

The Alternative Investment Fund Managers Directive

Key features & focus on third countries



Legal advice from a different perspective

Fiercely independent in structure and spirit, Elvinger Hoss Prussen guides clients on their most critical Luxembourg legal matters.

We are proud to be ranked as top tier by Legal 500, Chambers & Partners and IFLR 1000.



INTRODUCTION

This brochure focuses on the Alternative Investment Fund Managers Directive with special attention given to third countries.

The first Chapter highlights the key features of the Directive.

The second Chapter illustrates through practical case studies, the implications of the Directive on:

- managers established in non-EU Member States which manage and/or market AIF; (EU AIF and non-EU AIF); and

- managers established in EU Member States which manage and/or market non-EU AIF.

Terms in Capital Letters have the meaning ascribed to them in the section "Definitions" at the end of the brochure.

CHAPTER I. KEY FEATURES

In November 2010, the European Parliament approved the compromise text on the AIFMD agreed with the Council and the EU Commission. The Directive came into force in July 2011.

The Directive imposes requirements for the authorisation and the supervision of AIFM and it allows AIFM to provide management services to AIF and to market these AIF throughout the EU, subject to compliance with conditions set forth in the Directive.

In order to ensure that the managers of all AIF located in the EU and/or marketed in the EU, are captured by the AIFMD, EU authorities have adopted an all-encompassing approach for the definition of AIF.

The term "AIF", as used in the Directive, refers to collective investment undertakings, which raise capital from a number of investors with a view to investing it in accordance with a defined investment strategy for the benefit of those investors, and which do not qualify as UCITS.

Hedge funds, real estate and infrastructure funds, private equity and venture capital funds, etc. are therefore targeted by the AIFMD, regardless of their current legal regime, i.e. regulated or non-regulated, their legal form, and to a certain extent, their location within or outside the EU.

Funds and managers located in third countries are potentially covered by the Directive:

- third country funds, insofar as they are marketed in the EU or managed by an EU AIFM; and
- third country managers, insofar as they manage EU AIF or market (EU or non-EU) AIF in the EU.

However, although EU AIFM managing EU AIF have had access to a European passport since July 2013¹ for marketing EU AIF to professional investors, this passport will only be available to non-EU AIFM and non-EU AIF from the end of 2015, at the earliest². In the meantime, these non-EU AIF and EU AIF (in this latter case if they are managed by a Non-

EU Manager) can continue to be sold in the EU on the basis of local private placement rules (with a few additional AIFMD requirements) which the EU Commission aims to abolish in 2018.

Non-EU AIF managed by a Non-EU Manager and not marketed in the European Union are not covered by the Directive.

This Chapter describes the key features of the AIFMD:

- Section 1 focuses on the timing of application of the AIFMD obligations
- Section 2 analyses the scope
- Section 3 briefly describes the main steps to follow and the information to provide in order to be authorised as AIFM
- Section 4 highlights the ongoing obligations applying to AIFM
- Section 5 is dedicated to the requirements for and obligations of a depositary for AIF
- Section 6 introduces the AIFMD marketing provisions and the third country regime.

This Chapter will conclude with information on the implementation of the Directive in Luxembourg (Section 7).

1. TIMING

The Directive has been applicable since 22 July 2013.

The scope of application of the AIFMD obligations is not the same for all AIFM:

- EU AIFM starting their activities on or after 22 July 2013 must apply for authorisation as from that date.
- EU AIFM already performing activities under the Directive before 22 July 2013 had to apply for authorisation at the latest by 22 July 2014.

A One-Year Transition Period is indeed provided in the AIFMD. These AIFM were required to take all necessary measures to comply with the national laws of the Member States stemming from the Directive and to submit an application

¹ Subject to fulfilment of the AIFMD authorisation procedure and marketing notification(s).

² See Section 6 Marketing – Third country regime: Recent developments in this Chapter I.

for authorisation within 1 year of that date³.

- Non-EU AIFM are not required to become authorised under the AIFMD immediately. Until the end of 2015, at least⁴, they will be entitled to continue to manage AIF without the need to apply for authorisation. Some AIFMD provisions will, however, apply to them as from July 2013 (subject to application of the One-Year Transition Period). Subject to further decisions from EU authorities, they should have the possibility to submit an application to become authorised as from the end of 2015, at the earliest. Pending such authorisation, they do not have the benefit of the EU Passport. Please refer to the second Chapter of this brochure 'Focus on Third Countries' for further information on the AIFMD third country regime.

2. SCOPE

The Directive aims at regulating all entities engaged in the management of AIF⁵. It lays down rules for the authorisation, ongoing operation and transparency obligations incumbent upon an AIFM and for the marketing of AIF.

Definition of the AIF

The definition given to AIF in the Directive is broad. It captures all non-UCITS regardless of their asset class, e.g. hedge funds, real estate funds, infrastructure funds, private equity and venture capital funds and regardless of their legal form and regulatory regime (if any).

In Luxembourg, it comprises notably Part II UCIs and SIFs, SICARs, SOPARFIs, insofar as the three latter raise capital from a number of investors with a view to investing it in accordance with a defined investment strategy for the benefit of those investors.

Definition of the AIFM

The AIFM is the legal person whose regular business is to manage one or more AIF.

The investment management function is identified

in the AIFMD as the key function to be performed by the AIFM. Investment management includes portfolio management and risk management. AIFM may also perform administrative and marketing functions, and activities related to the assets of the AIF⁶.

The AIFMD makes a distinction between internally managed AIF and externally managed AIF:

- internal AIFM are prohibited from engaging in activities other than the internal management of that AIF;
- external AIFM must engage solely in the investment management of AIF and the performance of additional functions mentioned above (i.e. administration, marketing and activities related to the assets of the AIF). External AIFM may extend their licence to be allowed also to manage UCITS funds (subject to authorisation under Directive 2009/65/EC). They may, in addition, be authorised to provide the following services:
 - management of portfolios of investments, in accordance with mandates given by investors on a discretionary, client-by-client basis;
 - non-core services comprising:
 - investment advice;
 - safe-keeping and administration in relation to shares or units of collective investment undertakings;
 - reception and transmission of orders in relation to financial instruments.

³ Article 61.1 of the AIFMD.

⁴ This period will be extended if the granting of the passport to Non-EU AIFM is deferred as described in Section 6 (Marketing – Third country regime: Recent developments) of this Chapter I.

⁵ Unlike the UCITS Directive, which aims at regulating the fund, the AIFMD is a 'manager' regulation; the AIFM is the entity directly caught by the AIFMD provisions, although some obligations apply to the AIF, like the depositary and the reporting rules.

⁶ The activities related to the assets of the AIF which may be performed by an AIFM are mentioned in Annex I (2) (c) of the AIFMD.

AIF excluded from the scope

The Directive provides for a limited number of exemptions:

- AIFM managing only AIF held only and directly/indirectly by the AIFM and its related entities as a whole (provided that none of those members is an AIF);
- Institutions for occupational retirement plans;
- Supranational institutions, e.g. the World Bank, the International Monetary Fund, the European Central Bank, the European Investment Bank, the European Investment Fund, etc.;
- National central banks;
- Social security, public institutions/bodies which manage funds supporting social security and pension systems;
- Employee participation/saving schemes;
- Holding companies;
- Securitisation vehicles.

The following are also excluded from the scope:

- AIF which, under their rules or instruments of incorporation or through other binding rules, are reserved to a single investor⁷;
- Investment undertakings which invest the private wealth of a pre-existing group of investors, e.g. family office vehicles (if no external capital raising)⁸.

AIFM entitled to benefit from a lighter regime

A lighter regime is foreseen for small managers who manage AIF assets which do not exceed EUR 100 million or EUR 500 million when the portfolio of AIF consists of AIF that are not leveraged and have no redemption rights exercisable during a period of 5 years following the date of the initial investment in each AIF. The exempted "small" managers are, however, required to register with their national regulators and report to them on the AIF they manage (investment strategies, instruments that they trade, principal exposures, etc.).

