

Chapter 10

Operating on a cross-border basis



10.1 Application and purpose

Application

- 10.1.1 **G** (1) This chapter applies to the following types of *firm* in relation to the activities in (2):
- (a) a *full-scope UK AIFM*;
 - (b) a *full-scope EEA AIFM*;
 - (c) a *small non-EEA AIFM*; and
 - (d) an *above-threshold non-EEA AIFM*.
- (2) The activities to which this chapter relates are the management and *marketing* on a cross-border basis, into or from the *UK* of:
- (a) a *UK AIF*;
 - (b) an *EEA AIF*; and
 - (c) a *non-EEA AIF*.

Purpose

- 10.1.2 **G** The purpose of this chapter is to provide *guidance* on the requirements that apply to the types of *firm* set out in **FUND 10.1.1 G** when operating on a cross-border basis into or from the *UK*.

Introduction

- 10.1.3 **G** An *AIFM* operates on a cross-border basis when it manages or *markets* an *AIF* in an *EEA State* other than the state in which it has its registered office (which may include, in certain cases, a state which is a *non-EEA State*).
- 10.1.4 **G** (1) *AIFMD* allows certain types of *AIFM* to operate on a cross-border basis using a passport. There are two types of passport that are provided for in *AIFMD*:
- (a) a management passport, which allows an *AIFM* to establish a *branch* in, or provide *cross-border services* into, another *EEA State* to manage an *AIF*; and
 - (b) a *marketing* passport, which allows an *AIFM* to provide *cross-border services* into another *EEA State* to *market* an *AIF* to investors that are *professional clients*.
- (2) The following types of *AIFM* are allowed to operate on a cross-border basis using the management and *marketing* passport:

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- (a) a *full-scope UK AIFM* of:
 - (i) a *UK AIF*; and
 - (ii) an *EEA AIF*; and
- (b) a *full-scope EEA AIFM* of:
 - (i) a *UK AIF*; and
 - (ii) an *EEA AIF*.

- (1) *AIFMD* also contains specific provisions for third country *AIFs* and *AIFMs* (ie, in relation to *non-EEA AIFs* and *non-EEA AIFMs*) and the *marketing* of a *UK AIF* or an *EEA AIF* that is a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*.
- (2) In line with these provisions, the following types of *AIFM* are allowed to manage a *non-EEA AIF* from an *EEA State*:
 - (a) a *full-scope UK AIFM*; and
 - (b) a *full-scope EEA AIFM*.
- (3) In addition, *EEA States* may allow the *marketing* by the following types of *AIFM* in their territory only:
 - (a) a *full-scope UK AIFM* of:
 - (i) a *UK AIF* or an *EEA AIF* that is a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF* and;
 - (ii) a *non-EEA AIF*;
 - (b) a *full-scope EEA AIFM* of:
 - (i) a *UK AIF* or an *EEA AIF* that is a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
 - (ii) a *non-EEA AIF*; and
 - (c) a *non-EEA AIFM* of:
 - (i) a *UK AIF*;
 - (ii) an *EEA AIF*; and
 - (iii) a *non-EEA AIF*.



10.2 AIFM management passport

Application

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This section applies to:

- (1) a *full-scope UK AIFM* that intends to manage an *EEA AIF*:
 - (a) by establishing a *branch* in another *EEA State*; or
 - (b) under the freedom to provide *cross-border services*; and
- (2) a *full-scope EEA AIFM* that intends to manage a *UK AIF*:
 - (a) by establishing a *branch* in the *UK* (an *incoming EEA AIFM branch*); or
 - (b) under the freedom to provide *cross-border services*.

Management passport for full-scope UK AIFMs

10.2.2

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Information on the use of the management passport by a *full-scope UK AIFM* is contained in ■ SUP 13 (exercise of passport rights by UK firms), which includes:

- (1) *guidance* on the conditions for establishing a *branch* to manage an *AIF* in an *EEA State* other than the *UK* (■ SUP 13.3.2 G);
- (2) *guidance* on the conditions for providing *cross-border services* to manage an *AIF* in an *EEA State* other than the *UK* (■ SUP 13.4.2 G);
- (3) the notice of intention that a *full-scope UK AIFM* must submit to establish a *branch* in an *EEA State* other than the *UK* (■ SUP 13 Annex 1);
- (4) the notice of intention that a *full-scope UK AIFM* must submit to provide *cross-border services* to manage an *AIF* in an *EEA State* other than the *UK* (■ SUP 13 Annex 8AR);
- (5) *guidance* on changes to *branches* (■ SUP 13.6.10 G); and
- (6) *guidance* on changes to *cross-border services* to manage an *AIF* in an *EEA State* other than the *UK* (SUP 13.7.13G).

