

Transposition de la directive AIFM dans les grandes juridictions européennes de fonds : où en est-on ?

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Quels pays allons nous couvrir aujourd'hui?

- France;
- Allemagne;
- Irlande;
- Luxembourg;
- Pays-Bas; et
- Royaume-Uni.

Quels thèmes allons nous aborder aujourd'hui?

- Propos introductifs;
- Remarques générales sur la transposition d'AIFM;
- Changement affectant la structure des fonds;
- Règles spécifiques s'agissant de l'enregistrement des GFIA;
- Obligation d'information découlant de la directive AIFM;
- Exercice du passeport AIFM;
- La délégation et son contrôle; et
- Commercialisation.

Remarques générales sur la transposition d'AIFM

Remarques générales France

– **Etat de la transposition:**

- Ordonnance n°2013-676 du 25 juillet 2013 transposant l'AIFM dans le code monétaire et financier (**CMF**);
- Arrêté du 8 août 2013 modifiant le Livre III du Règlement général de l'AMF (**RGAMF**) relatif aux prestataires de services; et
- Position n° 2013-11 de l'Autorité des marchés financiers (**AMF**) sur les politiques de rémunération applicables aux gestionnaires de FIA.

– **Principaux impacts:**

- Nouveau cadre des véhicules de gestion collectifs ;
- Obligation pour les sociétés de gestion de prendre position d'ici au 22 juillet 2014;
 - **ATTENTION:** obligation de respecter « l'ensemble du dispositif » dès l'option.
- Extension du champs des véhicules: et
- Extension du champs des gestionnaires.

Remarques générales Allemagne (1/3)

- The German Implementing Act entered into force on 22nd July 2013;
- Main issues (German 1st-level):
 - the existing German Investment Act regulating UCITS, open-ended mutual real estate funds, fund-of-hedge-funds and special investment funds for institutional investors (no closed-end funds) was replaced in its entirety by:
 - new German "Kapitalanlagegesetzbuch" (KAGB) regulating both UCITS and AIFs (including AIFMs) as one rulebook for all types of funds; and
 - Amendments inter alia to German Credit Act (KWG), Securities Trading Act (WpHG) and German Financial Asset Act (VermögensanlagenG) regulation German closed-end funds.

Remarques générales Allemagne (2/3)

- Main issues (German 2nd -level):
 - 6 new ordinances including inter alia:
 - Ordinance for the use of derivatives (DerivateVO);
 - Ordinance regarding organisational requirements and rules of conduct (Kapitalanlage Verhaltens und OrganisationsVO, KAVerOV); and
 - Ordinance regarding valuation and reporting (Rechnungslegungs- und BewertungsVO),
 - Ordinances are not applicable to all types funds e.g. DerivateVO is not applicable to closed-end AIFs as these may use derivatives only for hedging purposes

Remarques générales Allemagne (3/3)

- Main issues (German 3rd -level):
 - 8 new explanatory notes (Merkblätter) including inter alia:
 - License-procedure including relevant documents to be provided; and
 - Marketing of EC-AIFs in Germany to semi-professional and professional clients,
 - 5 new FAQs and statements regarding the BaFin's view on certain aspects:
 - concretising Transitional provisions
- Implementation of AIFMD and supervisory view on many aspects still in progress; and
- Still missing: taxation provisions.

Remarques générales Irlande (1/2)

– **Implementation of AIFMD in Ireland**

- Transposing Irish Regulations – enacted on 19 July 2013;
- AIF Rulebook (replaces entire non-UCITS regime and non-UCITS notices); and
- Applications for authorisation are currently accepted and the first authorisations have now been processed.

– **Transitional arrangements:**

- Existing Irish AIFMs – must comply with AIFMD on a “best efforts” basis from 22 July 2013 with AIFMD being legally binding from 22 July 2014;
- What does “best efforts” mean?
- Transitional period permits new AIFs and new sub-funds of existing AIFs to be launched between 22 July 2013 and 21 July 2014 without triggering AIFMD compliance automatically provided an existing AIFM has been identified which is complying with AIFMD on a best efforts basis; and
- Impact on self-managed AIFs (existing AIFs, new sub-funds of existing AIFs and new umbrella self-managed AIFs).

Remarques générales Irlande (2/2)

– **Domestic Issues:**

1. Depositary liability under AIFMD – AIFs managed by EU AIFMs and non-EU AIFMs;
2. Restructuring of depositary/prime broker relationships - a number of different models currently being discussed;
3. Funds that remain below the threshold after 2 years; and
4. Delegation.

Remarques générales Luxembourg (1/3)

- **AIFMD**: implementation in the Luxembourg legislation by the Law of 12 July 2013 on alternative investment fund managers (the « **AIFM Law** »);
- Entry into force of the AIFM Law: 15 July 2013;
- The AIFM Law undertakes a very close transposition of the AIFMD;
- The AIFM Law does not repeal existing legislation applicable to Part II funds, SIF and SICAR;
- AIFM Law has amended the Luxembourg Company Law by introducing a Luxembourg limited partnership regime: *Société en commandite simple spéciale*;
- Applicable to SIF Part I and Part II, SICAR Part I and Part II (regulated entities);
- Applicable to holding entities (out of scope of the AIFM Law); and
- Inspired from successful Anglo-Saxon L.P. Regime.

Remarques générales Luxembourg (2/3)

- Salient legal features of the LP regime:
 - i. Absence of legal personality but domiciliation at the place of its central administration (the LP is a Luxembourg-based entity)
 - ii. Formed by a Limited Partnership Agreement (LPA) – no notary deed (no notary costs)
 - iii. No registration required of the LPA for the formation of the LP (unless when CSSF prior approval is required)
 - iv. 1 GP and 1 LP at least but no publication of the names and the respective contributions of the LP(s)

Remarques générales Luxembourg (3/3)

v. Drafting of LPA could rely on a large contractual freedom:

- Exclusion of partners and admission of new partners
- Issuance & transfer of partnership interests
- Form of contributions
- Allocation of profits and losses
- Voting rights, quorum and majority
- Conditions of dissolution
- Shares & Bonds can be issued
- Variable capital is possible
- Return of capital is possible
- Adjustment of the equity / debt ratio is also possible

vi. The LPs may not conduct the management of the Partnership however some actions are permitted (loans, collateral, advices)

vii. Tax transparency of the Lux LP and attractive tax regime for carried interests

viii. Possible specific features of the Partnership:

- Ring-fencing principle may be applicable (creditors of the Partners have no right against the assets of the LP)

Remarques générales Pays-Bas

- The Netherlands met the deadline;
- Dutch regulators provided guidance by FAQ's and resolutions;
- Significant impact; and
- Existing AIFMs must comply with AIFMD on a “best efforts” basis from 22 July 2013.

Remarques générales

Royaume-Uni

- **Change of UK regulatory regime:**
 - Financial Services Authority (**FSA**) split to Financial Conduct Authority and the Prudential Regulatory Authority (**PRA**); and
 - AIFMs will be FCA regulated with some large depositaries PRA.
- **HM Treasury and FSA/FCA consultations** held over past 12 months, but maximum harmonisation so little scope for discretion by UK:
 - implementation by way of the AIFM Regulations; and
 - a few UK derogations such as allowing some retail marketing and implementation of a “lite” regime for small sub-threshold AIFMs.
- **Transitionals:**
 - If manage or market AIF immediately before 22 July 2013, may continue but must obtain permission to manage/market within 12 months (i.e. 22 July 2014);
 - New AIF manager or marketer must seek FCA authorisation/provide notification to market immediately – no transition period; and
 - AIF depositary needed permission to act as such from 22 July 2013.

Changements affectant la structure des fonds

Changements affectant la structure des fonds France (1/2)

- Nouvelle typologie des fonds français:
 - Nouvelle définition de placements collectifs :
 - fonds conformes à la directive 2009/65/EC (“**OPCVM**”);
 - fonds conformes à la directive 2011/61/EU (“**FIA**”); et
 - autres placements collectifs (ex. SICAV sous forme de SASU):
 - Pas de bénéfice du passeport AIFM; et
 - Pas gérés par un gestionnaire de FIA (« **GFIA** »).
 - Nouvelle définition des organismes de placement collectifs:
 - OPCVM; et
 - FIA spécifiquement énumérés dans le CMF (FIA par nature).
- Création d’une nouvelle catégorie de fonds qui sont des placements collectifs mais pas des organismes de placements collectifs : “les autres FIA” ou “FIA par objet”.
 - n’émettent pas nécessairement des titres financiers; et
 - ne sont ni des « holdings » ni des véhicules d’exploitation..

Changements affectant la structure des fonds France (2/2)

- Reconnaissance plus claire des véhicules autogérés;
- Obligation pour les FCIMT et les OPCVM à procédure allégée de se transformer d'ici au 22 juillet 2014;
- Obligation de désigner un **dépositaire** d'ici au 22 juillet 2014 pour l'ensemble des FIA;
- Révision du montant **minimal de souscription**: EUR100.000;
- Fonds professionnels spécialisés, extension de la liste des investisseurs potentiels (dirigeants, salariés ou personnes physiques agissant pour le compte du GFIA);
- Modifications des règles d'investissement applicables aux fonds:
 - révision des critères d'éligibilité s'agissant des fonds fermés;
 - admission des créances comme actifs possible du FIA; et
- Reconnaissance des mécanismes de "*valeur liquidative ajustée*" et de "*commissions de souscriptions/rachats compensatrices*".

