certain conditions.

Generally, the private / public placement distinction is applicable to securities issued by any entity. They may include:

- (a) shares or other securities equivalent to shares which represent a share in capital or in shareholders' rights in a company, as well as the certificates on shares deposited;
- (b) bonds and other types of securitised debts, also including a certificate of deposit related to such securities;
- (c) any other security that gives the right to its holder to: acquire or sell negotiable securities by a unilateral declaration of will; or to demand a cash payment in an amount which is determined in view of the value of negotiable securities, foreign currency exchange rate, interest rates or yield, commodity, or in view of any other index or factor.

#### **Type of non-funds subject to private placement provisions**

Generally, the private / public placement distinction is applicable to all existing and former issuers of securities. All tradable non-funds interests (such as shares, bonds etc.) may be subject to private placement rules.

#### **Type of investor in scope of private placement exemptions**

According to the CMA, the following investors, among others, fall within the scope of exemptions from the prospectus requirement:

- qualified investors (e.g. professional investors and persons treated as such at their own request under prescribed conditions); and
- investors in an offer to less than 150 natural or legal persons per Member State (not including qualified investors).

#### **Definition of a “private placement” in respect of non-fund investment**

Unlike the AAIF, the CMA does not recognise the term “private placement”.







# Cyprus

## **Summary of private placement provisions for fund interests (if applicable)**

The private placement regime in Cyprus is contained in the CySEC Marketing Directive 2015 implemented further to the AIFM Law and the AIF Law. There is no definition of private placement in the Cyprus regime, but the term is generally taken to mean any placement outside of the scope of the AIFMD as implemented in Cyprus.

The CySEC Marketing Directive distinguishes between diverse categories of AIFs, AIFMs and target investor bases and the rules that will apply will vary accordingly.

In respect of AIFMs seeking to market units of AIFs without a passport to professional investors in Cyprus, the AIFM must communicate its intention to CySEC and submit the required documentation outlined in the CySEC Marketing Directive. The AIFM may commence the marketing of units in the AIF following the expiration of two months from the date of submitting the notification unless CySEC expressly rejects the submission.

Sub-threshold AIFMs intending to market to professional and “well-informed investors” must seek express prior authorisation from CySEC to do so. Well-informed investors refer generally to an investor which is not a professional investor, confirms its status as such and invests at least EUR 125,000 (or its expertise is subjected to assessment by a credit institution). The documentation required to be submitted for authorisation is set out in an Annex to the CySEC Marketing Directive. CySEC must decide on the authorisation within three months of submitting a complete application and the Sub-threshold AIFM may commence marketing following authorisation.

AIFMs intending to market AIFs to retail investors in Cyprus may do so provided they obtain authorisation in a similar way to Sub-threshold

AIFMs (see above) and on the understanding that the relevant AIF is subject to continuous prudential supervision and other requirements relevant to funds marketed to retail investors.

The CySEC Marketing Directive imposes on-going obligations on persons marketing AIFs in Cyprus on a notified or authorised basis as outlined above.

The obligations include certification of individuals involved in marketing, transaction reporting requirements, disclosure obligations towards unit-holders and obligations relating to marketing over the internet.

## **Other forms of possible placement options for fund interests outside fund regulations**

Reverse solicitation, i.e. the acquisition of fund interests at the initiative of the investor, lies outside the fund regulations. However, any intermediary where applicable, e.g. an investment advisor, must not receive any other remuneration apart from the investment advice fee, in order for the reverse solicitation to be lawful.

Another placement possibility outside the scope of the fund regulations is where a portfolio manager acting under a discretionary portfolio management mandate decides to include fund units in the client's portfolio. In the case of non-discretionary portfolio management, no additional remuneration, other than the management fee, must be received, for the purchase to take place outside the fund regulations.

Further, interests in European Social Entrepreneurship Funds (“**EuSEF**”), within the meaning of EU Regulation 346 / 2013 and in European Venture Capital Companies (“**EuVECA**”), within the meaning of EU Regulation 345 / 2013 are out of the scope of the marketing provisions of the AIFM and the AIF Law.

## Consequences of non-compliance with placement regimes for fund interests

If there is a breach of the AIFM Law marketing provisions, the AIFM Law sanctions will apply. These consist of administrative and criminal sanctions. Administrative sanctions in the form of an administrative fine are provided in section 74 of the AIFM Law.

The administrative fine may be up to EUR 350,000 and may increase to EUR 700,000 for repeated breaches. Where the person in breach of the AIFM Law marketing provisions obtains a benefit pursuant to the breach, the administrative fine imposed may be up to twice the amount of the benefit. Criminal sanctions are laid down in section 75 of the AIFM Law, and apply to a breach of AIFM Law marketing provisions in the following situations:

- Marketing of AIFs by an unauthorised person takes place. In such a case the applicable criminal sanctions will be imprisonment of up to five years and/ or monetary sanctions of up to EUR 700,000;
- A false, misleading or deceiving statement or submission of documents is made, or evidence is concealed or omitted to be submitted or the exercise of CySEC's controlling or investigatory duties is obstructed. In these cases, the applicable criminal sanctions will be imprisonment of up to five years and/ or monetary sanctions of up to EUR 700,000. Administrative fines according to section 74 of the AIFM Law may also be imposed; advertising material or subscription forms relating to AIFs which are not permitted to be marketed in Cyprus under the AIFM Law are knowingly issued, circulated or distributed. In these cases, the applicable criminal sanctions will be imprisonment of up to three years and/ or monetary sanctions of up to EUR 200,000.

Sanctions under the AIF Law also comprise administrative and criminal sanctions.

Administrative sanctions in the form of an administrative fine are provided in section 120 of the AIF Law and relate to breaches of the AIF Law or any of the CySEC Directives issued further to the AIF Law. The administrative fines imposed may be up to EUR 350,000 and may increase to EUR 700,000 for repeated breaches. Where the person in breach of the AIF Law marketing provisions obtains a benefit pursuant to the breach, the administrative fine imposed may be up to twice the amount of the benefit. In addition to administrative fines, administrative sanctions also include withdrawal of the relevant marketing licence.

Criminal sanctions are laid down in section 121 of the AIF Law, and apply to a breach of AIF Law provisions, including marketing provisions, in the following situations:

- When, in the course of providing information for any matter regulated under the AIF Law, thus including marketing of AIF; a false, misleading or deceiving statement or submission of documents is made, or evidence is concealed or omitted to be submitted or the exercise of the controlling or investigatory duties of the CySEC is obstructed. In these cases, the applicable criminal sanctions will be imprisonment of up to five years and / or monetary sanctions of up to EUR 350,000;
- Use of a brand, name or description that creates the false impression of an AIF being licensed under the AIF Law. In these cases, the applicable criminal sanctions will be imprisonment of up to five years and/ or monetary sanctions of up to EUR 350,000;
- Advertising material or subscription forms relating to AIFs, which are not permitted to be marketed in Cyprus under the AIF Law, being knowingly issued, circulated or distributed. In these cases, the applicable criminal sanctions will be imprisonment of up to three years and / or monetary sanctions of up to EUR 200,000; and Administrative fines according to section 110 of the AIF Law may also be imposed.

## Private placement rules for non-fund investments available

The AIFM Law provides that the following non-funds are subject to private placement opportunities:

- Institutions for occupational retirement provision; supranational institutions, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
- National, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;
- Employee participation schemes or employee savings schemes;
- Securitisation special purpose entities;
- Investments offered by a holding company;
- AIFMs in so far as they manage AIFs whose only investors are the AIFMs themselves or their parent undertakings, their subsidiaries or other subsidiaries of their parent undertaking



and where those investors are not themselves AIFs.

Regulation under the Prospectus Directive should also be considered when seeking to market on a private placement basis. The Prospectus Law transposes the Prospectus Directive in Cyprus. To avoid the requirement to prepare a prospectus, the person marketing would need to ensure that the offering in Cyprus does not constitute an offering of securities to the public or otherwise qualifies for a safe harbour under the Prospectus Law.

The most important safe harbours in practice under the Prospectus Law are the *de minimis* threshold whereby an offering to fewer than 150 persons who are not “qualified investors” will be exempt; and a

safe harbour relevant to offers to any “qualified investors”. For these purposes a Cyprus qualified investor will be either an eligible counterparty or professional client under the Investment Services and Activities and Regulated Markets Law 2007, which transposes MiFID.

The Cypriot Companies Law Cap. 113 also imposes a requirement for a prospectus in relation to an offer to the public. There is an exemption for shares or debentures to which the Prospectus Law applies.

The outline above also projects regulatory practice, following the enactment of the AIF Law.







# Czech Republic

## Summary of private placement provisions for fund interests (if applicable)

Czech law distinguishes between private and public placements. In general, private placement provisions apply to funds of qualified investors or similar foreign funds. Other types of funds, including local special (non-UCITS) funds, are used for collective investment – i.e. for public placements.

A public placement is regulated by the Investment Companies and Investment Funds Act while any other means of public investment offering is not permitted. Both Czech and foreign investment funds must be registered in the list maintained by the Czech National Bank (the “**CNB**”) in order to be offered publicly (unless the fund is an UCITS fund, which can be offered publicly upon notification of the home state authority).

On the other hand, a private placement is generally an investment offering:

- (a) to qualified investors (as specified below); or
- (b) to other persons under conditions that such offering:
  - (i) satisfies the conditions of the public offering, or
  - (ii) the investment instruments are offered to no more than 20 persons in a single offering.

Specific conditions apply in respect of a public placement of investments into foreign AIFs managed by foreign AIFM. Private placement is permitted to professional clients only upon a notification of a home member state authority. Private placement to other investors is permitted if the investment is offered fewer than 20 persons that are non-professional clients or the investment satisfies conditions for a public offering.

Private placement exemptions apply to qualified investors, and/ or professional clients (as the case may be). Qualified investors are defined as any of the following:

- institutional investors and other licensed financial services entities (e.g. banks, brokers, insurance companies, investment companies, investment funds, pension funds, securitisation entities);
- large entities holding certain amounts of assets or having certain levels of turnover;
- a manager of an investment fund;
- an entity directly subordinated to a governmental authority;
- a person or entity which submits a declaration on awareness of the risks connected with investment into the fund of qualified investors with a minimum investment in the fund of:
  - EUR 125,000; or
  - EUR 37,000 while obtaining confirmation of administrator of the fund of qualified investors issued based on the information from the investor that the investment meets the financial background, financial goals and experience of the investor.
- a person or entity which is the founder or shareholder of a different fund of qualified investors which is managed by the same administrator having submitted a declaration on awareness of the risks connected with an investment into the fund of qualified investors with a minimum investment contribution of:
  - EUR 125,000; or

- EUR 37,000 while obtaining confirmation of administrator of the fund of qualified investors issued based on the information from the investor that the investment meets the financial background, financial goals and experience of the investor.

Professional clients are institutional investors, other large entities holding certain amounts of assets or having certain levels of turnover, or clients that required to be considered professional and meet certain additional criteria.

#### **Other forms of possible placement options for fund interests outside fund regulations**

Reverse solicitation is allowed. The Investment Companies and Investment Funds Act expressly sets out that reverse solicitation is not considered to constitute a form of placement, i.e. it is not subject to provisions of the Act regulating the placement.

#### **Consequences of non-compliance with placement regimes for fund interests**

The Czech courts have not yet ruled on the matter of non-compliance with placement regimes. But it is likely that non-compliance with mandatory provisions on placement regimes will lead to the invalidity of a placement agreement and subsequent civil liability (i.e. return of unjust enrichment and damage compensation). A fund's

management may also be held liable for a breach of managerial duties.

Moreover, an administrative fine may be imposed by the Czech National Bank.

#### **Private placement rules for non-fund investments available**

There is no distinction between private placement of fund and non-fund interests. All tradeable non-fund interests (such as shares, bonds, options, swaps, futures, other financial derivatives etc.) may be subject to private placement rules.



## Denmark

### Summary of private placement provisions for fund interests (if applicable)

The AIFMD has been implemented in Denmark through the Danish AIFM Act (“**AIF Act**”) and ancillary executive orders (“**Danish AIFM Rules**”). None of the Danish AIFM Rules define the term “private placement” and there is no private placement exemption under the Danish AIFM Rules in the sense that a fund may be marketed to investors in Denmark without prior approval. Accordingly, alternative investment funds may not be marketed in Denmark unless and until a marketing approval has been obtained from the Danish Financial Supervisory Authority (the “**DFSA**”) in accordance with the AIF Act.

Consequently, provided that the AIF has been notified correctly, it may only be marketed in Denmark in accordance with the AIF Act, unless marketed by a bank or investment company with a license in its EU home country which have been passported to conduct cross-border investment services in Denmark. This applies irrespective of whether the fund is marketed to professional or retail investors.

‘Marketing’ is defined in accordance with AIFMD Article 4(x) as meaning “a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM”.

The AIF Act distinguishes between professional investors and retail investors. A professional investor is defined as 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 MiFID”.

Additionally, certain individuals employed by an AIFM and certain other parties such as investors making an investment commitment of at least EUR 100,000 and who undertake by written declaration to be familiar with the risks associated with an

investment in the fund are considered semi-professional investors under the Danish AIF Act. This means that an AIF that has been approved for marketing to professional investors in Denmark may also be marketed to such semi-professional investors.

To be able to market funds to retail investors, an AIFM must obtain a separate approval from the DFSA in addition to the approval to market funds to professional investors. Funds marketed to retail investors have to comply with several additional burdensome requirements as set out in Executive Order no. 797 of 26 June 2014.

The scope of the AIM Act is wide and captures most fund structures. However, operational companies and funds that qualify as UCITS are not subject to the Danish AIFM Rules.

Moreover, the following entities are exempted from the AIF Act and are therefore not subject to the marketing restrictions:

- holding companies
- institutions for occupational retirement provision
- supranational institutions
- national central banks
- AIFMs that manage AIFs where the only investor is the AIFM
- national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems
- employee participation schemes or employee pension schemes
- securitisation special purpose entities
- family owned investment units
- joint ventures

### **Other forms of possible placement options for fund interests outside fund regulations**

As set out in the definition of marketing, marketing to or investments made by the investor on the investor's own initiative (reverse solicitation) is not governed by the AIF Act and is therefore permitted without registering the AIF for marketing in Denmark.

### **Consequences of non-compliance with placement regimes for fund interests**

Marketing of AIFs in violation of the Danish AIFM Rules is a criminal offence and may be punished by a fine and revocation of any approval to market a fund in Denmark. Despite potential non-compliance with the AIF Act contracts entered into with investors will generally be interpreted in accordance with existing Danish contractual law and will be considered valid. Investors may hold the AIFM liable for any losses suffered as a result of non-compliance.

### **Private placement rules for non-fund investments available**

Generally, any public offering of securities (which includes shares, notes and other financial instruments) is subject to a prospectus requirement. However, the prospectus rules include several exemptions including in respect of offerings of securities to:

- professional investors exclusively,
- fewer than 150 non-professional investors per Member State within the EU/ EEA,
- investors which acquire securities equal to a minimum of EUR 100,000, or
- securities with a denomination of a minimum of EUR 100,000 per security.

A 'professional investor' is an investor that is considered to be a professional client or may, on request, be treated as a professional client within the meaning of MiFID Annex II.





## Estonia

### Summary of private placement provisions for fund interests (if applicable)

Estonia has fully implemented AIFMD with a new Investment Funds Act (“**IFA**”) taking effect on 10 January 2017.

There is no express definition of “private placement” in Estonian law. Instead, the Estonian Securities Market Act (“**ESMA**”) and the IFA provide for a definition of a “public offer” and stipulates a list of exemptions which under which an offer or placement of securities is not considered to be public and which, if met, would exempt the issuer and the offeror from the obligation to publish a prospectus. The relevant exemptions provided in the ESMA derive from the Prospectus Directive (as amended). An offer of securities (including an offer of units or shares of investment funds) is considered public, unless it satisfies any of the following exemptions provided by the ESMA. For the purpose of the ESMA, an offer of securities is defined as a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to the securities.

Article 12(2) of the ESMA states that an offer of securities is not deemed to be a public offer if it falls within the following exemptions:

- an offer of securities is addressed solely to qualified investors (as defined in Article 6(2) of the ESMA which implements the MiFID definition of qualified investor);
- an offer of securities is addressed to fewer than 150 persons per each EEA Member State, who are not qualified investors; or
- an offer of securities is addressed to investors who acquire securities for a total consideration

of at least EUR 100,000 per investor, for each separate offer; or

- an offer of securities has the nominal or book value of at least EUR 100,000 per each security; or
- an issue or offer of securities has a total consideration in all EEA Member States of less than EUR 2,500,000 during a one-year period.

In addition, the IFA exempts from the public offer regime any offering of units or shares of a foreign open-ended investment fund by a fund, management company or a credit institution to its specific client in the course of provision of portfolio management services or services relating to issue or underwriting of securities.

The concept of private placement remained unchanged after the full implementation of the AIFMD.

