

## **Marketing of investment in the Czech Republic in EU alternative investment funds**

- Regulations
- Act No. 240/2013 Coll., on Management Companies and Investment Funds, as amended (“**AMCIF**”)
  - Act No. 256/2004 Coll., on capital market undertakings, as amended (“**AoCMU**”)
  - Directive of the European Parliament and the Council 2011/61/EU on alternative investment fund managers (“**AIFMD**”)
  - Decree No. 247/2013 Coll., on applications according to the Act on Management Companies and Investment Funds, as amended (“**Decree**”)

Provisions

Articles 15, 16, 69, 272, 295a, 296, 297, 306, 310, 312, 315, 504, 532, 597, 623 and 626 of the AMCIF  
 Articles 2, 24 and 28 of the AoCMU  
 Articles 3, 4, 6–8 and 32 of the AIFMD  
 Articles 28, 34 and 50 of the Decree

Question

**What is the procedure for marketing of investment in the Czech Republic in an alternative investment fund from another Member State of the European Union (EU) managed by an entity having its registered office in another EU Member State?**

### **I. Introduction**

In this Opinion, the Czech National Bank (CNB) summarises the conditions for the marketing of investment in the Czech Republic in an alternative investment fund established in another EU Member State managed by a manager having its registered office in another EU Member State, and specifies key technical aspects thereof. The Opinion describes the framework for managers authorised under the AIFMD<sup>1</sup> and for the so-called “sub-threshold managers” (i.e. managers not authorised under the AIFMD which are subject to the law of the state of their registered office).

The Opinion does not address the marketing of specific alternative funds regulated by directly applicable EU regulations, specifically the European venture capital funds (EuVECA), the European social entrepreneurship funds (EuSEF) and the European long-term investment funds (ELTIF).

#### *Definitions of some terms*

For the purposes of this Opinion:

1. “*EU Member State*” means EU Member States and other states constituting the European Economic Area (Norway, Lichtenstein and Iceland) [in accordance with Article 623(a) of the AMCIF],
2. “*foreign alternative fund*” means an alternative investment fund pursuant to Article 4(1)(a) of the AIFMD whose home state is another EU Member State,
3. “*foreign managers authorised pursuant to the AIFMD*” means an entity having its registered office in another EU Member State which is authorised by its home supervisory authority in accordance with Articles 6–8 of the AIFMD,
4. “*exceeding the designated threshold*” means a situation where the value of the assets of all investment funds and foreign investment funds and

<sup>1</sup> In the Czech Republic, the equivalent of authorisation under the AIFMD is the authorisation to exceed the designated threshold pursuant to Article 16 of the AMCIF.

- of the assets pursuant to Article 15(1) of the AMCIF managed or administered, *de jure* or *de facto*, by a single person exceeds EUR 100 million, or EUR 500 million if no part of those assets has been acquired through use of leverage<sup>2</sup> and those assets may not be paid out or divided earlier than 5 years from the date on which they were collected (Article 16(1) of the AMCIF in accordance with Article 3 of the AIFMD),
5. “*UCITS*” means an investment fund compliant with the requirements of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (“*UCITS*”),
  6. “*professional client*” means a person referred to in Articles 2a(1) or (2) and 2b of the AoCMU,
  7. “*qualified investor*” means a person compliant with the conditions set forth in Article 272(1) of the AMCIF,
  8. “*unqualified investor*” means a person other than a qualified investor,
  9. “*marketing to the public*” means the distribution of investment to more than 20 unqualified investors (see Article 295a of the AMCIF); marketing to the public must be distinguished from “public offer”, i.e. the public availability of an offer,<sup>3</sup>
  10. “*notification*” means notification and the process of notification of the intention of a manager authorised pursuant to the AIFMD to market investment in an alternative investment fund managed by the manager in a Member State other than the manager’s home state,
  11. “*contact point*” means a bank, an investment firm, a branch of a foreign bank or a foreign investment firm<sup>4</sup> providing activities referred to in Article 306(1)(a)–(d) of the AMCIF.