AIFM entitled to benefit from a grandfathering regime

AIFM may benefit from a grandfathering regime if they manage:

- closed-ended AIF whose subscription period closed prior to 21 July 2011 and whose duration expires at the latest on 23 July 2016. In that case, only AIFMD provisions on annual reporting and controlling interests apply;
- closed-ended AIF before 22 July 2013, which do not make any additional investments after that date: none of the AIFMD provisions apply in that case; the AIFM is entitled to continue to manage such AIF without any AIFMD authorisation.

3. AIFM AUTHORISATION REQUIREMENTS

Authorisation

The AIFMD aims at regulating and supervising the AIFM and imposes on all fund managers falling under the scope of the Directive the obligation to apply for authorisation to act as AIFM.

Authorisation procedure

The authorisation procedure requires introducing a file with information on the AIFM and the AIF it intends to manage to the financial authorities of the home Member State of the AIFM.

→ information on the AIFM

At the level of the AIFM, the following information must be provided to the competent authorities of the home Member State of the AIFM:

- (a) persons conducting the business;
- (b) identity of the AIFM shareholders that have a qualifying holding;
- (c) programme of activity setting out the organisational structure of the AIFM;
- (d) remuneration policies; and
- (e) delegation arrangements.

⁷ This exemption is implied by the reference made in Art.2 of the Directive (definition of AIF) to a number of investors: «... as far as they raise capital from a number of investors with a view to investing it in accordance with a defined investment strategy for the benefit of those investors (see ESMA Guidelines on key concepts of the AIFMD, dated 13 August 2013, ESMA/2013/611).

⁸ This exemption is foreseen in the Preamble of the Directive (see also ESMA Guidelines on key concepts of the AIFMD, dated 13 August 2013, ESMA/2013/611).

➔ **information on the AIF**

At the level of the AIF, the information to be provided includes:

- (a) the investment strategy, including the types of underlying funds if the AIF is a fund of funds, and the AIFM's policy as regards the use of leverage, and the risk profiles and other characteristics of the AIF it manages or intends to manage, including information about the Member States or third countries in which such AIF are established or are expected to be established;
- (b) information on where the master AIF is established if the AIF is a feeder AIF;
- (c) the rules or instrument of incorporation of each AIF the AIFM intends to manage;
- (d) information on the arrangements made for the appointment of the depositary for each AIF the AIFM intends to manage;
- (e) a description of the main legal implications of the contractual business arrangements entered into for the purpose of investment;
- (f) the identity of the depositary, auditor, and other service providers and a description of their duties and the investors' rights;
- (g) a description of how the AIFM is complying with the requirement to cover potential liability risks resulting from its activities;
- (h) a description of any delegated management function of the AIFM and of any safekeeping duties delegated by the depositary;
- (i) a description of the valuation procedure and pricing methodology;
- (j) a description of the liquidity risk management;
- (k) a description of all fees, charges and expenses to be borne by the investors;
- (l) a description of how the AIFM ensures fair treatment of investors, including information on any preferential treatment applying to an investor or to a type of investors;

- (m) the latest annual report, procedure and conditions of issue and sale of units or shares;
- (n) the latest net asset value of the AIF or latest market price of the units or shares of the AIF;
- (o) where available, the historical performance of the AIF;
- (p) the identity of the prime broker with a description of any material arrangements of the AIF with its prime broker; and
- (q) information on how periodic information will be disclosed to investors.

The financial authorities of the home Member State of the AIFM will assess:

- (a) the ability of the AIFM to meet the conditions of the Directive;
- (b) the good repute of the persons who effectively conduct the business of the AIFM and their experience in relation to the investment strategies pursued by the AIF managed by the AIFM;
- (c) the suitability of the significant shareholders of the AIFM taking into account the need to ensure the sound and prudent management of the AIFM.

They will also verify if the AIFM has sufficient initial capital and own funds (see Section 4) and if the head office and the registered office of the AIFM are located in the same Member State.

As regards the time taken to obtain the authorisation, the applicant is informed within three months of the submission of an application. This period can be extended in specific circumstances.

UCITS management companies are not required to provide information or documents which have already been provided to their financial authorities at the time of their application for authorisation under the UCITS Directive, provided that such information or documents remain up to date.

Once granted, ESMA will keep a central register identifying each authorised AIFM in electronic format.

4. AIFM ONGOING OBLIGATIONS⁹

- **Capital:** the required share capital of an AIFM varies depending on whether the AIFM is internal or external. Internally managed AIF must have an initial share capital of EUR 300,000. This amount is reduced to EUR 125,000 for an externally appointed AIFM.

Additional own funds are required when the value of the portfolios managed by an AIFM exceeds EUR 250 million. That additional amount of own funds must be equal to 0,02 % of the value of the portfolio which exceeds EUR 250 million with a maximum of EUR 10 million.

Both internally managed AIF and external AIFM must also have additional own funds or hold professional indemnity insurance to cover professional liability risks resulting from the performance by an AIFM of its functions.

- **Substance:** an AIFM must, at all times, have adequate human and technical resources that are necessary for the proper management of its AIF. At least two persons of sufficiently good repute and with sufficient experience will have to decide on the conduct of the business of the AIF.
- **Remuneration:** an AIFM must set up remuneration policies that are consistent with effective risk management and do not encourage inconsistent risk taking. The remuneration policies and practices must be determined in accordance with Annex II of the AIFMD.
- **Conflicts of interest:** organisational arrangements must be made in order to identify, prevent, manage and monitor conflicts of interest.
- **Risk management:** the function of risk management must be hierarchically separated from the operating units. An adequate risk management system must be implemented in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy.
- **Leverage:** an AIFM must set a maximum level of leverage which the AIFM may employ on behalf of each AIF it manages as well as the extent of the right to re-use collateral or guarantee that could be granted under the leveraging arrangement.

- **Liquidity management:** an appropriate liquidity management system must be employed in order to monitor the liquidity risk of an AIF and ensure that it complies with its underlying obligations.
- **Valuation:** appropriate and consistent procedures must be in place to ensure a proper and independent valuation of the assets of the AIF. The valuation function can either be performed by a professional external valuer or by the AIFM itself. In the latter case, the valuation task must be functionally and hierarchically independent from the portfolio management.

The valuation must be done at least once a year and for open-ended AIF, when appropriate.

- **Depositary:** an independent depositary must be appointed. Its functions and liabilities are extensive. Private equity, venture capital and real estate AIF, however, benefit from less onerous rules adapted to the kind of non-custodial assets they normally hold.
- **Delegation:** the delegation of some of an AIFM's functions is permitted, subject to prior notification to the regulator and appropriate disclosure. The AIFM may not, however, become a letter-box entity. The delegation of portfolio management and risk management (i) can be given only to authorised and registered firms for the purpose of asset management and (ii) the cooperation between authorities must be ensured. Where condition (i) cannot be met, the prior approval of the authorities of the home Member State of the AIFM must be obtained. Sub-delegation is permitted subject to similar conditions.
- **Reporting obligations:** AIFM must report to the regulator and investors on matters including:
 - investment strategy and objectives of the AIF, use of leverage, risks, investment restrictions...;
 - contractual business and delegation arrangements;

⁹ Many of the ongoing obligations imposed by the Directive and set forth below are similar to those imposed by the UCITS Directive on UCITS management companies.

- liquidity risk management, valuation procedure and pricing methodology;
- preferential treatment applying to an investor or to a type of investor.
- **Financial information:** the annual report of an AIF has to be made available within 6 months following the end of the financial year, including:
 - financial statements;
 - remuneration of AIFM staff;
 - any material changes in the information to be disclosed to the investors.

In addition, an AIFM is obliged to regularly inform the financial authorities of its home Member State notably on the main traded instruments, the markets of which it is a member or where it actively trades, the principal exposures and the most important concentrations of each AIF it manages.