### Other forms of possible placement options for fund interests outside fund regulations

Estonian public offer rules may not apply if the placement of securities of an investment fund is made at the initiative of an investor, i.e. on the basis of reverse solicitation (including unsolicited request). In addition, Estonian public offer rules would not apply if the offer is not deemed to be made in Estonia. This condition may only be deemed fulfilled if no marketing materials or other communications regarding the offer of securities are distributed in Estonia or addressed to Estonian investors (i.e. marketing materials are not in Estonian, there is no Estonian help desk/ call centre, a website is not on an Estonian server etc.), any contracts are concluded and the securities are acquired, cleared and accepted by Estonian persons outside Estonia, according to a non-binding opinion expressed by the Estonian Financial Supervision Authority (“**EFSA**”). Thus, reverse solicitation could, in principle, fall outside

the Estonian public offer rules to the extent that the foreign fund is not actively marketed in Estonia and the acquisition of fund units or shares occurs and is cleared outside Estonia.

The EFSA will, however, assess on a case-by-case basis whether the above-mentioned conditions are fulfilled.

The IFA regulates all types of investment funds (investment funds are defined as a pool of assets established for collective investment (hereinafter common fund) or a public limited company founded for collective investment, which is or the assets of which are managed on the principle of risk-spreading by a management company), including but not limited to pension funds and UCITS. With amendments to the IFA that have transposed the AIFMD, the list of available types of investment funds has been supplemented to include AIFs (although AIFs are not defined in the IFA as a separate fund class, but rather the legislation applicable to AIFs has been transposed through the rules and regulations concerning AIFMs) by reference to funds that are defined as another (not previously regulated) pool of assets or person established for collective investment, including an investment fund founded in a foreign state. The general exemptions of AIFMs stipulated in Paragraph 3 of Article 2 of the AIFMD have also been implemented in Estonia.

#### **Consequences of non-compliance with placement regimes for fund interests**

An offer of securities in a manner not compliant with Estonian law may lead to:

- claims for damages by investors that have subscribed to the offer of securities; and
- regulatory sanctions (including the imposition of administrative penalties of up to EUR 32,000 and also ban on further distribution activities of the fund); and
- criminal liability (including a fine of up to EUR 16m and/ or the risk of imprisonment for the directors of the fund manager or marketing entity).

#### **Private placement rules for non-fund investments available**

The private placement regime described above applies according to the ESMA to the following types of securities (non-fund investments):

- a share or other similar tradeable right;
- a bond, convertible security or other tradeable debt obligation issued which is not a money market instrument;
- a subscription right or other tradeable right granting the right to acquire securities specified in the previous two points;
- a money market instrument;
- a derivative security or a derivative contract;
- a tradeable depositary receipt; or
- a greenhouse gas emission allowance within the meaning of subsection 137 (1) of the Estonian Atmospheric Air Protection Act.

Similar to fund units and shares, the offer of the above non-fund investments is exempt from the obligation to publish a prospectus if it falls under any of the exemptions stipulated in Article 12(2) of the ESMA.



# Finland

## Summary of private placement provisions for fund interests (if applicable)

The Alternative Investment Fund Managers Act (Fi: laki vaihtoehtorahastojen hoitajista, 162 / 2014, the “**AFMA**”), implementing the AIFMD in Finland, entered into force on 15 March 2014. Since the entry into force, the AFMA has been complemented by several decrees and regulations of the Finnish Financial Supervisory Authority (“**FIN-FSA**”).

As explained below, the entry into force of the AFMA fundamentally changed the private placement regime in Finland. The Finnish private placement exemptions, which previously covered e. g. the offering of non-UCITS funds to professional investors, are no longer available as such. However, with respect to Non-EEA AIFMs wishing to market their funds to professional investors in Finland, Finland has not implemented any national requirements that go beyond the requirements set out in Article 42 of the AIFMD.

## Definition of private placement and the relevance of type of funds/ investors

There is no exact definition of a private placement in Finnish legislation, but the term is generally understood to mean an offering of securities or other financial instruments that is exempted from:

- in case of transferable securities, the requirement to publish a prospectus, and/ or
- in case of funds, the requirement to seek a licence of an asset manager / a fund management company and to register the fund to be marketed with the FIN-FSA or, alternatively, the requirement to use the European passporting regime to market the funds (passporting under the UCITS Directive or the AIFMD).

## Private placement possibilities in respect of transferable securities

In accordance with the Prospectus Regulation (EU) 2017 / 1129 and the Finnish Securities Markets Act (746 / 2012, the “**FSMA**”), if the fund interests qualify as transferable securities, there is no obligation to publish a prospectus if the fund interests are:

- offered solely to qualified investors as defined in the Prospectus Regulation;
- offered to fewer than 150 natural or legal persons other than qualified investors;
- are to be acquired for a consideration of at least EUR 100,000 per investor with regard to an offer or in portions of at least EUR 100,000 in nominal or counter value;
- offered so that the total consideration (i.e. the aggregate purchase price of the securities) in the European Economic Area is under EUR 8,000,000 calculated for a 12-month period

In situations referred to above, the private placement exemption does not apply if the distribution of the securities to the final investors does not meet the requirements of the exemption.

## Private placement regime under the AFMA

The entry into force of the AFMA fundamentally changed the private placement regime previously available to foreign non-UCITS funds and to all funds established as closed-ended funds and qualifying as transferable securities within the meaning of the FSMA. Under the pre-AFMA regulatory framework, closed-ended funds could traditionally take advantage of the private placement exemptions provided in the FSMA (see above). Due to the entry into force of the AFMA, the prospectus exemptions provided in the FSMA have partly lost their significance, as offerings relating to all types of non-UCITS funds, whether

open-ended or closed-ended, are now subject to the extensive requirements of the AFMA.

The AFMA makes authorisation (or registration) mandatory for all Finnish AIFMs managing or marketing AIFs in Finland. The main principle under the AFMA is that if a fund does not qualify as an UCITS, the fund constitutes an AIF and, consequently, the manager of such a fund is required to comply with the requirements of the AFMA. Due to the broad definition of an AIF, a wide range of investment vehicles previously exempted in private placements, or alternatively, unregulated by default, has been brought into the scope of regulation and supervision in Finland. Under the AFMA, AIFMs are subject to the authorisation/ registration requirements irrespective of whether the fund interests are offered to professional or non-professional investors. Thus, under the AFMA, there are no private placement exemptions available based on investor classification. If an AIFM intends to market EEA AIFs under its management also to non-professional investors in Finland, it must meet certain further requirements set out in the AFMA (including the requirement to prepare and make available a key investor information document).

### **EEA AIFMs**

EEA AIFMs can passport their licence into Finland in accordance with the AIFMD passporting regime to manage AIFs in Finland (Article 33 of the AIFMD). EEA AIFMs may also market EEA AIFs in Finland directly on a cross-border basis through the notification procedure (Article 32 of the AIFMD).

As regards Brexit, there is no legislative initiative proposing temporary exemption for the marketing by UK AIFMs of EEA AIFs into Finland under the marketing passport as prescribed in Article 32 of the AIFMD. This would mean that UK AIFMs will have to comply with provisions of AFMA applicable to Non-EEA AIFMs when marketing units in an AIF that is established either in an EEA State or a Non-EEA State after a no-deal Brexit.

### **Marketing of AIFs by Non-EEA AIFMs**

The way a Member State implements the provisions of the AIFMD governing the conditions for marketing of AIFs by Non-EEA AIFMs (Article 42 of the AIFMD) could be construed as a national private placement regime of sorts. In this respect, the rules of the AFMA do not go beyond the AIFMD, i.e. there is no “gold-plating” in Finland regarding the implementation of Article 42.

However, if a Non-EEA AIFM intends to market AIFs in Finland, a marketing notification must be submitted to the FIN-FSA in order for the FIN-FSA to assess whether the Non-EEA AIFM fulfils the requirements to market in Finland. Marketing may

only be commenced once the Non-EEA AIFM has received an acknowledgement thereof from the FIN-FSA. In Finland, Non-EEA AIFs managed by a Non-EEA AIFM may only be marketed to professional clients.

### **Offering of UCITS funds**

Offering of UCITS funds is not subject to any private placement exemptions since the FIN-FSA considers that UCITS funds are always available to the public.

### **Summary**

There are no private placement exemptions available for an offering of fund interests in Finland because, from a Finnish law perspective, all funds offered in Finland will be classified as either UCITS funds or AIFs. A lighter regulatory regime is available for EEA AIFMs whose total assets under management fall below EUR 500m (or EUR 100m if leverage is used to acquire assets).

For EEA AIFMs there is a passporting regime available as provided for in the AIFMD.

Non-EEA AIFMs intending to market fund interests in Finland must obtain prior approval from the FIN-FSA. Non-EEA AIFMs may market Non-EEA AIFs in Finland without any additional requirements to those of the AIFMD. Non-EEA AIFs managed by a Non-EEA AIFM may only be marketed to professional clients.

### **Other forms of possible placement options for fund interests outside fund regulations**

The AFMA does not cover and therefore exempts reverse solicitation (i.e. when investors themselves contact an AIFM and the AIFM presents various investment opportunities to the investor) under certain circumstances. The AFMA includes a specific provision explaining that it does not seek to affect the right of investors to invest in Non-EEA funds of their choosing.

### **Consequences of non-compliance with placement regimes for fund interests**

The AFMA imposes on AIFMs a liability for damages resulting from wilful or negligent breaches of the obligations provided in the AFMA and related regulations. An AIFM and a professional client may, however, contractually deviate from the liability regime provided in the AFMA.

Pursuant to the AFMA, a person engaged in unauthorised marketing and offering of fund interest may become subjected to administrative and criminal sanctions.

The FIN-FSA may impose administrative fines for failures to disclose certain information to investors



such as information on leverage. An administrative penalty may be imposed for breaches of the prohibitions against provision of untrue or misleading information and for breaches of periodic disclosure obligations. A person that manages or markets AIFs without authorisation faces criminal liability and sanctions.

#### **Private placement rules for non-fund investments available**

AFMA's exemptions relating to non-fund investments are compatible with the AIFMD. These include investments in or by:

- companies belonging to the same group;
- business that does not qualify as collective investment;
- joint ventures;
- holding companies;
- employee pension insurance schemes and companies;
- public sector entities such as the ECB, IMF, central banks, governments etc.
- employee participation schemes; and
- special purpose vehicles.

These non-fund investments are normally subject to specific regulations, such as legislation governing pension insurance schemes and employee participation. If the investment takes the form of a transferable security or another financial instrument, it will be covered by the FSMA and regulations on investment services. To the extent a non-fund investment is not captured by any of these regulations, it will be exempted from the regulatory requirements and may be offered on a private placement basis or to members of the public. Since the definitions of an AIF, a transferable security and a financial instrument cover collectively most conceivable forms of fund interests, a private placement of a non-fund should be a relatively rare occurrence.







The General Regulation of the AMF and the AMF instruction no. 2014-03 provide for the possibility to apply for a marketing authorisation in relation to the marketing of non-passported AIFs.

#### **Summary of private placement provisions for fund interests (if applicable)**

Marketing of an AIF (including its private placement) that does not benefit from the AIFMD passporting regime is prohibited unless the fund obtains a specific authorisation from the Autorité des marchés financiers (“**AMF**”).

The concept of a private placement under French law is based on the definition given under the Prospectus Regulation. It benefits closed-ended funds (subject to additional requirements for closed-ended AIF) but not open-ended funds.

French law and regulations do not provide for an express definition of a closed-ended AIF. For the ESMA, a closed-ended AIF is defined as an AIF whose shares or units cannot be repurchased or redeemed prior to the commencement of its liquidation phase or wind-down.

Private placement covers any offer of financial securities (a concept that includes negotiable securities) (an “**Offer**”) in France:

- made to qualified investors (i.e. investors qualifying as professional investors or eligible counterparties under MiFID) (“**Qualified Investors**”);
- made to 150 natural or legal persons per EU State, other than Qualified Investors;
- where the total amount of the Offer in France and in the EU is less than EUR 8,000,000 or the foreign currency equivalent thereof;
- where the transaction is intended for investors acquiring at least EUR 100,000 worth, or the foreign currency equivalent thereof, per

investor and per transaction, of the relevant financial securities; and

- where the transaction concerns financial securities with a minimum denomination of at least EUR 100,000 or the foreign currency equivalent thereof.

#### **Other forms of possible placement options for fund interests outside fund regulations**

The prohibition on marketing does not include a prohibition on the introduction of financial securities in France and therefore French investors may invest in such products (either directly or through a discretionary investment management agreement), provided that the investment was made at the specific request of the investor (the reverse solicitation exemption).

However, in order to fully comply with the spirit of such exemption, any request for information should be interpreted strictly and dealt with carefully. Thus, a request from a potential investor to receive the prospectus for an offer should not be replied to simply by forwarding the prospectus and the application form for such an offer.

According to the AMF, payment of fees to a third party as a result of subscriptions by a French investor raises a rebuttable presumption of an unlawful reverse solicitation exemption.

#### **Consequences of non-compliance with placement regimes for fund interests**

- Marketing of a non-authorised fund in France is subject to heavy criminal sanctions; and
- Although not yet clear, it is likely that a subscription made further to the unlawful marketing of financial securities issued by a non-authorised fund may be declared null and void.

### **Private placement rules for non-fund investments available**

Any instruments covered by the Prospectus Regulation may benefit from the private placement exemption, in particular:

- securities by “ordinary companies”; and
- closed-ended AIF exempted structures whose securities fall within the ambit of the Prospectus Regulation (e.g. an alternative investment fund that does not qualify as an AIF which falls outside the scope of the AIFMD and that does not allow redemption of its interests in line with ESMA guidelines on closed-ended funds and whose interests qualify as financial securities under the Prospectus Regulation); etc.

Private placement may benefit either:

- Qualified Investors i.e. both professional investors and eligible counterparties within the meaning of MiFID; or
- any non-Qualified Investor within a group of fewer than 150 offerees.

There is no distinction between a private placement of the interests of a fund or a non-fund.



## Germany

### Summary of private placement provisions for fund interests (if applicable)

As of 22 July 2013, fund interests can no longer be distributed in Germany on a private placement basis. Consequently, there is no defined set of rules regarding the private placement of fund interests.

The German law implementing the AIFMD, the German Capital Investment Code (*Kapitalanlagegesetzbuch*), allows for domestic German as well as EU and Non-EU funds to be placed only in accordance with a dedicated set of rules. Those rules do not provide for a private placement exemption, meaning that placement would be exempted from regulatory requirements. In particular, funds targeting professional and private investors cannot rely on private placement exemptions. In respect of the latter investor group, the German Capital Investment Code applies – beyond what the AIFMD stipulates – to retail funds.

Most importantly, the German Capital Investment Code imposes comparably high hurdles to the placement of Non-EU funds or funds managed by Non-EU managers as of 22 July 2013. Those require, *inter alia*, for placement in Germany that cooperation agreements are in place between the German regulator and the regulator of the fund's and/ or manager's country of domicile.

The legal situation in Germany has significantly changed since 22 July 2013. The private placement rules previously available for fund interests have been abolished.

### Other forms of possible placement options for fund interests outside fund regulations

Placement of fund interests is not subject to the regulations of the German Capital Investment Code when not made on the “initiative” of the fund manager but on the initiative of professional investors or so called semi-professional investors.

This exemption is commonly referred to as reverse solicitation.

From a German perspective, “reverse solicitation” applies to an approach by a potential professional or semi-professional investor on its own initiative. Due to a change in the law, reverse solicitation will be much more restricted in the future and as such be classified as marketing activity.

For the sake of completeness, certain other activities are also not classified as marketing activities pursuant to the German Capital Investment Code. Such activities include the publication of NAV and ISIN and other information published to comply with legal requirements as well as the issuance of interests in a German UCITS, which is a feeder to an EU master UCITS.

Placement of certain interests in the following vehicles or structures is exempted from the German Capital Investment Code and can therefore be made on private placement basis:

- holding companies;
- institutions for occupational retirement provision;
- supranational institutions, if such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
- national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;
- employee participation schemes or employee savings schemes;
- securitisation special purpose vehicles;
- AIFs in so far as their only investors are their AIFM or the AIFMs parent undertakings, their subsidiaries or other subsidiaries of their parent

undertaking and where those investors are not themselves AIFs;

- AIFs managed by an AIFM where the aggregated assets managed do not exceed EUR 100m (leverage included) or EUR 500m (without leverage) subject to certain further marketing requirements;
- AIFs for private investors where the assets do not exceed EUR 5m and have not more than five investors;
- AIFs for private investors in the form of a cooperative society which invests in clean energy; and
- AIFs for private investors where the assets of the AIFM managing such AIFs do not exceed EUR 100m.

Private placement options for non-fund interests are available and outlined below under private placement rules for non-fund investments.

#### **Consequences of non-compliance with placement regimes for fund interests**

From a civil law perspective, the German law implementing AIFMD creates some uncertainty.

Contracts concluded should principally be regarded as valid under general German law even if one of the parties may have acted in contrary to the German Capital Investment Code when entering into the agreement. However, if a fund needs to be unwound, e.g. for regulatory requirements, an investor might under general German civil law principles hold the fund and/ or its manager responsible and claim compensation and damages for losses suffered.

From a regulatory perspective, distribution of fund interests which breaches the German Capital Investment Code could constitute a criminal

offence. Sanctions include fines and even imprisonment. Further, the German regulator may issue a request to the fund manager to adapt their operations so that they comply with the legal requirements or may prohibit further distribution activities and request unwinding of the fund.

