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SPECIAL REPORT

MARKETING INTO EUROPE

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MARKETING INVESTMENT FUNDS IN EUROPE

BRIAN KELLIHER, JOHN KENNEDY AND MICHAEL TANSLEY, OF DILLON EUSTACE, REFLECT ON SOME OF THE PRACTICAL CONSIDERATIONS MANAGERS SHOULD BE AWARE OF WHEN MARKETING INVESTMENT FUNDS IN EUROPE

Brian Kelliher is a partner in the asset management and investment funds unit of Dillon Eustace. He specialises in the establishment and authorisation of Ucits and AIFs under Irish funds legislation, and investment firms under Mifid and other domestic legislation. He advises on all regulatory/compliance aspects applicable to investment funds and investment firms and heads up the dedicated fund registrations unit in Dillon Eustace.

John Kennedy is a solicitor who has been with Dillon Eustace for three years and has during that period spent a considerable amount of time servicing the foreign registration needs of Dillon Eustace's funds clients.

The Ucits product has been hugely successful since its inception in 1985. According to the European Fund and Asset Management Association, as of 31 December 2016 there were 30,674 Ucits funds with €8,658bn in assets and 27,788 non-Ucits European investment funds with €5,483bn in assets. In this regard, Europe is the most popular market for distributing Ucits followed by the Asia Pacific region, the Americas and the Middle East/Africa.

In the global asset management industry, Europe ranks as the second largest market, second to the United States. Europe is therefore a market in which asset managers seek to raise investment.

Ireland continues to be a leading domicile of choice with global asset managers and promoters seeking to access the European market with total assets under management in Irish domiciled investment funds as of 31 January 2017 being €2,097bn.

There are a number of different options available to investment funds seeking to access the European market, from the use of marketing passports to availing of applicable national private placement regimes (NPPRs). The Ucits Directive 2009/65/EC (Ucits directive) provides for the passport to market Ucits to potential investors throughout the European Economic Area (EEA). In the context of non-Ucits, the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD) provides for the passport for Alternative Investment Fund Managers (AIFMs) to market Alternative Investment Funds (AIFs) to professional investors throughout the EEA.

The Ucits and AIFMD regimes both provide a tried and tested framework for marketing across Europe. What follows is a brief overview of some of the more practical considerations.

MARKETING PASSPORTS

Ucits Passport

A key development with the Ucits directive was the introduction of the current regulator to regulator notification procedure for the exercise of the Ucits marketing passport. The Ucits marketing passport is a key aspect of the European Ucits regime and facilitates the cross border marketing of Ucits.

The application for the Ucits marketing passport occurs by way of a notification to the home state regulator of the Ucits, informing them of the intention to market the Ucits in a relevant EEA jurisdiction. Once a complete notification is received, the Ucits home state regulator will then forward this notification to the host state regulator within 10 working days. Pursuant to the Ucits directive, the relevant market can be accessed once the Ucits home state regulator confirms it has transmitted the notification to the host state regulator.

AIFMD Passport

The AIFMD marketing passport allows an EEA AIFM to apply for a passport to market to professional investors within the EEA AIFs which it manages. This marketing passport is currently only available to EEA AIFMs in respect of their EEA AIFs and is not available to either (a) EEA AIFMs in respect of their non-EEA AIFs or (b) non-EEA AIFMs in respect of the AIFs they manage, irrespective of whether they are EEA or non-EEA AIFs.

In order to avail of the marketing passport for an EEA AIF, the EEA AIFM must submit a notification to its home state regulator who will in turn transmit the notification to the relevant host state regulator. The home state regulator has a period of 20 working days to transmit the notification to the relevant host state regulator and marketing may commence once the home state regulator confirms transmission of the notification.

NATIONAL PRIVATE PLACEMENT REGIME

The NPPRs operated within Europe may offer an alternative marketing route to AIFMs who cannot avail of the AIFMD marketing passport.