- **Investment in listed and non-listed entities/ anti-asset stripping measures:** specific disclosure obligations and anti-asset stripping measures (24 months following the acquisition) will apply to private equity AIF in relation to the acquisition of shares in a listed or non-listed company.
 - if the threshold of 10%, 20%, 30%, 50% and 75% of the voting rights of the non-listed company has fallen or is exceeded, the proportion of voting rights held by the AIF must be notified to the financial authorities of the home Member State of the AIFM;
 - in the case of acquisition of control in a listed or non-listed company, additional information must be provided to the company concerned, its shareholders and the financial authorities of the home Member State of the AIFM. Those obligations and restrictions regarding asset stripping do not apply where the listed or non-listed companies are real estate SPV (Special Purpose Vehicles) or small and medium-sized enterprises.

5. DEPOSITARY REGIME

An AIFM must ensure that a single depositary is appointed for each AIF it manages.

Depositary functions

The main tasks of the depositary include:

- Cash monitoring
- Safe-keeping of assets of the AIF
- Supervision of transaction/assets of the AIF

Cash monitoring

The cash in- and outflows of each AIF need to be properly monitored by the depositary.

Safe-keeping

Within the safe-keeping function, one needs to distinguish between those assets which can be held in custody and all other assets.

With regard to the assets that can be held in custody, the Directive requires that the depositary holds in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's book (segregated accounts) and all financial instruments that can be physically delivered to it.

Regarding all other assets of the AIF (i.e. those assets which cannot be held in custody, e.g. real estate, commodities, securities which are not transferable), the Directive requires the depositary to verify whether or not the AIF or the AIFM on behalf of the AIF has obtained an ownership interest. If the depositary is satisfied that this is the case, the depositary shall register those assets in a record and up-date the record (i.e. take out assets in which the AIF/AIFM no longer holds an ownership interest, e.g. after it has sold it). The assessment that the AIF holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, if available, on external evidence.

Supervisory function

In addition to the tasks mentioned above, the depositary is also entrusted with oversight duties of the AIF's assets and transactions.

The depositary must itself directly fulfil its legal obligation to supervise the assets and to control the transactions. That obligation may not be delegated.

Entities eligible to act as depositary

The depositary can be:

- an EU credit institution
- a MiFID authorised investment firm
- an institution subject to prudential regulation and ongoing supervision, which, on 21 July 2011, was included in the categories of institutions determined by Member States to be eligible as a UCITS depositary
- only in the case of non-EU AIF: a credit institution, an investment firm or an equivalent entity, subject also to prudential regulation and ongoing supervision.

In relation to certain types of funds (essentially private equity, venture capital and real estate funds) which have no redemption rights exercisable during a period of 5 years from the date of the initial investments, Member States may allow the depositary to be an entity which is subject to mandatory professional registration or to legal provisions, which can provide sufficient professional guarantees to perform the relevant depositary functions and meet the commitments inherent in those functions.

An AIFM can never act as depositary, neither can the prime broker when acting as counterparty to an AIF, unless the prime broker has functionally and hierarchically separated the two functions and unless the potential conflicts of interest are properly identified, managed and disclosed to investors.

Liability of the depositary

The Directive proposes a mixed concept of negligence and strict liability. In general, the depositary shall only be liable in the case of intentional or negligent failure. However, in the event of a loss of financial instruments held in custody, strict liability applies. Where the depositary is strictly liable, it may discharge liability under certain circumstances.

6. MARKETING – THIRD COUNTRY REGIME

Marketing

The Directive also regulates the marketing of AIF. It introduces an EU Passport: once authorised in an EU Member State, an AIFM can market the AIF it manages to professional investors in all other EU Member States, using a simplified regulator-to-regulator notification mechanism.

"Marketing" refers to the direct or indirect offering or placement, on the initiative of an AIFM or on behalf of an AIFM, of units or shares of an AIF it manages to or with EU investors.

Investment by investors without marketing (also called "reverse solicitation" or "passive marketing"), is not regulated by the AIFMD.

The EU professional investors targeted by the Directive are the same as the MiFID professional investors, which include:

- entities which are regulated or authorised to operate in financial markets (credit institutions, investment firms, pension funds, insurance funds.);
- large undertakings, governments, central banks, international institutions; and
- investors who may elect to be treated as professional investor on request, and insofar as they meet the criteria set forth by the MiFID Directive.

The marketing of AIF to retail investors is not regulated in the AIFMD in the same way as the marketing of AIF to professional investors. There is no EU passport for the distribution of AIF to retail investors in the AIFMD. The Member States may allow AIFM to market to retail investors in their territory units or shares of AIF they manage in accordance with the Directive. In that case, the Member States have to inform the EU Commission and ESMA of the type of AIF that are allowed to be marketed to retail investors on their territory and of any additional requirement that they have decided to impose for the marketing of AIF to retail investors.

Third country regime

The Directive provides for complex delayed transposition rules applicable to non-EU AIFM (managing EU AIF and/or non-EU AIF) and to EU AIFM (managing non-EU AIF).

The 2nd Chapter of this brochure provides a detailed overview of the AIFMD third country regime (with a Table inserted which summarises the applicable third country rules for each type of AIF/AIFM structures).

The EU Passport will, initially, only be available to EU AIFM managing EU AIF. NPR will remain applicable to non-EU AIFM (managing EU AIF and/or non-EU AIF) and to EU AIFM (managing non-EU AIF), subject to compliance with some requirements of the Directive.

During the second half of 2015 at the earliest, subject to an opinion and positive advice from ESMA and the adoption of implementing legislation by the EU authorities, the EU Passport will become available to non-EU AIFM (managing EU AIF and/or non-EU AIF) and to EU AIFM (managing non-EU AIF)¹⁰.

NPR will not end automatically by the extension of the passport system. There will be a transitional period during which both regimes, i.e. NPR (with some AIFMD requirements) and the EU Passport (subject, in that case, to compliance with all AIFMD obligations) will remain available to EU AIFM (managing non-EU AIF) and non-EU AIFM. The situations where the dual regime system will apply are identified in the Table.

During the last quarter of 2018 at the earliest, the EU authorities may decide to terminate the NPR. If that decision is made, all non-EU AIFM developing management and/or marketing activities of EU and EU AIFM managing non-EU AIF will be subject to the full AIFMD rules.

Third country regime – Recent developments

On 7 November 2014, ESMA published a "Call for evidence on AIFMD passport and third countries AIFMs" to receive information from the EU and the non-EU stakeholders about the functioning of the passport and the marketing in the Member States. In this call for evidence, ESMA also invited stakeholders to give their views on the possible

impact of an eventual extension of the passport to non-EU AIFMs on (i) competition and (ii) risks in relation to market disruptions and investor protection. Responses were to be provided by 8 January 2015.

In their responses (published on ESMA's website), some stakeholders suggest that certain reciprocity conditions should be met before the passport is made available to non-EU AIFMs.

ESMA will consider the feedback so received during the first quarter of 2015 and expects to deliver its opinion and advice to the EU Commission by 22 July 2015. It is not excluded that, after considering the advice of ESMA, the EU Commission may defer the extension of the passporting regime to non-EU AIFMs beyond 2015.

7. AIFMD IMPLEMENTATION IN LUXEMBOURG¹¹

The AIFMD was implemented in Luxembourg by a law dated 12 July 2013 (**AIFM Law**).

The AIFM Law also introduces a number of innovations which are designed to improve the legal and regulatory framework applicable to Luxembourg investment funds and fund managers.

A brochure presenting the AIFM Law in consolidation with the AIFMD and with the Level 2 AIFM Regulation is available on our website: www.elvingerhoss.lu.

This brochure can be printed and/or used as an electronic version.

The electronic version gives direct access to the corresponding article in the AIFMD (consolidated with the Level 2 AIFM Regulation), together with links to (i) additional Level 2 AIFM regulations, (ii) ESMA Guidelines, and (iii) Q&A and FAQ issued by the European Commission, ESMA and the CSSF in relation to the AIFMD and its application.

