AIFMD: the level 2 regime - a pan-European perspective
2 May 2013
What we will cover today

Introduction and overview - Ash Saluja

Delegation and depository issues - Jérôme Sutour

Cross-border marketing and third country funds - Joachim Kaetzler

An Irish perspective - Mark White

A Luxembourg perspective - Evanthi Savvoulidi

Q&A panel session - All Speakers and Panel
AIFMD Level 2 – An overview

Ash Saluja
Partner, CMS London
The helicopter view of AIFMD

- How we got here
- Timetable
- Scope
  - What is an AIF?
  - Who is the AIFM?
- Overview of consequences of being an AIFM
  - Prudential
  - Conduct
  - Other requirements
- Overlap with other areas
A brief reminder of how we got here…

<table>
<thead>
<tr>
<th>Policy</th>
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<tbody>
<tr>
<td>- Financial crisis and need to manage systemic risks</td>
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<td>- Protection for investors (Madoff etc.)</td>
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<td>- Paranoia about the activities of hedge &amp; private equity funds (e.g. asset stripping)</td>
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<td>- Continental protectionism</td>
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<table>
<thead>
<tr>
<th>Process</th>
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<tr>
<td>- A controversial initial Level 1 draft, a short consultation period with numerous competing drafts. Last minute compromises/deferring (or ignoring) some difficult decisions</td>
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<td>- Commission and ESMA constantly deferring final Level 2 draft and further guidance - finally publishing Level 2 just before Christmas with material changes from previous drafts</td>
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<td>- Confusing transitional arrangements especially in the UK</td>
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Timetable

- Level 1 Directive entered into force on 21 July 2011
- EU Member States have to implement the Directive into local law by 22 July 2013
- Many Member States have commenced consultation process on transposition, but rules still being written
- Draft Level 2 Regulation published on 19 December 2012, objection period expires next week
- Transitional arrangements on authorisation
  - existing AIFMs have one year to get new permissions
  - new AIFMs have no transitional relief and earliest UK application date is 22 July 2013
- ESMA still to publish final guidelines and Regulatory Technical Standards (RTS) on various topics including on key concepts of AIF and types of AIFM (i.e. perimeter guidance)
Scope (1) - AIFMD

- AIFMD applies to management or marketing of an alternative investment fund (AIF) by an alternative investment fund manager (AIFM)
- Covers
  - All EU based AIFM, wherever they market or manage
  - Non-EU based AIFM managing EU AIF, wherever marketed
  - Non-EU based AIFM marketing any AIF in the EU, wherever managed
- Does not cover
  - Non EU based AIFMs marketing solely to non EU investors
Scope (2) - AIFs

- Alternative Investment Fund (AIF) means:
  - any collective investment undertaking, anywhere
  - which raises capital from a number of investors
  - with a view to investing in accordance with a defined investment policy
  - which is not a UCITS fund

- AIFs will include:
  - all asset classes/strategies (hedge, private equity, real estate, infrastructure etc)
  - irrespective of legal form (unit trust, OEIC, investment trust, LPs etc)
  - close ended and open ended
  - regulated (NURS or QIS) and unregulated
Scope (3) - AIFMs

- **Alternative Investment Fund Manager (AIFM)** means:
  - any legal person
  - whose regular business is managing one or more AIF
  - internal or external (i.e. an AIF can also be an AIFM if it is self-managed)

- **Managing AIF** means performing the investment management functions of:
  - portfolio management - not defined but essentially buying/selling assets/investments with discretion – MiFID concept very familiar; and/or
  - risk management – now defined in Level 1 and Level 2, essentially establishing and operating risk management systems, policies and procedures – new concept for many managers; and
  - responsible for both (cannot delegate either function to extent that you become a letter-box entity)
Scope (4) - Exemptions

- Holding companies: any company applying a business strategy through subsidiaries, associated companies or participations to contribute to their long-term value, and
  - listed on a European regulated market and operating for own account; or
  - not established for main purpose of generating returns by means of divestment of subsidiaries or associated companies
- Joint ventures
  - limited number of parties
  - involvement for all parties in strategic decisions – how active does management have to be?
- Below de minimis thresholds – AIFM managing AIFs of less than €100m, or unleveraged, closed ended AIFs of less than €500m with minimum five-year lock-in (both aggregate tests)
Scope (5) – Other key points

- AIFM essentially restricted to AIFMD/UCITS activities and activities ancillary or related to that – cannot be a MiFID firm or a credit institution or an insurance company
- EU member states may permit AIFM to carry on e.g. portfolio management of segregated mandates – question as to whether this activity alone is passportable under AIFMD
- Authorised AIFM can manage or market funds to professional investors throughout the EU under an AIFMD passport
Typical in-scope structure

**AIFM**
Internally managed AIF or external manager as long as they do not delegate portfolio management or risk management to the extent they become a letter-box entity. Cannot be a MiFID firm.

**AIF**
May be internally managed (e.g. investment trust or company) or externally managed (e.g. unit trust or LP). May or may not be a collective investment scheme for UK purposes.

**Fund or Investment vehicle**

**Investment manager**
Portfolio management and/or Risk management

**Investor 1**
**Investor 2**
**Investor 3**

**Portfolio / assets**
Some key questions on scope

- **AIFs**
  - Have you identified the AIFs in your group and/or that you manage?
  - Are there any exemptions or transitional arrangements that might apply?
  - Are these non-EU AIF offered only to non-EU investors?