#### **Private placement rules for non-fund investments available**

Any instrument, other than a fund instrument, can be subject to private placement rules in Germany. German law distinguishes between two different regimes; first, private placement of securities, and second, private placement of non-securities. Both regulations explicitly allow for private placement.

Under German law, securities are transferable instruments which are tradeable on capital markets. All other instruments, e.g. non-tradeable participations in companies, are non-securities.

The private placement of securities is regulated in the German Securities Prospectus Act (*Wertpapierprospektgesetz*). This law provides for a number of private placement exemptions, the most important applying to offers (i) where the minimum subscription amount is EUR 100,000 per investor or (ii) addressing fewer than 150 investors per EEA State or (iii) which are restricted to professional investors (professional investors defined in accordance with the MiFID definition of professional clients).

The private placement of non-securities is regulated by the German Asset Investment Act (*Vermögensanlagengesetz*). Again, this law provides for several private placement exemptions of which the most important apply to offers where (i) the minimum subscription amount is EUR 200,000 per investor or (ii) a maximum of 20 interests are issued.



# Greece

## Summary of private placement provisions for fund interests (if applicable)

Law 4099 / 2012 (effective from 20 December 2012) implemented in Greece Directive 2009 / 65 of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (“**UCITS**”). Law 4099 / 2012 is applicable only to UCITS established within the territories of the EU member states. However, when enacting Law 4099 / 2012, the Greek legislature added a provision (Article 92) which is not included in Directive 2009 / 65. Article 92 provides, *inter alia*, that any undertaking for collective investments that is seated in a Non-EU member state needs to be licensed by the Hellenic Capital Market Commission (“**HCMC**”) before making offerings in Greece.

Moreover, Law 4209 / 2013 (effective from 21 November 2013, except for some interim provisions that have different effective dates) implemented Directive 2011 / 61 of the European Parliament and of the Council on Alternative Investment Fund Managers (“**AIFM**”). Law 4209 / 2013 is applicable to AIFMs (either EU or Non-EU based) which manage and/ or market alternative investment funds (“**AIFs**”) in the EU. However, Greece opted not to implement Article 42 of Directive 2011 / 61 which provides the conditions for Non-EU AIFMs to make offerings to professional investors within an EU member state.

In light of the above non-EU funds are governed by the special provision of Article 92 of Law 4099 / 2012.

The AIFMD, which came into force on 22 July 2013, seeks to establish a harmonised regulatory framework for firms that manage or market AIFs in the EU. An AIF has been defined broadly and catches a variety of non-UCITS investment

vehicles such as closed-end listed vehicles (e.g., investment trusts) and private equity, real estate and hedge funds.

AIFMD is likely to affect most private equity fund managers who manage funds or have investors in the EU if they are identified as the AIFM of a particular fund or funds. Limited grandfathering provisions apply, generally exempting closed-end funds which will end prior to 2016 or are fully invested by 2013. Those EU funds with non-EU managers may be required to become authorised by 2015. AIFMs managing funds below *de minimis* aggregate thresholds may only be subject to lighter touch requirements, which include registration with regulators, notification of investment strategies, and certain investment reporting.

There is no specific definition of private placement under Greek law but the concept of “private placement” is determined by opposition to public offer and by referring to the exemption from the requirement to publish a prospectus under the provisions of the law implementing Directive 2003 / 71 / EC, as amended (Law 3401 / 2005 as in force – “Prospectus Law”).

Private placement in Greece is a placement that:

- is addressed solely to qualified investors. As per Article 1 of Directive 2010 / 73 EU “qualified investors” means persons or entities that are described in points (1) to (4) of Section I of Annex II to Directive 2004 / 39 / EC, and persons or entities who are, on request, treated as professional clients in accordance with Annex II to Directive 2004 / 39 / EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004 / 39 / EC unless they have requested that they be treated as non-professional clients – these provisions have been implemented in Greece; and/ or



- is addressed to fewer than 150 natural or legal persons other than qualified investors per each EU member state; and/or
- is addressed to investors who acquire securities for a total consideration of at least EUR 100,000 per investor, for each separate offer; and/ or
- refers to securities whose denomination per unit amounts to at least EUR 100,000; and/ or
- refers to securities with a total consideration of less than EUR 100,000 calculated over a period of 12 months.

If a fund meets any one (or more) of the above criteria then it is subject to private placement provisions.

#### **Other forms of possible placement options for fund interests outside fund regulations**

The following fall outside of the scope of the law covering the placement of fund interests:

- reverse solicitation (i.e. following a genuine unsolicited request by the investor);
- non-equity securities issued by an EU Member State or by public international bodies of which one or more EU Member States are members or by the European Central Bank or by the central banks of the EU Member States;
- shares in the capital of central banks of the EU Member States;
- securities unconditionally and irrevocably guaranteed by an EU Member State;
- securities included in an offer where the total consideration for the offer in the EU is less than

EUR 5m calculated over a one-year period; and

- non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration for the offer in the EU is less than EUR 75m calculated over a one-year period, provided that those securities are not subordinated, convertible or exchangeable and that they do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument.

#### **Consequences of non-compliance with placement regimes for fund interests**

If there is a violation of private placement provisions, the contract may be declared null and void under the applicable provisions of the Greek Civil Code. A breach of the applicable laws and regulations creates civil liability to fully indemnify any injured party.

Regulatory sanctions include a fine of up to EUR 1m. Criminal charges may be pressed, with the possibility of imprisonment for up to five years.

#### **Private placement rules for non-fund investments available**

Non-fund investments which are generally subject to private placement opportunities outside fund regulation include financial instruments such as shares in companies; bonds or other forms of securitised debt; certain other securities; units in collective investment undertakings; options, futures and swaps and other derivative contracts. These financial instruments are subject to private placement provisions when the exemptions from the duty to publish a prospectus apply.



# Hungary

## Summary of private placement provisions for fund interests (if applicable)

Hungary has implemented the AIFMD by Act XVI of 2014 on Forms of Alternative Investments and Their Managers and Amendment of Acts relating to the Financial Sector (the “**Act**”). The Act came into force gradually, but it has been fully effective since 1 December 2014.

Generally, any private placement of fund interests in Hungary must be reported to the National Bank of Hungary which also acts as a financial supervisory authority.

As opposed to a public offering, the private placement of fund interests in Hungary is not subject to the prospectus requirements. Pursuant to Act CXX of 2001 on Capital Markets, a placement qualifies as a “private placement” if

- (i) securities are offered only to qualified investors (i.e. investors recognised as professional clients or eligible counterparties in accordance with MiFID);
- (ii) securities are offered to fewer than 150 non-qualified investors in each EU Member State;
- (iii) the minimum purchase is equal to EUR 100,000, or the equivalent in another currency;
- (iv) the face value of the securities offered is at least EUR 100,000, or its equivalent in another currency;
- (v) the issue value of all securities issued in the EU Member States does not exceed EUR 100,000, or its equivalent in any other currency, within 12 months from the offering date; or
- (vi) a company limited by shares is formed by the transformation of a cooperative and the

shares are offered exclusively to the members of the transforming cooperative.

Both closed-end and open-ended funds are subject to private placement provisions.

In respect of fund interests, Hungary has introduced a national private placement regime the main features of which are the following:

Marketing of a third country AIF managed by an EU AIFM is subject to the regime.

Marketing for professional investors is allowed if:

- the AIFM must comply with the Act;
- appropriate cooperation arrangements for the purpose of systemic risk oversight in line with international standards are in place between the National Bank of Hungary and the supervisory authorities of the relevant third country, in order to ensure an efficient exchange of information that enables the National Bank of Hungary to carry out its duties;
- the relevant third country is not listed as a NCCT by the FATF.

In case of an EU AIF managed by a third country AIFM, marketing for professional investors is not regulated under Hungarian law therefore, it is not subject to the regime.

As a general rule, a public offering is subject to the prospectus requirements. However, in the following cases a public offering of fund units (e.g. offerings to at least 150 non-qualified investors in each EU Member State), a prospectus is not required:

- (a) in connection with the offering of money market instruments with an original maturity of less than twelve months;
- (b) in connection with the offering of units of an open-ended investment fund;

- (c) in connection with the registration of the following types of securities in a multilateral trading facility:
  - (i) securities representing, over a period of twelve months, less than five million euros at Union level, or its equivalent in another currency, in total issue and value; or
  - (ii) securities issued as part of a series already admitted to trading on a regulated market or on a stock exchange established in an OECD Member State;
- (d) in connection with the public offering of securities where e.g. the issued securities serve as consideration in a merger, demerger or public takeover transaction or as dividends to existing shareholders, directors or employees.

Instead of a prospectus, a summary prospectus shall be prepared in accordance with the requirements set out in Act CXX of 2001 on Capital Markets for the public offering of securities whose offer value remains for a period of twelve months less than one million euro or equivalent at EU level.

#### **Other forms of possible placement options for fund interests outside fund regulations**

Reverse solicitation may be excluded from marketing activity. Since reverse solicitation is made at the initiative of the investor, it will not qualify as a public offering or a private placement. Marketing activity covers making offers at the initiative only of the fund managers or on their

behalf. Notwithstanding that, further interpretation is required and assessment of reverse solicitation would be analysed on a case-by-case basis, but the main criterion is that the purchase of fund interests should be initiated and controlled by the investor. Therefore a professional service provider offering fund interests will not generally be able to benefit from the reverse solicitation exemption.

#### **Consequences of non-compliance with placement regimes for fund interests**

Under contract law, the placement may be deemed invalid and damages required to be paid. A court may be requested to order the invalidation by any affected investor or any other person who has a legitimate interest in nullifying the placement. However, market practice is very limited.

In addition, an administrative penalty may be incurred ranging from HUF 100,000 to HUF 2,000,000,000 (EUR 330 – EUR 6,666,667). Also, if the non-compliance is repeated or severe, the National Bank of Hungary may revoke the licence of the fund manager.

#### **Private placement rules for non-fund investments available**

Generally, the private placement / public offering distinction applies to securities issued by any entity (such as an “ordinary company”). Accordingly, securities such as bonds, notes and warrants may provide a good private placement opportunity outside fund regulation, as long as these are indeed issued in a private placement (i.e. a placement to no more than 149 non-qualified investors).



# Ireland

## Summary of private placement provisions for fund interests (if applicable)

AIFMD has been transposed in Ireland through regulations.

In the context of “marketing” to “professional investors” (as each term is defined within AIFMD) without a passport, Irish implementing regulations implement the following provisions of AIFMD:

- (a) Article 36 (marketing without a passport of Non-EU AIFs managed by an Irish AIFM or an AIFM from another EU State); and
- (b) Article 42 (marketing without a passport of AIFs managed by Non-EU AIFM).

The Irish implementing regulations do not carry stricter supplemental rules. While they do grant the Central Bank of Ireland (“CBI”) the power to impose additional conditions or requirements where it considers it necessary for the proper and orderly regulation and supervision of alternative investment fund managers, no such conditions or restrictions have been made to date.

In the case of both the Article 36 facility and the Article 42 facility referred to above, the affected AIFM must give written notification to the CBI before marketing units or shares of an AIF it manages to professional investors in Ireland. This notification should include the name of the AIFM and the AIF and the identity of the jurisdiction in which the AIFM is domiciled and the jurisdiction where the AIF is domiciled.

## Prospectus Regulation

Where a fund is closed-ended, any offer of securities to the public in the EU will be subject to a requirement to publish a prospectus under the European Prospectus Regulation (EU) 2017/1129 (the “**European Prospectus Regulation**”) and the European Union (Prospectus) Regulations 2019 of Ireland (the “**Irish Prospectus Regulations**”, and

together with the European Prospectus Regulation, the “**Prospectus Regulation**”).

For closed-end funds any offer which falls either (1) outside of the definition of a public offer; or (2) within the exemptions of Regulation 9 of the PDR (equivalent to Article 3(2) of the Prospectus Directive 2003 / 71 / EC, as amended), should not be subject to the prospectus requirement.

## Other forms of possible placement options for fund interests outside fund regulations

An approach made by a potential investor on an unsolicited basis would not as a matter of principle breach any marketing restrictions under the applicable private placement exemption.

## Consequences of non-compliance with placement regimes for fund interests

Where a fund acts outside of the provisions outlined above, there may be consequences where a fund's activities are deemed to fall under another set of rules / regulations (i.e. where a fund is deemed to be within the scope of the public offering regime or, where a fund is a closed-ended, any offer made to the public will be subject to a requirement to publish a prospectus under the Prospectus Regulation).

The CBI may administer sanctions in respect of prescribed contraventions by regulated financial service providers and persons concerned with the management of regulated financial service providers.

## Private placement rules for non-fund investments available

The Prospectus Regulation requires that a prospectus be published in respect of, *inter alia*, any offer of securities to the public in the EU.

The European Prospectus Regulation defines an “offer of securities to the public” as:

*“a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries”.*

The European Prospectus Regulation defines “securities” as “transferable securities as defined in point (44) of Article 4(1) of Directive 2014/65/EU with the exception of money market instruments as defined in point (17) of Article 4(1) of Directive 2014/65/EU, having a maturity of less than 12 months”.

The European Prospectus Regulation defines an “issuer” as “a legal entity which issues or proposes to issue securities”. It is irrelevant whether the issuer is an Irish or foreign company.

There is no definition of “private placement” in the Prospectus Regulation; however, the following shall not be considered to be an offer of securities to the public pursuant to Article 1(4) of the European Prospectus Regulation (and therefore could be considered to be private placements for purposes of Irish law):

- (a) an offer of securities addressed solely to qualified investors;
- (b) an offer of securities addressed to fewer than 150 natural or legal persons per European member state, other than qualified investors;
- (c) an offer of securities whose denomination per unit is at least EUR 100,000;
- (d) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 100,000 per investor, for each separate offer;
- (e) shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;
- (f) securities offered in connection with a takeover by means of an exchange offer, provided that a document is made available to the public in accordance with the arrangements set out in Article 21(2), containing information describing the transaction and its impact on the issuer;
- (g) securities offered, allotted or to be allotted in connection with a merger or division,

provided that a document is made available to the public in accordance with the arrangements set out in Article 21(2) of the European Prospectus Regulation, containing information describing the transaction and its impact on the issuer;

- (h) dividends paid out to existing shareholders in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- (i) securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer or allotment;
- (j) non-equity securities issued in a continuous or repeated manner by a credit institution, where the total aggregated consideration in the EU for the securities offered is less than EUR 75,000,000 per credit institution calculated over a period of 12 months, provided that those securities:
  - are not subordinated, convertible or exchangeable; and
  - do not give a right to subscribe for or acquire other types of securities and are not linked to a derivative instrument.

Further exemptions worth noting are the European Prospectus Regulation does not apply to, *inter alia*:

- (a) units issued by collective investment undertakings other than the closed-end type (Article 1(2)(a) of the European Prospectus Regulation);
- (b) an offer of securities to the public with a total consideration in the EU of less than EUR 1,000,000, which shall be calculated over a period of 12 months (Article 1(3) of the European Prospectus Regulation); and
- (c) offers which are not subject to a notification requirement in accordance with Article 25 of the European Prospectus Regulation and the total consideration of the offer does not exceed EUR 5,000,000 (Article 3(2) of the European Prospectus Regulation and Article 3(1) of the Irish Prospectus Regulations).





# Italy

## Summary of private placement provisions for fund interests (if applicable)

Italian laws and regulations do not provide for a definition of “private placement”.

The term “private placement” is commonly used to indicate a restricted offer of financial products to professional investors that is exempted from the duty to publish a prospectus.

In particular, according to Article 100 of the Italian Consolidated Financial Act (Legislative Decree no. 58 / 1998, “**CFA**”), as implemented by Article 34-ter of the Issuers Regulation no. 11971 / 1999 issued by Consob (the Italian Securities Market Supervisory Authority), the offer of financial products exclusively to professional investors is exempted from the duty to publish a prospectus.

The definition of professional investors is set out under Article 6, para. 2-*quinquies* of the CFA and Attachment 3 of Consob Intermediaries Regulation no. 20307 / 2018, whereby professional investors include:

- professional investors by operation of law, i.e.:
  - Italian and foreign entities authorised and regulated to operate in financial markets (e.g. banks, investment companies, insurances, pension funds etc.);
  - large companies meeting certain requirements;
  - institutional investors whose main activity is investment in financial instruments;
- professional investors on request, provided that certain criteria and procedures are met (in this case the offeror is in any case obliged to assess whether the investor is able to make informed investment decisions and to understand the risks thereof); and

- public professional investors, subject to certain procedures and requirements.

The AIFMD has been implemented in Italy by Legislative Decree n. 44 of 4 March 2014, which amended the provisions of the CFA and became effective from 9 April 2014.

The marketing of AIFs to professional investors (and to the investors identified under the Ministry Regulation enacted under Article 39 of the CFA) shall be preceded by the prior notification to Consob under Article 43 of the CFA, requiring:

- the prior notification to Consob and an assessment by the Bank of Italy of the adequacy of the AIFMs to manage the relevant AIF, in order to market to professional investors:
  - (i) Italian AIFs reserved to professional investors; and
  - (ii) EU and Non-EU AIFs managed by either Italian SGRs (asset management companies) or Non-EU AIFMs authorised in Italy;
- the prior notification to Consob by the home State authority in order to market to professional investors:
  - (i) Italian AIFs (either reserved or not reserved to professional investors); and
  - (ii) EU and Non-EU AIFs managed by either EU AIFMs or Non-EU AIFMs authorised in an EU country other than Italy.