Changements affectant la structure des fonds Allemagne (1/2)

- Limitation of allowed legal forms of investment funds:
 - "Sondervermögen" (fcp) as no legal entity on its own as the German archetype;
 - Investmentaktiengesellschaft (sicav/sicaf) (open-ended or closed-ended); and
 - New form: Investmentkommanditgesellschaft (investment lp) (open-ended or closed-ended),
- Closed-ended funds are regarded as investment funds and thus as financial instruments; and
- major impacts for marketing and possible investments in closed-ended funds,

Changements affectant la structure des fonds Allemagne (2/2)

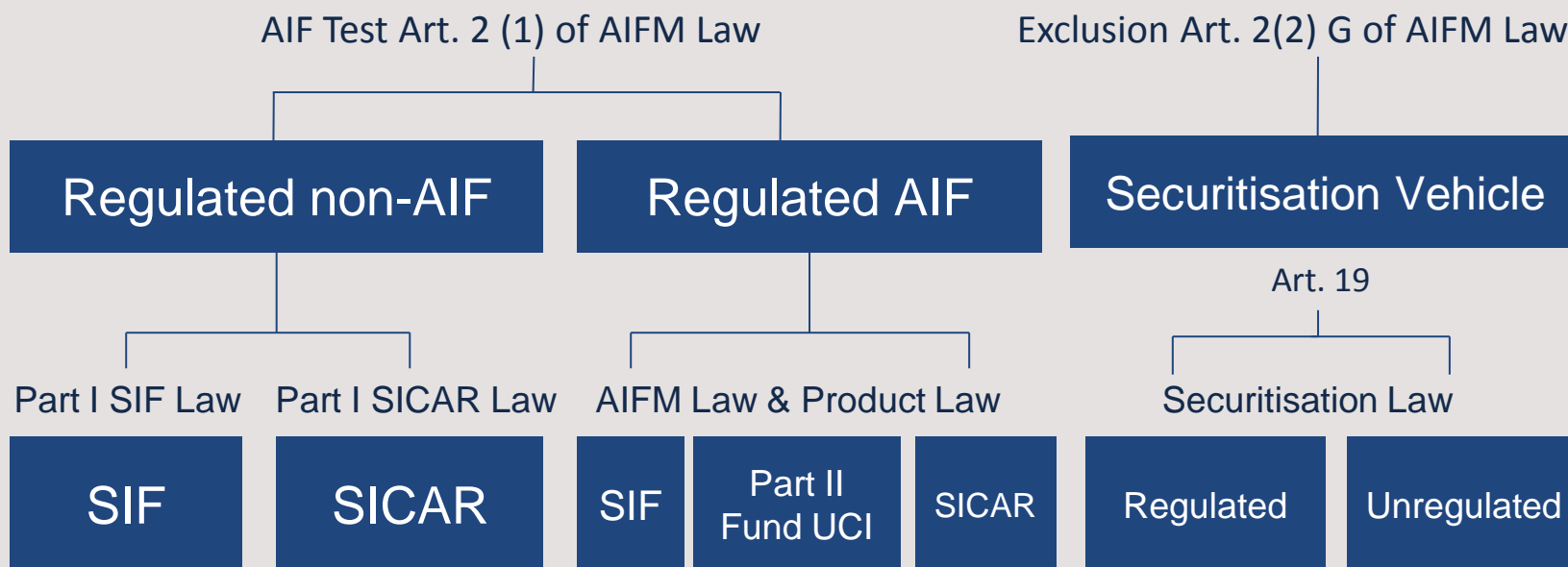
- Introduction of new type of investor "semi-professional investor":
 - minimum investment 200.000 EUR;
 - written confirmation regarding risks of investment;
 - assessment of his knowledge and experience by AIFM or distribution partner;
 - "appropriateness-test"; and
 - Confirmation by AIFM or distribution partner of assessment and appropriateness-test.
- Eligible investors for German special funds.

Changements affectant la structure des fonds Irlande

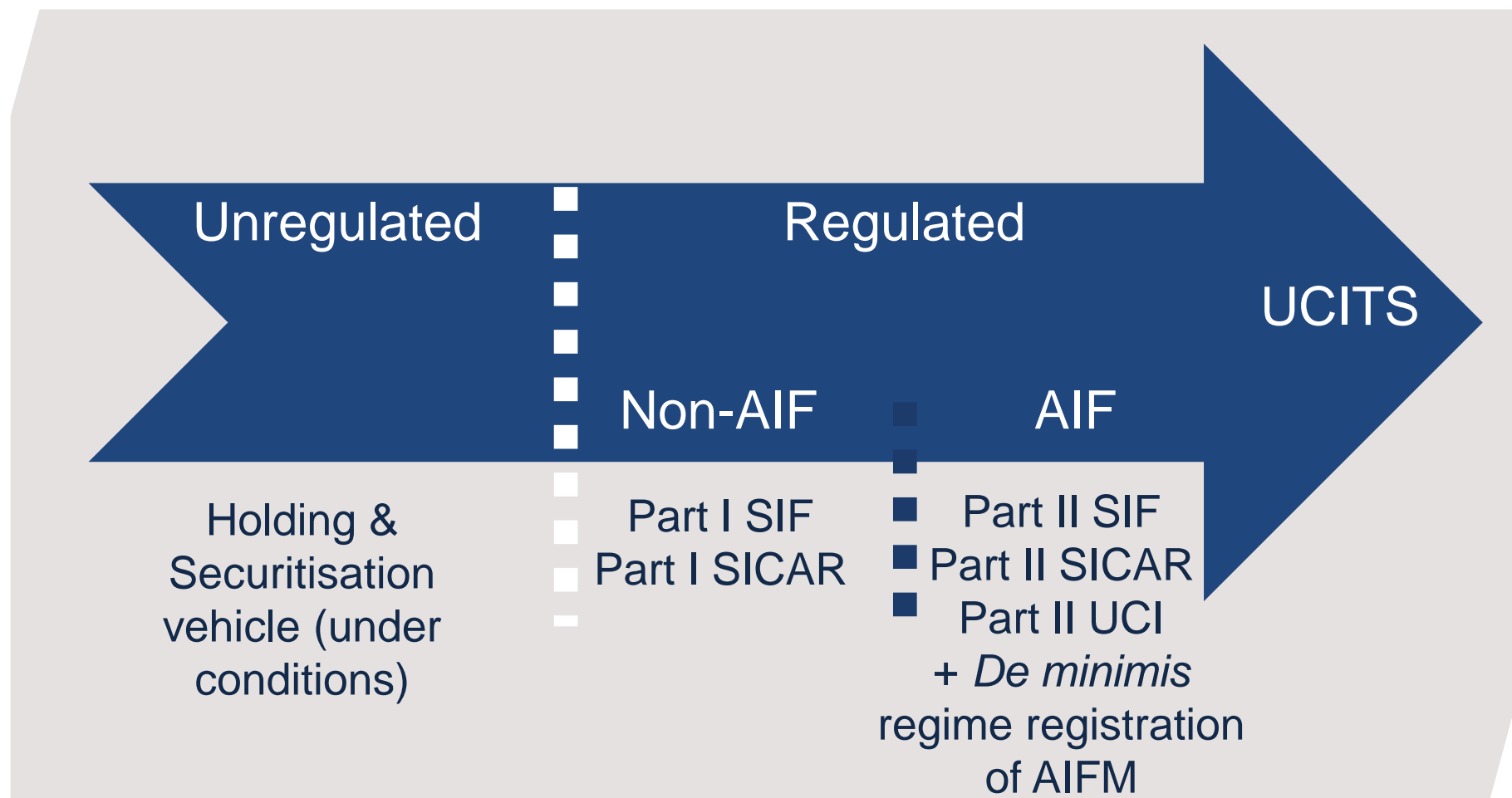
- **Other changes:**
 - Removal of PIF regime; and
 - Introduction of ICAV for U.S. tax purposes; enhancements to ILP structure.

Changements affectant la structure des fonds Luxembourg (1/2)

SIF / SICAR / Part II Fund UCI / Securitisation



Changements affectant la structure des fonds Luxembourg (2/2)



Changements affectant la structure des fonds Pays-Bas

- The Dutch private placement rules have been revised and no longer include an exemption for offers:
 - solely addressed to qualified investors;
 - to fewer than 100 non-qualified investors; and
 - of units that could only be acquired for at least EUR 100,000 per investor.