¹⁰ For recent developments on this process, see the point on "Third country regime – Recent developments" below.

¹¹ For up-to-date and full information on the implementation status of the AIFMD in Luxembourg, please see the AIFMD Addendum which is added as an insertion in this brochure.

CHAPTER II. FOCUS ON THIRD COUNTRIES

The AIFMD will have an impact on third country funds and managers.

This Chapter aims at analysing in a practical manner the most frequently used structures to provide solutions on how to address the impact of the AIFMD. It is not a detailed analysis of the case studies described hereafter, but it highlights the most relevant implications for each of the case studies described.

- **Case 1:** Non-EU Manager managing a Luxembourg AIF with Marketing in the EU;
- **Case 2:** Non-EU Manager managing a Non-EU AIF with Marketing in the EU;
- **Case 3:** Non-EU Manager managing a Luxembourg AIF with no Marketing in the EU;
- **Case 4:** Luxembourg AIFM managing a Luxembourg AIF and delegating investment management to a Non-EU Manager with Marketing in the EU; and
- **Case 5:** Luxembourg AIFM managing a Luxembourg AIF and delegating investment management to a Non-EU Manager with no Marketing in the EU.

It is assumed in each case study that (i) the AIF does not benefit from any exemption under AIFMD and (ii) that the Non-EU Manager does not benefit from the *small manager* exemption, as described in the first part of this brochure "AIFMD Key Features".

A Table is inserted at the end of this Chapter, which illustrates the different situations where the third country regime applies and also the scope of application of the AIFMD provisions. The criteria to use when reviewing the Table are (i) the identification and location of the AIF and of the AIFM, and (ii) the marketing, i.e. whether the AIF is marketed and if so, whether the AIF is marketed to professional investors within the EU or outside the EU.

THIRD COUNTRY REGIME: PRINCIPLES

A core principle introduced by the AIFMD is the management authorisation and the EU Passport.

In order to preserve a level playing field, the implementation of the third country regime and the access to the EU Passport are structured around three time-periods which are described below:

- (1) the **Initial Period** (from 22 July 2013 to approximately the end of 2015);
- (2) the **Intermediary Period** (from the end of 2015 to approximately the end of 2018); and
- (3) the **Final Period** (from approximately the end of 2018 onwards).

In addition, a **One-Year Transition Period** was provided for AIFM which performed activities under the Directive before 22 July 2013. These AIFM were required to take all necessary measures to comply with the national laws of the Member States stemming from the Directive and to submit an application for authorisation within 1 year of that date¹².

The Initial Period (22 July 2013 – end 2015)

During the Initial Period, only EU AIFM managing an EU AIF will benefit from the EU Passport. NPR will continue to apply to Non-EU Managers and to EU AIFM managing Non-EU AIF.

Certain AIFMD requirements¹³ will, however, apply in addition to NPR. Furthermore, NPR remain subject to any changes and/or restrictions which may be introduced by each Member State.

In the case where the EU AIFM or Non-EU Manager benefits from the One-Year Transition Period, most of the AIFMD conditions to be fulfilled by this EU AIFM or Non-EU Manager will have to be complied with by 22 July 2014 at the latest.

¹² Article 61.1 of the AIFMD.

¹³ These requirements will be detailed in each case study.

The Intermediary Period (end 2015 – end 2018)

The Intermediary Period is characterised by the implementation of a dual marketing regime where the NPR will co-exist with the EU Passport.

Non-EU Managers (managing EU and non-EU AIF) and EU AIFM (managing Non-EU AIF) will have the choice of either opting into the Directive (i.e. to comply with all of the AIFMD conditions) and to benefit from the EU Passport or not opting into the full AIFMD regime and continuing to use NPR.

The Intermediary Period will be initiated during the second half of 2015, subject to a decision from the EU authorities¹⁴. Indeed, by 22 July 2015¹⁵, ESMA is required to issue:

- an opinion on the functioning of (i) the EU Passport for EU AIFM managing and/or marketing EU AIF and (ii) the marketing of non-EU AIF by EU AIFM and the management and/or marketing of AIF by Non-EU Managers in the EU pursuant to the NPR; and
- an advice on the extension of the EU Passport to the marketing of Non-EU AIF by EU AIFM and the management and/or marketing of AIF by Non-EU Managers.

ESMA's opinion and advice will be issued to the EU legislative authorities, i.e. the EU Commission, the EU Council and the EU Parliament¹⁶.

In the case of a positive advice, the EU Commission may decide to extend the EU Passport. A delegated act will be adopted to this end, which will specify the date from which the EU Passport is available to Non-EU Managers. The EU Parliament and the Council may object to this delegated act within a period of 3 months from the notification by the EU Commission (this period may be extended by 3 months).

Depending on whether the authorisation for Non-EU Managers and the extension of the EU Passport to Non-EU Managers and EU AIFM (managing Non-EU AIF) is decided or deferred by the EU authorities, the Intermediary Period will start or be delayed.

The Final Period (end 2018 - onwards)

The Final Period is characterised by the end of the NPR. At the earliest at the end of July 2018¹⁷, ESMA may issue an opinion following the same procedure as the one described in the preceding paragraph. On the basis of this opinion, EU legislative authorities may agree on a termination of the NPR.

Should termination of the NPR be decided, the Final Period would start and all AIFMs developing activities in the EU would be required to be authorised under the Directive and to market AIF that they manage to professional investors in the EU on the basis of the EU Passport only.

1. CASE 1: NON-EU MANAGER MANAGING A LUXEMBOURG AIF WITH MARKETING IN THE EU



As indicated in the introductory paragraphs, the scope of application of AIFMD provisions will evolve over the coming years and the Non-EU Manager will have different options for the Marketing of the AIF. Each of these marketing options is described hereafter. They can be summarised as follows:

- During the Initial Period (22 July 2013 – end 2015): Option A and Option B;
- During the Intermediary Period (end 2015 – end 2018): Option A, Option B and Option C;
- As from the start of the Final Period (end 2018 onward): Option B and Option C.

¹⁴ Articles 375 and 67 of the AIFMD.

¹⁵ Article 67 of the AIFMD.

¹⁶ As regards the status of this process, see Chapter I, Section 6 Marketing – Third country regime: Recent developments.

¹⁷ Article 68 of the AIFMD provides that the termination procedure of the application of the NPR will be initiated three years after the entry into force of the decision to extend the EU Passport to the marketing of Non-EU AIF by EU AIFM and the management and/or marketing of AIF by Non-EU Managers.

1.1 Initial Period: no authorisation – no passport

1.1.1 Management

During the Initial Period, the Non-EU Manager will not be required to be authorised as AIFM under the AIFMD. The Non-EU Manager may continue to act as portfolio manager of the Luxembourg AIF.

1.1.2 Marketing

Option A – NPR

A Non-EU Manager will be entitled to market a Luxembourg AIF in the EU using the NPR subject to complying at least with the following conditions¹⁸:

- Publication of an annual report by each AIF¹⁹, disclosure to investors²⁰, reporting by the Non-EU Manager to competent authorities in each of the EU Member states where the marketing takes place on the markets and instruments it trades on behalf of the AIF²¹, and notification and disclosure requirements when the AIF is taking controlling interests of certain issuers²²;
- FATF Compliance of the third country in which the Non-EU Manager is established; and
- Cooperation arrangements for the purpose of systemic risk oversight are entered into between (i) the supervisory authority of the Non-EU Manager, (ii) the supervisory authorities in each of the Member States where marketing takes place and (iii) the home Member State authority of the AIF (i.e. in this Case 1, the CSSF) in order to ensure an efficient exchange of information.

In addition and as previously indicated, Member States are free to adapt their NPR and impose stricter rules on the Non-EU Manager in respect of the Marketing of the AIF to the investors on their territory.