The above notification duties also apply to Italian, EU and Non-EU AIFs managing their own assets.

### **Other forms of possible placement options for fund interests outside fund regulations**

Fund interests can be placed outside fund regulations through the reverse solicitation mechanism (i.e. following a genuine unsolicited request by the investor).

Certain requirements must be met if the (unsolicited) request is made by a bank/ investment company when providing a portfolio management service to Italian clients.

### **Consequences of non-compliance with placement regimes for fund interests**

If there is a breach of the private placement provisions an agreement may be declared null and void for violation of mandatory provisions according to Article 1419 of the Italian Civil Code and the breaching party may have to refund the relevant sums invested by the customers plus any damages and interest.

According to Article 190 of the CFA if offers of fund interests in Italy are carried out in breach of the procedure set out under Article 42 and Article 43 of the CFA, an administrative sanction from EUR 30,000 up to the higher of

(i) EUR 5,000,000, and (ii) 10% of the offeror's turnover can be applied to the offeror. Furthermore, according to Article 190-bis of the CFA, an administrative sanction from EUR 5,000 to EUR 5,000,000 can also be applied to representatives, directors, auditors and employees of the offeror, when the breach is caused by a violation of their duties, upon occurrence of specific circumstances (e.g. their conduct has caused damage to the investors or to the correct functioning of the securities market or has materially affected the offeror's organisation or risk profile).

### **Private placement rules for non-fund investments available**

Financial products are generally subject to private placement opportunities, for example, tradeable securities, money market instruments, options, futures, swaps and other derivative contracts. These are subject to the private placement provisions when the exemptions from the duty to publish a prospectus apply.



## Latvia

### Summary of private placement provisions for fund interests (if applicable)

The Latvian law implementing the AIFMD, i.e. the Law on Alternative Investment Funds and Fund Managers (“**AIFFM**”), was passed on 9 July 2013 and came into force on 8 August 2013, although certain sections of the law will only come into effect at a later date. These include sections relating to initial capital and core capital requirements (Implementing Regulation no. 575 / 2013) which came into effect on 1 January 2014.

Neither the AIFFM nor the Law on Market for Financial Instruments (“**LMFI**”) which regulate financial markets and the public trading of securities in Latvia include any definition of “private placement”. The notion of a private placement is generally addressed by way of specific exemptions relating to the obligation to prepare and register a prospectus, with such exemptions corresponding to the exemptions in the Prospectus Directive.

According to the terms of the AIFFM and LMFI, funds distributed in Latvia must be registered with the Financial and Capital Markets Commission. Furthermore, fund shares can no longer be distributed in Latvia on a “private placement” basis, whether the fund is targeted at qualified or other investors.

### Other forms of possible placement options for fund interests outside fund regulations

As an exemption from the general authorisation rule, unsolicited business with Latvian clients does not trigger any licensing requirements. In other words, there is no restriction on the right of persons and entities domiciled in Latvia to request the services of any entity (such as a fund manager) on their own initiative (i.e. reverse solicitation).

### Consequences of non-compliance with placement regimes for fund interests

Where there has been a distribution of fund interests in a manner not compliant with Latvian law, administrative penalties of up to EUR 142,300 may be imposed.

Additional regulatory sanctions can also include the prohibition on further distribution activities of the fund.

### Private placement rules for non-fund investments available

The private placement of securities is regulated by the LMFI. This law provides for a number of private placement exemptions, the most important applying to offers (i) where the minimum subscription amount is EUR 100,000 per investor; (ii) where the offer is addressed to less than 150 investors per EEA Member State; or (iii) being restricted to professional investors (professional investors being in essence MiFID professional clients as per Annex II of the MiFID).



# Liechtenstein

## Summary of private placement provisions for fund interests (if applicable)

As one of the first countries in the EEA<sup>1</sup> Liechtenstein has fully adopted the AIFM Directive into national law, i.e. the Law on Alternative Investment Fund Managers (“AIFMG-L”). Since 2016 the EEA countries (Norway, Ireland and Liechtenstein) have also adopted the AIFMD into EEA law. That means that distribution in or from Liechtenstein follows 100% the distribution rules of the AIFMD. One of the impacts of the implementation is that there is no longer a general definition of “private placement” in national law.

All AIFs are subject to the above provisions. Generally, the exemption above is directed at professional investors. Where units or shares of an AIF are marketed to professional investors only, measures must be taken to prevent marketing to private investors, in particular by way of:

- (a) appropriate design of the subscription form;
- (b) references in the documentation of the AIF; and
- (c) the exclusion of marketing of units or shares to private investors in the distribution agreements.

Professional investors are defined as investors which are considered to be professional clients or which may be treated as professional clients within the meaning of Annex II to Directive 2014 / 65 / EU.

## Other forms of possible placement options for fund interests outside fund regulations

As an exemption from the general authorisation rule, unsolicited business with Liechtenstein residents does not trigger any licensing requirement in Liechtenstein. Therefore, there is no restriction on the right of persons and entities

domiciled in Liechtenstein to request the services of any entity on their own initiative. Financial services and transactions requested on the client's own initiative without any prior solicitation and marketing are therefore not subject to any licensing requirements in Liechtenstein.

## Consequences of non-compliance with placement regimes for fund interests

There are no mandatory contractual consequences. However, the marketing of units or shares without compliance with the requirements of AIFMG-L and AIFMV could lead to damages claims by investors.

In the case of non-compliance with relevant provisions, the District Court shall impose imprisonment for up to one year or a fine of up to 360 daily rates upon a person who, *inter alia*, acts as an AIFM without authorisation, markets units or shares of an AIF which may only be marketed to professional investors to private investors without the required approval or authorisation or acts as an distributor without the required authorisation.

Should circumstances appear to endanger investors, the reputation of Liechtenstein as a fund centre or the stability of the financial system, the Liechtenstein Financial Market Authority may, in particular, without prior warning or setting of a deadline, require the suspension of issue of units or shares or prohibit the marketing of them.

<sup>1</sup> European Economic Area

### **Private placement rules for non-fund investments available**

Generally, all public offerings of an offeror or issuer in or to Liechtenstein residents are subject to a duty to prepare a prospectus. This includes the offering of securities negotiable on securities market, shares equivalent to equity or shares of legal entities, bonds and other securitised debts and any other securities qualifying as transferable securities.

However, the prospectus duty does not apply according to Article 3 of the Law of 10 May 2019 implementing Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (EEA Securities Prospectus Implementation Act; **EWR-WPPDG**) in accordance with Article 3 (1) of Regulation (EU) 2017/1129, insofar as:

- a) these offers are not subject to notification in accordance with Article 25 of Regulation (EU) 2017/1129; and
- b) the total consideration of such an offer in the EEA is less than a monetary amount calculated over a period of 12 months which shall not exceed EUR 8,000,000 or the equivalent in CHF.

**Generally, the obligation to publish a prospectus according to Article 1 (4) of Regulation (EU) 2017/1129 is exempted in the following cases:**

- (a) if the offer is directed solely at qualified investors;
- (b) if the offer is directed at fewer than 150 non-qualified investors in each State;
- (c) if the offer price does not exceed EUR 100,000 or the equivalent in another currency over a period of twelve months; or
- (d) if the denomination per unit or per investor amounts to at least EUR 100,000 or the equivalent in another currency.

Qualified investors according to the Article 2(e) of Regulation (EU) 2017/1129 are persons or entities that are listed in points (1) to (4) of Section I of Annex II to Directive 2014/65/EU, and persons or entities who are, on request, treated as professional clients in accordance with Section II of that Annex, or recognised as eligible counterparties in accordance with Article 30 of Directive 2014/65/EU unless they have entered into an agreement to be treated as non-professional clients in accordance with the fourth paragraph of Section I of that Annex. For the purposes of applying the first sentence of this point, investment firms and credit institutions shall, upon request from the issuer, communicate the classification of their clients to the issuer subject to compliance with data protection laws.

In addition, the Regulation (EU) 2017/1129 provides for several other exemptions which depend on the nature of the security (securities offered in connection with a takeover, shares representing, over a period of 12 months, securities that are traded on a regulated market etc.).





# Lithuania

## Summary of private placement provisions for fund interests (if applicable)

As of 1 January 2015, the Law on Management Companies of Alternative Collective Investment Undertakings of the Republic of Lithuania (“**Lithuanian AIFMD Law**”), which implements AIFMD, was in force.

If the AIF is considered to be of a closed-end type the Law on Securities of the Republic of Lithuania (“**Law on Securities**”) and Prospectus Regulation (EU) 2017/1129 (“**Prospectus Regulation**”) apply.

Pursuant to Article 1(4) of the Prospectus Regulation, the following offerings are not deemed to have a public character and do not require to have a prospectus approved in Lithuania:

- offerings to professional investors only; and/ or
- offerings to fewer than 150 natural or legal persons per Member State, other than professional investors;
- offerings whose denomination per unit amounts to at least EUR 100,000;
- offerings to investors who acquire securities for a total consideration of at least EUR 100,000 per investor, for each separate offer.

Additionally, the Law on Securities establishes exemption from the obligation to have a prospectus approved when the total consideration of each such offer in the EEA is less than a monetary amount calculated over a period of 12 months which shall not exceed EUR 8,000,000 and such offers are not subject to notification in accordance with Article (25) of the Prospectus Regulation.

## Other forms of possible placement options for fund interests outside fund regulations

Reverse solicitation is not deemed to constitute a public offering of a fund interest in Lithuania and, in such context the collective investment undertaking does not need to be registered or have a prospectus approved in Lithuania.

## Consequences of non-compliance with placement regimes for fund interests

Possible consequences include:

- Claims for damages by investors that have acquired the fund interests;
- Regulatory sanctions including warnings, bans on operations or activities in Lithuania, requirements to change the manager and/ or monetary fines.

## Private placement rules for non-fund investments available

The private placement regime for non-fund investments is not defined by the law. In this regard “private placement” is a market developed concept which is understood as a placement of various securities such as shares, bonds, notes, etc. which are exempted from the requirement to publish an offering prospectus.

The exemptions from the obligation to publish a prospectus are established in the Law on Securities and the Prospectus Regulation.



# Luxembourg

## Summary of private placement provisions for fund shares

Given that there is no specific definition of private placement under Luxembourg law, the legal framework related to the distribution of shares / units or interests in a fund (all together the fund shares) within the territory of Luxembourg is to be found in the combined provisions of the law of 10 July 2005 on prospectuses for securities, as amended (the “**Prospectus Law**”), the law of 17 December 2010 on undertakings for collective investment, as amended (the “**UCITS Law**”), the law of 12 July 2013 on alternative investment funds managers (the “**AIFM Law**”), the law of 15 June 2004 relating to the investment company in capital risk, as amended (the “**SICAR Law**”), the law of 23 July 2016 on reserved alternative investment funds (the “**RAIF Law**”), the law of 13 February 2007 relating to specialised investment funds, as amended (the “**SIF Law**”) and the law of 5 April 1993 on the financial sector, as amended (by references to the so-called MIFID provisions) (the “**LFS**”).

A distinction is made between closed-ended and open-ended type funds. This distinction is key to understanding the scope of the Prospectus Law which may overlap with some other specific provisions. The Prospectus Law does not apply to funds other than of a closed-end type.

The Prospectus Law requires the prior publication of a prospectus (the content of which must be in line with the relevant provisions of the Prospectus Law) when an offer of securities (save for the funds outside the scope) is made within the territory of Luxembourg unless one of the exemptions set forth by said law applies, e.g. when:

- the offer is addressed solely to qualified investors;

- the offer is addressed to fewer than 150 natural persons per Member State, other than qualified investors;
- the offer is addressed to investors who acquire securities for at least EUR 100,000 for each separate offer;
- the offer of securities where denomination per unit amounts to at least EUR 100,000.

Another important criterion is the legal and regulatory status of the fund and in particular whether it qualifies as an undertaking for collective investment in transferable securities (“**UCITS**”) or as an alternative investment fund (“**AIF**”). Regarding the AIF, further distinctions will need to be made depending on whether the AIF is a Luxembourg AIF governed by a specific product law (such as the RAIF Law, SIF Law or the SICAR Law), whether it is a regulated or unregulated vehicle, and whether its shares are offered to professional / well-informed investors or to retail investors. Depending on the applicable regulatory status of the fund, specific marketing rules will apply.

The implementation of the AIFMD into Luxembourg legislation has not meant an end to the traditional private placement regime. The two regimes therefore co-exist, the distribution passport under the AIFM Law and the private placement regime of EU AIF on the Luxembourg territory.

The Luxembourg regulator of the financial sector (“**CSSF**”) gave some guidance as to when an offering of securities could be considered as not being made to the public (and hence be within the traditional private placement regime):

- whether the offer is made to (i) EU professional investors (as defined under Annex II of Directive 2014 / 65 / EU (MiFID));

- whether the securities have a high nominal amount (equivalent or in excess of EUR 125,000);
- whether the offer is made to a small circle of persons (the CSSF will consider cases on an individual basis, there is no maximum number of investors to fulfil the criteria);
- the form of the offer e.g., targeting existing customers, high sales amount, no advertisement;
- the use of a “wrapper” that is initially offered on a private placement basis but ultimately offered to the public does not benefit from the private placement regime.

However, the CSSF requires to be informed in advance of the marketing of any AIF by non-EU alternative investment fund managers (“AIFM”) within Luxembourg territory. The CSSF has set out the steps to be followed for such notification procedure for marketing either EU or non-EU AIFs managed by a non-EU AIFM. While there is no statutory time-limit for the administrative procedure with the CSSF, the marketing of the AIFs can start from the date of the notification. The non-EU AIFM is subject to certain reporting obligations to the CSSF, publication of an annual report and compliance with the Consumer Code.

#### **Other forms of possible placement options for fund shares**

The CSSF specifies that reverse solicitation, contrary to marketing, is providing information in respect of an AIF and enabling a potential investor to subscribe for the fund’s securities (i) on its (or its agent’s) own initiative and (ii) without any solicitation by the AIF or AIFM (or its intermediary). Also, certain activities are excluded by the CSSF from marketing, such as (i) investments in AIFs via a discretionary mandate to manage individual portfolios (instigated by the investment manager), (ii) proposals to invest in an AIF via an investment advisory agreement (instigated by the adviser) or (iii) investments in AIFs via collective portfolio management of an AIF (instigated by such AIF/ AIFM or portfolio manager). Reverse solicitation is only available to professional investors and cannot be used as a placement strategy. Permission for the reverse solicitation exemption would be given on a case-by-case basis.

#### **Consequences of non-compliance with placement regimes for fund shares**

- Contractual consequences may apply: payment of damages under contractual law (i.e. Article 1147 of the Civil code). The following regulatory and other
- Regulatory and other sanctions may also apply: caution, official warning, penalty, ban on operations or activities, professional ban on the directors / managers of the entities supervised by the CSSF.

#### **Private placement rules for non-fund investments available**

The following non-fund investments are subject to private placement opportunities outside fund regulation:

- Securities (i.e. shares, units, bonds, notes, warrants, certificates etc. issued by ordinary companies, holding companies, securitisation companies etc.)

The following types of non-funds are subject to private placement provisions:

- Securitisation vehicles;
- Holdings / Soparfi.

The following types of investor are within the scope of private placement exemptions

- Professional investors (as defined in MiFID); and
- Retail investors.



## Malta

### Summary of private placement provisions for fund interests (if applicable)

Malta has transposed the AIFMD through subsidiary legislation and Investment Services Rules published by the Malta Financial Services Authority (“**MFSA**”).

The Investment Services Act (Alternative Investment Fund Manager) (Third Country Regulations) (the “**Third Country Regulations**”) transposes the third country provisions set out in the AIFMD into Maltese law.

Amongst other matters, the Third Country Regulations provide for various requirements which must be satisfied by fund managers (whether EU or Non-EU) marketing EU/ Non-EU AIFs in Malta without a passport, and the various requirements which must be satisfied when targeting professional clients (as defined in AIFMD), as well as retail clients, in Malta. In addition to the Third Country Regulations, on the 22 September 2014, the MFSA issued a circular together with a set of documents formalising the national private placement regime in Malta. The ‘Guidance notes on the completion of the National Private Placement Notification Forms pursuant to the provisions of the AIFMD’ (“**NPPR Guidance Notes**”) provide further detail as to the process to be followed prior to marketing under the private placement regime in Malta. This includes the submission of the relevant application forms to the MFSA prior to the commencement of marketing activities in respect of the AIFs.

Neither the Third Country Regulations nor the NPPR Guidance Notes define “private placement”. The NPPR Guidance Notes simply state that the “national private placement regime allows AIFMs to market AIFs in the instances where these cannot be marketed in terms of the passporting regimes outlined in Articles 31 – 33 of the AIFMD”. However, the Guidance Notes do not define what

constitutes marketing under the private placement regime. Part A of the Investment Services Rules for Retail Collective Investment Schemes (“**Retail Collective Investment Schemes Rules**”) issued by the MFSA provide guidance on the interpretation of the term ‘marketing’ in the context of retail funds. However, there is no strict interpretation and/ or official position set by the MFSA in this regard and specifically in relation to the marketing of AIFs on a private placement basis.