Changements affectant la structure des fonds Royaume-Uni

- New regulated activities:
 - Managing an AIF and/or a UCITS (includes establish/operate); and
 - Depositary for an AIF or a UCITS.
- Significant changes likely to be similar across EU:
 - cannot be an AIFM and carry on other activities unless permitted by AIFMD (e.g. cannot be a bank or a MiFID firm);
 - firms are having to change status and/or set up new group AIFM and/or use a third party firm as an AIFM (“hosted” service); and
 - engagement of 3rd party depositaries.
- FCA has created a FUND rulebook for AIFMs and depositaries;
- basic rules for UK AIFMs and EEA AIFMs operating in the UK – largely copy-out from Level 2; and
- additional to requirements under COLL rulebook for regulated funds UCITS and AIFs (i.e. non-UCITS retail schemes/NURS or qualified investor scheme/QIS).

Règles spécifiques s'agissant de l'enregistrement des GFIA

Règles spécifiques s'agissant de l'enregistrement des GFIA

France (1/2)

- Obligations d'opter (ou non) d'ici au 22 juillet 2014;

	A1 OPCVM (uniquement)	A2 FIA (uniquement)	A3 Mandats (uniquement)	A1+A2+A3 OPCVM + FIA + Mandats	A1 + A2 OPCVM + FIA	A1+A3 OPCVM + Mandats	A2+A3 FIA + Mandats
Gestion d'OPCVM	Oui	Non	Non	Oui	Oui	Oui	Non
Gestion de FIA	Non	Oui	Non	Oui	Oui	Non	Oui
Gestion de mandats	Non	Non	Oui	Oui	Non	Oui	Oui*
RTO	Non	Oui	Oui	Oui	Oui	Oui	Oui
Conseil	Oui	Oui	Oui	Oui	Oui	Oui	Oui

- Obligations d'adopter une politique de rémunération;
- Obligation de désigner un dépositaire;
- ...

Règles spécifiques s'agissant de l'enregistrement des GFIA

France (2/2)

- Obligation d'être régulé:
- Attention: Les GFIA ne peuvent pas gérer d' "Autres placements collectifs"

	GFIA sous les seuils	Porteur non-professionnel	Obligation d'avoir un dépositaire	GFIA régulé
FIA par nature	Oui	Indifférent	Oui	OUI
	Non			
FIA par objet	Oui	Oui	Oui	Oui
		Non	Non	Non
	Non	Indifférent	Oui	Oui

Règles spécifiques s'agissant de l'enregistrement des GFIA

Allemagne (1/2)

- Limitation of allowed legal forms for German AIFMs:
 - stock corporation;
 - Limited liability company; and
 - Mandatory implementation of supervisory board.
- Very strict rules on management board and owners of AIFM regarding:
 - Personal trustworthiness (criminal records and no involvements in cases of insolvency); and
 - Personal professional qualification (2 years in a leading position with responsibility for the relevant asset-class).
- AIFM-license and corporate purpose will be limited to certain types of funds and assets:
 - Amendments to articles of association.
- Very detailed business plan has to be provided including forecast of the next 3 years; and
- AIFMs are deemed to comply with all relevant provisions as of the time of filing the license.

Règles spécifiques s'agissant de l'enregistrement des GFIA Allemagne (2/2)

- Responsible BaFin department has no practical experience with new types of AIFs / investment funds;
- External AIFM may manage UCITS and AIFs, provided that external AIFM has practical experience with both types of funds; and
- No grandfathering: AIFMs managing UCITS and AIFs before implementation of AIFMD will have to apply for AIFM-license.

Règles spécifiques s'agissant de l'enregistrement des GFIA Irlande

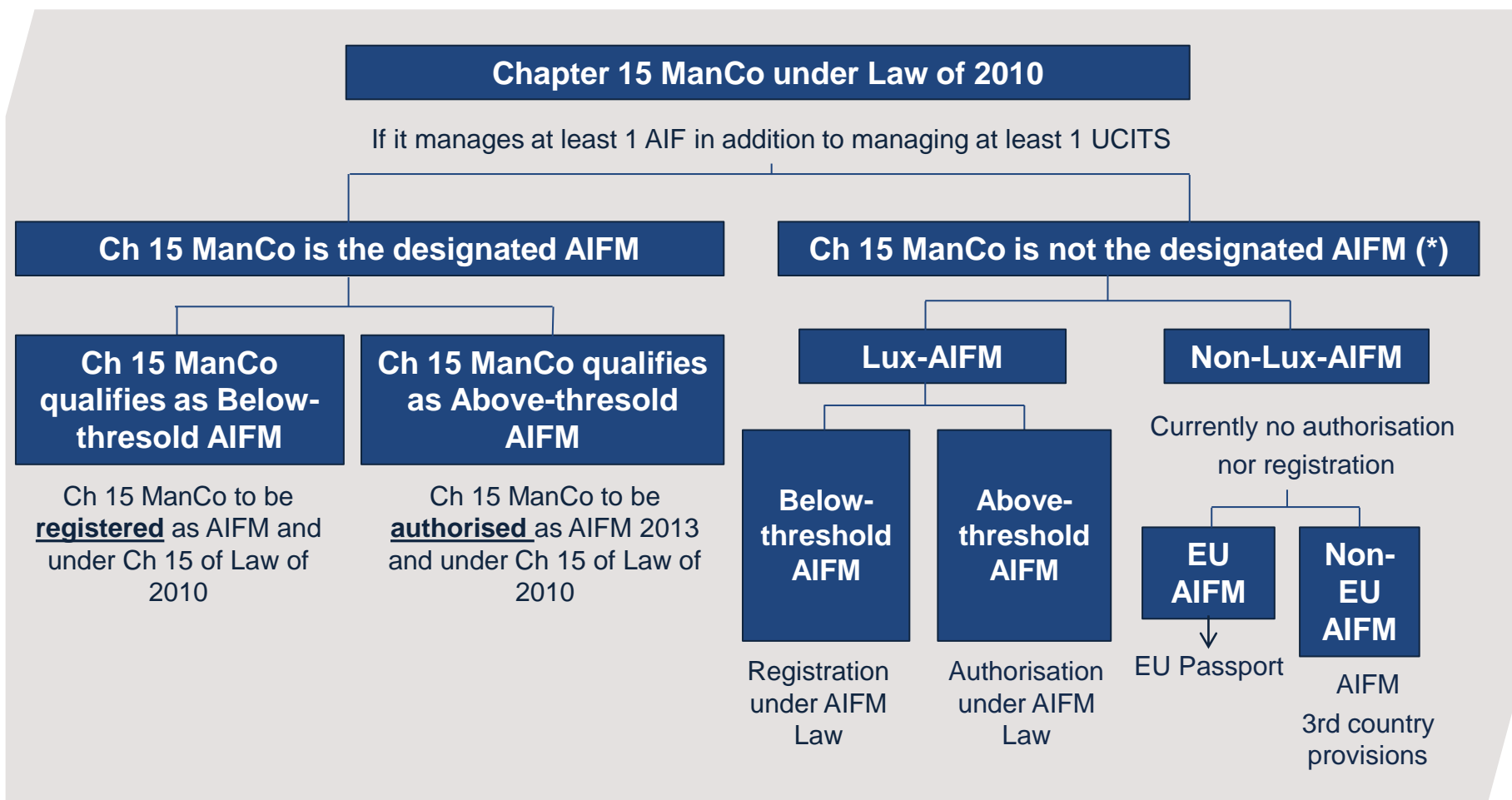
- Already up and running.

Règles spécifiques s'agissant de l'enregistrement des GFIA

Luxembourg (1/3)