In Brief

If specific requirements set forth in the Directive are met, a Luxembourg AIF managed by a Non-EU Manager can be marketed in the EU on the basis of and under the conditions set forth by the locally applicable NPR, without the Non-EU Manager being required to become an authorised AIFM under the Directive.

¹⁸ Article 42 of the AIFMD.

¹⁹ Article 22 of the AIFMD.

²⁰ Article 23 of the AIFMD.

²¹ Article 24 of the AIFMD.

²² Articles 26 to 30 of the AIFMD.

Option B – Interposition of Luxembourg AIFM and EU Passport

If NPR are considered too restrictive²³, the structure could be changed by interposing a Luxembourg AIFM which will act as AIFM²⁴ of the Luxembourg AIF and benefit from the EU Passport. The portfolio management could be delegated by the Luxembourg AIFM to the non-EU manager (see Case 4 for more information and requirements on that possibility).

In Brief

A Luxembourg AIF ultimately managed by a Non-EU Manager, through delegation from an authorised Luxembourg AIFM, can be marketed to professional investors in the EU on the basis of the EU Passport.

1.2 Intermediary Period:

As from the start of the Intermediary Period, a distinction must be made between the authorisation requirements for the management of AIF and the Marketing of AIF.

1.2.1 Management

As from the end of 2015 at the earliest, subject to a decision from the EU authorities²⁵, a Non-EU Manager managing an EU AIF will have to be authorised as a Non-EU AIFM.

Appointment of a Member State of Reference

A Member State of Reference will need to be appointed and the financial authorities of that Member State of Reference will act as the Non-EU Manager's regulator. The Non-EU Manager will have to submit a request for authorisation to its Member State of Reference²⁶.

Specific rules are provided for the designation of the Member State of Reference depending essentially on the Member State(s) where the AIF is established (in this Case 1, Luxembourg) or where it is intended to be marketed²⁷. In addition, a Legal Representative established in the Member State of Reference will need to be appointed. The Legal Representative

²³ NPR are at the discretion of each Member State and therefore vary from country to country. Also, as indicated above, Member States may impose stricter rules on a Non-EU AIFM in respect of the marketing of units or shares of AIFs to investors in their territory (Article 42.2 of the AIFMD).

²⁴ The Luxembourg AIFM will need to be authorised as AIFM and all the conditions provided for by the AIFMD will need to be fulfilled.

²⁵ Articles 37 and 67 of the AIFMD.

²⁶ Article 37.1 of the AIFMD.

²⁷ Article 37.4 of the AIFMD.

will be the contact point of the Non-EU Manager in the EU and it must be sufficiently equipped to perform the compliance function relating to the management and marketing activities performed by the AIFM, together with the AIFM²⁸.

For that purpose, it will have to comply with the Directive (with the exception of its Chapter VI which relates to the rights of an EU AIFM to manage and market an EU AIF in the EU). In the case where compliance with a provision of the Directive would be incompatible with compliance with the law(s) to which the Non-EU Manager is subject, there shall be no obligation to comply with the provision of the Directive provided that specific conditions are fulfilled²⁹.

The Directive's key requirements to be fulfilled by the Non-EU Manager and the AIF in view of the authorisation are listed below and they are all described in the first Chapter of this brochure headed "Key Features".

International requirements

In addition, the following requirements apply³⁰:

- Appropriate cooperation arrangements need to be in place between the authorities of the Member State of Reference, the authorities of the home Member State of the EU AIF concerned (i.e., in this case, the CSSF) and the supervisory authorities of the third country where the Non-EU Manager is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their respective duties in accordance with the Directive;
- FATF Compliance of the third country where the Non-EU Manager is established;
- The third country where the Non-EU Manager is established has signed an agreement with the Member State of Reference which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements.
- The effective exercise by the authorities of their supervisory functions must not be prevented by

the laws, regulations or administrative provisions of the third country governing the Non-EU Manager.

Key requirements for the Non-EU Manager

- Authorisation (Articles 6 to 8 of the AIFMD)
- Capitalisation and own funds requirements (Article 9 of the AIFMD)
- Operating conditions (Articles 12 to 17 of the AIFMD)
- Organisational requirements (Article 18 and 20 of the AIFMD)
- Reporting to regulators (Article 24 of the AIFMD)
- Notification and disclosure requirements when the EU (in this case Luxembourg) AIF is taking controlling interests of certain issuers (Articles 26 to 30 of the AIFMD)

Key requirements for the Luxembourg AIF

- Annual report (Article 22 of the AIFMD)
- Disclosure to investors (Article 23 of the AIFMD)
- Valuation (Article 19 of the AIFMD)
- Depositary (Article 21 of the AIFMD)

1.2.2 – Marketing

Option A – NPR

NPR remain available to the authorised Non-EU Manager for the Marketing of the Luxembourg AIF, within the limits and subject to the conditions set forth for Option A in Section 1.1 above.

The AIFMD obligations which will apply to the Non-EU Manager as from the start of the Intermediary Period are, however, more stringent than those described above in Section 1.1 which are applicable during the Initial Period given the management authorisation requirements referred to above in Section 1.2.1.

²⁸ Article 373 and 377 c) of the AIFMD.

²⁹ Article 372 of the AIFMD.

³⁰ Article 377 d) to g) of the AIFMD.

In Brief

A Luxembourg AIF managed by a Non-EU Manager authorised as AIFM through the relevant authorisation procedure in the Member State of Reference (Luxembourg or another EU Member State) can (continue to) be marketed to professional investors in the EU on the basis of the NPR. However and as previously exposed, the use of NPR may entail certain risks to the extent that NPR are not harmonised in the EU and remain subject to any changes decided by each local authority.

Option B – Interposition of a Luxembourg authorised AIFM and EU Passport

Option B, which consists of interposing a Luxembourg Manager acting as AIFM with delegation of the portfolio management to a non-EU manager, also remains available.

Option B may be of interest:

- to non-EU managers which would have chosen Option B already in 2013 and which could continue to benefit from the EU Passport in 2015 without any further changes or updates required; and
- to new investment fund structures in the cases where the determination of a Member State of Reference may trigger issues, i.e. in the situations where different Member State authorities could be appointed as competent authorities for the Marketing of the AIF.

In Brief

A Luxembourg AIF ultimately managed by a non-EU manager, through delegation from an authorised Luxembourg AIFM, will (continue to) benefit from the EU Passport and so avoid the potential issues linked to the determination of the Member State of Reference.

Option C – Non-EU authorised AIFM and EU Passport

As from the start of the Intermediary Period, an authorised Non-EU Manager will have the possibility to benefit from the EU Passport.

Once duly authorised, the Non-EU Manager will be entitled to initiate the notification procedure required in order to market the Luxembourg AIF to professional investors in the EU on the basis of the EU Passport³¹.

³¹ Article 39 of the AIFMD.

In Brief

A Luxembourg AIF managed by an authorised Non-EU Manager can be marketed to professional investors in the EU on the basis of the EU Passport.

1.3 Final Period

As from the start of the Final Period, the Non-EU Manager will be subject to the full AIFMD rules. Option A (NPR) will no longer be available for the Marketing of the Luxembourg AIF, and only Options B and C will remain available.

2. CASE 2: NON-EU MANAGER MANAGING A NON-EU AIF WITH MARKETING IN THE EU

The Marketing of a Non-EU AIF by a Non-EU Manager in the EU entails application of the AIFMD.



Case 2 presents some similarities with Case 1, the key difference being that the AIF is not located in the EU. As a matter of fact, the AIFMD requirements in terms of Marketing are close to those mentioned in Case 1. The AIFMD requirements in terms of management are, however, different as a Non-EU Manager managing a non-EU AIF will not be required to become authorised before 2018 (Final Period), unless it decides during the Intermediary Period to opt into the Directive and to benefit from the EU Passport.