Management passport for full-scope EEA AIFMs

10.2.3

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Information on the use of the management passport by a *full-scope EEA AIFM* is contained in ■ SUP 13A (Qualifying for authorisation under the Act)

and ■ SUP 14 (Incoming EEA firms changing details, and cancelling qualification for authorisation), which include:

- (1) *guidance on the conditions for establishing a branch to manage an AIF in the UK* (■ SUP 13A.4.1 G);
- (2) *guidance on the conditions for providing cross border services to manage an AIF in the UK* (■ SUP 13A.5.3 G);
- (3) *guidance on Handbook provisions that apply to an incoming EEA AIFM branch* (■ SUP 13A Annex 1);
- (4) *guidance on the matters that are reserved to a firm's Home State regulator* (■ SUP 13A Annex 2);
- (5) *guidance on changes to branches* (SUP 14.2.15G and SUP 14.2.16G);
and
- (6) *guidance on changes to cross-border services to manage an AIF* (SUP 14.3.8G to SUP 14.3.10G).



10.3 AIFM marketing passport

Application

10.3.1

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This section applies to:

- (1) a *full-scope UK AIFM* of:
 - (a) a *UK AIF*; and
 - (b) an *EEA AIF*;
 - that intends to *market* the *AIF* it manages in an *EEA State* other than the *UK*; and
- (2) a *full-scope EEA AIFM* of:
 - (a) a *UK AIF*; and
 - (b) an *EEA AIF*;
 - that intends to *market* the *AIF* it manages in the *UK*.

Feeder AIFs

10.3.2

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If the *UK AIF* or *EEA AIF* is a *feeder AIF*, the *full-scope UK AIFM* or *full-scope EEA AIFM* may only *market* the *AIF* using the *marketing passport* if the *master AIF* is a *UK AIF* or an *EEA AIF* that is managed by a *full-scope UK AIFM* or a *full-scope EEA AIFM*. However, the *AIFM* of such an *AIF* will be entitled to *market* the *AIF* if it meets the conditions in regulation 57 (Marketing under Article 36 of the directive) of the *AIFMD UK regulation*, as explained in ■ FUND 10.5.3 G to ■ FUND 10.5.5 G.

Marketing passport for full-scope UK AIFMs

10.3.3

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Information on the use of the *marketing passport* by a *full-scope UK AIFM* is contained in ■ SUP 13 (exercise of passport rights by UK firms), which includes:

- (1) *guidance* on the conditions for providing *cross-border services* to market an *AIF* in an *EEA State* other than the *UK* (SUP 13.4.2FG);
- (2) the notice of intention that a *full-scope UK AIFM* must submit to provide *cross-border services* to market an *AIF* (SUP 13 Annex 8BR); and
- (3) *guidance* on changes to *cross-border services* to *market* an *AIF* in an *EEA State* other than the *UK* (SUP 13.7.14G).

Marketing passport for full-scope EEA AIFMs

10.3.4 **G** Information on the use of the *marketing* passport by a *full-scope EEA AIFM* is contained in ■ SUP 13A (Qualifying for authorisation under the Act) and ■ SUP 14 (Incoming EEA firms changing details, and cancelling qualification for authorisation), which include:

- (1) *guidance* on the conditions for providing *cross-border services to market an AIF into the UK* (■ SUP 13A.5.3 G); and
- (2) *guidance* on changes to *cross-border services to market an AIF in the UK* (SUP 14.3.9G and SUP 14.3.10G).

10.3.5 **G** In accordance with article 32(5) of *AIFMD* arrangements for the *marketing* of *AIFs* (referred to in point (h) of Annex IV of *AIFMD*) are subject to the laws and supervision of the *Host State* of the *AIFM*. This means that a *full-scope EEA AIFM* that is *marketing* an *AIF* in the *UK* using the *marketing* passport should have regard to the *financial promotions* regime, as explained in ■ PERG 8.37.6 G (3) (Communications with investors in relation to draft documentation).

