

Marketing non-listed real estate funds post-Brexit

On 31 December 2020 the UK will leave the EU. This snapshot analyses Brexit's potential impact on UK and on EU and other EEA managers wanting to market non-listed real estate funds after Brexit.

EU and other EEA managers wishing to market into the UK

EU and other EEA managers will no longer be able to manage and market their funds in the UK under their AIFMD passport after 31 December 2020. However, there are two options that enable them to continue to market their funds in the UK post-Brexit.

Temporary permissions regime:

In July 2018, HM Treasury published a draft of the EEA Passport Rights Regulations. It provided for a temporary permissions regime (TPR) enabling EEA firms and funds to continue operating in the UK for a limited period of time after Brexit (maximum of three years, so now until the end of 2023, although this period is subject to possible extension) while they seek to be authorised in the UK.

To be eligible to operate under the TPR, EU and other EEA managers must be authorised to carry on regulated activities in the UK under the EU passporting regime. This is not an automatic process; therefore, fund managers are obliged to make the relevant notification/application to the FCA. Once in the temporary

permissions regime, the EEA managers would be subject to the same obligations and duties as if they were an authorised manager.

Managers needed to apply either by notifying the FCA of their intention to enter the regime before 29 March 2019 (the original exit day), or by applying for authorisation before the exit day.

The ability of EU and other EEA fund managers to notify the FCA of their intention to use TPR reopened on 30 September 2020, and will likely close before 31 December 2020. The new TPR notification period allows EEA fund managers that did not submit a notification in the previous term to notify the relevant UK regulators of their intention to continue carrying out marketing activities in the UK after Brexit occurs on 31 December

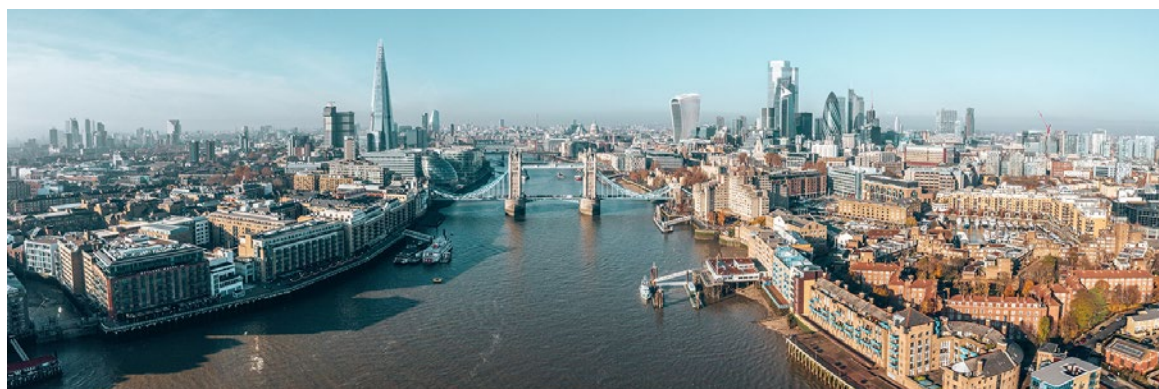
2020. EEA fund managers that previously submitted a TPR notification now have an opportunity to re-consider and update their submissions.

UK Private Placement Regime:

EU and other EEA managers that do not qualify for the TPR or decide not to use it can apply for permission from the FCA to market their funds in the UK via the relatively straightforward UK private placement regime.

UK managers wishing to market into the EU and other EEA countries

UK AIFs and UK AIFMs will be reclassified as third country AIFs and AIFMs after Brexit and can no longer rely on AIFMD passport authority to market their funds in the EU and other EEA countries. UK managers that have decided not to establish an office in an EU



or other EEA country and apply for AIFMD authorisation there have two other options to be able to market their funds and access European investors after 31 December 2020: National Private Placement Regimes and Host AIFMs.

National Private Placement Regimes (NPPRs):

There is no EU scheme similar to the UK’s Temporary Permissions Regime. UK AIFMs will only be able to directly market their funds to EU investors under the national private placement regimes of individual EU and other

EEA member states. Marketing permission is granted by the financial regulators of each country pursuant to national rules which vary from country to country.

Host AIFMs:

If a UK AIFM wishes to access the EU/EEA market, it can also do so by using a third party or “Host” AIFMD solution.

The Host AIFM essentially acts as a service provider, which either retains risk management and delegates portfolio management back to the UK manager or,

alternately, retains portfolio management and delegates risk management back to the UK manager. Importantly, the authorised Host AIFM is legally responsible for supervision of all delegated functions and must ultimately be in control of all risk and portfolio management and other important decisions of the fund.

There are aspects of this approach that must be considered. On one hand, the Host AIFM allows the rapid launch of a fund without building a platform with additional HR, capital and operational requirements. The Host AIFM provides IT infrastructure and assumes regulatory and compliance burdens. This approach may also be cheaper for the investment manager than setting up its own structure.

On the other hand, the appointment of a Host AIFM entails loss of direct control and final decision-making authority.

In both the NPPR and the Host AIFM approach there is regulatory risk. Changes can always be made by the national regulators to PPRs and by the EU to rules involving Host AIFM and AIFMD delegation requirements.

Conclusion

Real estate fund managers need to understand Brexit’s potential impact on their ability to market funds across the Brexit divide. INREV will continue to closely monitor Brexit developments and the impact on the real estate fund management industry as they evolve.