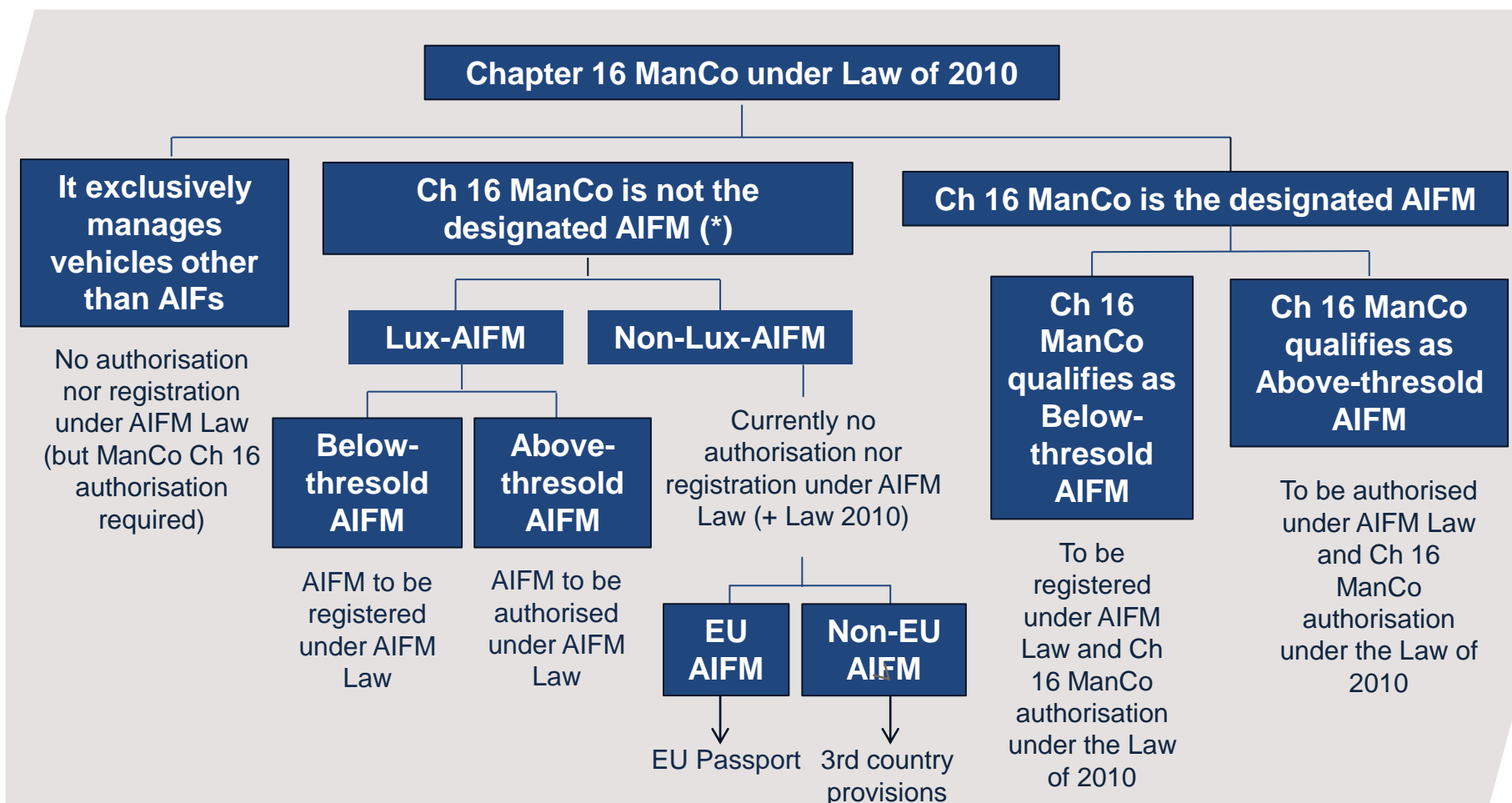
- Already up and running;
- No specific features in relation to AIFM registration in the AIFM Law (i.e., questionnaire about the nature of the AIF, investment policy, leverage / borrowing, etc.);
- Usual regulatory requirements to set up a Chap 16 or a Chap 15 ManCo with new requirements under AIFM Law (identical to AIFMD);
- Management Companies regulated under Chapter 15 / Chapter 16 of the law of 2010 on UCITS can aggregate the new AIFM license;
- New license under the Law of 1993 for managing and marketing the AIFs with administration services; and
- Official list of the AIFMs: Credit Suisse Fund Management and Oppenheim Asset Management Services.

Règles spécifiques s'agissant de l'enregistrement des GFIA Luxembourg (2/3)



Règles spécifiques s'agissant de l'enregistrement des GFIA

Luxembourg (3/3)



Règles spécifiques s'agissant de l'enregistrement des GFIA Pays-Bas

- Lighter regime combined with the exemptions under the national regime:
 - Third country rules;
 - Alternative depositary;
 - The AIFMD regime also applies to offers to non-professional investors (Top-Up rules for retail); and
 - AIFM may provide certain investment services.
- The lighter regime is available to Dutch managers (i) managing a portfolio that does not exceed a threshold of € 100 million; or (ii) managing only unleveraged alternative investment funds without redemption rights during a period of 5 years with a cumulative value that falls below a threshold of € 500 million; and
- The lighter regime also applies to managers offering to non-professional investors provided that (i) the offer must be made to less than 150 investors or (ii) with a value of more than € 100,000 per investor.

Règles spécifiques s'agissant de l'enregistrement des GFIA?

Royaume-Uni

- No grandfathering – all AIFMs to apply for authorisation;
- FCA style is forward looking judgements on management, governance & procedures, but sheer volume of applications brings a challenge;
- FCA encouraging firms to apply by 22 January 2014, with a likely cut-off at 22 April 2014;
- Regulator to be **provided with information** on:
 - managers, shareholders or members of the AIFM;
 - programme of activity & organisational structure of the AIFM;
 - remuneration policies and practices compatible with AIFMD;
 - arrangements for delegation and sub-delegation; and
 - investment strategies, use of leverage and risk profiles; fund rules; custody.
- Authorisation **conditional** on:
 - fit & proper; and
 - head office and registered office of AIFM in the UK.

Obligations d'information découlant d'AIFM

Obligations d'information découlant d'AIFM France (1/2)

– Reporting à l'AMF:

- Reporting obligatoire:
 - Composition de l'actif de chaque FIA;
 - Principaux marchés financiers/instruments financiers des FIA; et
 - Notification de la prise de contrôle dans des sociétés cotées et non cotées (10%, 20%, 30%, 50% et 75%).
- Accès à l'AMF:
 - **Levier:** (i) le niveau de levier général utilisé par chaque FIA, (ii) la ventilation de l'effet de levier selon qu'il résulte de l'emprunt de liquidités, d'instruments financiers ou de contrats financiers et (iii) le emploi des actifs du FIA dans le cadre d'aménagements relatifs à l'effet de levier;
 - **Liste** détaillée de tous les FIA gérés par un GFIA; et
 - **Publication d'un rapport annuel** pour chaque FIA de l'UE géré par un GFAI pour chaque FIA qu'il commercialise dans l'Union.

Obligations d'information découlant d'AIFM France (2/2)

– Reporting aux investisseurs:

- Application des mêmes règles que celles applicables aux OPCVM; et
- Informations à leur fournir préalablement à leur investissement:
 - arrangement conclu par le dépositaire pour se décharger contractuellement de sa responsabilité et des circonstances justifiant une telle décharge;
 - délégation des fonctions de dépositaire pour des raisons légales, lorsque l'autorité de régulation d'un pays tiers le requiert et que ce dépositaire local n'est pas conforme aux modalités de délégation;
 - du pourcentage de l'actif des FIA qui sont soumis à des dispositions particulières du fait de leur nature illiquide;
 - des nouvelles modalités de gestion de la liquidité des FIA;
 - du profil de risque actuel du FIA et les systèmes de gestion du risque utilisés par GFIA pour gérer ces risques;
 - le niveau global de levier employé par le FIA; et
 - toute modification du niveau maximum de l'effet de levier

Obligations d'information découlant d'AIFM Allemagne

- BaFin will focus during the licensing process on
 - Risk-management:
 - description of risk-management process including the filing of the internal risk-management rule-book; and
 - Detailed description of the impact of other services provided by the AIFM.
 - implementation of internal audit (including monitoring of external providers in case of delegation of services); and
 - implementation of compliance-function.
- BaFin will focus during the licensing process on:
 - Remuneration policy:
 - list of relevant employees (risk-takers etc.) within the scope of remuneration policy; and
 - Description of components of remuneration, calculation methods and underlying parameters.
 - new draft of German ordinance regarding remuneration including implementation independent remuneration officer .

Obligations d'information découlant d'AIFM Irlande

Obligations d'informations découlant d'AIFM Luxembourg

- Art 20: an annual report within 6 months after the financial year to be communicated to the investors and made available to the CSSF and the Member State of the EU AIF (if applicable);
- Disclosure of the remuneration policy (fixed, variable, number of beneficiaries, carried interests (if applicable)); and
- Art 21: Disclosure of information and documentation to investors.

Obligations d'informations découlant d'AIFM Pays-Bas

- Twin peaks supervision:
 - Dutch Authority for Financial Markets (AFM); and
 - Dutch Central Bank.
- Follow ESMA's approach;
- Information requirements based on AIFMR;
- Digital portal; and
- Public registers.



Obligations d'information découlant d'AIFM Royaume-Uni

- **Target** – enable investors, markets and regulators to assess risk:
 - Disclosure to investors – all EEA AIFs and AIFs marketed into EEA; and
 - Non-EEA AIFM must comply for each AIF marketed into the UK.
- **Pre-sale:**
 - Strategy, leverage, liquidity, fees, valuation, deal, delegate *all as constitution provides*; and
 - At minimum on request (FUND 3.1).
- **Ongoing:**
 - Liquidity, risk profile, leverage, remuneration (Level 2 is key); and
 - At minimum in annual report with specified requirements (FUND 3.2).
- **.Material changes:**
 - Level 2 (FUND 3.3);
- **Reporting to the FCA** – markets, instruments, risk exposure, liquidity management ... full details in Level 2 (FUND 3.4).

Exercice du passeport AIFM

Exercice du passeport AIFM France (1/2)

- **Passeport couvre:**
 - La gestion de portefeuille;
 - La gestion des risques;
 - La commercialisation d'AIF;
 - L'administration d'AIF; et
 - Activités liées aux actifs d'un AIF.

- **Passeport ne couvre pas:**
 - RTO;
 - Conseil en investissement; et
 - Gestion sous mandat.