The AIFMD rules and options available to the Non-EU Manager in this Case 2 can be summarised as follows for the different periods:

- **Initial Period: no authorisation and no EU Passport**
 - Option A = NPR.
- **Intermediary Period: dual regime**
 - No authorisation and no EU Passport → Option A = NPR; or
 - Non-EU authorised AIFM and EU Passport → Option C.

In the case of Marketing of a Non-EU AIF by an authorised Non-EU AIFM, the AIFMD imposes the following conditions³², in addition to the management authorisation procedure described above in Section 1.2.1.

- (i) appropriate cooperation arrangements need to be in place between the authorities of the Member State of Reference and the supervisory authorities of the third country where the Non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their respective duties in accordance with the Directive;
- (ii) FATF Compliance of the third country where the Non-EU AIF is established;
- (iii) the third country where the Non-EU AIF is established has signed an agreement with the Member State of Reference which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements.

- **Final Period: authorisation and EU Passport**

- Option C (Non-EU authorised AIFM and EU Passport) with the additional conditions mentioned above.

In Brief

There is a level playing field between an EU AIF and a Non-EU AIF managed by a Non-EU AIFM in terms of Marketing, but not in terms of management authorisation. A Non-EU Manager managing a Non-EU AIF with Marketing in the EU will remain entitled to use the NPR during the Intermediary Period without being subject to the management authorisation described in Section 1.2.1.

The choice of managing an EU AIF and a Luxembourg AIF in particular, however, presents the advantage of offering a legal and regulatory environment which will facilitate the meeting of the AIFMD conditions described above, among others:

- compliance of the AIF with the applicable AIFMD obligations;

- FATF Compliance of the two jurisdictions concerned; and
- existence of cooperation arrangements between the relevant supervisory authorities and necessary OECD tax model agreements.

As regards Luxembourg, part of these conditions have already been met due to the regulated nature of Luxembourg AIF and cooperation arrangements are already in place between the Luxembourg supervisory authorities and the supervisory authorities in almost all relevant countries (see the information on the AIFMD implementation in Luxembourg at the end of the first Chapter and in the AIFMD Addendum).

3. CASE 3: NON-EU MANAGER MANAGING A LUXEMBOURG AIF WITH NO MARKETING IN THE EU

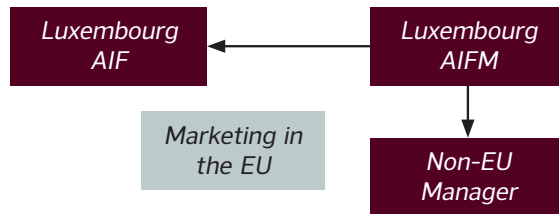


During the Initial Period, this investment structure will not be affected by the AIFMD.

As from the start of the Intermediary Period, the management authorisation procedure described in Section 1.2.1 will apply. A Member State of Reference will need to be appointed and the financial authorities of that Member State of Reference will act as EU competent authorities for the authorisation and supervision of the Non-EU Manager.

³² Article 402 of the AIFMD.

4. CASE 4: LUXEMBOURG AIFM MANAGING A LUXEMBOURG AIF AND DELEGATING INVESTMENT MANAGEMENT TO A NON-EU MANAGER, WITH MARKETING IN THE EU



4.1 Authorisation for the management

The Luxembourg AIFM must be authorised as AIFM as from 22 July 2013 (subject to the application of the One-Year Transition Period for AIFM which performed activities under the AIFMD before 22 July 2013) and is, upon authorisation, entitled to benefit from the EU Passport.

Case 4 corresponds mutatis mutandis to the structuring solution proposed in Option B (described above in Case 1).

4.2 Delegation of portfolio management by a Luxembourg AIFM to a non-EU manager

The Luxembourg AIFM may delegate the portfolio management to a non-EU manager provided the general conditions applying to delegation under AIFMD are fulfilled, i.e.:

- the delegation must be notified to the CSSF before the delegation can take effect;
- the Luxembourg AIFM must be able to justify objectively the entire delegation structure;
- the non-EU manager must have sufficient resources to carry out the respective tasks and those who effectively conduct the delegated activities must be of good repute and have sufficient experience;
- the delegation must not impede the effective supervision of the Luxembourg AIFM and, in particular, it must not prevent the Luxembourg AIFM from acting, or the Luxembourg AIF from being managed, in the best interests of investors;
- the Luxembourg AIFM must be able to prove that the non-EU manager is qualified and capable of performing the tasks in question,

that due diligence has been implemented in its selection and that the Luxembourg AIFM is able to monitor the delegated tasks effectively and at any time, to give further instructions to the non-EU manager and to withdraw the delegation with immediate effect when this is in the investors' interests.

To the extent that the delegation relates to portfolio management function³³, the following additional conditions also need to be fulfilled:

- the non-EU manager must be authorised or registered for the purpose of asset management and subject to supervision³⁴; and
- cooperation between the CSSF and the supervisory authority of the non-EU manager must be ensured. The AIFM Regulation provides that the competent authority of the home Member State of the AIFM (i.e., in this case, the CSSF) and the supervisory authority of the non-EU manager must have concluded a cooperation arrangement based on a written agreement and that the arrangement must be in place prior to the delegation.

The Luxembourg AIFM remains liable towards the Luxembourg AIF and its investors. Its responsibility is not affected by the delegation.

The Directive also provides that an AIFM may not delegate its functions to such an extent that it can no longer be considered as the manager of the AIF nor to such an extent that it becomes a letter-box entity. The AIFM Regulation provides some clarifications on the notion of letter-box entity. It confirms that the AIFM must itself perform the investment management functions (i.e. the portfolio management or the risk management functions), that it must have the necessary expertise and resources, keep the power to take decisions which fall under senior management responsibility and perform senior management functions. The assessment of a delegation structure and in particular, of whether or not the Luxembourg AIFM is deemed a letter-box entity will be made by the CSSF. It shall be based on a series of criteria, including qualitative criteria.

³³ The same requirement applies in case of delegation of risk management functions.

³⁴ If the condition relating to the local authorisation and supervision cannot be met, the competent authorities of the AIFM (i.e. the Luxembourg authorities) may approve the non-EU manager under certain conditions.

4.3 Appointment of a non-EU investment advisor

Alternatively, an advisory agreement may be entered into whereby a Luxembourg AIFM may receive investment advice from a non-EU manager³⁵.

Under an advisory agreement, the Luxembourg AIFM holds responsibility for making the final investment decision and is hence free to choose whether or not to follow the advice received from the non-EU manager.

The AIFM Regulation seems to consider that depending on the scope of the tasks assigned to the advisor, the execution of an advisory agreement may qualify as delegation under the AIFMD. The general conditions mentioned under 4.2 will apply in this case.

As long as the terms of the advisory agreement are clear, do not create any confusion and are complied with in practice, the execution of this agreement, however, should not qualify as delegation of the portfolio management function. As a consequence, the additional conditions mentioned under 4.2 above (i.e. authorisation/registration for the purpose of asset management, supervision and cooperation between the competent authority of the Luxembourg AIFM and the supervisory authority of the non-EU manager) should not apply.