## **II. Foreign alternative funds managed by a foreign manager authorised pursuant to the AIFMD**

### **A. Ways of marketing investment in foreign alternative funds managed by a foreign manager authorised pursuant to the AIFMD**

#### **1. Non-public marketing of investment**

Non-public marketing of investment in foreign alternative funds managed by a foreign manager authorised pursuant to the AIFMD to professional clients<sup>5</sup> is subject only to a notification of the intention to market investment in the Czech Republic pursuant to Article 315 of the AMCIF. In accordance with Article 315 of the AMCIF (and Article 32(2) of the AIFMD), the notification is submitted to the supervisory authority of the manager’s home state, and that authority subsequently informs the CNB (for more details on the notification process, see section B below). Investment may be marketed non-publicly already from the moment the competent foreign supervisory authority informs the manager that

<sup>2</sup> For the purposes of the AMCIF, “use of leverage” means any use of procedures that lead to an increase in exposure, such as borrowing cash or investment instruments or investing in investment securities or money market instruments containing derivatives (Article 16(4) of the AMCIF).

<sup>3</sup> More detailed information is available in Czech in the CNB’s FAQs on the definition of “public offer” ([https://www.cnb.cz/miranda2/export/sites/www.cnb.cz/cs/faq/definice\\_verejne\\_nabidky\\_cennych\\_papiru.pdf](https://www.cnb.cz/miranda2/export/sites/www.cnb.cz/cs/faq/definice_verejne_nabidky_cennych_papiru.pdf)).

<sup>4</sup> i.e. a person referred to in Article 24(5) of Article 28(6) of the AoCMU.

<sup>5</sup> In accordance with the AIFMD, Article 315 of the AMCIF allows investment in alternative funds in the form of “private placement” to be marketed only to professional clients (i.e. a narrower category than qualified investors).

it has submitted the notification to the CNB.

Investors other than professional clients can be addressed outside a publicly available offer on the basis of Article 295b of the AMCIF in conjunction with Article 315 of the AMCIF provided that:

- such investment can be marketed publicly (i.e. it is compliant with the conditions set out in item 3 below), or
- notification of the marketing of investment is submitted and the number of addressees other than professional clients does not exceed 20.

## 2. Public marketing of investment to qualified investors

The AMCIF allows the publication of an offer of investment in alternative investment funds managed by a foreign manager authorised pursuant to the AIFMD targeted at qualified investors provided that the following conditions are met:

- the fund manager is authorised pursuant to the AIFMD (to facilitate the administrative proceedings, the CNB ascertains the existence of such authorisation from the documentation sent by the manager's home supervisory authority under the notification framework),
- notification of the intention to market investment in the foreign investment fund in the Czech Republic is submitted pursuant to Article 315,
- the fund has been registered in the relevant list maintained by the CNB pursuant to Article 597(d) of the AMCIF (in accordance with Articles 295a(1) and 315(2) of the AMCIF),
- the set of unit holders, beneficiaries, founders, members or dormant partners, and for a trust fund also persons who increase the fund's assets under contract, is limited to qualified investors; this fact must be explicitly stressed in the public marketing (Article 296 of the AMCIF).

## 3. Public marketing of investment to unqualified investors

Pursuant to Article 297(1), the AMCIF allows public marketing of investment in foreign alternative funds in the Czech Republic to unqualified investors only in the case of foreign investment funds comparable to the so-called "special funds", i.e. Czech investment funds intended for the public other than UCITS (for further details on special funds please refer to Section B below). This marketing is subject to the following conditions:

- a) the fund's manager is authorised pursuant to the AIFMD (the CNB generally ascertains the existence of such authorisation from the documentation sent by the manager's home supervisory authority within the notification procedure),
- b) the CNB has been notified of the intent to market investment in a foreign investment fund in the Czech Republic pursuant to Article 315 of the AMCIF,
- c) the fund is registered in the relevant list maintained by the CNB pursuant to Article 597(d) of the AMCIF (in accordance with Articles 295a(1) and 315(2) of the AMCIF),
- d) pursuant to Article 297(3) of the AMCIF, the CNB has decided at the manager's request that the foreign investment fund is comparable to a "special fund", and
- e) a contact point has been established in the Czech Republic meeting the conditions of Article 306 of the AMCIF (in conjunction with the requirement of Article 297(1) of the AMCIF).