The AIFMD essentially lays down certain minimum requirements with respect to NPPRs, which must be satisfied in addition to any local obligations imposed by relevant jurisdictions. The NPPRs vary from jurisdiction to jurisdiction in that within certain jurisdictions, a notification is only required to be made to the relevant regulator in order for marketing to commence, whereas other jurisdictions require the submission of an application and prior approval of the host state regulator before marketing may commence. The NPPRs are of particular interest to non-EEA managers managing EEA/non-EEA AIFs who cannot for the foreseeable future avail of a marketing passport – e.g. US managers seeking access to the European market for their US funds. The United Kingdom, Luxembourg, the Netherlands and Ireland are some of the more straightforward jurisdictions to access via their respective NPPRs.

Michael Tansley has recently re-joined Dillon Eustace from Blackrock where he was part of the team that handled Blackrock's international foreign registration work for UK, Irish and Luxembourg funds. Michael previously worked in Dillon Eustace's tax unit.

JURISDICTIONAL REQUIREMENTS

There are a number of distinct and unique requirements in particular jurisdictions across the EEA. For example, in relation to the Ucits regime, a number of jurisdictions, including the United Kingdom, Germany and France require the appointment of a local agent. The role of any local agents required can vary in each jurisdiction, from the provision of fund documentation to the collection and processing of subscription and redemption orders. In some cases, the requirement for and/or the role of a local agent can be determined by reference to the targeted investor base of the fund, whether institutional or retail investors. Similar issues can arise under the AIFMD regime. For example, in the context of a marketing permission for Spain, there is currently a requirement for a local agent to be appointed for the purpose of discharging regulatory fees.

Other considerations include initial registration fees, annual regulatory fees and translation and taxation requirements, which all differ across the EEA.

> "EUROPE IS THE MOST POPULAR MARKET FOR DISTRIBUTING UCITS"

RETAIL VERSUS INSTITUTIONAL INVESTORS

The distinction between retail and institutional investors is particularly relevant under the Ucits regime.

From a European marketing perspective, the target investors can have a significant impact on the specific requirements that may arise in certain jurisdictions. Where there is marketing to retail investors, this can result in additional requirements applying such as the appointment of a local paying agent, additional translations and notifications to host state regulators (these notifications being in addition to the usual notification for a Ucits marketing passport). In particular, France and Italy are two jurisdictions that have additional requirements to be satisfied in the case of marketing to retail investors.

By contrast, the AIFMD marketing passport is specifically limited to marketing to professional investors as defined in the AIFMD. Any marketing outside of the foregoing (marketing to non-professional investors) must be in accordance with applicable national legislation and is not covered by the AIFMD marketing passport.

DISTRIBUTION/MARKETING CONSIDERATIONS

Under the Ucits directive, a Ucits management company is permitted to market the units of any Ucits for which it acts as manager in any relevant EEA jurisdiction, provided that a marketing passport is in place in respect of the Ucits and the marketing is not carried out using a branch in the relevant jurisdiction. From a Ucits perspective, information as to the party responsible for marketing must be included in the initial passport notification and, accordingly, consideration must be afforded this issue from the outset.

Within an AIFMD context, a passport application by an EEA AIFM requires information to be provided as to the arrangements made for the marketing of the relevant EEA AIF including in the case where the EEA AIFM relies upon the activities of independent entities to provide investment services in respect of the EEA AIF in question.

BREXIT CONSIDERATIONS

Following the triggering of Article 50, the formal process of the United Kingdom's exit from the European Union has officially commenced.

In light of the disruption which Brexit has the potential to cause, asset managers and promoters should be considering their current arrangements and developing alternative solutions for the various possible outcomes to the Brexit negotiations, in particular given UK Ucits and UK AIFMs may lose their marketing passporting rights into Europe and similarly non-UK EEA Ucits and non-UK EEA AIFMs may lose their marketing passporting rights into the UK. If UK Ucits are treated as retail AIFs, they could only be marketed in non-UK EEA countries through the respective NPPRs of those countries. Similarly, UK AIFMs managing EEA or non-EEA AIFs could only market those AIFs in non-UK EEA countries through the respective NPPRs of those countries

CONCLUSION

There are a wide range of options available for those asset managers and promoters wishing to access the European market.

Irrespective of the options utilised, there are a number of practical considerations to be taken into account. These practical considerations range from selection of the appropriate regime to a consideration of the targeted investors and require careful consideration both in advance and on an ongoing basis so as to ensure that all regulatory and tax requirements are satisfied. ■