Prior to the entry into force of the AIFMD, private placement rules in Malta did not distinguish between target investors and therefore they applied equally to retail and professional investors. Marketing on a private placement basis was restricted to one-to-one offers, without any active marketing or solicitation being permitted. Post-AIFMD, the Third Country Regulations distinguish between professional and retail investors, with more restrictive conditions imposed on marketing to retail investors, such as the authorisation requirement mentioned below.

The private placement regime applies to Non-EU managers in respect of both EU and Non-EU AIFs. For a Non-EU manager to market units or shares of AIFs in Malta, the Non-EU manager must adhere to the conditions for the applicability of the private placement regime as set out in the Third Country Regulations. In particular, the Non-EU manager must adhere to Article 42 of the AIFMD as transposed within the Third Country Regulations. Among the various requirements to be met in this respect, the Non-EU manager must (i) comply with transparency requirements as established under Articles 22, 23 and 24 of the AIFMD (and with Articles 26 to 30 where the AIF falls within the scope of Article 26(1) of the AIFMD), (ii) ensure proper cooperation agreements are in place between the relevant regulatory authorities and (iii) ensure that the third country where the third country AIF is established is not listed as a NCCT



by the FATF. The marketing by Non-EU managers is subject to the payment of an application fee of EUR 2,500 for the AIF and EUR 450 per sub-fund of the AIF (if applicable). An annual supervisory fee is also payable in respect of the AIF and the sub-funds of the AIF.

EU managers may market Non-EU AIFs and/ or EU Feeder AIFs under the private placement regime in accordance with Article 36 of AIFMD, as transposed. In this respect the EU manager must ensure that it complies with all the requirements of the AIFMD with the exception of Article 21 (depository clause). This notwithstanding, the EU manager must ensure that one or more entities has been appointed to carry out the cash monitoring, safekeeping and oversight functions as set out in Articles 21(7), (8) and (9) of AIFMD in relation to the AIFs. Furthermore, the EU manager must also ensure that there are appropriate cooperation arrangements between the relevant competent authorities, and that the jurisdiction where the Non-EU AIF is established is not listed as a NCCT by the FATF. Where an EU manager wishes to market EU AIFs in Malta, it may do so under the Investment Services Act (Marketing of Alternative Investment Funds) Regulation and must follow a notification procedure. Passporting rights would apply in this case. A marketing fee of EUR 2,500 for the AIF and EUR 450 per sub-fund of the AIF (if applicable) is payable to the MFSA. An annual supervisory fee is also payable in respect of the AIF and the sub-funds of the AIF.

Prior to marketing the AIF under the private placement regime in Malta, the EU/ Non-EU manager must complete and submit to the MFSA the relevant notification form (which should be accompanied with a copy of the latest approved offering document(s)) as set out under the NPPR Guidance Notes, including a confirmation that the AIF complies with the relevant conditions set out in the relevant applicable laws, along with the appropriate fee. A confirmation of receipt will be sent to the manager together with a notification number. The manager must wait until the confirmation letter is received prior to commencing marketing.

Marketing to retail investors is subject to additional requirements as set out in the Third Country Regulations and the MFSA rules. In this respect, an AIF may not be marketed to retail investors on a private placement basis unless a specific authorisation to market to retail investors is obtained from the MFSA.

#### **Other forms of possible placement options for fund interests outside fund regulations**

Reverse solicitation is where the investor requests information (including marketing material) and

therefore the communication is considered to be initiated by the investor rather than by the Non-EU manager and, is interpreted by the MFSA as not constituting marketing, provided that no additional activities take place which do constitute marketing. Consequently, reverse solicitation is exempt from the private placement rules and passporting requirements.

In addition, pursuant to AIFMD, placements by the following entities are not subject to the (private) placement regimes as set out in the Third Country Regulations and the Investment Services Rules as they fall out of the scope of the AIFMD:

- Holding companies;
- Institutions for occupational retirement provision;
- Supranational institutions, in the event that such institutions or organisation manage AIFs and in so far as those AIFs act in the public interest;
- National central banks;
- National, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;
- Employee participation schemes and employee savings schemes;
- Securitisation special purpose vehicles;
- AIFs in so far as their only investors are their AIFM or the AIFM's parent undertakings, their subsidiaries or other subsidiaries of their parent undertaking and where those investors are not themselves AIFs;
- Investment undertakings, such as family office vehicles which invest the private wealth of investors without raising external capital; and
- AIFs managed by an AIFM where the aggregated assets managed do not exceed EUR 100m (leverage included) or EUR 500m (excluding leverage provided that the AIF does not have redemption rights exercisable during a period of five years following the date of initial investment in each AIF).

#### **Consequences of non-compliance with placement regimes for fund interests**

To the extent that a contract is governed by Maltese law, local legislation relating to the validity and effects of contracts and the interpretation thereof would apply. Any sanctions set out in the agreement between the fund and the client would be enforceable to the extent that these are not contrary to law, public policy or morality. The client could also rescind the contract with the fund. There



may also be liability in tort for damages caused by negligence, gross negligence, fraud or wilful default. Damages payable would consist of actual loss, loss of earnings (unless excluded by contract) as well as expenses incurred in consequence of the damages caused.

The following regulatory sanctions may apply. Under the Investment Services Act (“ISA”) the MFSA may, if it is satisfied that a person’s conduct amounts to a breach of any of the provisions of the ISA, impose an administrative penalty not exceeding EUR 150,000 for each infringement or failure to comply. In case of certain other breaches as provided for in Article 22 of the ISA, a person found guilty shall be liable on conviction to a fine (multa) not exceeding EUR 466,000 and/ or to a term of imprisonment not exceeding four years.

#### **Private placement rules for non-fund investments available**

The Companies Act (“CA”) provides for rules in relation to distribution and registration of prospectuses which should be issued when offering securities to the public. A security is defined as including a share, debenture or any other similar instrument issued by a company or other commercial partnership. These fall outside fund regulation in Malta but are subject to the CA and the Companies Act (The Prospectus) Regulation. The CA does not define the term ‘private placement’, but it is understood that a private placement is any offering which is not an offer of securities to the public.

The CA provides for several exemptions from publishing a prospectus in relation to such offerings, including the following:

- An offer of securities made only to qualified investors (i.e. persons or entities qualifying as professional clients under Annex II of MiFID);
- An offer made to fewer than 150 persons per EEA State not including qualified investors;
- An offer where the minimum subscription is EUR 100,000 per investor, for each separate offer; or
- An offer of securities where the nominal value of each security amounts to at least EUR 100,000 or the total consideration of the offer in the EU and the EEA does not exceed EUR 100,000, with the limit calculated over a period of 12 months.



# The Netherlands

## Summary of private placement provisions for fund interests (if applicable)

An AIFM whose seat is in Guernsey, Jersey, the US (provided that the US AIFs are registered with the SEC) or Hong Kong (provided that the Hong Kong AIFs are registered with the Securities and Futures Commission and will only be offered to non-professional investors in the Netherlands) and which is adequately supervised in its country of origin, may offer units in an AIF in the Netherlands or manage a Dutch AIF without a licence. The units may be offered to both qualified and non-qualified investors (except for Hong Kong AIFs). The AIFM must file a notification of its intention to offer units in the Netherlands with the Dutch Authority for Financial Markets (*Autoriteit Financiële Markten*, the “**AFM**”) and needs to comply with certain requirements.

Other Non-EU AIFMs are allowed to offer units in an AIF in the Netherlands or to manage a Dutch AIF without a licence if the offer is solely addressed to qualified investors. The following conditions must be satisfied: (i) there should be an appropriate cooperation arrangement between the AFM and the supervisory authorities of the third country where the Non-EU AIFM is established, (ii) the third country where the Non-EU AIFM is established may not be listed as a NCCT by the FATF and (iii) the Non-EU AIFM must comply with certain transparency requirements.

The AIFMD does not apply to the following entities:

- institutions for occupational retirement provision;
- holding companies;
- supranational institutions, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
- national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;
- employee participation schemes or employee savings schemes; securitisation special purpose entities;
- AIFMs in so far as they manage AIFs whose only investors are the AIFMs themselves or their parent undertakings; their subsidiaries or other subsidiaries of their parent undertaking and where those investors are not themselves AIFs.

## Reverse solicitation

The AIFMD does not affect the situation whereby a professional investor established in the EU invests in AIFs on its own initiative, irrespective of where the AIFM and/ or the AIF is established. In the Netherlands a transaction regarding units in an AIF that is solely performed upon the initiative of an investor is not considered an offer of units in an AIF.

In the event that a non-Dutch AIFM or a non-Dutch AIF is acting in the Netherlands via media such as internet, telephone, fax, newspapers or emails, the non-Dutch AIFM or the non-Dutch AIF could be considered to have made an offer in the Netherlands. The AFM has published the following indicators to determine whether a non-Dutch AIFM or a non-Dutch AIF offers units in an AIF in the Netherlands:

- the failure to use disclaimers or inadequate maintenance thereof;
- failure to include a list of countries at which the activities are expressly aimed, or inadequate maintenance thereof;
- use of Dutch as the language of the activities;

- the regular distribution area of the used media is amongst others the Netherlands;
- canvassing (for example via e-mail) of residents in the Netherlands;
- supply of information about the Netherlands tax system;
- supply of information about a foreign tax system in relation to the Netherlands;
- references to or the supply of information about Dutch laws;
- “hyperlinks” on the internet which lead the user to a website where units in AIFs are offered;
- mentioning of a contact point / person in the Netherlands.

#### **Consequences of non-compliance with placement regimes for fund interests**

In the event that a Non-EU AIFM does not comply with the Dutch private placement provisions, the AFM may impose an administrative fine or an order for incremental penalty payments, or it can issue instructions to follow a specific line of conduct.

#### **Prospectus requirement**

A prospectus must be prepared and approved by the competent authority if transferable securities are offered to the public in the Netherlands, unless an exemption applies under the Prospectus Regulation. Exemptions from the obligation to issue a prospectus for an offering include (i) offerings addressed solely to qualified investors, (ii) offerings addressed to fewer than 150 non-qualified investors per EU State and (iii) offerings addressed to investors who acquire securities for at least EUR 100,000 in each separate offer.

#### **Private placement rules for non-fund investments**

No party may offer investment objects to consumers in the Netherlands without a licence granted for that purpose by the AFM. Investment objects relate to property, entitlement to property, and or entitlement to a return in cash or part of the proceeds from the sale of property. There must be the prospect of a return on investment, and the party that mainly manages the property must not be the same as the acquiring party. An exemption from the licensing requirement exists for offers of investment objects for a nominal amount per investment object of at least EUR 100,000.



# Norway

## Summary of private placement provisions for fund interests (if applicable)

The Norwegian Alternative Investment Funds Act and Alternative Investment Funds Regulations (jointly the “AIFA”) implementing the major part of the AIFMD entered into force on 1 July 2014. After clarification of certain constitutional issues, the AIFMD was included in the EEA agreement between the EFTA countries (which includes Norway) and the EU by decision of the EEA joint committee 30 September 2016, published in the Official Journal 23 February 2017.

The Norwegian private placement regime, in the context of marketing to professional investors without a passport (as there is no specific definition of “private placement”), is set out in Section 6-4 and 6-5 of the AIFA. Marketing of AIFs to retail investors can only be conducted by authorised EEA AIFMs and is regulated by Chapter 7 of the AIFA.

An AIFM is required to submit an application to the Financial Supervisory Authority of Norway (“Finanstilsynet”) of its intention to market under the Norwegian private placement regime, providing certain information about each AIF concerned, and confirming that it meets the relevant conditions in the AIFA. The AIFM is entitled to market the AIF when Finanstilsynet has given its approval.

There are currently no fees need be paid to Finanstilsynet in order to market under the private placement regime.

## Conditions for authorised EEA AIFMs (Section 6-4)

An authorised EEA AIFM applying to Finanstilsynet to market a Non-EEA (or “third country”) AIF, or an EEA feeder AIF of third country master AIF to

professional investors in Norway must confirm that the following conditions are satisfied:

- It complies with the majority of the requirements of the AIFA as further set out;
- To the extent applicable, the AIFM does what is required to make payments to investors in Norway, redeem fund interests and give the information required pursuant to its home state regulations;
- Appropriate co-operation arrangements are in place between the regulatory authority of the AIF’s home state and Norway; and
- The AIFs home state is not listed as a NCCT by FATF.

Finanstilsynet may set additional conditions for approval in order to protect investors in Norway.

## Conditions for Non-EEA AIFMs (Section 6-5)

A Non-EEA AIFM submitting an application to Finanstilsynet to market any AIF (whether EEA or Non-EEA) to professional investors in Norway must confirm that the following conditions are satisfied:

- The AIF and management of the AIF is subject to appropriate supervision in its home state and complies with applicable requirements to manage the AIF in the home state;
- The AIFM complies with certain transparency requirements under the AIFA (Chapter 4);
- Appropriate co-operation arrangements are in place between Finanstilsynet and the regulatory authority of the AIF’s / AIFM’s home state;
- To the extent applicable, the AIFM does what is required to make payments to investors in Norway, redeem fund interests and give the information required pursuant to its home state regulations; and

- The country where the third country AIFM and, if applicable, the third country AIF is established must not be listed as a NCCT by the FATF.

Finanstilsynet may set additional conditions for approval in order to protect investors in Norway.

#### **Conditions for EEA AIFMs marketing to non-professional investors (Section 7-1)**

An authorised Norwegian or EEA AIFM applying to Finanstilsynet to market any AIF (whether Norwegian, EEA or Non-EEA) to non-professional investors in Norway must provide the following information:

- A business plan identifying the AIF and where the AIF is established;
- Information about the AIF available to potential investors, including information set out in Section 42 of the AIFA;
- Key Investor Information Document as set out in Section 7-2 of the AIFA and Chapter 7 of the AIFR;
- Confirmation that the AIF can be marketed to retail investors in its home state; and
- An outline of planned marketing and sale of the AIF, including procedures for conduct of a suitability test for each investor.

For Non-EEA AIFs, the conditions set out in Section 6-4 (see above) must in addition be complied with. The AIFM must be a member of an independent, external complaints handling mechanism.

Finanstilsynet may set additional conditions for approval in order to protect investors in Norway.

#### **Other forms of possible placement options for fund interests outside fund regulations**

The Norwegian national private placement regime will not apply if the purchase or subscription of fund interests was made solely at the initiative of the professional investor without any prior solicitation from the AIFM ("reverse solicitation").

#### **Consequences of non-compliance with placement regimes for fund interests**

If marketing is carried out in contravention of the Norwegian private placement regime, Finanstilsynet may require the AIFM to make the necessary corrections or cease its marketing operations. Finanstilsynet may also withdraw the marketing approval.

Unlawful marketing might also be a criminal offence subject to imprisonment for a term not exceeding twelve months or a fine, or both. Norwegian AIFMs authorised by Finanstilsynet who carry out unlawful marketing may be sanctioned through public censure and potentially enforcement action leading to the withdrawal of the AIFM authorisation.

#### **Private placement rules for non-fund investments available**

Norwegian law allows private placements in financial instruments issued by non-AIFs.

This will, *inter alia*, cover private placements in holding companies, companies having a general commercial or industrial purpose, employee participation or employee savings schemes, pension rights etc.

If the non-fund investments are transferable securities, such private placements must be conducted in compliance with national legislation implementing the Prospectus Directive.





### **Summary of private placement provisions for fund interests (if applicable)**

There is no specific definition of private placement under Polish law. The concept of “private placement” is determined in opposition to public offer and by referring to the exemption from the requirement to publish a prospectus under the provisions of the prospectus law implementing Directive 2003 / 71 / EC, as amended (“**Prospectus Law**”). According to the Prospectus Law, a placement by any entity (including an AIF) will be deemed a private placement provided it is not addressed to more than 149 investors or an unspecified investor.

A public placement will be exempt from the prospectus requirement if, among others, (i) it is addressed to professional entities only; (ii) it is addressed to investors acquiring securities worth no less than EUR 100,000 or securities with a face value of no less than EUR 100,000; (iii) the value of the whole placement does not exceed EUR 1,000,000.

Closed-end funds that invest in non-public assets (so-called closed end private equity funds) are subject to private placement provisions.

As mentioned, a public placement (a placement with over 149 investors) will be exempt from the prospectus requirement if, among others, it is addressed to professional entities only. A professional entity is one which has the experience and knowledge enabling it to make the right investment decisions and to correctly evaluate the risk associated with such decisions. A detailed list includes, among others: banks, investment firms, insurance companies, dealers / brokerage, investment funds, pension funds, entrepreneurs meeting certain capitalisation thresholds based on MiFID.

There are no major changes to the private placement rules following the implementation of AIFMD in Poland. AIFMD was implemented into Polish law in March

2016 and came into force at the beginning of June 2016.

### **Other forms of possible placement options for fund interests outside fund regulations**

Reverse solicitation may be considered as a non-marketing activity. Assessments of reverse solicitation are made on a case-by-case basis.