Detailed information about each of the conditions is given in section B below.

***B. Detailed information on the conditions for marketing investment in foreign alternative funds managed by a foreign manager authorised pursuant to the AIFMD***

***Registration in the CNB's list***

Public marketing of investment in any foreign alternative fund in the Czech Republic is subject to registration of the fund in the relevant list maintained by the CNB.

Pursuant to Article 295a(1) and 315(2) of the AMCIF, investment in a foreign alternative fund managed by a foreign manager authorised pursuant to the AIFMD can only be marketed publicly if the fund is registered in the relevant list maintained by the CNB pursuant to Article 597(d) of the AMCIF, i.e. the marketing may be published at the earliest when the fund is registered in the list. This condition applies to the marketing of investment both to the public and to qualified investors. In the case of foreign alternative funds managed by a foreign manager authorised pursuant to the AIFMD which is interested only in non-public marketing of investment, the CNB can register the fund in the list maintained by the CNB pursuant to Article 597(e) of the AMCIF. If the conditions set out by law are met, the CNB will automatically register the fund in the relevant list on the basis of a received notification, so the manager need not apply separately to the CNB for registration in the list (for more details about notification, see below).

In light of all this, we would like to emphasise that the CNB maintains two lists of foreign investment funds based on Article 597 of the AMCIF:

- a list pursuant to letter (d) in which an investment fund must be registered if it is interested in marketing investment in the Czech Republic publicly;
- a list pursuant to letter (e) for investment funds managed by a manager authorised pursuant to the AIFMD, investment in which is to be marketed only non-publicly.

A manager of a foreign alternative fund managed by a manager authorised pursuant to the AIFMD may thus choose the list in which the CNB is to register the fund (taking into account whether the investment is to be marketed publicly or non-publicly). If the manager does not expressly specify his choice in the notification documentation which the CNB receives from the manager's home supervisory authority, the CNB will register the foreign alternative fund in the list pursuant to Article 597(d) of the AMCIF, since registration in this list enables investment in a foreign alternative fund to be marketed both publicly and non-publicly and is hence more favourable. If a manager requires registration of the foreign alternative fund in the list pursuant to Article 597(e) of the AMCIF (and hence intends to market investment only non-publicly), he must expressly inform the CNB of this fact. The manager may do so for instance in a cover letter within the notification procedure.

***Notification of the intention to market investment in an alternative fund (notification)***

A basic condition which a foreign manager authorised pursuant to the AIFMD must comply with in connection with the marketing of investment in an alternative investment fund in the Czech Republic is that it must notify the competent supervisory authority of the member state in which the manager has its registered office of this intention. The essential elements of the notification are laid down in the law of the manager's home state which transposes the requirements of Article 32 of the AIFMD. In practice, these requirements will be similar to those set out in Article 312(2) of the AMCIF for investment funds established under Czech law which are to be marketed in another Member State. The manager's competent home supervisory authority will pass on to the CNB the received notification, together with a confirmation that the manager of the fund is

authorised pursuant to the AIFMD. It will also inform the manager that the documentation has been forwarded.

Notification pursuant to Article 32 of the AIFMD of the intention to market investment in a foreign alternative fund in the Czech Republic is made exclusively through the home supervisory authority of the foreign manager authorised pursuant to AIFMD which manages the given fund. Notification made by the fund's manager directly to the CNB is not effective.

As regards the notification procedures laid down in the AIFMD, the CNB receives documents transmitted by the supervisory authority of the EU Member State via an e-mail address that it shares with the other supervisory authorities through the European Securities and Markets Authority (ESMA). Notification is defined in Article 315 of the AMCIF. The notifying party does not participate in this exchange of information between the supervisory authorities.

No fee is charged for the notification procedure under Article 315 of the AMCIF.

