

EU free movement not required for funds marketing

Partner in global law firm Morgan Lewis **Simon Currie** argues that it should be technically straightforward for UK fund managers and investment firms to take advantage of 'third country' rights following Brexit

Much attention has focused on access to the EU single market requiring acceptance of free movement of people but, in two important areas of the financial services sector, this is not the case.

The Alternative Investment Fund Managers Directive permits fund managers from outside the EU to opt-in to the regulatory regime under the Directive in order to market their funds to EU investors and to manage EU funds, either on a cross-border basis or via the establishment of branches in the EU. '

Third country' fund managers thus benefit from passporting rights and do not need to establish a presence in the EU in order to do so.

ESMA

This extension of the Directive to fund managers in any particular country is dependent upon the European Securities and Markets Authority (ESMA) advising the EU Commission that there are no significant obstacles to doing so in terms of investor protection, market disruption, competition and the monitoring of systemic risk.

No acceptance by the country in question of free movement of people is required. ESMA has already advised the Commission that the AIFMD passport can be extended to fund managers in Guernsey, Jersey and Switzerland (although the Commission has not yet acted upon this advice).



Similarly, the Markets in Financial Instruments Regulation, due to come into effect in January 2018, entitles 'third country' investment firms to provide investment services to professional clients across the EU upon registration with ESMA.

Registration requires the Commission first to have determined that the legal and supervisory regime in the country in question is equivalent to that under applicable European standards but does not impose any acceptance of free movement principles.

STRAIGHTFORWARD

Since the UK has implemented the AIFMD and will have implemented the recast Markets in Financial Instruments regime prior to any Brexit taking effect, it should be

technically straightforward for the Commission to permit UK fund managers and investment firms to take advantage of these 'third country' rights following a Brexit.

Ensuring that UK firms are able to do so ought to be an important component of any exit negotiations. ■

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