- **Exercice du passeport-in:**
 - Le GFIA étranger doit être soumis à AIFM de droit ou sur option;

Exercice du passeport AIFM France (2/2)

– Exercice du passeport-out:

- **LPS:**

- Délai: 1 mois pour une gestion directe;
- Informations: Etat visé et programme d'activité.

- **Succursale:**

- Délai: 2 mois;
- Informations complémentaires:
 - éléments relatifs à la structure d'organisation de la succursale;
 - adresse, dans l'Etat membre d'origine du FIA, à laquelle des documents peuvent être obtenus; et
 - nom et les coordonnées des personnes chargées de la direction de la succursale.

Exercice du passeport AIFM Allemagne

- Nothing over and above the requirements of Article 32 (and Annex IV).

Exercice du passeport AIFM Irlande

- Nothing over and above the requirements of Article 32 (and Annex IV).

Exercice du passeport AIFM Luxembourg (1/2)

– **Distribution Passport:**

- Notification obligation to the CSSF in the registration process of the AIF or during the life of the AIF (Art 30);
- Indications regarding the marketing strategy and the distribution channels with the disclosure of the name and the prudential supervision of the agent(s) in charge of the distribution (nominee included); and
- No specific communication for the moment from the CSSF regarding the passporting procedure for the distribution of Lux AIF on a cross-border basis in the EU.

Exercice du passeport AIFM Luxembourg (2/2)

– **Management Passport:**

- Notification procedure to the CSSF:
 - The Member State where it intends to manage the AIFs / or establish a branch;
 - Program of activities with a definition of the services (core vs non-core);
 - The address in the Home Member State of the AIF from which the documents may be obtained; and
 - The names and contact details of the persons responsible for the management of the branch (if any).
- CSSF has 1 month - extended to 2 months if a branch is set up – to notify the host Member State of the EU AIF; and
- The CSSF must notify to the Lux AIFM the notification to the local regulator and the Lux AIFM may start to manage the EU AIF.

Exercice du passeport AIFM Irlande

- Nothing over and above the requirements of Article 32 (and Annex IV).

Exercice du passeport AIFM Pays-Bas

- Nothing over and above the requirements of Article 32 (and Annex IV).

Exercice du passeport AIFM Royaume-Uni

- Form to be completed by UK AIFMs and FCA will have 20 days to pass on to other EEA regulators – same detail as in other jurisdictions
- The “big” issue is whether a UK AIFM will be permitted to provide MiFID services permitted under Article 6(4) AIFMD on a cross-border basis (e.g. segregated mandate portfolio management)
- In its Q&A, the European Commission indicated its opinion that MiFID services permitted under Article 6(4) AIFMD cannot be passported
- UK position is that an AIFM authorised to provide MiFID services in its home state should be able to exercise its single market rights by passporting those services to other EEA States
- FCA’s passporting application forms for AIFMs have been drafted accordingly
- ESMA has also confirmed that can AIFMs passport into EU jurisdictions that have not yet implemented the AIFMD (reverse does not work unless firm can rely on UK transitional arrangements)

La délégation et son contrôle

La délégation et son contrôle France (1/2)

– Conditions à remplir par le délégataire et ses sous-délégataires:

- information à l'AMF de la nomination d'un délégataire;
- justification de la délégation doit reposer sur des raisons objectives:
 - optimisation des fonctions commerciales et de process;
 - réduction des coûts;
 - expertise du délégataire;
 - accès du délégataire au trading global;
- le délégataire doit disposer de:
 - ressources: quantité et qualité du personne / structure organisationnelle appropriée;
 - expérience: théorique, pratique et formation;
 - réputation: capacité à gérer les éventuelles failles et infractions financières);
- Si la délégation de gestion portefeuille ou de gestion des risques concerne un FIA ouvert à des investisseurs non professionnels, le délégataire doit être autorisé à gérer des OPC.

La délégation et son contrôle France (2/2)

- **Délégation de gestion de portefeuille / gestion des risques concerne des FIA ouverts à des investisseurs professionnels:**
 - **le délégataire est en France ou l'UE:** le délégataire doit être
 - soit une entité autorisée à avoir une activité de gestion de portefeuille et soumise à la supervision d'une autorité, s'il n'y a pas de supervision, l'approbation préalable de l'AMF est nécessaire; ou
 - un prestataire de service d'investissement à condition que cette entité ait mis en place un processus de suivi des risques et de prévention des conflits d'intérêts dans les conditions énoncées par une instruction de l'AMF
 - **le délégataire est dans un pays tiers:** le délégataire doit être une entité autorisée à avoir une activité de gestion de portefeuille et qui est supervisée de façon effective par l'autorité de régulation compétente de son pays.
- la délégation ne doit pas contrevenir à la bonne gestion du FIA qui doit se faire dans l'intérêt des investisseurs;
- diligence raisonnable dans la sélection du délégataire et assurer un suivi efficace à tout moment;
- pas de délégation possible à un dépositaire ou au délégataire du dépositaire ou à une entité avec laquelle il existerait un risque de conflit d'intérêt;
- contrôle par le gestionnaire AIFM des services fournis par le délégataire; et
- accord écrit avec le délégataire.

La délégation et son contrôle Allemagne

- Filing of delegation in advance of entering into force applicable for UCITS as well;
- BaFin will focus on inclusion in internal auditing system;
- Qualification of external portfolio manager;
- German market-standard agreement for delegation of portfolio management available;
- German model of "Master-KAGs" (investment company as a platform for white-label funds delegating portfolio-management and various other functions) in question; and
- Marketing of German AIFs by distribution partners might be regarded as a delegation by the AIFM: Risk of reliability for (external) distribution,

La délégation et son contrôle

Irlande (1/5)

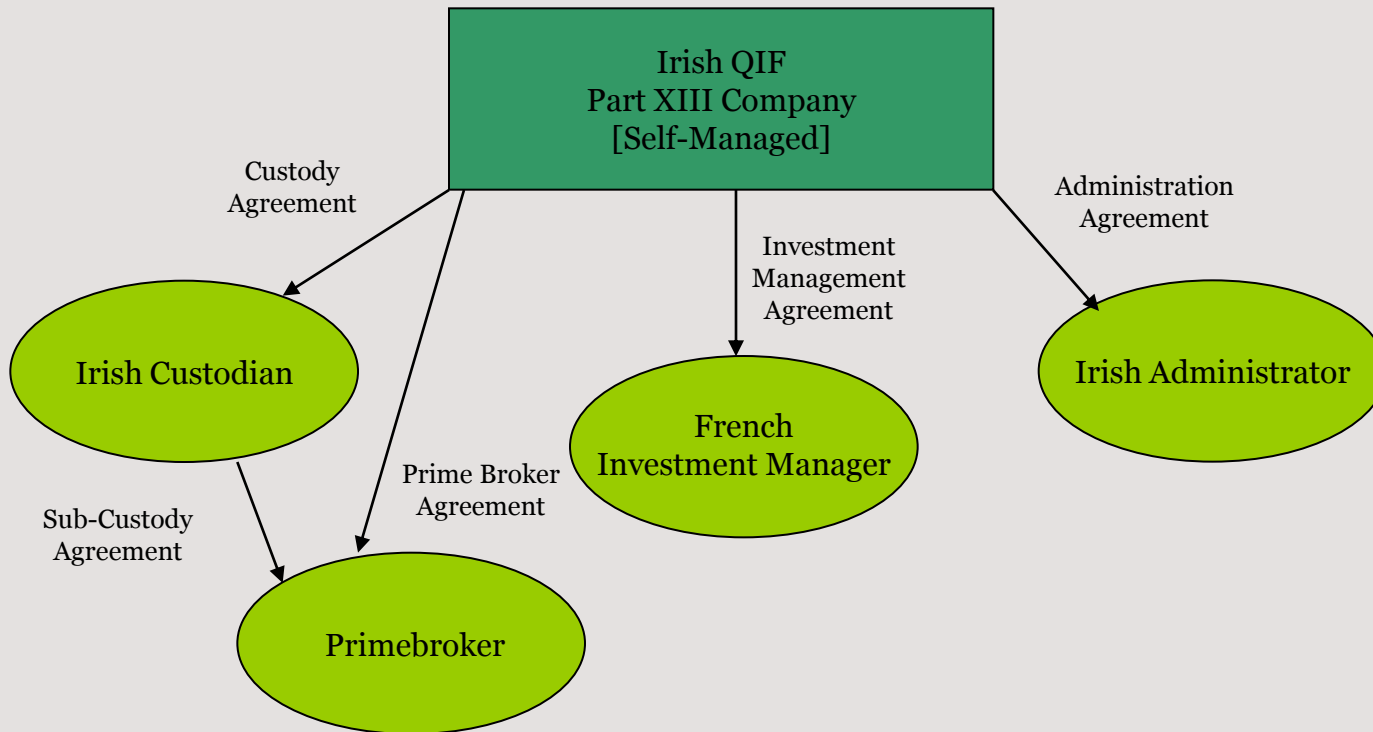
AIFMD – Opportunities using Ireland

– **French Investment Manager managing Irish QIF Structure:**

- If QIF is a ‘self-managed’ fund, the QIF would be the AIFM and the French investment manager would be a delegate. In this scenario, the French investment manager will not need to comply with the AIFMD. However, the QIF cannot become a ‘letter box entity’.
- QIF complying with the AIFMD:
 - likely to be similar to UCITS IV compliance which is a successful ‘self-managed’ model in Ireland (e.g.. business plan, managerial functions, risk management) with certain enhancements; and
 - revision of material contracts (e.g.. custody agreement, prime broker agreement etc).
- Significant emphasis on “substance” to avoid failing the “Letter Box” test; and
- ESMA Guidelines/Impact on Delegates.