#### Comparability of a foreign alternative fund with a special fund

Pursuant to Article 297(1) of the AMCIF, one of the conditions for public marketing of investment in foreign alternative funds to unqualified investors is a decision of the CNB that the foreign alternative fund is comparable to a "special fund", i.e. a Czech investment fund intended for the public other than a UCITS (for details on comparability with the law of another state, see Article 626 of the AMCIF). The CNB will decide on comparability on the basis of an application filed by the manager pursuant to Article 297(3) of the AMCIF. The application must be filed electronically and must contain the following essential elements specified in Article 34 of the Decree<sup>6</sup>:

- the identification data of the manager and the foreign alternative fund;
- the statute/prospectus and memorandum of association of the foreign alternative fund or comparable documents;
- the annual report of the foreign alternative fund for the previous year;
- the contract between the foreign manager authorised pursuant to the AIFMD and the so-called contact point, or a draft thereof (under Article 306(1) of the AMCIF);
- texts of the legal regulations governing the foreign alternative fund and its manager, administrator and depositary;
- an analysis of comparability of the rules for marketing, management, administration, investing and protection of the assets of a foreign alternative fund with the rules applicable to a special fund.

The basis for the decision that a foreign fund is comparable to a special fund is the comparability of the framework applicable to the foreign alternative fund and its manager, administrator and depositary. The CNB will conduct the comparability assessment mainly on the basis of the analysis of comparability of the rules submitted by the manager as part of the application. The analysis of comparability must contain a conclusion of comparability pursuant to Article 626(1) of the AMCIF, which must contain the reasons why the applicant believes that the rules/criteria are comparable.

If the comparability condition is met, the CNB will approve the application for determination of comparability of a foreign alternative fund to a special fund and will automatically register this fund in the list pursuant to Article 504 of the AMCIF

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<sup>6</sup> If the submission of an annex to the application as required by the Decree is ruled out by the nature of the matter, Article 51(1) of the Decree must be applied and the applicant shall thus "state this fact in a separate annex to the application along with the reasons why such an annex cannot be submitted or why such information cannot be stated; these reasons shall be appropriately substantiated by the applicant".

as of the date of effect of the decision.<sup>7</sup> An application for registration in the list is thus not required in this case.

Conditions of comparability of a foreign alternative fund and rules for the management thereof:

Manager: The starting point for determining comparability in the area of management of the fund is the authorisation of the manager pursuant to the AIFMD. In practice, the CNB determines compliance with this condition on the basis of the notification documentation of the home supervisory authority. This fact can also be proven in a different manner, but further evidence would be necessary. This would lead to uneconomical prolongation of the proceedings and cause the applicant to incur unnecessary administrative costs (notification is in any case necessary for the authorisation to publicly market investment in a foreign alternative fund). There is hence a recommended sequence of actions where notification is made first. This approach is also more cost-effective for the applicant.

For the purposes of determining comparability, the manager must also prove that he is subject to supervision of comparable scope to the supervision of managers of “special funds” as performed by the CNB. The competent supervisory authority must also have appropriate supervisory powers, i.e. powers to conduct inspections, request information and, if shortcomings are identified, impose remedial measures or sanctions.

Depositary: The foreign fund must have a depositary complying with the conditions as set out in the AMCIF. In particular, pursuant to Article 69 of the AMCIF, the depositary must be an entity comparable to a bank or investment firm which satisfies prudential requirements and which is subject to supervision when undertaking this activity. Requirements for the management of conflicts of interest between the depositary and the manager must also be complied with. The role performed by the depositary with regard to the fund, i.e. especially its inspection duties vis-à-vis the manager, must also be comparable.

Comparability of the fund: The requirements regulating the fund itself must also be comparable with the requirements set forth in Czech law for “special funds”, including, for example, the minimum amount of fund capital.<sup>8</sup>

As for the rules governing the marketing of investment, investor protection and management, administration and investment of the investment fund’s assets, the manager must prove comparability of the management transparency requirements, such as the duty to have the financial statements audited by an independent auditor, to disclose certain information (the statute/prospectus, the annual report) or to provide the investor with information on request. Another criterion is comparability of the statutory restrictions regarding the fund’s asset structure, investment limits, lending and borrowing conditions, conditions for use of leverage and management techniques.