Further guidance on marketing an AIF

10.3.6 **G** Further guidance on marketing an *AIF* can be found in ■ PERG 8.37 (AIFMD Marketing).

Marketing an ELTIF

10.3.7 **G** To *market* an *ELTIF* in an *EEA State* other than the *United Kingdom* a *full-scope UK AIFM* should submit a notice to the *FCA* using the forms in:

- (1) ■ SUP 13 Annex 8BR (Passporting: AIFMD); and
- (2) ■ FUND 4 Annex 1R (Additional documentation and information to market an ELTIF).



10.4 AIFM third country management

Application

10.4.1 **G** This section applies to a *full-scope UK AIFM* of a *non-EEA AIF* that is not *marketed* in the *EEA* to *EEA* investors.

Applicable requirements

10.4.2 **G** A *full-scope UK AIFM* may manage a *non-EEA AIF* subject to the satisfaction of certain conditions. If the *AIF* is not *marketed*, these conditions are that:

- (1) the *AIFM* complies with the full requirements of *AIFMD* in respect of that *AIF*, except article 21 (Depositaries) and article 22 (Annual reporting); and
- (2) (in accordance with regulation 33 of the *AIFMD UK regulation*) appropriate cooperation arrangements are in place between the *competent authorities* of the *Home State* of the *AIFM* and the supervisory authorities of the third country where the *non-EEA AIF* is *established* in order to ensure an efficient exchange of information that allows the *competent authority* of the *Home State* of the *AIFM* to carry out its duties in accordance with *AIFMD*.

10.4.3 **G** As a result, a *full-scope UK AIFM* of a *non-EEA AIF* that is not *marketed* is required to comply with:

- (1) all of **FUND 3** with the exception of **FUND 3.3** (Annual report of an *AIF*), **FUND 3.11** (Depositaries) and **FUND 3.12** (Marketing in the home Member State of the *AIFM*); and
- (2) such other provisions of the *FCA Handbook* as are applicable to a *full-scope UK AIFM*.

10.4.4 **G** If a *full-scope UK AIFM* wishes to market in the *UK* a *non-EEA AIF* that it manages, the *AIFM* must comply with the relevant requirements, as explained in **FUND 10.5.3 G** to **FUND 10.5.5 G** (Marketing under article 36 of *AIFMD*).



10.5 National private placement

Application

10.5.1 **G** This section applies to the following types of *AIFM* that intend to market an *AIF* in the *UK*:

- (1) a *full-scope UK AIFM* of:
 - (a) a *feeder AIF* that is a *UK AIF* or an *EEA AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
 - (b) a *non-EEA AIF*;
- (2) a *full-scope EEA AIFM* of:
 - (a) a *feeder AIF* that is a *UK AIF* or an *EEA AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
 - (b) a *non-EEA AIF*;
- (3) a *small non-EEA AIFM* of:
 - (a) a *UK AIF*;
 - (b) an *EEA AIF*; and
 - (c) a *non-EEA AIF*; and
- (4) an *above-threshold non-EEA AIFM* of:
 - (a) a *UK AIF*;
 - (b) an *EEA AIF*; and
 - (c) a *non-EEA AIF*.

Introduction

10.5.2 **G** *AIFMD* permits *EEA States* to allow the *marketing* in their territory only of the types of *AIF* set out in **FUND 10.5.1 G**, subject to certain conditions. This has been implemented in the *UK* by Part 6 (Marketing) of the *AIFMD UK regulation*. In accordance with these provisions, an *AIFM* of the type set out in **FUND 10.5.1 G** may *market* an *AIF* in the *UK* providing it has notified the *FCA* of its intention to *market*, it meets the relevant conditions in the *AIFMD UK regulation* and the *FCA* has not suspended or revoked the *AIFM*'s entitlement to *market* the *AIF*. 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*.