### **Consequences of non-compliance with placement regimes for fund interests**

Mandatory contractual consequences:

Possible application of contract law resulting in an invalidation of the placement and payment of damages. However, market practice is very limited.

Regulatory sanctions:

An administrative penalty of up to PLN 5m (EUR 1,250,000).

Penal sanctions:

A criminal penalty of up to PLN 10m (EUR 2,500,000) and/ or a two-year prison sentence may be adjudicated if public placement securities are offered in a private placement.

### **Private placement rules for non-fund investments available**

Generally, the private / public placement distinction is applicable to securities issued by any entity (such as an “ordinary company”). Accordingly, securities such as bonds, notes, warrants may constitute a good private placement opportunity outside fund regulation, as long as these are issued in a private placement (i.e. a placement to less than 149 investors).

Generally, the private / public placement distinction is applicable to all issuers of securities, including in particular ordinary companies, municipalities and other separately regulated issues.



# Portugal

## Summary of private placement provisions for fund interests (if applicable)

The private placement provisions in force are those established in the Portuguese Securities Code enacted by Decree-Law 486 / 99, as amended from time to time.

These rules are applicable to offers of securities, including shares, bonds, equity instruments, units in collective investment schemes, covered warrants, certain rights detached from securities and other documents representing similar legal situations, provided they may be traded on the market.

According to the referred legal framework, the following offers are deemed private offers:

- Offers exclusively addressed to qualified investors;
- Subscription offers addressed by non-publicly held companies to the majority of their shareholders, except if these offers are preceded or accompanied by a prospectus, a solicitation to an unidentified addressee to invest, or promotional materials; and
- Offers addressed to fewer than 150 identified recipients, either a natural or legal person that are retail investors.

Certain private offers are only subject to a subsequent reporting requirement to the Portuguese Securities Market Commission (“**CMVM**”) for statistical purposes.

Public offers are usually preceded by the disclosure of a prospectus. Notwithstanding, the following public offers may be exempted from this requirement:

1. Offers of securities to be allotted in connection with a merger or spin off, provided that is made available, with fifteen days prior to the relevant shareholders meeting, a document comprising

information that is deemed by CMVM as analogous to those set forth in the prospectus;

2. Dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid;
3. Offers for distribution of securities to existing or former directors or employees by their employer which has securities already admitted to trading on a regulated market or by an affiliated undertaking.

AIMFD was transposed in Portugal by Law 16 / 2015, approving a revised legal framework for collective investment undertakings and amending the Legal Framework of Credit Institutions and Financial Companies and the Portuguese Securities Code. However, it should be noted that the amendments provided focus exclusively on Securities and Real Estate Investment Funds Management Companies, not including any amendments to the placement provisions for those entities which are not subject to this law.

Pursuant to Law 16 / 2015, alternative investment funds (“**AIF**”) are subject to very broad duties of publication and transparency. The alternative investment fund manager (“**AIFM**”) must prepare a document with fundamental information to be provided to the investors, which must comply with Regulation 583 / 2010 of the European Commission and Regulation no. 1286 / 2014 of the European Parliament and of the Council. Furthermore the AIFM, in case of public offers, must prepare and keep updated a prospectus for each AIF managed, which shall include necessary information required to allow the investors to make an informed judgment regarding the proposed investment, as well as a clear and easy understandable explanation of the risk profile of the AIF.

### Other forms of possible placement options for fund interests outside fund regulations

In light of the above, according to Portuguese law, certain offers are exempted from public placement provisions, the most relevant being the following:

1. The offer of securities issued by an open-ended collective investment undertaking, made by the issuer or on its behalf;
2. The offers in a regulated market or multilateral trading facility (“**MTF**”) or organised trading facility (“**OTF**”) registered with CMVM that are presented exclusively through the market’s or system’s own means of communication and that are not preceded or included with a prospectus, solicitation to an unspecified addressee to invest, or promotional material;
3. Public offers for distribution of securities with a denomination per unit equal to or greater than EUR 100,000 or whose subscription or sale price per addressee is equal to or greater than this amount, by each different offer;
4. Certain public offers for distribution of non-equity securities issued in a continuous or repeated manner by credit institutions;
5. Public offers for distribution of securities where the total consideration of the offer is less than EUR 5m (this limit shall be calculated over a 12-month period);
6. Certain public offers for distribution of non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer within the European Unit is less than EUR 75m, (this limit shall be cumulative over a 12-month period);
7. Public offers for the subscription of shares issued in substitution of shares of the same class already issued, if the issue of such shares does not involve any increase in the issued capital;
8. The public offers of debt securities issued for a period of less than a year (e.g. commercial paper).

### Consequences of non-compliance with placement regimes for fund interests

Making a public offer without approval of a prospectus or registration with the CMVM is considered to be a very serious offence and may be subject to an administrative fine of between EUR 25,000 and EUR 5m.

Failure to communicate a private offer to the CMVM is considered to be a less serious offence and therefore subject to administrative fines between EUR 5,000 and EUR 1,000,000.

Additionally, certain additional sanctions may be imposed on those responsible for any offence:

1. Apprehension and loss of the object of the offence, including the benefit obtained by the infringer;
2. Temporary suspension or disqualification of the exercise by the infringer from the profession or the activity to which the offence relates;
3. Disqualification from the exercising the functions of administration, management, control, supervision and, in general, representation of any financial intermediary within the scope of any or all activities of intermediation in securities or other financial instruments;
4. Publication by the CMVM of the sanction imposed in view of the offence, at the expense of the infringer and in places suitable for the accomplishment of the aims of general prevention of the legal system and protection of securities or other financial instruments markets;
5. Revocation of the authorisation or cancellation of the registration necessary for the performance of the activities of financial intermediation in securities or in other financial instruments.

### Private placement rules for non-fund investments available

As previously mentioned, according to the Portuguese Securities Code, the following offers are qualified as private offers:

1. Offers exclusively addressed to qualified investors;
2. Subscription offers addressed by non-publicly held companies to the majority of their shareholders, except if such offers are preceded or accompanied by a prospectus or a solicitation for investment intentions to unidentified addressees, or promotional material.

These rules are applicable to offers of securities, as established in the Portuguese Securities Code, and therefore include shares, bonds, equity instruments, units in collective investment schemes, covered warrants, certain rights detached from securities and other documents representing similar legal situations provided they may be traded on the market.

As a consequence, investments related to the transfer of shares of limited liability companies by quotas are not subject to the legal framework above explained, as the same are not considered to be securities under Portuguese law.



# Romania

## Summary of private placement provisions for fund interests (if applicable)

### Definition of a “private placement”

There is no specific definition of private placement under Romanian law and the concept of “private placement” is generally interpreted in contrast to public offering and by referring to the exemption from the requirement to publish a prospectus under the provisions of Law No. 24 / 2017 on Financial Instruments Issuers and Market Transactions (“Financial Instruments Issuers and Market Transactions Law”), implementing the Prospectus Directive (as amended). According to the Financial Instruments Issuers and Market Transactions, a placement can be done without the obligation to publish a prospectus for the following

#### 1. Types of offerings:

- (i) an offering is made exclusively to qualified investors; and/ or
- (ii) an offering is made to fewer than 150 legal or natural entities, other than the qualified investors, per Member State; and / or
- (iii) an offer of securities addressed to investors who acquire securities for a consideration of at least the RON equivalent of EUR 100,000, for each separate offer; and/or
- (iv) an offer of securities whose denomination per unit amounts to at least the RON equivalent of EUR 100,000; and/or
- (v) an offer of securities with a total consideration in the EU of less than the RON equivalent of EUR 100,000, which limit shall be calculated over a period of 12 months;

#### 2. Types of securities:

- (i) shares issued in substitution for shares of the same class already issued, if the issuing of

such new shares does not involve any increase in the issued capital;

- (ii) securities offered in connection with a public purchase offer/takeover bid by means of an exchange offer, provided that a document is available containing at least the information laid down in Regulation (EC) No 809/2004 of the Commission from April 29, 2004 of applying Directive 2003/71/EC of the European Parliament and Council regarding the information contained in the prospectus, inclusion of information by transmission, publishing of the prospects and distribution of the press releases with advertising purposes, depending the type of issuer and securities provided for exchange purposes;
- (iii) the securities are offered, or which are to be offered, as the result of a merger or dissolution, provided a document containing information deemed to have the content provided for in the regulations issued by the Romanian Financial Supervisory Authority (“**Romanian FSA**”) is supplied; and / or
- (iv) dividends are paid to existing shareholders in the form of shares from the same class as those giving rise to the right to such dividends, provided that a document containing information regarding the number and nature of the shares, as well as the reasons and features of the offering, is supplied.
- (v) securities offered, allotted or to be allotted to existing or former members of the management or employees by their employer or by the parent undertaking or by an affiliated undertaking, provided that the undertaking has its head or registered office in the EU and that a document is made available containing at least the information laid down in the regulations issued by the Romanian FSA.



## Type of funds subject to private placement provisions

Under the Romanian law implementing UCITS and related directives (i.e. Directive 2009 / 65 / EC, Directive 2010 / 43 / EU, etc.), open-ended funds units cannot be distributed other than by a prospectus authorised by the Romanian FSA/ passported into Romania. Closed-end funds established in the form of joint stock companies may qualify for the exemptions from the obligation to publish a prospectus, subject to certain conditions as mentioned under the paragraphs listed above.

Non-harmonised, privately-held funds (non-UCITS) with a permissive policy (i.e. funds with fewer than 500 investors, with a value of the fund unit around EUR 230 and which may invest in a wide range of financial instruments) and non-harmonised funds established for qualified investors are not required to comply with authorisation and prospectus requirements, provided that certain conditions are observed with respect to, *inter alia*, number of investors, nominal value of the fund units, etc.

## Type of investor in scope of private placement exemptions

The Financial Instruments Issuers and Market Transactions Law provides a definition of qualified investors. Pursuant to the provisions of this law, qualified investors are the persons who are either qualified as professional clients, or are treated, on demand, as professional clients or are recognized as eligible counterparts, with the exception of the cases when these latter persons have requested not to be treated as professional clients.

## Private placement under the AIFMD

Law 74 / 2015 (as amended), together with Romanian FSA Regulation 10 / 2015 (as amended), implements the AIFMD. Law 74/ 2015 regulates the marketing activities undertaken by EU and non-EU AIFMs in Romania, these being defined as an offer or placement, direct or indirect, conducted at the initiative of an AFIM or in the name of an AIFM, of funds units of an AIF under its management and addressed to investors domiciled or headquartered in a member state.

There is a current legislative initiative co-ordinated by the Romanian FSA which might be seen as aiming to create a regulatory framework establishing, *inter alia*, different regimes applicable to funds specialised in a certain type of investment. As the initiative is still in a very incipient phase, its real impact could be assessed once it reaches a more developed stage.

Under Law 74 / 2015, marketing activities may be undertaken by EU AIFMs on a passported basis

provided that a notification is submitted to the Romanian FSA by the competent authority in their home State. EU AIFMs may also market third country AIFs, provided that the same notification procedure is complied with. In this latter case, the Romanian FSA is entitled to submit objections to the European Securities and Markets Authority in relation to the competent authority's assessment regarding compliance by an AIFM with relevant legal provisions. Law 74 / 2015 contains several references to the provisions of the Capital Markets Law on the obligation to publish a prospectus (nowadays, such provisions can be found in the Financial Instruments Issuers and Market Transactions Law), but it does not impose additional requirements in this regard.

Romanian FSA Regulation 10 / 2015 provides that, for advertising EU AIFs to retail investors, EU AIFMs are required to:

- (i) follow the notification procedure outlined above;
- (ii) comply with the publicity and transparency requirements applicable to publicly distributed Non-UCITS; and
- (iii) be authorised to perform investment consulting services.

## Other forms of possible placement options for fund interests outside fund regulations

Reverse solicitation is not explicitly accepted or captured by the relevant legislation. On a case-by-case basis, it could be argued that, as a matter of principle, this should not be considered a marketing activity, especially if it refers to the cross-border acquisition of fund units. Similar reasoning suggests that an approach made by a potential investor on an unsolicited, cross-border basis will also not be regarded as a breach of marketing and authorisation requirements.

## Consequences of non-compliance with placement regimes for fund interests

By way of principle from a civil law perspective, an agreement concluded by breaching the mandatory provisions of law regarding placement would be annulled. Regulatory sanctions may result in fines of up to 10% of the yearly income of the company. The FSA could also suspend or withdraw the functioning authorisation of the issuer. Breach of the mandatory provisions regarding the authorisation regime may result in criminal sanctions.



### Private placement rules for non-fund investments available

Generally, the public offering and prospectus requirements should be observed by all issuers for securities tradable on a regulated market and/ or multilateral trading facility (“**MTF**”) i.e. shares, bonds, rights, etc.

Exemptions for these obligations related to non-fund investments are briefly described above, for example:

- (i) the securities offered, or which are to be offered, following a merger or dissolution, provided that a document containing information deemed to have the content provided for in the regulations issued by the Romanian FSA is supplied;
- (ii) dividends paid to existing shareholders in the form of shares from the same class as those giving rise to the right to such dividends, provided that a document containing information regarding the number and nature of the shares, as well as the reasons for and features of the offer, is provided;
- (iii) offerings where the nominal value is a minimum of EUR 100,000;
- (iv) offerings where the total amount in the EU is a maximum of EUR 100,000;
- (v) shares allotted in stock option plans.

In accordance with Law 74 / 2015 for the implementation of the AIFMD, its provisions would not apply to the following entities:

- (i) holding companies;
- (ii) pension funds;
- (iii) supranational institutions such as, by way of example, EBRD, ECB, IMF;
- (iv) the National Bank of Romania;
- (v) national, regional or local authorities or other institutions which manage funds supporting social services and pensions;
- (vi) employee's savings or participation schemes;
- (vii) securitisation vehicles.

As mentioned above, no definition of private placement is provided under Romanian law but it is generally interpreted that an exemption from the obligation to publish a prospectus may benefit either qualified investors such as professional clients or regulated institutions; or any non-qualified investors within a group of less than 150 offerees.



# Slovakia

## Summary of private placement provisions for fund interests (if applicable)

### Definition of “private placement”

Under the Slovak law on collective investment, i.e. Act. No 203/ 2011 Coll. on Collective Investment (“ACI”), a private placement shall mean any communication, offering or recommendation addressed, in advance, to a specified number of investors, with the aim to collect funds for the purpose of collective investment, which is realised without any use of means of publication.

In contrast, public placement means any communication, offering or recommendation, which aims to collect funds for the purpose of collective investment made by a person for their own benefit or for the benefit of other persons through any means of publication.

Collective investment under the Slovak law is defined as the business activity of raising funds from investors with the objective to invest in compliance with determined investment policy for the benefit of entities whose funds have been raised.

Collective investment may be conducted only through established local collective investment undertakings, or by the raising of funds through the offer of securities of foreign collective investment undertakings.

### Funds subject to the private placement provisions

The private placement provisions are relevant in relation to the following funds:

AIFs (local):

- Special common funds
- Local subjects of collective investments which are legal entities

Foreign AIFs:

- European AIFs
- Non-European AIFs.

European AIFs mean funds licensed or registered under the law of an EU Member State or which have a seat or headquarters in an EU Member State.

Non-European AIFs are those which are not licensed or registered under the law of an EU Member State or have a seat/ headquarters outside an EU Member State. It can be self-administered or administered by a foreign management company.

The assets of the AIF, whether local or foreign, have to be registered separately from the assets of the management company, as well as from the assets of the different subjects of collective investment.

### Investors within the scope of private placement exemptions

Distribution of the interests in local subjects of collective investments which are legal entities is only possible to professional investors.

Distribution of interests in AIFs within private placement exemptions/ rules is possible for professional investor or investors whose investment is at least EUR 50,000.

Professional investors are defined as:

- securities dealers, foreign securities dealers, financial institutions, commodity and commodity derivatives traders, and entities authorised to operate in the financial markets by a competent authority or whose activity is separately regulated by generally binding legal regulations
- large undertakings

- state, regional or municipal authorities, state or regional authorities of other countries, the Debt and Liquidity Management Agency, public authorities of other countries that are charged with or intervene in the management of public debt, 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
- other legal persons not mentioned whose main activity is to invest in financial instruments
- a person who meets certain conditions and applies to be treated as a professional investor.

#### **Other forms of possible placement options for fund interests outside fund regulations**

Reverse solicitation is allowed as the distribution of the funds is defined as the direct or indirect offer of securities relating to or interests in a collective investment, or their placement with investors with permanent residence or seat in a Member State upon the initiative of the person managing said collective investment or by a person on behalf of the manager.

Collecting money with the prime aim of financing production, research or provision of services other than financial services is permitted provided such activity is financed mainly from the sources of the person collecting money which are outside the scope of regulation of funds.

#### **Consequences of non-compliance with placement regimes for fund interests**

Non-compliance with mandatory provisions on placement regimes might cause the placement agreement to become invalid and / or potential claims for damages by investors.

The NBS can impose various sanctions such as requiring remediation, suspending the distribution of interests or imposing penalties.

#### **Private placement rules for non-fund investments available**

Certain “private placement” options are excluded from the scope of the collective investment regime.