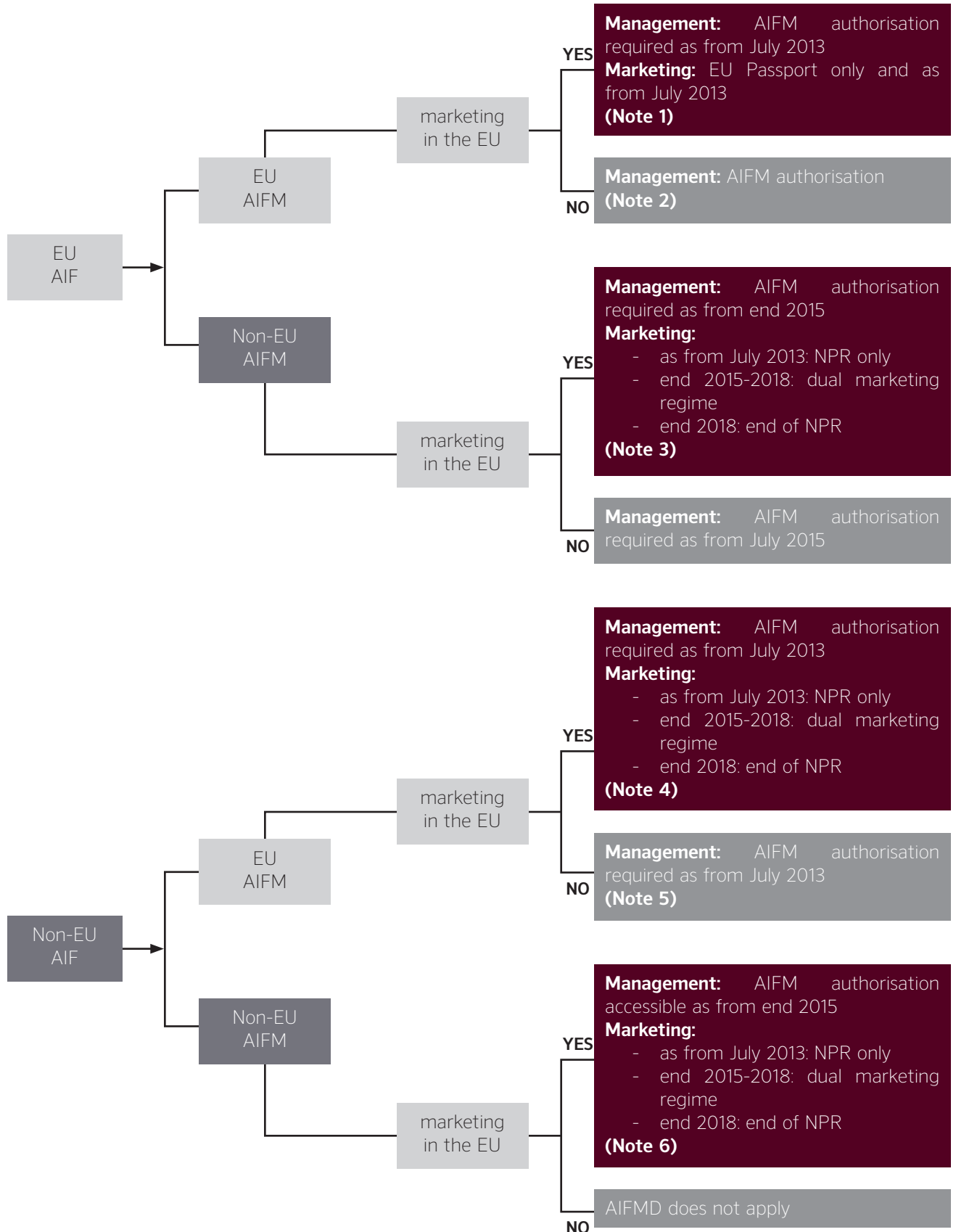
5. CASE 5: LUXEMBOURG AIFM MANAGING A LUXEMBOURG AIF AND DELEGATING INVESTMENT MANAGEMENT TO A NON-EU MANAGER, WITH NO MARKETING IN THE EU

The Luxembourg AIFM will need to be authorised under the AIFMD as from the start of the Initial Period (subject to the application of the One-Year Transition Period).

As for Case 4, delegation of the portfolio management or any other management function and/or the entry into an advisory agreement can be envisaged.

³⁵ Reference is kept to a "non-EU manager" although, strictly speaking, it does not act as investment manager in the contemplated scenario.

THIRD COUNTRY SUMMARY TABLE: MANAGEMENT & MARKETING



Note 1:

Management: AIFM required to be authorised as from July 2013, subject to application of the One-Year Transition Period.

Marketing: access to EU Passport as from AIFM authorisation and upon fulfilment of the required marketing notification(s).

Note 2

Management: AIFM required to be authorised as from July 2013, subject to application of the One-Year Transition Period.

Note 3 (see 1. Case 1 for a more detailed analysis)

Management: AIFM required to be authorised as from the end of 2015 at the earliest (appointment of a Member State of Reference, compliance with Full 3rd Country Requirements and effective supervision of the Non-EU Manager).

Marketing:

- 2013- end 2015: NPR + AIFMD provisions on transparency, reporting, controlling interests and compliance with Partial 3rd Country Requirements (subject to application of the One-Year Transition Period).
- end 2015-2018: dual marketing regime:
 - NPR + AIFMD provisions on transparency, reporting and controlling interests and Partial 3rd Country Requirements; or
 - EU Passport: accessible upon fulfillment of all AIFMD conditions, marketing notification (s) and compliance with Full 3rd Country Requirements.
- end 2018: end of NPR.

Note 4

Management: EU AIFM managing non-EU AIF with marketing in the EU are required to be authorised as from July 2013, subject to application of the One-Year Transition Period.

Marketing:

- 2013- end 2015: NPR + all AIFMD provisions except depositary (a separate entity must be appointed as depositary and must fulfill the depositary duties provided for in art.21 §7 to 9 AIFMD) and compliance with the Partial 3rd Country Requirements (subject to application of the One-Year Transition Period).
- end 2015-2018: dual marketing regime:
 - NPR + all AIFMD provisions except depositary (a separate entity must be appointed as depositary and must fulfill the depositary duties provided for in Art.21 §7to 9. AIFMD) and Partial 3rd Country Requirements; or
 - EU Passport: accessible upon fulfillment of all AIFMD conditions (including depositary requirements), marketing notification (s) and compliance with Full 3rd Country Requirements.
- end 2018: end of NPR.

Note 5

Management:

- 2013: EU AIFM managing non-EU AIF with no marketing in the EU are required to be authorised as from July 2013, subject to application of the One-Year Transition Period.

These AIFM must comply with all AIFMD requirements except annual report and depositary.

- Cooperation arrangements must be in place between AIFM regulator and the authority of the third country where the non-EU AIF is established.

Note 6 (see 2. Case 2 for a more detailed analysis)

Management: AIFM authorisation accessible as from the end of 2015 at the earliest (appointment of a Member State of Reference, compliance with the Full 3rd Country Requirements and effective supervision of the Non-EU Manager).

Non-EU AIFM managing non-EU AIF with marketing in the EU will be required to be authorised upon termination of NPR (not before the end of 2018).

Marketing:

- 2013- end 2015: NPR + AIFMD provisions on transparency, reporting and controlling interests and Partial 3rd Country Requirements (subject to application of the One-Year Transition Period).
- end 2015-2018: dual marketing regime:
 - NPR + AIFMD provisions on transparency, reporting and controlling interests and Partial 3rd Country Requirements.
 - EU Passport accessible upon fulfillment of all AIFMD authorisation conditions , marketing notification (s), compliance with the Full 3rd Country Requirements, and appointment of a Member State of Reference.
- end 2018: end of NPR.

DEFINITIONS

AIF	Alternative investment fund(s).
AIFM	Alternative investment fund manager(s).
AIFMD or Directive	Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.
AIFM Law	Means the Law dated 12 July 2013 on Alternative Investment Fund Managers which implements the AIFMD into Luxembourg law.
AIFMD Addendum	Means the AIFMD Addendum on the implementation status of the AIFMD in Luxembourg, which is inserted in this brochure.
Application Date	Means 22 July 2013, i.e. the date as from which the AIFMD became applicable.
CSSF	Means the <i>Commission de Surveillance du Secteur Financier</i> , the Luxembourg financial supervisory authority.
EU	European Union.
EU AIF	Means: (i) an AIF which is authorised or registered in a Member State under the applicable national law; or (ii) an AIF which is not authorised or registered in a Member State but has its registered office and/or head office in a Member State.
EU AIFM	Means an AIFM which has its registered office in a Member State.
EU Passport	Means the passport introduced by the Directive for the Marketing of AIF to professional investors in the EU.
External AIFM	Means the legal person appointed by the AIF or on behalf of the AIF and which through this appointment is responsible for managing the AIF.
FATF	Financial action task force on anti-money laundering and terrorist financing.
FATF Compliance	Means the requirement that the third country in which the non-EU Manager or the non-EU AIF, as applicable, is established, is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force.
Final Period	Means the period described in the Chapter " <i>Focus on Third Countries, Third Country Regime: Principles</i> " which will start at the earliest three years after the beginning of the Intermediary Period.