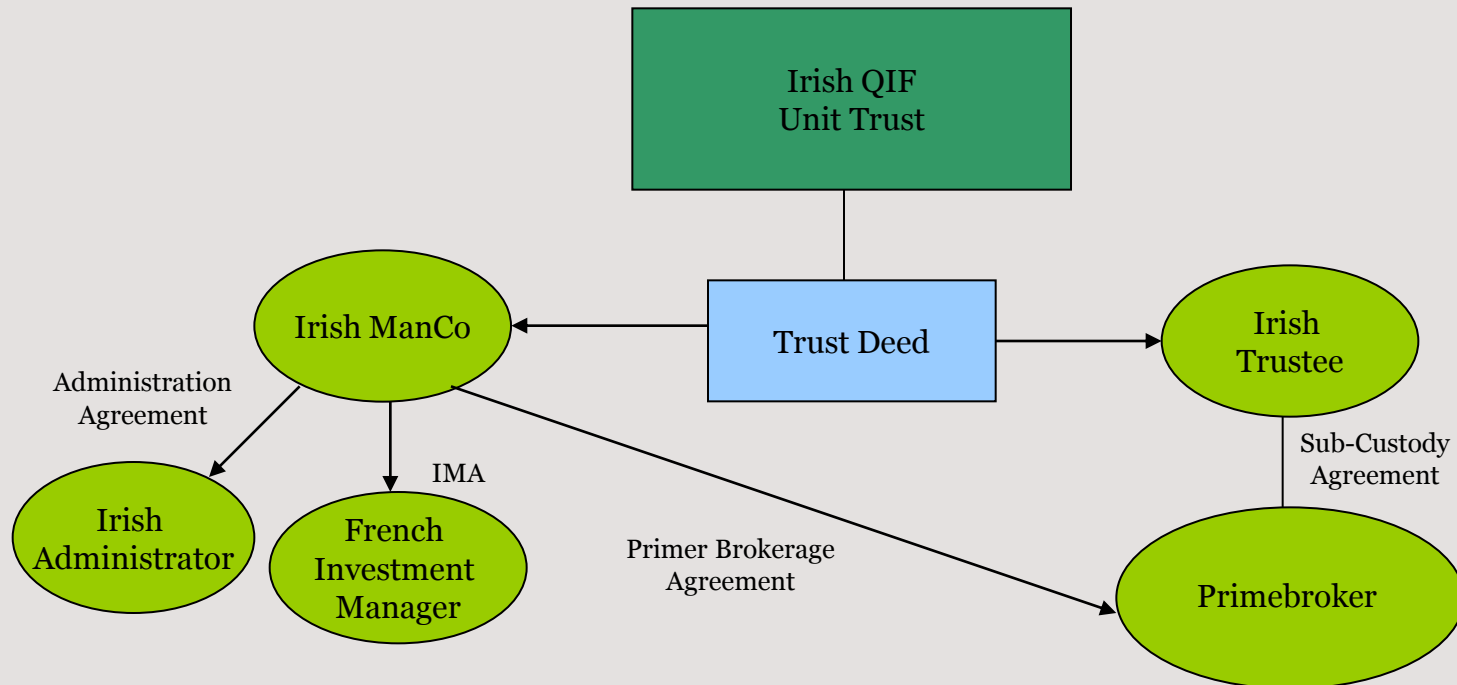
La délégation et son contrôle Irlande (2/5)

Irish QIF Delegation Model (Self-Managed Investment Company)



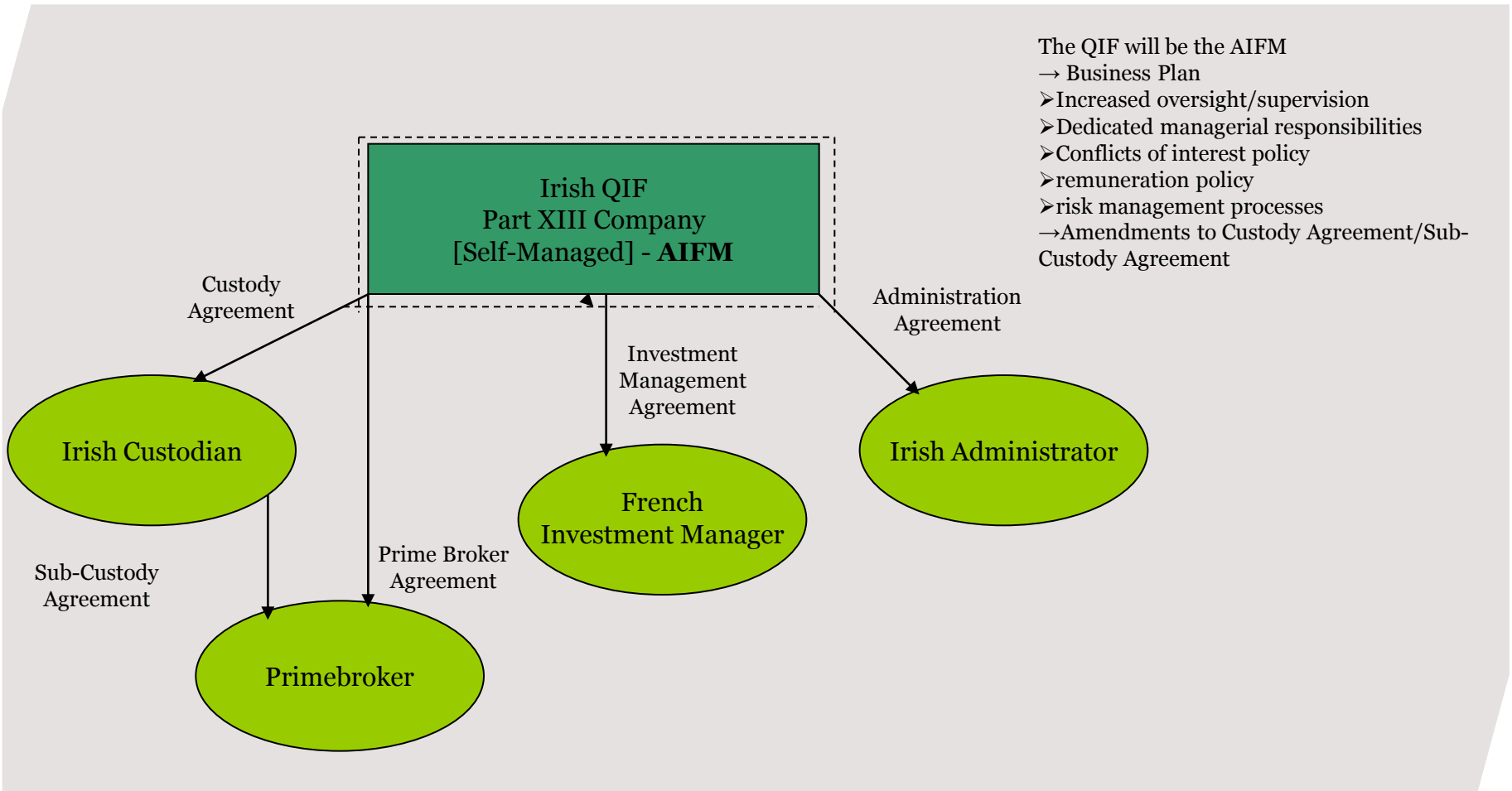
La délégation et son contrôle Irlande (3/5)

Irish QIF Delegation Model (Unit Trust with Irish ManCo)



