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REV2 – replaces the notice (REV1) dated
8 February 2018

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF ASSET MANAGEMENT

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a “third country”.¹ The Withdrawal Agreement² provides for a transition period ending on 31 December 2020. Until that date, EU law in its entirety applies to and in the United Kingdom.³

During the transition period, the EU and the United Kingdom are will negotiate an agreement on a new partnership. However, it is not certain whether such an agreement will be concluded and will enter into force at the end of the transition period. In any event, such an agreement would create a relationship, which will be very different from the United Kingdom’s participation in the internal market.⁴

Moreover, after the end of the transition period the United Kingdom will be a third country as regards the implementation and application of EU law in the EU Member States.

Therefore, all interested parties, and especially economic operators, are reminded of the legal situation implications that the end of the transition period will have on their activities.

Advice to stakeholders:

UCITS⁵ management companies and Alternative Investment Fund (AIF) managers (AIFMs) are advised to assess the consequences of the end of the transition period in view of this notice and take appropriate action, such as obtaining an authorisation to manage non-EU AIFs (former UK UCITS or UK AIFs), informing investors of the consequences

¹ A third country is a country which is not a Member State of the EU.

² Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L29, 31.1.2020, p. 7 (“Withdrawal Agreement”).

³ Subject to certain exceptions provided for in Article 127 of the Withdrawal Agreement, none of which is relevant in the context of this notice.

⁴ In particular, a free trade agreement does not provide for internal market concepts (in the area of goods and services) such as mutual recognition.

⁵ Undertakings for Collective Investment in Transferable Securities

of the end of the transition period and reviewing, when appropriate, the delegation of certain operational functions to providers established in the United Kingdom. Following the change of legal status of the UK funds, investors should also check when appropriate the modification of eligibility of their investments.

All relevant stakeholders are therefore strongly encouraged to take advantage of the time until 31 December 2020 to ensure that they have taken all the necessary actions to prepare for the end of the transition period.

Please note: This notice does not address

- EU rules on conflict of laws and jurisdictions (“judicial cooperation in civil and commercial matters”);
- EU company law;
- EU rules on personal data protection.

For these aspects, other notices are in preparation or have been published.⁶

After the end of the transition period, the EU rules in the field of asset management, in particular Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities⁷ (“UCITS Directive”) and Directive 2011/61/EU on Alternative Investment Fund Managers (“AIFM Directive”) no longer apply to the United Kingdom. This has in particular the following consequences:

1. UK ASSET MANAGEMENT ACTIVITY

- Entities authorised by the United Kingdom competent authorities to manage collective investment undertakings (hereafter “UK-authorised entities”) in accordance Directive 2009/65/EC and Directive 2011/61/EU will no longer benefit from this authorisation⁸ across the EU (they will lose the so-called “EU passport”) and will be treated as third-country AIF managers. This means that those UK entities will no longer be able to manage funds and market funds in the EU on the basis of their current authorisations:
 - For UCITS, EuVECA⁹, EuSEF¹⁰ and ELTIF¹¹, both the collective investment funds and their managers must be established and registered or authorised in

⁶ https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/getting-ready-end-transition-period_en.

⁷ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302, 17.11.2009, p. 32.

⁸ Article 6 of Directive 2009/65/EC, Article 6 of Directive 2011/61/EU.

⁹ European Venture Capital Funds.

¹⁰ European Social Entrepreneurship Funds.

¹¹ European Long Term Investment Funds.