The following non-funds gathered by following entities are subject to private placement opportunities:

- institutions for occupational retirement provision;
- holding companies;
- Slovak or foreign state bodies or Slovak or foreign region or municipality;
- supranational institutions, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
- national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;
- employee participation schemes or employee savings schemes;
- securitisation special purpose entities;
- AIFMs in so far as they manage AIFs whose only investors are the AIFMs themselves or their parent undertakings, their subsidiaries or other subsidiaries of their parent undertaking and where those investors are not themselves AIFs.

Furthermore, investments that do not meet the definition of collective investment would enable “private placement” by investors.



# Slovenia

## Summary of private placement provisions for fund interests (if applicable)

### Definition of a “private placement”

Despite the implementation of the Directive, there is still no definition of “private placement” under Slovenian law. However, “public placement of securities” is defined in the Financial Instruments Market Act (“ZTFI-1”) as every message given to individuals in any form and with use of any resource, which contains enough information about the conditions of the offer and about offered securities in order for the investors to decide on the purchase or subscription of such securities.

According to the ZTFI-1, a placement will be exempted from the prospectus requirement if (i) it is addressed solely to Qualified Investors, (ii) it is addressed to fewer than 150 natural or legal persons per Member State, other than Qualified investors, (iii) it is addressed to investors who have obtained the securities for a purchase amount of at least EUR 100,000 on the basis of accepting individual offers, (iv) it relates to securities in denominations of at least EUR 100,000 each, (v) the securities are included in an offer which has a total selling price of the offer of less than EUR 3,000,000 (the EUR 100,000 limit shall be calculated over a period of 12 months).

### Type of investor in scope of private placement exemptions

According to the Article 72 of the ZTFI-1, Qualified Investors fall within the scope of private placement exemptions. The definition of “Qualified Investor” follows the respective definition provided by Directive 2003 / 71 / EC (on the prospectus to be published when securities are offered to the public or admitted to trading) and includes Professional Clients and Eligible Counterparties, both in the meaning of MiFID.

## Potential changes of private placement rules

The last amendments to Slovenian law were adopted in 2018.

The Alternative Investment Fund Managers Act (“ZUAIS”) entered into force on 23 May 2015 while the Investment Funds and Management Companies Act (“ZISDU-3”) entered into force on 19 May 2015. Both were amended in 2018.

### Other forms of possible placement options for fund interests outside fund regulations

Reverse solicitation is not explicitly accepted or captured by the relevant legislation. On a case-by-case basis, it could be argued that, as a matter of principle, this should not be considered a marketing activity, especially if it refers to the cross-border acquisition of fund units by a qualified Investor. Similar reasoning suggests that an approach made by a potential qualified investor on an unsolicited, cross-border basis will also not be regarded as a breach of marketing and authorisation requirements.

### Consequences of non-compliance with placement regimes for fund interests

#### Mandatory contractual consequences

Non-compliance with mandatory provisions on placement regimes might cause the placement agreement to become invalid and/ or potential claims for damages by investors. A fund's management might also be held liable for the breach of managerial duties.

#### Regulatory sanctions

According to the ZTFI-1, a fine ranging from EUR 12,000 to EUR 500,000 is prescribed for a legal person in case it fails to notify the Securities Market Agency of the use of the exception from the obligation to publish the prospectus regarding a public offer.

### **Private placement rules for non-fund investments available**

There is no distinction between private placement of fund and non-fund interests. All tradeable non-fund interests (such as shares, bonds, options, swaps, futures, other financial derivatives etc.) may be subject to private placement rules.

### **Non-fund investments subject to private placement opportunities outside fund regulations**

Generally, the private / public placement distinction is applicable to securities issued by any entity.

They may include:

- shares or other securities equivalent to shares which represent a share in capital or in shareholders' rights in a company, as well as the certificates of shares deposited,
- bonds and other types of securitised debts, also including a certificate of deposit related to such securities,
- any other security that gives the right to its holder to: acquire or sell negotiable securities by a unilateral declaration of will; or to demand a cash payment in an amount which is determined in view of the value of negotiable securities, foreign currency exchange rate, interest rates or yield, commodity, or in view of any other index or factor.

### **Type of non-funds subject to private placement provisions**

The private placement regime for non-fund investments is not defined by the law. In this regard "private placement" is a market developed concept which is understood as a placement of various securities such as shares, bonds, notes, etc. which are exempted from the requirement to publish an offering prospectus.

Further in accordance with ZUAIS, the following entities are exempted and thus subject to private placement opportunities:

- holding companies;
- pension funds;
- supranational institutions such as, by way of example EBRD, ECB, IMF;
- the national central banks;
- national, regional or local authorities or other institutions which manage funds supporting social services and pensions;
- employee's savings or participation schemes;
- securitisation vehicles.





# Spain

## Summary of private placement provisions for fund interests (if applicable)

In Spain, funds can be divided into open-ended or closed-ended collective investment institutions (“**OECII**” and “**CECII**” respectively).

OECIIs those are regulated by Law 35/ 2003 of 4 November, on Collective Investment Schemes (“**CIS**”).

CIS specifically states that the private placement regime regulated in the Spanish Securities Market Act (Royal Legislative Decree 4 / 2015 of 23 October approving the consolidated text of the Securities Market) does not apply to these transferable securities, regardless of whether they are UCITS, open-ended EU or non-EU AIFs, domestic OECII or any other types of foreign OECII regardless of the management company or regardless of whom the type of investor is addressed to. Therefore, management companies depending on the fund shall comply with all requirements imposed by the CIS in order to legally commercialise an OECII in Spain.

Regarding CECII, those are regulated by, Law 22 / 2014 of 12 November on venture capital entities (“**VCE**”), other CECII and management companies of CECII and amending CIS (“**LECROSI**”), the main aim of which was to implement the AIFMD.

With this law, the former law governing VCE was derogated and a regulation applicable to all CECIIs was introduced. Before this piece of legislation, CECIIs were regulated mainly by the Spanish Securities Market Act.

Concerning private placement of CECIIs, it was expected that this regulation would contain its own provisions on private placement, however, there is no such mention.

As we highlighted, before the LECROSI came into force there was no legislation expressly regulating

CECIIs in Spain so the private placement regime contained in the Spanish Securities Market Act was being applied to CECIIs. Now, taking into account that *lex specialis* (LECROSI) overrides *lex generalis* (Spanish Securities Market Act regulating the private placement regime), the LECROSI shall be analysed in order to determine whether there is an applicable private regime to CECIIs or not.

In this regard, the LECROSI states that CECIIs, regardless of whether they are close-ended EU or Non-EU AIFs, domestic CECIIs or any other types of foreign CECIIs, regardless of the management company or regardless of what the type of investor it is addressed to management companies depending on both the fund and investor shall comply with all requirements imposed by the LECROSI in order to legally commercialise a CECII in Spain.

To sum up, the legal situation for CECIIs has changed significantly since the LECROSI entered into force.

## Other forms of possible placement options for fund interests outside fund regulations

The CIS and LECROSI define “marketing” of fund interests as the capture of clients by means of advertising activity on behalf of the collective investment institution or any other entity acting on its behalf or on behalf of any of its traders, so these clients contribute with funds, assets or rights. As stated above, marketing activity entails making offers at the initiative of the fund managers or on their behalf.

Provided the above objective (advertising means) and subjective (on behalf of whom the advertisement is being made) requisites are not met (e.g. whether the investment takes place at the initiative of the investor), such contribution to the fund could not be considered a public offering or a private placement. As stated above, marketing

activity entails making offers at the initiative of the fund managers or on their behalf.

However, given the lack of regulations regarding the initiative of the investor to contribute to the fund, the former structure should be analysed on a case-by-case basis.

### **Consequences of non-compliance with placement regimes for fund interests**

From a regulatory perspective, marketing fund interests in Spain (whether open or closed-ended) without complying with the relevant placement regime as applicable to the relevant fund could, in principle, constitute a very serious infringement.

### **Private placement rules for non-fund investments available**

The Spanish Securities Market Act regulates offerings of transferable securities and so does govern exemptions to the consideration of public offers. Whether such is the case, the requirement of publishing a prospectus does not apply due to

such offering being qualified as a private placement.

The following offerings of transferable securities are qualified as private placement:

- an offer exclusively directed at qualified investors;
- an offer directed at fewer than 150 natural or legal persons of an EU State, without including qualified investors;
- an offer directed at investors who acquire securities / interests for a minimum of EUR 100,000 per investor, for each separate offer;
- an offer, the unit nominal value of which is at least EUR 100,000;
- an offer for a total sum of less than EUR 5m within the EU, the limit of which is calculated over a 12-month period.



# Sweden

## Summary of private placement provisions for fund interests (if applicable)

Sweden has implemented the AIFMD through the 2013 Swedish Act on Alternative Investment Fund Managers (Sw. Lag (2013:561) om förvaltare av alternativa investeringsfonder, the “**SAIFM Act**”). Generally, any placement of fund interests in Sweden requires a licence from the Swedish FSA (“**SFSA**”) and the provision of certain minimum information.

For both EEA AIFMs and UCITS there are passporting regimes available as provided for in the UCITS Directive and AIFMD.

The main rule according to the Swedish Financial Instruments Trading Act (Sw. Lag (1991:980) om handel med finansiella instrument) (“**FTA**”), is that a prospectus must be prepared when transferable securities (e.g. fund interests) are offered to the public. However, there are exceptions to this rule for certain fund interests. The prospectus requirement does not apply when the offer concerns units in (i) UCITS Funds or (ii) “Special Funds”.

UCITS Funds are regulated in the Swedish UCITS Act (Sw. Lag (2004:46) om värdepappersfonder) (“**UCITS Act**”). The UCITS V Directive was implemented into Swedish law in November 2016. “Special Funds” are a category of AIFs that must meet certain requirements (e.g. rules on diversification and redemption) in the SAIFM Act and require authorisation from the SFSA. The “Special Funds” exemption also applies to foreign equivalent funds.

Even though UCITS funds, Special Funds and foreign equivalents to Special Funds can be offered without a prospectus, other information requirements apply pursuant to the UCITS Act and the SAIFM Act. As a general rule, marketing of funds in Sweden (other than under applicable

passporting regimes) requires a licence from the SFSA and triggers an obligation to make certain information (e.g. description of the investment strategy and objectives, fees, risks etc.) available to investors. These rules apply even if the fund interests are offered only to qualified investors and/or in a private placement (as defined below). AIFs that are only marketed to qualified investors are, however, not legally required to issue a Key Investor Information Document (KIID).

Swedish laws and regulations do not provide for a definition of “private placement”. However, the term “private placement” is commonly used to describe a restricted offer of securities to professional investors that is exempted from the duty to publish a prospectus. Pursuant to Chapter 2 Section 4 of the FTA a prospectus does not need to be prepared where:

1. the offer is directed solely to qualified investors;
2. in a country within the EEA, the offer is directed to fewer than 150 natural persons or legal entities who are not qualified investors;
3. the offer relates to a purchase of transferable securities for a sum equivalent to not less than EUR 100,000 for each investor;
4. each of the transferable securities has a nominal value equivalent to not less than EUR 100,000; or
5. the aggregate sum which the investors shall pay during a 12-month period within the EEA does not exceed the equivalent of EUR 2.5m.

The private placement rules apply to “Qualified Investors” as defined in FTA and the Securities Market Act (“**SMA**”). Qualified Investors are, broadly speaking, professional clients who are considered to be treated as professional clients or may be treated as professional clients within the meaning of Annex II of MiFID.

### **Other forms of possible placement options for fund interests outside fund regulations**

So called “reverse solicitation” is not considered marketing, provided that the AIFM’s sale of shares or participation rights in an AIF to an investor is initiated entirely by the investor. For example, if an investor places an order with an AIFM without being contacted by the AIFM before the order is placed, this is not considered marketing.

Reverse solicitation is not considered marketing as such activity does not fall within the definition of “marketing” in the SAIFM Act. However, no express exemption or safe harbour is provided in the SAIFM Act in this respect.

### **Consequences of non-compliance with placement regimes for fund interests**

There are no explicit mandatory contractual consequences. In theory, an investor could claim compensation under general tort law if the information given was inaccurate and caused damage to the investor.

An entity that breaches the relevant rules in the UCITS Act or SAIFM Act and conducts fund operations in Sweden without a licence from the SFSA may be subject to an order by the SFSA to cease the operations.

Such order may be combined with an administrative fine. Fines are decided on a case-by-case basis. If uncertain whether the UCITS Act or the SAIFM Act applies to the activities in question, the SFSA may order the entity to submit information on the activities undertaken.

Further, the SFSA may prohibit an offer of transferable securities where the SFSA finds that the provisions of the FTA or the Prospectus Regulation have been breached. A breach of the Swedish prospectus requirements may also result in an administrative fine. Neither the prospectus nor the licensing/ registration requirements are sanctioned with imprisonment. In addition to other available sanctions, the SFSA regularly publishes a so called “alert list” which contains companies that offer financial services and/ or products without having the appropriate licence in place. This list is available on the SFSA’s website.

### **Private placement rules for non-fund investments available**

All kinds of financial instruments such as shares in companies and comparable ownership rights in other types of undertakings, depositary receipts in respect of shares and bonds and other forms of debt instruments, including depositary receipts in respect of such securities, may be offered in a private placement as long as they meet any of the criteria in Chapter 2 Section 4 FTA, as outlined above.



# Switzerland

## Summary of private placement provisions for fund interests (if applicable)

Switzerland is not a Member State of the EU and thus not subject to the AIFMD and the respective rules. Switzerland has its own

- (a) set of rules, laid down in the Collective Investment Scheme Act (“**CISA**”, Kollektivanlagegesetz) and the corresponding Ordinance (“**CISO**”, Kollektivanlageverordnung); and
- (b) terminology related to funds or collective investment schemes (“**CIS**”), the term commonly used in Switzerland for any type of fund. Besides the law, the placement of CIS is based on rules published by the Financial Market Supervisory Authority (“**FINMA**”).

The applicable rules do not distinguish between private and public placement, but – currently – solely rely on the term “*distribution*”, being defined as any “*offering*” and “*marketing*” of CIS, *which is not exclusively aimed* at a limited group of investors, which are listed in the respective provision of the law. The CISA and CISO define *activities*, which are not considered to be distribution (or placements) and thus not subject to the law, such as

- (a) any offering and marketing of CIS exclusively aimed at prudentially supervised financial intermediaries such as banks, securities dealers, fund management companies, insurance companies and asset managers of CIS; and
- (b) provided that no third party (such as the sponsor, manager or a promoter of the CIS) is involved:
  - reverse solicitation by or “execution only” transactions on behalf of investors;

particularly in the context of an advisory mandate;

- acquisitions of CIS by prudentially supervised financial intermediaries (excluding insurance companies) for their clients based on a discretionary asset management agreement; and
- acquisitions of CIS by an independent asset manager for a client based on a discretionary asset management agreement, if certain criteria are met, namely that (i) the independent asset manager is (aa) a registered financial intermediary for money laundering purposes and (bb) subject to a code of conduct accepted by FINMA and that (ii) the particular discretionary asset management agreement meets industry standards, accepted by FINMA; and
- (c) the publication of prices, net asset values and quotes for CIS by supervised financial intermediaries; and
- (d) employee participation schemes based on CIS.

All other forms of distribution (or placements) are subject to the CISA and CISO and the respective regulatory constraints, whereby a distinction is made between two different distribution forms, namely

- (a) to qualified investors (“**QIs**”) other than prudentially supervised financial intermediaries, namely:
  - public entities, pension schemes and private enterprises, each with professional treasury;
  - high net worth individuals (“**HNWIs**”) requesting to be treated as a QI in writing (opt-in); and



- clients of asset managers not waiving the QI status (opt-out), provided the criteria mentioned above are met and the asset manager provides a written undertaking to use the CIS for QIs only;

which is subject to some (but not all) rules of the law with respect to distribution; and

- (b) to non-qualified investors (Non-QIs), which is subject to all the rules of the law with respect to distribution.

Distribution to QIs requires the CIS to appoint a Swiss representative and a paying agent and may only be made by domestic fund distributors (having a distribution licence or being exempt from applying for a licence) or foreign entities (subject to an adequate foreign supervision), based on a distribution agreement with the Swiss representative.

Distribution to Non-QIs requires in addition to what is required for distribution to QIs a regulatory licence for CIS (a “Swiss passport”).

There is a level playing field, meaning that the same rules apply to all foreign (and domestic) CIS irrespective of the legal format or jurisdiction of the CIS.

#### **Other forms of possible placement options for fund interests outside fund regulations**

The following are not covered by the law and thus exempt from the distribution rules related to CIS:

- (a) placements to prudentially supervised financial intermediaries;
- (b) reverse solicitation or “execution only” transactions by investors particularly in the context of an advisory mandate;
- (c) acquisitions of CIS by prudentially supervised financial intermediaries (excluding insurance companies) for clients based on a discretionary asset management agreement;
- (d) acquisitions of CIS by an independent asset manager for a client based on a discretionary asset management agreement (if certain further criteria are met);
- (e) the publication of prices, net asset values and quotes for CIS by supervised financial intermediaries; and
- (f) employee participation schemes based on CIS.

The exemptions in the second and fourth paragraphs above do not apply if induced by the activities of a third party, such as the sponsor, manager or promoter of the CIS.