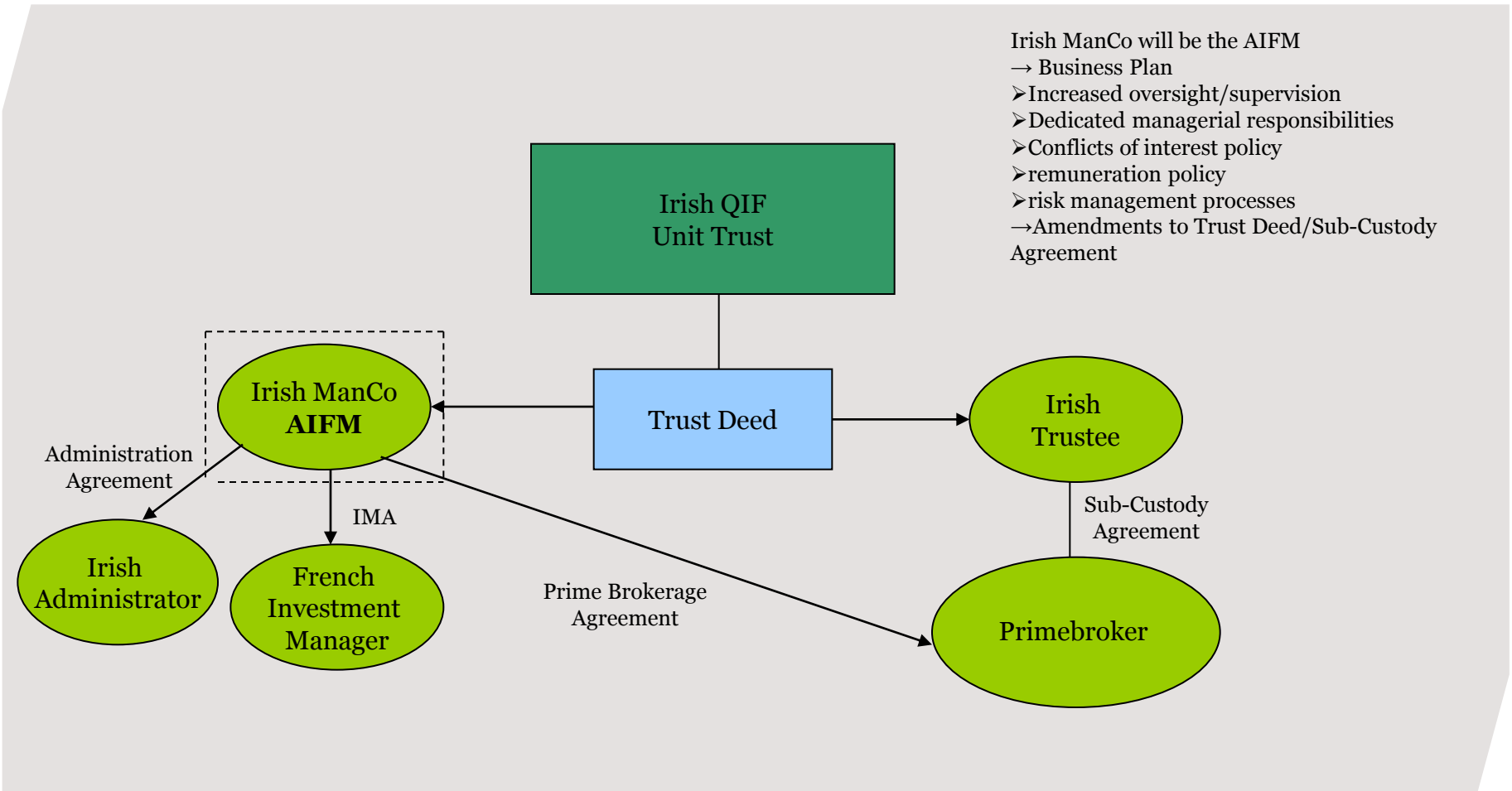
La délégation et son contrôle Irlande (4/5)

Irish QIF Delegation Model (Self-Managed Investment Company)



La délégation et son contrôle Irlande (5/5)

Irish QIF Delegation Model (Unit Trust with Irish ManCo)



La délégation et son contrôle Luxembourg

- Prohibition of letter-box will apply however RM and IM could be both delegated but not at the same time;
- The Regulator has already indicated that Section 7 of the CSSF Circular 12/546 will be extended and will be applicable to Luxembourg AIFMs;
- The Regulator will control the delegation process; and
- Practical case: A French Investment Manager with a self-managed SICAV or managing directly a SICAV.

La délégation et son contrôle Pays-Bas

- How is the Dutch regulator expected to control delegation?
 - Principle based;
 - Focus on risks areas (i.e. pensions and real estate); and
 - Random checks.

La délégation et son contrôle Royaume-Uni

- The AIFM must:
 - provide objective reasons for the delegation (internal or 3rd party) (FUND 3.10);
 - notify regulator beforehand – the FCA will be quantitative, judgemental but proportionate;
 - “no letterbox” requirement is in Level 2 but FCA states it will focus on:
 - who runs the portfolio?
 - who manages the risk?
 - who actually exercises oversight?
 - FCA will not review delegation during transitional period until application made to become an AIFM;
 - Sub-delegation of investment management to non-supervised entity requires prior FCA approval; and
 - One approach – split risk & portfolio management, delegating latter – “hosted” service providers acting as AIFMs to multiple AIFs.

Commercialisation

Commercialisation France (1/2)

- **Commercialisation de FIA de l'UE aux investisseurs professionnels en France ou dans l'UE:**
 - FIA de l'UE géré par un gestionnaire AIFM français: Le dossier de notification destiné à l'AMF afin de commercialiser des FIA comprend:
 - un prévisionnel des opérations qui seront réalisées afin d'identifier les FIA que le gestionnaire AIFM à l'intention de commercialiser et où ces FIA sont localisés;
 - le règlement du fonds ou les instruments qui le composent;
 - l'identification du dépositaire;
 - une description, ou toute information, relative au FIA dans lequel il est possible d'investir;
 - s'il s'agit d'un FIA nourricier, une information sur le pays où est localisé le FIA maître;
 - information sur l'arrangement proposé en vue de la commercialisation des FIA et, le cas échéant, information sur les arrangements conclus afin d'empêcher que les parts ou actions du FIA soient commercialisés à des investisseurs de détail.
 - Délai: 20 jours ouvrables suivant la réception de la notification.
- **Commercialisation de FIA aux investisseurs professionnels en France ou dans l'UE: autorisation préalable.**

Commercialisation France (2/2)

- **Les règles de commercialisation s'appliquant aux OPCVM sont étendus à la commercialisation des FIA:**
 - La commercialisation selon l'AMF couvre le placement, la sollicitation (démarchage, la fourniture de conseils et la publicité;
 - interdiction de commercialiser un FIA qui ne bénéficie pas du régime du passeport résultant de la directive AIFM à moins que le FIA ne se voit délivrer une autorisation spécifique par l'AMF;
 - Quid de la "*reverse solicitation*"?
 - Quid du "*placement privé*"?

Commercialisation Allemagne (1/2)

- Very broad definition of "marketing" in Germany:
 - Not restricted to MiFID-services;
 - Definition Marketing:
 - Direct or indirect offering or placement of investment funds (including advertisements); and
 - Exceptions for certain activities (e.g. publishing of nav),
 - no (official) private-placement regime;
 - Sales documents to be provided:
 - "KIID";
 - Sales prospectus; and
 - Annual / semi-annual reports.

Commercialisation Allemagne (2/2)

- As AIFs qualify as financial instruments (in case of closed-ended funds for the first time) MiFID rules for marketing apply as well:
 - Information about inducements (in advance of advice);
 - MiFID-rules for marketing material; and
 - Appropriateness / suitability tests.
- German regime for "Honorar-Anlageberatung" (investment advice on fee basis) vs. inducement-driven marketing?

Commercialisation Irlande

- Requirement to comply on a “best efforts” basis during transitional period with requirements set out in Article 32; and
- Rules on inward marketing to (i) professional investors; (ii) retail investors.

Commercialisation Luxembourg

- Requirement to comply on a “best efforts” basis during transitional period with requirements set out in Article 32;
- EU AIFMs and non-EU AIFMs placement rules will continue to be permitted until 22 July 2014 and will not be affected by the AIFM Law;
- Art 29: Notification procedure with reference to Annex III. The CSSF accepts within 20 days (or rejects the request);
- Annex III of the AIFM Law is strictly identical to Annex III of the AIFMD regarding the documentation and the information to be provided in case of marketing in Luxembourg; and
- However Luxembourg is mainly a hub for the cross-border distribution of funds.

Commercialisation Pays-Bas (1/2)

- **Principles:**
 - **EU AIFM:**
 - Passport only applies to marketing to professional investors; and
 - AIF's may only be offered to retail investors if (i) the AIFM is licenced by the AFM, and (ii) is in compliance with the Top-Up rules.
 - **Non EU AIFM:**
 - Continue private placement regime for offerings to qualified investors until 2018; and
 - Continue designated countries regime until 2018.

Commercialisation Pays-Bas (2/2)

– Marketing Non-EU AIFM:

- A manager of a fund having its seat outside the EU is allowed to distribute funds in the Netherlands without a licence in the event that the offer is solely addressed to qualified investors provided that:
 - there is an appropriate cooperation arrangement between the AFM and the supervisory authorities of the third country where the non-EU AIFM is established;
 - the third country where the non-EU AIFM is established is not listed as a Non-Cooperative Country and Territory by FATF; and
 - the manager needs to comply with certain transparency requirements.
- A manager of a fund having its seat in Guernsey, Jersey and the US (provided that the US investment funds are under supervision of the SEC) and which is adequately supervised in this country of origin, may distribute in the Netherlands without a licence, **including to non-qualified investors**. The funds need to comply with certain information requirements.