- the EU to manage and market funds to retail¹² and professional investors across the Union.
- AIF managers need to be established and authorised in the EU to be allowed to manage and market AIFs to professional investors across the EU.
- As a consequence, all collective investment undertakings registered or authorised in the United Kingdom will become non-EU alternative investment funds (non-EU AIFs). This applies to:
 - Undertakings for Collective Investment in Transferable Securities (UCITS)
 - Alternative investment funds (AIFs)
 - European Venture Capital Funds (EuVECA);¹³
 - European Social Entrepreneurship Funds (EuSEF);¹⁴
 - European Long Term Investment Funds (ELTIF);¹⁵ and
 - Money Market Funds (MMF).¹⁶
 - UCITS management companies', AIFMs and investors' business adaptations and strategies will have to be ready for the situation where UK established entities cannot benefit from the regime laid down in Directive 2011/61/EU. It should be noted that the third country passport regime in Directive 2011/61/EU has never been activated.
 - Member States may allow AIFMs who are not established and authorised in the EU to market AIFs exclusively within their own territory under so-called National Private Placement regimes¹⁷ (hereafter "NPPR"). Directive 2011/61/EU provides Member States with discretion as to whether to activate NPPR and allows for stricter rules in addition to the minimum requirements in the Directive. Some Member States do not have NPPR, while other Member States only allow marketing to professional investors.
 - UCITS management companies or AIF managers authorised by EU competent authorities in accordance with Article 6 of Directive 2009/65/EC or Article 6 of Directive 2011/61/EU which are subsidiaries of entities established in the United Kingdom (legally independent companies established in the EU controlled by or affiliated to entities established in the United Kingdom) are EU companies and can continue to operate on the basis of their authorisation as UCITS management companies or AIFMs in the EU.

¹² EuVECA and EuSEF can only be marketed to retail investors subject to limitations in Article 6 of Regulation (EU) No 345/2013 and Article 6 of Regulation (EU) No 346/2013. ELTIF can only be marketed to retail investors subject to limitations in Article 28 of Regulation (EU) 2015/760.

¹³ Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, OJ L 115, 25.4.2013, p. 1.

¹⁴ Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, OJ L 115, 25.4.2013, p. 18.

¹⁵ Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds, OJ L 123, 19.5.2015, p. 98.

¹⁶ Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds, OJ L 169, 30.6.2017, p. 8.

¹⁷ Under NPPRs, third country entities do not benefit from the EU passports in the single market framework as each NPPR is valid only for the Member State concerned. Directive 2011/61/EU includes a minimum set of conditions under NPPR for (i) third country entities (e.g. non-EU managers should comply with some requirements of Directive 2011/61/EU such as annual report, disclosure to investors and reporting), and (ii) for the third country (e.g. appropriate cooperation agreements must be in place between the EU competent authority and the relevant third country authorities).

- Branches of UK managers (permanent presences which are not legally independent from the AIF manager) in the EU will be treated as branches of a non-EU AIFMs after the end of the transition period. These branches will be subject to the requirements of NPPRs in the Member States concerned, where available.

2. EU ASSET MANAGEMENT ACTIVITY

- After the end of the transition period, UCITS and AIFs authorised or registered in the United Kingdom in accordance with the Directive 2009/65/EC or Directive 2011/61/EU will be non-EU AIFs (see above). Entities authorised by EU competent authorities in accordance with Directive 2009/65/EC (hereafter “EU UCITS management companies”) managing those (former) UCITS authorised in the United Kingdom will need to obtain an authorisation according to Article 6 of Directive 2011/61/EU to manage non-EU AIFs.
- AIFMs established and authorised or registered in the EU managing non-EU AIFs that are not marketed in the EU must comply with Directive 2011/61/EU (except depositary and annual report rules). Cooperation agreements for exchange of information between EU competent authorities and the relevant third country authorities must be in place (Article 34 of Directive 2011/61/EU). Failing such cooperation agreements, AIFMs established and authorised or registered in the EU may not manage and market such non-EU AIFs.
- According to Article 36 of Directive 2011/61/EU, the marketing of non-EU AIFs managed by an AIFM established and authorised or registered in the EU is subject to the relevant NPPR, which is an option for Member States. Member States can impose stricter rules on this category of AIFM in respect of the marketing of such investment funds. They can also choose to not allow any marketing of such non-EU AIFs.
- According to the rules on disclosure to investors in Directive 2009/65/EC and Directive 2011/61/EU, UCITS management companies and AIFMs must take a number of steps to inform investors of the consequences of the withdrawal of the United Kingdom from the EU and the end of the transition period, in particular:
 - AIFMs must disclose to investors any material change to the information that is required to be disclosed in accordance with Article 23 of Directive 2011/61/EU, which includes, but is not limited to, the legal implications of the contractual relationship entered into for the purpose of investment.
 - According to Article 72 and 78 of Directive 2009/65/EC, UCITS management companies must keep up to date the essential elements of prospectus and a key investor information document. This includes information on Member States in which the management company is authorised, where the UCITS is managed or marketed cross-border.