Marketing under article 36 of AIFMD

10.5.3 **G** In accordance with regulation 57 (Marketing under Article 36 of the directive) of the *AIFMD UK regulation*, a *full-scope UK AIFM* and a *full-scope EEA AIFM* may market the following types of *AIF* in the *UK* by submitting a notification to the *FCA* in the form in **■ FUND 10 Annex 1 D**:

- (1) a *feeder AIF* that is a *UK AIF* or an *EEA AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
- (2) a *non-EEA AIF*.

10.5.4 **G** To allow the *AIFM* to comply with regulation 57(4), the notification includes a statement from the *AIFM* confirming that the following conditions are met:

- (1) subject to (2), the *AIFM* complies with the requirements of *AIFMD* in respect of that *AIF*;
- (2) the *AIFM* is not required to comply with the requirements of article 21 (Depositaries) of *AIFMD* provided the *AIFM*:
 - (a) ensures that one or more entities, other than the *AIFM*, are appointed to carry out the duties in article 21(7) to (9) of *AIFMD*; and
 - (b) informs the *FCA* about the identity of each entity;
- (3) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the *FCA* and the supervisory authorities of the relevant third country to ensure an efficient exchange of information that enables the *FCA* to carry out its duties in accordance with *AIFMD*; and
- (4) the third country where the *non-EEA AIF* is established is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force (FATF).

10.5.5 **G**

- (1) As a result of *marketing* an *AIF* in the *UK*, a *full-scope UK AIFM* is required to comply with:
 - (a) all of **■ FUND 3**, except certain sections of **■ FUND 3.11** (Depositaries) (as set out in **■ FUND 3.11.33R** (AIFM of a non-EEA AIF)) and **■** (Marketing in the home Member State of the AIFM); and
 - (b) such other provisions of the *FCA Handbook* that apply to a *full-scope UK AIFM* of a *UK AIF*.
- (2) A *full-scope UK AIFM* managing a *non-EEA AIF* that is not marketed should note that the *rules* it needs to comply with will change in relation to that *AIF* as a result of the *AIF* being marketed (see **■ FUND 10.4.3 G** for details of the rules that apply to a *full-scope UK AIFM* managing a *non-EEA AIF* that is not marketed). In particular, an *AIFM* will be subject to the annual report requirements in **■ FUND 3.3** (Annual report of an AIF) and some of the depositary provisions in **■ FUND 3.11** (Depositaries) (as set out in **■ FUND 3.11.33 R** (AIFM of a non-EEA AIF)).

Marketing of AIFs managed by small third-country AIFMs

10.5.6 **G** In accordance with regulation 58 (Marketing of AIFs managed by small third country AIFMs) of the *AIFMD UK regulation*, a *small non-EEA AIFM* may market an *AIF* in the *UK* managed by it by submitting a notification to the *FCA* in the form set out in ■ FUND 10 Annex 1 D.

10.5.7 **G** To allow the *AIFM* to comply with the requirements of regulation 58(2), the notification includes a statement from the *AIFM* confirming that the following conditions are met:

- (1) the *AIFM* is the person responsible for complying with the implementing provisions relating to the *marketing* of the *AIF* (as explained in ■ FUND 10.5.8 G); and
- (2) the *AIFM* is a *small non-EEA AIFM*.

10.5.8 **G** As a result of *marketing* an *AIF* in the *UK*, a *small non-EEA AIFM* is required to provide the *FCA* with information on:

- (1) the main instruments in which the *AIFM* trades; and
- (2) the principal exposures and most important concentrations of the *AIFs* it manages.
in accordance with SUP 16.18 (AIFMD reporting).

Marketing under article 42 of the directive

10.5.9 **G** In accordance with regulation 59 (Marketing under article 42 of the directive) of the *AIFMD UK regulation*, an *above-threshold non-EEA AIFM* may market a *UK AIF*, an *EEA AIF* or a *non-EEA AIF* in the *UK* managed by it by submitting a notification to the *FCA* in the form in ■ FUND 10 Annex 1 D.