Full 3 rd Country Requirements	Means execution of cooperation arrangements between EU and non-EU authorities, compliance with anti-money laundering and terrorist financing requirements, and execution of an OCDE model tax agreement.
Holding Company	Means a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to their long-term value, and which is either a company: <ul style="list-style-type: none"> (i) operating on its own account and whose shares are admitted to trading on a regulated market in the Union; or (ii) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents.
Initial Period	Means the period described in the Chapter " <i>Focus on Third Countries, Third Country Regime: Principles</i> " which will start on the Application Date and which will end when the Intermediary Period will start.
Intermediary Period	Means the period described in the Chapter " <i>Focus on Third Countries, Third Country Regime: Principles</i> " which will start at the earliest two years after the Application Date and which will end when the Final Period will start.
Internal AIFM	Means a structure where the legal form of the AIF permits an internal management and where the AIF's governing body has chosen not to appoint an external AIFM.
Legal Representative	Means the contact point of the non-EU AIFM in the European Union
Level 2 AIFM Regulation	European Commission Delegated Regulation 231/2013 of 19 December 2012 supplementing the AIFMD with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.
Marketing	Means a direct or indirect offering or placement on the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors in the EU.
Member State of Reference	Means the Member State of reference for a non-EU AIFM.
MiFID	Directive 2004/39/EC of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC repealing Council Directive 93/22/EEC.
Non-EU Manager	Investment manager(s) not based in the EU which acts as non-EU AIFM.
NPR	National private placement regime(s).
One-Year Transition Period	Means the one-year period starting on 22 July 2013, referred to in Article 61.1 of the AIFMD.
Option A	Means the marketing option A described in Chapter 2 " <i>Focus on Third Countries</i> ", Section 1.1.2.
Option B	Means the marketing option B described in Chapter 2 " <i>Focus on Third Countries</i> ", Section 1.1.2.

Option C	Means the marketing option C described in Chapter 2 "Focus on Third Countries", Section 1.2.2.
Part II UCI	Undertakings for collective investment regulated by the provisions of Part II of the Law of 17 December 2010 relating to undertakings for collective investment.
Partial 3 rd Country Requirements	Means execution of cooperation arrangements between EU and non-EU authorities and compliance with anti-money laundering and terrorist financing requirements provided for by the AIFMD.
SICAR	<i>Sociétés d'investissement en capital à risque</i> regulated by the amended Law dated 15 June 2004 relating to investment companies in risk capital.
SIF	Specialised investment funds regulated by the amended Law dated 13 February 2007.
SOPARFI	<i>Sociétés de participations financières</i> incorporated under the amended Law on Commercial Companies of 10 August 1915.
Table	Means the table inserted at the end of Chapter II of this brochure which illustrates the different situations where the third country regime applies and also the scope of application of the AIFMD provisions.
UCITS	Undertakings for collective investment in transferable securities which require authorisation pursuant to Article 5 of Directive 2009/65/CE of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

ASSET MANAGEMENT AND INVESTMENT FUNDS

We advise on a wide range of investment products, with a client base of similar diversity: from boutique investment houses to the largest American, British, continental European and Asian fund promoters. We are the leading firm in Luxembourg in terms of net assets of investment funds for which we act as legal adviser.

Our service to clients is based on our deep understanding of the fund industry and its needs, as well as our team's collective legal and regulatory knowledge. We have extensive experience in setting up all types of investment vehicles such as UCITS (Undertakings for Collective Investments in Transferable Securities), regulated AIFs (like SIF and SICAR) and non-regulated AIFs. We have dedicated teams of specialists covering all asset classes, including hedge funds, private equity funds, real estate and infrastructure funds, debt funds and microfinance funds. Our teams guide fund promoters and asset managers on their funds structuring, eligible investments and strategies, draft the required legal documentation and ensure regulatory approval is obtained.

We are committed to the evolution of Luxembourg as the primary European investment fund centre. We actively participate in discussions with the government and the regulator on all initiatives in the development of the financial sector – thus contributing to legislative development and origination of new legal structures.

Our partners are members of a number of advisory committees led by the *Commission de Surveillance du Secteur Financier* (CSSF) where regulatory developments are discussed with industry practitioners. As a result of our participation in such committee works and our day-to-day involvement in the CSSF approval process for our clients or their investment fund structures, we have a very good relationship with the CSSF. Our clients therefore benefit from prompt and efficient discussion and resolution of regulatory matters.

In the last decade, the Association of the Luxembourg Fund Industry (ALFI) has become a powerful association, taking numerous initiatives to develop the Luxembourg investment fund industry. Our lawyers are members of ALFI's board of directors, regulatory board and various working groups, giving us greater exposure to the latest developments and the ability to keep our clients ahead of the latest regulatory changes and opportunities.

Our partners are also actively involved in the Luxembourg Private Equity and Venture Capital Association (LPEA) which plays a major role in the promotion and the development of the private equity industry in Luxembourg. We notably co-chair the legal committee of the LPEA.

Our full-service approach spans not only all types of investment funds, but also the entities providing management, custody, administration and distribution services to such funds.

ELVINGER HOSS PRUSSEN TEAM

For further information, please liaise with your usual contact person at Elvinger Hoss Prussen or any of the partners and counsel listed below :



JACQUES ELVINGER
jacqueselvinger@elvingerhoss.lu
T. +352 44 66 44-5411



PATRICK REUTER
patrickreuter@elvingerhoss.lu
T. +352 44 66 44-5211



GAST JUNCKER
gastjuncker@elvingerhoss.lu
T. +352 44 66 44-5232



JÉRÔME WIGNY
jeromewigny@elvingerhoss.lu
T. +352 44 66 44-5234



SOPHIE LAGUESSE
sophielaguesse@elvingerhoss.lu
T. +352 44 66 44-5363



KATIA PANICHI
katiapanichi@elvingerhoss.lu
T. +352 44 66 44-5112



FRÉDÉRIQUE LIFRANGE
frederiquelifrange@elvingerhoss.lu
T. +352 44 66 44-5361



SOPHIE DUPIN
sophiedupin@elvingerhoss.lu
T. +352 44 66 44-5464



XAVIER LE SOURNE
xavierlesourne_hk@elvingerhoss.lu
T. +852 22 87 1900



OLIVIA MOESSNER
oliviamoessner@elvingerhoss.lu
T. +352 44 66 44-5212



ANNE BAUDOIN
annebaudoïn@elvingerhoss.lu
T. +352 44 66 44-5462



JEAN-PIERRE MERNIER
jeanpierremermier@elvingerhoss.lu
T. +352 44 66 44-5461



PHILIPPE BURGNER
philippeburgener@elvingerhoss.lu
T. +352 44 66 44-5232



JOACHIM KUSKE
joachimkuske@elvingerhoss.lu
T. +352 44 66 44-5412



VIRGINIE LEBBE
virginielebbe@elvingerhoss.lu
T. +352 44 66 44-5471

Contact us to discuss how we can support
your business in Luxembourg.

Luxembourg Office

2, Place Winston Churchill
L-1340 Luxembourg
Phone (+352) 44 66 440
Fax (+352) 44 22 55

www.elvingerhoss.lu

Hong Kong Office

Suite 503, 5/F ICBC Tower,
Citibank Plaza,
3 Garden Road, Central,
Hong Kong
Phone (+852) 2287 1900
Fax (+852) 2287 1988