The criteria which the foreign alternative fund is subject to in this regard must be comparable to the requirements of the AMCIF and Government Decree No. 243/2013 Coll., on investment fund investments and techniques and

<sup>7</sup> In accordance with Article 76 of the Administrative Procedure Code, the CNB’s decision comes to effect if no appeal (or no administrative appeal in the case of the CNB) can be filed against it. It thus becomes effective upon the lapse of a delay of 15 days for filing an appeal or when all parties to the proceedings waive their right to file an appeal (for example, in order to expedite the proceedings). The administrative appeal is governed by Article 152 of the Administrative Procedure Code, mainly with reference to the rules for general appeal procedure pursuant to Articles 81–93 of the Administrative Procedure Code.

<sup>8</sup> Pursuant to Article 208(1) of the AMCIF, the minimum amount of fund capital of an investment fund intended for the public (a “special fund” or a UCITS) is EUR 1,250,000.



instruments used for the purpose of portfolio management. The rules laid down for the valuation of the fund's assets and debt (among other things, frequency and manner) and the issuance and purchase of holdings in the fund must provide protection comparable to that introduced by the AMCIF. In addition to the legal framework, the CNB assesses internal regulations of the fund in question, in particular its investment strategy (fund rules) and other conditions observed by the fund on the basis of its internal documents.

**III. Foreign alternative funds managed by a manager with a registered office in another EU Member State not authorised pursuant to the AIFMD (so-called sub-threshold managers)**

***A. Ways of marketing investment in foreign alternative funds managed by a manager not authorised pursuant to the AIFMD***

Non-public marketing of investment in foreign alternative funds managed by a manager not authorised pursuant to the AIFMD is not limited in the case of qualified investors. Investment may also be marketed publicly to qualified investors provided that:

- the fund has been registered, on the basis of an application of the manager, in the relevant list maintained by the CNB pursuant to Article 597(d) of the AMCIF (in accordance with Articles 295a(1) and 310(2) of the AMCIF),
- the set of unit holders, beneficiaries, founders, members or dormant partners, and for a trust fund also persons who increase the fund's assets under contract, is limited to qualified investors; this fact must be explicitly stressed in the public offer (Article 296 of the AMCIF).

Pursuant to Article 297(2) of the AMCIF, comparability of these funds with a special fund cannot be requested. Article 626(3) of the AMCIF thus applies which, in conjunction with Article 296 of the AMCIF, prohibits public marketing of investment in such funds to unqualified investors.<sup>9</sup> Investment in the fund may be marketed privately (in the form of private placement) to unqualified investors only if the number of unqualified investors (addressees of the offer) does not exceed 20 (in accordance with Article 295a(2) of the AMCIF).

***B. Detailed information on the conditions for marketing investment in alternative funds managed by a manager not authorised pursuant to the AIFMD***

**Registration in the CNB's list**

Public marketing of investment in any foreign alternative fund in the Czech Republic is subject to a registration of the fund in the relevant list maintained by the CNB.

As regards public marketing of investment in a foreign alternative fund managed by a foreign manager not authorised pursuant to the AIFMD, the fund must be registered, pursuant to Articles 295a(1) and 310(2) of the AMCIF, in the list pursuant to Article 597(d) of the AMCIF. Since no notification procedure based on Article 32 of the AIFMD takes place in respect of these foreign investment funds, registration in the list is made by the CNB on the basis of an application submitted by the manager pursuant to Article 503 of the AMCIF. The application for registration in the list must contain the essential elements specified in Article 28 of the Decree.

<sup>9</sup> A foreign investment fund, which is not comparable to a UCITS and in respect of which the CNB has not decided that it is comparable to a special fund, shall be deemed comparable to a fund for qualified investors.