10.5.10 **G** To allow the *AIFM* to comply with the requirements of regulation 59(2), the notification includes a statement from the *AIFM* confirming that the following conditions are met:

- (1) the *AIFM* is the person responsible for complying with the implementing provisions relating to the *marketing* of the *AIF* (see ■ FUND 10.5.11 G);
- (2) the *AIFM* complies with the requirements of articles 22 to 24 *AIFMD* in so far as such provisions are relevant to the *AIFM* and the *AIF* to be marketed;
- (3) if applicable, the *AIFM* complies with Part 5 (AIFs which acquire control of non-listed companies and issuers) of the *AIFMD UK regulation* in relation to the *AIF* to be marketed;
- (4) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between:
 - (a) the *FCA* and, if applicable, the *competent authorities* of the other *EEA State* where the *AIF* is established; and

(b) the supervisory authorities of the country where the *non-EEA AIFM is established* and, if applicable, of the country where the *non-EEA AIF is established*,

to ensure an efficient exchange of information that enables the *FCA* to carry out its duties in accordance with *AIFMD*; and

(5) the third country where the *non-EEA AIF is established* is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force (FATF).

10.5.11 G As a result of *marketing* an *AIF* in the *UK*, an *above-threshold non-EEA AIFM* is required to comply with:

(1) the requirements that apply to a *full-scope UK AIFM* in ■ **FUND 3.2** (Investor information), ■ **FUND 3.3** (Annual report of an *AIF*) and ■ **FUND 3.4** (Reporting obligations to the *FCA*) in so far as such provisions are relevant to the *AIFM* and the *AIF*; and

(2) if applicable, Part 5 (AIFs which acquire control of non-listed companies and issuers) of the *AIFMD UK regulation*.

10.5.11A G

(1) (a) A provision of ■ **FUND 3.2** (Investor Information), ■ **FUND 3.3** (Annual report of the *AIF*) or ■ **FUND 3.4** (Reporting obligations to the *FCA*) will not be relevant to an *above-threshold non-EEA AIFM* and the *AIF* it *markets*, if it relates to another provision to which the *AIFM* is not subject.

(b) For example, the *AIFM* does not need to comply with ■ **FUND 3.2.2R** (5) because it is not subject to the professional negligence requirements in *IPRU(INV)* 11.3.11G (Professional negligence).

(2) (a) However, the *AIFM* should comply with the substance of the provisions of ■ **FUND 3.2** (Investor Information), ■ **FUND 3.3** (Annual report of the *AIF*) or ■ **FUND 3.4** (Reporting obligations to the *FCA*) to the extent that these are relevant to the *AIFM* and the *AIF*.

(b) For example:

(i) the *AIFM* should make the latest net asset value of the *AIF* or latest market price of the *unit* or *share* of the *AIF* available to investors before they invest, but it does not need to do so in line with ■ **FUND 3.9** (Valuation), because it is not subject to these provisions; and

(ii) the *AIFM* should include information in its annual report in relation to the *remuneration* paid by the *AIFM* to its staff as set out in ■ **FUND 3.3.5R** (5) and ■ **FUND 3.3.5R** (6), but it does not need to do so in line with the requirements in ■ **SYSC 19B**, because it is not subject to those provisions.

(3) An *AIFM* should comply with the provisions in ■ **FUND 3.3** (Annual report of the *AIF*) in relation to the first financial year end date of

the *AIF* following the *AIFM*'s notification to the *FCA* of its intention to market the *AIF* in the *UK*.

10.5.11B G An *above-threshold non-EEA AIFM* should report on a quarterly basis to the *FCA* the information in ■ **FUND 3.4.2R**, ■ **FUND 3.4.3R** and (if applicable) ■ **FUND 3.4.5R** for each *AIF* that is not *marketed* in the *UK* if:

- (1) that *AIF* is a *master AIF* managed by the *AIFM*;
- (2) the *AIFM* markets the *feeder AIF* of that *master AIF* in the *UK*; and
- (3) the *AIFM* is subject to quarterly reporting under article 110 of the *AIFMD level 2 regulation* (see ■ **SUP 16.18.4EU**) for the *feeder AIF*.

Further guidance on marketing an AIF
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10.5.12 G Further *guidance* on marketing an *AIF* can be found in ■ **PERG 8.37** (*AIFMD* marketing).

Provision of key information document in accordance with the PRIIPs Regulation
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10.5.13 G An *AIFM* that makes an *AIF* available to *retail clients* in the *United Kingdom* will need to draw up a *key information document* in accordance with the *PRIIPs Regulation*.

National private placement notification

This annex consists of one or more forms. Forms can be completed online by visiting <https://www.fca.org.uk/firms/nppr>