Commercialisation Royaume-Uni (1/2)

- Captures marketing to investors “domiciled or with a registered office in the UK” – do overseas branches of UK investors get caught?
- Automatic permission for marketing AIF managed by small UK/EEA AIFM to professional investors – UK financial promotion regime applies
- Permission must otherwise be obtained by the AIFM from FCA or home EEA regulator to market to professional investors in UK
 - UK AIFMs and non-EEA AIFMs to apply to FCA
 - EEA AIFMs apply to local home state regulator
 - 20 working day approval time limit by FCA
- UK retaining national private placement rules for non-EEA AIFs/AIFMs
 - Must register with the FCA for marketing
- Marketing to retail investors in the UK also needs to comply with financial promotion regime
 - EEA AIFMs must apply to FCA as well as local home state regulator

Commercialisation Royaume-Uni (2/2)

- Direct or indirect offering or placement of units or shares in AIF
 - does not correspond to financial promotion regime - “invitation or inducement to engage in investment activity” is broader
 - does not cover reverse solicitation
- Revised draft of PERG produced by FCA, gives some help...
 - Offer/place – make available for potential investor to purchase
 - Providing draft documentation ≠ marketing (in UK at least)
 - Indirect – may include intermediaries
 - Territory – includes domicile or registered office in UK
 - Passive marketing – some examples provided – reverse solicitation letters to become standard?
 - Secondary trading ≠ marketing?
- Restrictions apply to AIFMs, and also to investment firms marketing at the initiative or on behalf of the AIFM – covers distributors but position of other third party investment managers/advisers acting for clients is unclear

Calendrier

Summary: EU Management Services Passport (1/ 2)

AIFM	AIF	EU management services passport	AIFMD requirements
EU	EU (established in another member state than the AIFM)	Yes From 2013	<ul style="list-style-type: none"> - AIFM must be authorised to manage that type of AIF - Communication of information by the AIFM to the competent authority of its home member state (which will transmit it to the competent authority of the host member state of the AIFM) <ul style="list-style-type: none"> 1) Member state in which AIFM intends to manage AIF (either directly or via a branch) 2) Program of operations stating the services to be performed by AIFM and identifying the AIF it intends to manage - If the AIFM intends to <u>establish a branch</u>, it shall provide additional information: <ul style="list-style-type: none"> 1) Organisational structure of the branch 2) Address in the home member state of the AIF for which documents may be obtained 3) Names and contact details of persons responsible for the management of the branch
EU	Non-EU	Yes From 2015 *	AIFM must fully comply with the directive (except the depositary requirements and the annual report requirements). Co-operation arrangement needs to be in place between the home regulator and the third country regulator where the non-EU AIF is based

* subject to ESMA's prior analysis and approval

Summary: EU Management Services Passport (2/ 2)

AIFM	AIF	EU management services passport	AIFMD requirements
Non-EU	EU (established in another member state than the AIFM)	Yes From 215 *	<p>AIFM must be authorised to manage that type of AIF. Communication of information by the AIFM to the competent authority of its home member state (which will transmit it to the competent authority of the host member state of the AIFM) including</p> <ul style="list-style-type: none"> •Member state in which AIFM intends to manage AIF (either directly or via a branch) •Program of operations stating the services to be performed and identifying the AIFs intends to manage <p>- In case of a <u>branch</u>, additional information required:</p> <ul style="list-style-type: none"> • Organisational structure of the branch • Address in the home member state of the AIF for which documents may be obtained • Names and contact details of persons responsible for the management of the branch
Non-EU	Non-EU	Yes From 2015 *	<p>AIFMD authorization by the "Member State of Reference" Compliance with full AIFMD except provisions re: "rights of EU AIFM to market and manage EU AIF in EU"</p> <p>Additional requirements</p> <ul style="list-style-type: none"> •AIFM has a legal representative in its member state of reference •Co-operation in place between home member state of AIFM and AIF domicile •AIF domicile is not FATF blacklisted •Country of AIF has signed OECD Model Tax Convention for exchange of information with home member state of AIFM and each member state where AIF is marketed

* subject to ESMA's prior analysis and approval

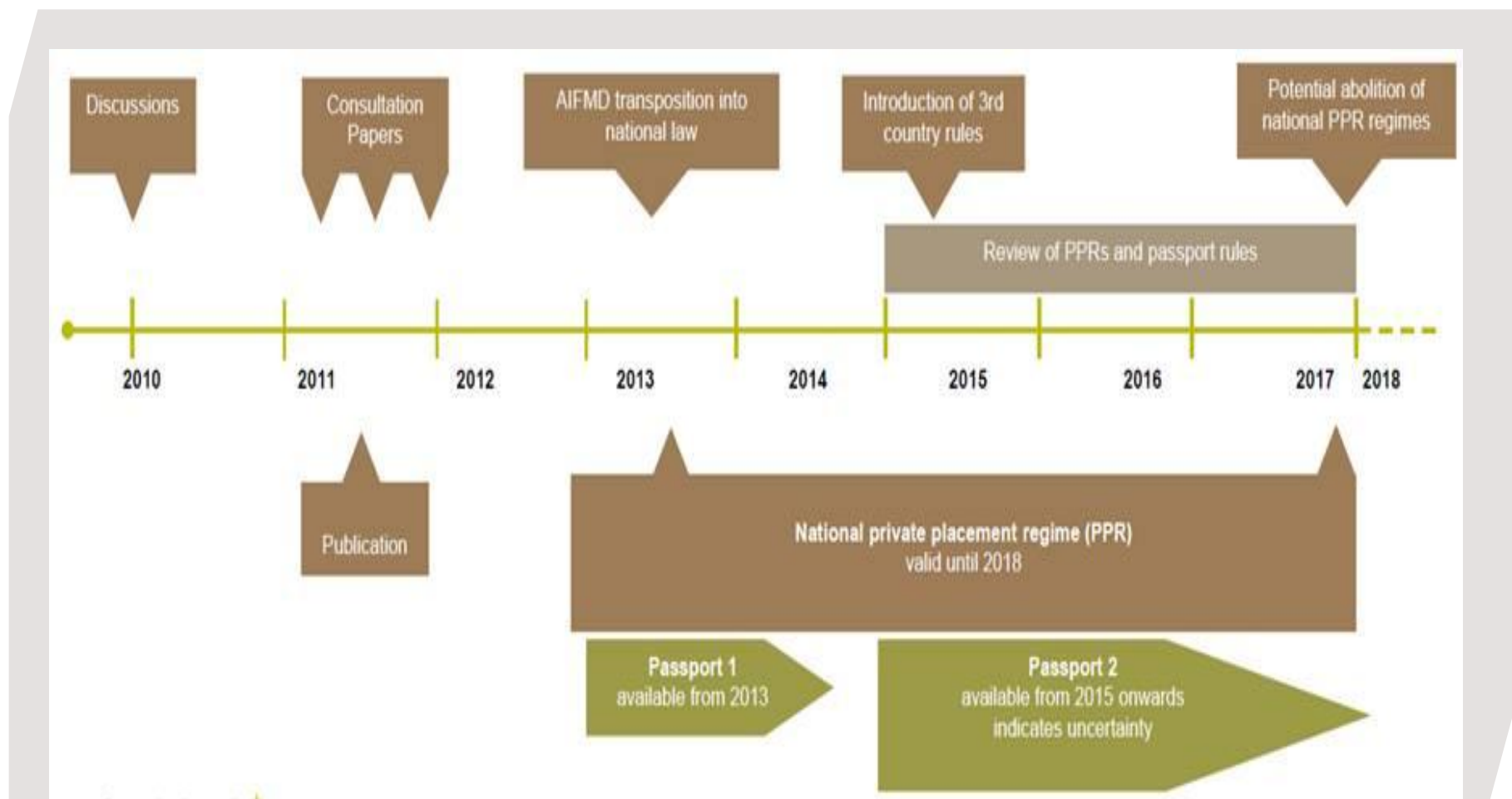
Private Placement

- EU Member State specific and fairly fragmented (no single EU-wide regime, in some EU Member State private placement is allowed and in others not) -

AIFM	AIF	Management & marketing	Private Placement	Depository	Valuation	AIFMD requirements
EU	EU	Yes	Yes Until 2018 *	AIFMD provisions applicable	AIFMD provisions applicable	The manager of the AIF must be authorised as AIFM under AIFMD as from 2013 → Full AIFM applies
EU	Non-EU	Yes	Yes Until 2018 *	AIFMD provisions not applicable But appointment of an equivalent entity in the country of AIF	Yes	Full AIFMD applies ex. depository Cooperation in place between home member state of AIFM and country of AIF Country of AIF is not on FATF non-cooperative countries list
Non-EU	EU	Yes	Yes Until 2018 *	Application of the rules of the member states where AIF is marketed	Valuer subject to national rules applicable to AIF	Compliance with annual report, disclosure to investors and reporting obligation to regulators requirements Compliance with reporting requirements (e.g. Cooperation in place between member state where AIF is marketed, country of AIFM and member state of AIF Country of AIFM ist not on FATF non-cooperative countries list
Non-EU	Non-EU	Yes	Yes Until 2018 *	Same as box above	Same as box above	Same as box above + Country of AIF is not on FATF non-cooperative countries list

* subject to ESMA's prior analysis and approval

AIFMD Timeline: Dates to keep in mind



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