#### **Consequences of non-compliance with placement regimes for fund interests**

There are no explicit mandatory contractual consequences, so the subscription remains basically valid (unless there are other reasons to have it declared invalid). However, violations of the placement rules are subject to criminal penalties. Unlawful activities are punishable with incarceration of up to three years or fines for intentional violations; negligent violations are subject to a fine of up to CHF 250,000. FINMA may act against private individuals or legal entities who are in violation of the placement rules and/ or acting without the required licence. FINMA may initiate an investigation, which could lead to a seizure and foreclosure of illicit gains or the liquidation of a legal entity at issue.

#### **Private placement rules for non-fund investments available**

Private placement outside the fund regulation is available for structured products, such as *inter alia*:

- financial instruments with capital protection or a maximum return; and
- certificates (“**Structured Products**”).

Shares, bonds and warrants follow a different set of rules and not rules laid down in the CISA and CISO, whereby a public placement, as opposed to a private placement, requires a prospectus. The term QI for the purpose of permissible private placements of Structured Products is the same as is used in the context of CIS and defined above.

Private Placement of Structured Products to Non-QIs may occur, but only if

- (a) the Structured Products are issued, guaranteed or provided with an equivalent protection by prudentially supervised financial intermediaries (such as banks, securities dealers or insurance companies or foreign entities subject to a similar, prudential supervision); and
- (b) there is a simplified prospectus.

#### **Definition of “private placement” in respect of non-fund investments**

The term private placement is used and applicable differently in the context of (a) CIS, (b) Structured Products and (c) shares, bonds and warrants. With respect to private placements of Structured Products, a distinction must be made on the basis of the type of investors, i.e. Non-QIs, requiring a prospectus, and QIs, where private placement without a prospectus is possible. Private placements of CIS are a much narrower concept, as outlined above, and not possible to QIs but only to prudentially supervised financial intermediaries and some other limited forms of placements. The

term private placements of shares, bonds and warrants is not defined by the law and there are different views, one being that a placement is public if more than 20 individuals are contacted. As opposed to private placements of CIS and Structured Products, the type of investor is not relevant.

### **Future Amendments**

The Swiss financial market legal landscape will change with the entry into force of the Financial Services Act ("**FinSA**") and the Financial Institutions Act ("**FinIA**"). The new laws are expected to enter into force as soon as 1 January 2020, there being, however, various transitory provisions. The definitive ordinances as well as the regulations of FINMA which detail the new laws are still not available. There is thus still uncertainty as to the new legal position.

In any case, the new laws will also bring about changes with respect to the private placement / distribution of foreign CIS into Switzerland. In particular, distributors of foreign CIS may, under certain circumstances, presumably deploy their activity in Switzerland only if they are entered into a register of advisers (whereas the FINMA license for fund distributors will be abolished). Also, the current term "distribution" will be abolished and replaced by the terms "offer" and "provision of financial services" which entails some changes as to when the Swiss rules will be triggered. Moreover, the obligation to appoint a representative and a paying agent will be limited under the new laws to an offer to non-qualified investors as well as to so-called opt-in qualified investors.

This guide will be updated once the new legal position is clear.



# United Kingdom

## Summary of private placement provisions for fund interests (if applicable)

The UK private placement regime applying from 22 July 2013 is set out at Chapter 3, Part 6 of the Alternative Investment Fund Managers Regulations 2013 (the “**AIFM Regulations**”), and in Rules and Guidance in the Financial Conduct Authority (“**FCA**”) Handbook. There is no definition of private placement. However, FCA guidance states:

*“An offering or placement takes place for the purposes of the AIFMD UK regulation when a person seeks to raise capital by making a unit or share of 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.”*

*“... a ‘placement’ includes situations where the units or shares of an AIF are only made available to a more limited group of potential investors.”*

An AIFM is simply required to notify the FCA of its intention to market under the UK private placement regime, providing certain information about each AIF concerned, and confirming that it meets the relevant conditions in the AIFM Regulations. The AIFM is entitled to market the AIF as soon as a notification containing all of the required information has been sent to the FCA.

However, the FCA will send out an automated response confirming that the original notification has been successfully processed and so firms may wish to wait until this confirmation is received before starting to market.

A fee must be paid to the FCA in order to market under the private placement regime. The fee for an AIF managed by a full-scope Non-EEA AIFM is GBP 250. For an AIF managed by a sub-threshold Non-

EEA AIFM, it is GBP 125. For a Non-EEA AIF managed by EEA AIFM, where the AIFM is not otherwise paying any FCA fee as an AIFM, it is GBP 250.

## Conditions for EEA AIFMs (Regulation 57)

A full scope UK AIFM or a full scope EEA AIFM notifying the FCA of its intention to market a Non-EEA (or “third country”) AIF, or UK or EEA feeder AIFs of third country master AIFs in the UK under the local private placement regime must confirm the following conditions are satisfied:

- It complies with the requirements of the AIFMD (subject to certain exceptions);
- Appropriate co-operation arrangements are in place between the regulatory authority of the AIFM’s home EU State and the supervisory authorities of the third country AIF or master AIF; and
- The country of establishment of the third country AIF or master AIF is not listed as a NCCT by the FATF.

## Conditions for Non-EEA AIFMs (Regulation 59)

A Non-EEA AIFM notifying the FCA of its intention to market any AIF (whether UK, EEA or Non-EEA) in the UK under the local private placement regime must confirm the following conditions are satisfied:

- The AIFM is the person responsible for complying with the implementing provisions relating to the marketing of the AIF;
- It complies with certain transparency requirements under the AIFMD;
- If it manages AIFs which acquire majority control of non-listed companies and issuers (with certain exceptions), it complies with the additional disclosure requirements and asset stripping restrictions under Part 5 of the AIFM Regulations;

- Appropriate co-operation arrangements are in place between the FCA and, if applicable, the competent authority of the other EEA State where the AIF is established and the supervisory authorities of the country where the third country AIFM is established and, if applicable, of the third country where the AIF is established; and
- The country where the third country AIFM and, if applicable, the third country AIF is established must not be listed as a NCCT by the FATF.

### **Conditions for “small” Non-EEA AIFMs (Regulation 58)**

A small Non-EEA AIFM notifying the FCA of its intention to market any AIF (whether UK, EEA or Non-EEA) in the UK under the local private placement regime, must confirm that the AIFM is the person responsible for complying with the implementing provisions relating to the marketing of the AIF; and that the AIFM is a small third country AIFM. The AIFM must also provide the FCA with certain information on the main instruments in which the AIFM trades and the principal exposures and most important concentrations of the AIFs that it manages.

The relevant forms to notify the FCA are available on the FCA website. Note the UK rules refer to “EEA” rather than “EU” AIFs / AIFMs.

Both professional and retail investors in the UK are within the scope of the private placement provisions (although marketing to retail investors is caught by additional UK financial promotion rules). There has been no significant change to the private placement rules.

### **Other forms of possible placement options for fund interests outside fund regulations**

The UK national private placement regime will not apply to: “an offering or placement of units or shares of an AIF to an investor made at the initiative of that investor” (AIFM Regulations, Reg 47). A confirmation from the investor that the offering or placement of units of shares of the AIF was made at its initiative should normally be sufficient to demonstrate that the marketing is at the initiative of the investor, provided this is obtained before the offer or placement takes place. Industry practice also seems to be that investment firms acting for the investor (e.g. investment managers and advisers) can make the initial approach to the AIF / AIFM and complete such confirmations on behalf of the investor. However, AIFMs and investment firms acting for AIFs / AIFMs should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of AIFMD.

The UK national private placement regime will not apply to the marketing of AIFs where securities are subject to an offer to the public under a prospectus

that has been drawn up and published in accordance with the prospectus directive before 22 July 2013. This applies for the duration of the validity of that prospectus (AIFM Regulations, Reg 73).

### **Consequences of non-compliance with placement regimes for fund interests**

Carrying out marketing in contravention of the UK private placement regime is defined as “unlawful marketing” under the AIFM Regulations.

An agreement entered into by a customer as a consequence of unlawful marketing by a person who is not authorised by the FCA is unenforceable and the customer is entitled to recover money paid under the agreement and compensation for any loss sustained. (However, the court may allow the agreement to be enforced and money to be retained if it is satisfied that it is just and equitable.) If an AIFM or an investment firm authorised by the FCA carries out unlawful marketing, this is actionable at the suit of a private person who suffers loss as a result of such marketing, subject to the defences and other incidents applying to actions for breach of statutory duty.

For persons who are not authorised by the FCA, unlawful marketing is a criminal offence subject to imprisonment for a term not exceeding three months (or, on indictment, for a term not exceeding two years) or a fine, or both.

FCA authorised persons who carry out unlawful marketing may be sanctioned through public censure, a financial penalty and potentially enforcement action by the FCA leading to the withdrawal of FCA authorisation.

### **Private placement rules for non-fund investments available**

Non-fund investments subject to other private placement opportunities:

- Investments offered by a holding company
- Investments offered by an employee participation scheme or employee savings scheme
- Investments offered by a securitisation special purpose entity
- Shares in listed and non-listed companies
- Rights under pension

Promotions of investments must be made by an FCA authorised person or else approved by an FCA authorised person (unless exempt under the Financial Promotions Order). Private placement of investments by FCA authorised persons must comply with FCA Rules on financial promotion in the Conduct of Business Sourcebook in the FCA Handbook.

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# Definitions

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<b>AAIF</b>	Act on Alternative Investment Funds (Croatia)
<b>AFM</b>	Autoriteit Financiële Markten (The Netherlands)
<b>AFMA</b>	Alternative Fund Managers Act (Finland)
<b>AIF</b>	Alternative Investment Fund, defined in the AIFMD as:  “A collective investment undertaking, including investment compartments of such an undertaking, which raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of these investors; and does not require authorisation pursuant to Article 5 of the UCITS directive.”
<b>AIFA</b>	Alternative Investment Funds Act (Norway)
<b>AIFFM</b>	Law on Alternative Investment Funds and Fund Managers (Latvia)
<b>AIFM</b>	Alternative Investment Fund Manager, defined in the AIFMD as a legal person whose regular business is managing one or more AIFs
<b>AIF Law</b>	Cypriot Law 131(I) / 2014 on Alternative Investment Funds
<b>AIFMD</b>	Alternative Investment Fund Managers Directive of 8 June 2011 (2011 / 61 / EC)
<b>AIFMG</b>	Alternative Investment Fund Managers Act (Austria)
<b>AIFM Law</b>	Cypriot Law 56 (I) / 2013 on Alternative Investment Fund Managers
<b>AIFMG-L</b>	Alternative Investment Fund Managers Law (Liechtenstein)
<b>AIFM Regulations</b>	Alternative Investment Fund Managers Regulations 2013 (United Kingdom)
<b>AIFMV</b>	Alternative Investment Fund Managers Ordinance (Liechtenstein)
<b>AIFR</b>	Alternative Investment Funds Regulations (Norway)
<b>AIM Act</b>	Danish AIFMD regulation
<b>AMF</b>	Autorité des marchés financiers (France)
<b>CA</b>	Companies Act (Malta)
<b>Capital Market Law</b>	Law no. 297 / 2004, implementing the Prospectus Directive (Romania)
<b>CBI</b>	Central Bank of Ireland
<b>CECII</b>	Closed-Ended Collective Investment Institutions (Spain)
<b>CFA</b>	Consolidated Financial Act (Legislative Decree no. 58 / 1998) (Italy)



<b>CIS</b>	Collective Investment Scheme
<b>CISA</b>	Collective Investment Scheme Act (Switzerland)
<b>CISO</b>	Collective Investment Scheme Ordinance (Switzerland)
<b>CMA</b>	Capital Market Act (Croatia)
<b>CMVM</b>	Securities Market Commission (Portugal)
<b>COBO</b>	Control of Borrowing (Jersey) Order 1958
<b>Consob</b>	Commissione Nazionale per le Società e la Borsa (Italy)
<b>CSSF</b>	Commission de Surveillance du Secteur Financier (Luxembourg)
<b>CySEC</b>	Cyprus Securities and Exchange Commission
<b>DFSA</b>	Danish Financial Supervisory Authority
<b>Draft CFA</b>	Draft amendments to the Consolidated Financial Act (Legislative Decree no. 58 / 1998) (Italy)
<b>EEA</b>	European Economic Area
<b>EFSA</b>	Estonian Financial Supervision Authority
<b>EU AIF</b>	AIF which is registered or authorised in an EU State under the applicable national law or which is not registered or authorised in an EU State but has its registered office and/ or head office in an EU State
<b>EU AIFM</b>	AIFM which has its registered office in an EU State
<b>EuSEF</b>	European Social Entrepreneurship Funds
<b>EuVECA</b>	European Venture Capital Companies
<b>EWR-WPPDG</b>	Law of 10 May 2019 implementing Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (Liechtenstein)
<b>FATF</b>	Financial Action Task Force
<b>FCA</b>	Financial Conduct Authority (United Kingdom)
<b>FCA Handbook</b>	FCA's handbook of rules and guidance for regulated firms (United Kingdom)
<b>Financial Promotions Order</b>	Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (United Kingdom)
<b>FIN-FSA</b>	Financial Supervisory Authority (Finland)
<b>FINMA</b>	Financial Market Supervisory Authority (Switzerland)
<b>FMA</b>	Financial Market Authority (Austria)
<b>FSC</b>	Financial Supervision Commission (Bulgaria)

<b>FSJL</b>	Financial Services (Jersey) Law 1998
<b>FSMA</b>	Financial Services and Markets Authority (Belgium)
<b>FSMA</b>	Securities Markets Act (Finland)
<b>FTA</b>	Swedish Financial Instruments Trading Act
<b>GFSC</b>	Guernsey Financial Services Commission
<b>HCMC</b>	Hellenic Capital Market Commission
<b>HNWIs</b>	High Net Worth Individuals
<b>HUF</b>	Hungarian Forint
<b>ISA</b>	Investment Services Act (Malta)
<b>ISIN</b>	International Securities Identification Number
<b>IUG</b>	Law on Investment Undertakings (Liechtenstein)
<b>JFSC</b>	Jersey Financial Services Commission
<b>KIID</b>	Key Investor Information Document (Sweden)
<b>LECROSI</b>	Law 22 / 2014, which governs venture capital entities, other closed-ended collective investment institutions and management companies of closed-ended collective investment institutions and which amends Law 35 / 2003, of November 4th, governing collective investment institutions. (Spain)
<b>LMFI</b>	Law on Market for Financial Instruments (Latvia)
<b>MFSA</b>	Malta Financial Services Authority
<b>MiFID</b>	Markets in Financial Instruments Directive of 21 April 2004 (Directive 2004 / 39 / EC)
<b>MiFID law</b>	Cypriot Law 144(I) / 2007, transposing MiFID
<b>MTF</b>	Multilateral Trading Facility
<b>NAV</b>	Net asset value
<b>NCCT</b>	Non-Cooperative Country and Territory
<b>New IFA</b>	New Investment Funds Act (Estonia)
<b>NOK</b>	Norwegian Krone
<b>Non-EEA</b>	Non-European Economic Area
<b>Non-EU AIF</b>	AIF not qualifying as an EU-AIF
<b>Non-EU AIFM</b>	AIFM which has its registered office in a state which is not an EU State
<b>OEClI</b>	Open-Ended Collective Investment Institutions (Spain)

<b>PDR</b>	Prospectus (Directive) Regulations 2005 (Ireland)
<b>POI Law</b>	Protection of Investors (Bailiwick of Guernsey) Law
<b>Prospectus Directive</b>	Directive 2003 / 71 / EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading
<b>Prospectus Law</b>	Cypriot Law 114(I) / 2005, transposing the Prospectus Directive
<b>Prospectus Law</b>	Greek law implementing Directive 2003 / 71 / EC, as amended (law 3401 / 2005 as amended by law 4099 / 2012)
<b>QIs</b>	Qualified Investors (for Swiss law purposes)
<b>Romanian FSA</b>	Romanian Financial Supervisory Authority
<b>SAIFM Act</b>	Swedish Act on Alternative Investment Fund Managers
<b>SEC</b>	Securities and Exchange Commission (United States of America)
<b>SFSA</b>	Swedish FSA
<b>SICAR</b>	Société d'Investissement en Capital A Risque (Luxembourg)
<b>SIF</b>	Specialised Investment Fund (Luxembourg)
<b>SMA</b>	Securities Market Act
<b>Small AIFM</b>	AIFM managing AIFs whose assets under management, calculated in accordance with Article 2 of the AIFMD Level 2 Regulation: do not exceed EUR 500m in total in cases where the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of five years following the date of initial investment in each AIF; or do not exceed EUR 100m in total in other cases, including any assets acquired through the use of leverage.
<b>Third Country Regulations</b>	The Investment Services Act (Alternative Investment Fund Manager) (Malta)
<b>UCIS</b>	Unregulated Collective Investment Schemes
<b>UCITS</b>	Undertakings for Collective Investment in Transferable Securities
<b>UCITS Act</b>	Swedish UCITS Act
<b>UK AIFM</b>	AIFM which has its registered office in the United Kingdom
<b>VCE</b>	Venture Capital Entities
<b>ZISDU-2</b>	Investment Trusts and Management Companies Act (Slovenia)
<b>ZTFI</b>	Financial Instruments Market Act (Slovenia)

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