#### **IV. Administrative proceedings with the CNB**

##### **Filing an application**

Pursuant to Article 50 of the Decree and Article 532 of the AMCIF, an application for a comparability assessment or an application for registration in the list can only be filed electronically with the CNB

- a) to the CNB's e-mail address (**podatelna@cnb.cz**) or
- b) to the CNB's data box (**8tgaiej**)

Both pieces of information are available on the CNB website (<https://www.cnb.cz/en/public/contacts.html>).

Each application must comply with the requirements laid down in the Decree. The application may be filed using the electronic forms available on the CNB website<sup>10</sup> which contain the prescribed essential elements.

Upon receipt of the application for a comparability assessment, the CNB will initiate administrative proceedings under Czech law. The general legal norm is the Administrative Procedure Code (Act No. 500/20014 Coll.). Special requirements are laid down mainly in the AMCIF and the Decree.

##### **Language of the submission and the proceedings before the Czech National Bank**

Pursuant to Article 16 of the Administrative Procedure Code, the language of the submission and the proceedings is Czech. The Administrative Procedure Code also allows parties to the proceedings to use Slovak as the language of the proceedings and for submitting documents. The language requirement applies to the submission itself and to the annexes thereto.

Pursuant to Article 16(2) of the Administrative Procedure Code, documents in a foreign language, except Slovak, must be submitted in the original language, accompanied by an authenticated translation into Czech unless the CNB informs the party to the proceeding that such a translation is not required.

In the case of financial statements and annual reports, including consolidated ones, the CNB also accepts their submission in English. Other documents in English must be submitted with a translation, but no authenticated translation is required.

Article 16(2) of the Administrative Procedure Code applies in full to documents in languages other than English.

##### **Administrative fees**

Registration in the lists of foreign investment funds<sup>11</sup> maintained by the CNB pursuant to Article 597(d) and (e) of the AMCIF is not subject to a fee. The notification procedure pursuant to Article 315 of the AMCIF is not subject to a fee either.

An application for an assessment of comparability of a foreign investment fund with a special fund is subject to an administrative fee of CZK 5,000 in respect of each foreign investment fund (item 66(9)(q) of the tariff annexed to the Act on Administrative Fees [No. 634/2004 Coll.]).

There are no fees associated with remaining on the list maintained by the CNB and with marketing investment in foreign alternative funds in the Czech Republic. Pursuant to Article 5 of the Act on Administrative Fees, the fees under this Act are

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[http://www.cnb.cz/en/supervision\\_financial\\_market/conduct\\_of\\_supervision/licensing\\_approval\\_proceedings/management\\_companies\\_and\\_investment\\_funds/index.html](http://www.cnb.cz/en/supervision_financial_market/conduct_of_supervision/licensing_approval_proceedings/management_companies_and_investment_funds/index.html)

<sup>11</sup> In the case of a foreign investment fund which creates sub-funds, "foreign investment fund" means each individual sub-fund.



payable upon receipt of the submission by the public administration body or before the act is carried out at the latest. If the fee is not paid when the application is filed, the CNB will call upon the applicant to do so within 15 days following the serving of the call. If the applicant fails to pay the fee within this time limit, the CNB will discontinue the proceedings on the application or will not carry out the action.

Administrative fees relating to the CNB's administrative proceedings can be paid by non-cash transfer to account number 78-69193891/0710 or in cash at CNB branches. Information about the CNB's branches, including office hours, is available on the CNB website [https://www.cnb.cz/en/about\\_cnb/org\\_structure/branches/index.html](https://www.cnb.cz/en/about_cnb/org_structure/branches/index.html).

The CNB recommends paying the administrative fee only on the basis of the call for payment by the CNB, in which the CNB will inform the applicant of the account number and the relevant variable code ("variabilní symbol", i.e. an individual identifier), which the CNB derives from the number of the administrative file (file reference).

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 Date: 13 March 2017

Importance of the answer for those to whom it is addressed

This answer expresses the opinion of Czech National Bank staff members. The courts and the Bank Board of the Czech National Bank may be of a different opinion. When performing financial market supervision, however, the CNB will consider action that is in accordance with the answer – within the bounds of the answer and its assumptions – to be action that is in accordance with the law, unless it is apparent from the circumstances that the answer is not applicable to the case in question.