Moreover, UCITS management companies and AIFMs must assess whether the change of the legal status of the investment fund would impact on compliance with the investment strategy of the fund as communicated earlier to investors.

- As regards the assets in which funds regulated by EU law invest, Directive 2009/65/EC and Directive 2011/61/EU do not prohibit investment in eligible assets located outside

the EU. Nevertheless, there are restrictions to fund-of-funds structures; in particular UCITS authorised in the EU must assess the eligibility of (former) UCITS authorised in the United Kingdom.¹⁸

- EU investors should review their investment criteria to assess compliance with respect to the collective investment funds they invested into after the change in the legal status of those funds (e.g. non-EU AIF instead of UCITS).
- The delegation of certain functions to providers established in the United Kingdom may be undertaken provided that the relevant requirements in Directive 2009/65/EC and Directive 2011/61/EU are complied with.¹⁹ In particular, where the delegation concerns portfolio management or risk management (or investment management for UCITS) and is conferred on an undertaking established in a third country, a cooperation agreement between the competent authority of the home Member State of the UCITS management company or the AIFM and the supervisory authority of the undertaking carrying out the delegated function in the third country must be in place. Moreover, the European Securities and Markets Authority (ESMA) has issued an opinion with specific clarifications on these matters, in particular on the risks of letter-box entities, which may arise from the use of outsourcing arrangements or from the use of non-EU branches for the performance of functions/services with respect to EU clients. The use of non-EU branches needs to be based on objective reasons linked to the services provided in the non-EU jurisdiction and may not result in a situation where such non-EU branches perform material functions or provide material services back into the EU.²⁰
- According to Article 21 of Directive 2011/61/EU and Article 23 of Directive 2009/65/EC, the depository of EU AIF and UCITS authorised in the EU must be located in the home Member State of the fund. Article 22a of Directive 2009/65/EC and Article 21(11) of Directive 2011/61/EU lay down requirements for delegation of safekeeping functions to a third party. Where safekeeping functions have been delegated to an entity established in the United Kingdom, UCITS and AIFs depositaries need to demonstrate objective reasons for delegation and to obtain a legal opinion from an independent party as to the adequacy of the insolvency laws of the UK. Depositaries should also ensure that such a third party complies with their national laws securing the benefits of asset segregation and communicates to the depository any changes to the applicable insolvency law and its effective application.

The website of the Commission on investment funds (https://ec.europa.eu/info/business-economy-euro/growth-and-investment/investment-funds_en) provides for general

¹⁸ Assessment of eligibility in accordance with Articles 52 and 55 of Directive 2009/65/EC.

¹⁹ Article 20 of Directive 2011/61/EU specified by Articles 75 to 82 of the Commission Delegated Regulation (EU) No 231/2013 and Article 13 UCITS. As part of the review of the European Supervisory Authorities ("ESAs") adopted on 20 September 2017, the Commission has proposed reinforced coordination by the ESAs in relation to delegation and outsourcing of activities as well as of risk transfers (COM(2017)536 final).

²⁰ ESMA opinion to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union (13 July 2017) (<https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-management-in-context-united>).

information concerning asset management. These pages will be updated with further information, where necessary.

European Commission
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Union