- **AIFMs**
  - Have you identified the potential AIFMs for the AIFs in your group and/or that you manage? Remember, each AIF can only have one AIFM.
  - Is this firm already FSA authorised?
  - Can it be an AIFM?
  - If not, will you apply for authorisation or get a third party to be the AIFM?
### Consequences of being an AIFM – in a nutshell

- Organisational requirements
- Risk management systems
- Capital/professional indemnity insurance
- Liquidity
- Leverage
- Securitisations
- Asset stripping
- Valuations
- Conflicts and disclosure of preferential treatment
- Reporting/transparency
- Remuneration
- Delegation and depositaries (Jerome)
- Marketing (Joachim)
Impact areas of AIFMD

1. Authorisation
   - Scope
   - Authorization requirements
   - Capital requirements

2. Marketing
   - EU AIF
   - Non-EU AIF
   - EU passport

3. Conduct of business
   - Remuneration guidelines
   - Rules of conduct
   - Conflict of interest

4. Functions and service providers
   - Valuation requirements
   - Risk and liquidity management
   - Depositary

5. Transparency
   - Delegation and sub-delegation
   - Reporting to regulator (FSA/FCA)
   - Disclosure to investors

6. Specific provisions
   - Leverage
   - Asset stripping
Finally, remember that AIFMD is not an island…

- **EU regime:**
  - UCITS – can be a UCITS firm and manage AIFs and vice versa
  - MiFID – cannot be an AIFM and a MiFID firm, but you can still conduct MiFID business (i.e. managing segregated portfolios) at least in UK
  - Prospectus Directive – transferable securities in an AIF still caught
  - PRIIPs – offering units/shares in AIFs to retail clients potentially caught

- **UK/national regimes:**
  - Private placement exemptions permit marketing to professional and retail investors – local marketing/financial promotion/conduct rules still relevant
  - UK collective investment schemes are a sub-set of AIFs – these will still require a regulated operator in the UK who will not necessarily be the AIFM and may be subject to COLL (FUND) rules if a regulated fund
Delegation and depository issues

Jérôme Sutour
Partner, CMS Paris
Delegation issues structure

- What is a delegation?
- Who may delegate?
- Who may be a delegate?
- How to delegate?
- The secret French (AMF’s) touch !!!
What is a delegation?

- Carrying out functions on behalf of the AIFM (AIFMD Art.20.1.(a))
  - ‘Agency relationship’ (mandate) one party is acting in the name and on behalf of another party;
  - ‘Outsourcing’ an arrangement between an ISP and a service provider by which the latter performs an activity which would otherwise be undertaken by the ISP (Directive 2006/73 Art.2.(6));
  - **Not a true blue civil law delegation** - AIFM retains responsibility (AIFMD Art.20.3 / AIFMR Art.75.b).

- Consequences:
  - Not necessarily a mandate;
  - The AIFM may not delegate a power/function that it does not have *(de jure/de facto)* (AIFMR Art.82);
  - AIFM retains responsibility.
Who may delegate? (1/2) - Conditions on the AIFM

- Applicable to AIFM (and its delegate for sub-delegation);
- Positive conditions:
  - Justification to its regulator by the AIFM (AIFMD Art.20.1.(b) / AIFMR Art.76)
    - Objective reasons reviewed by the regulator of the AIFM:
      - Optimising of business functions and processes;
      - Cost saving;
      - Expertise of the delegate;
      - Access of the delegate to global trading capabilities.
  - Contractual arrangement with the delegate (AIFMD Art.20.4 / AIFMR Art.76).

\textit{de facto} authorisation by the AIFM’s regulator AIFMD Art.6.7.(e)
Who may delegate? (2/2) - Conditions on the delegation

- Negative conditions (AIFMR Art.82): no delegation if:
  - AIFM may not supervise its delegate;
  - AIFM no longer has the power to take decisions in key areas (e.g. investment policy and investment strategies);
  - AIFM loses (in law or in practice) rights to inquire, inspect or give instructions to the delegate;
  - Delegation exceeds by a substantial margin the investment management functions:
    - Extent of the delegation (re. size, type or ambit of strategies/assets);
    - Configuration of the delegation, whether intra or extra group.
Who may be a delegate? (1/3) - Capacity of the delegate

- General principles:
  - Resources, reputation and experience (AIFMD Art.20.2.(b) / AIFMR Art.77)
    - **Resources**: Quantity and quality of staff / appropriate organisational structure;
    - **Experience**: Theoretical, practical and training;
    - **Reputation**: Emphasis on financial activities breaches (favourable presumption if regulated in the Union).
  - Portfolio or risk management (AIFMD Art.20.2.(c) & (d) / AIFMR Art.77):
    - Entities in the Union authorised for asset management or authorisation of the AIFM's regulator;
    - Third countries’ undertakings.
Who may be a delegate? (2/3) - Authorised entities

- **Presumption of authorisation** for portfolio or risk management (AIFMR Art.78.2):
  - Entities in the Union authorised for asset management:
    - UCITS management companies;
    - investment firms and credit institutions authorized under MIFID to perform portfolio management;
    - AIFM management companies.
  - Third country entities authorised for asset management and effectively supervised by a competent authority in those countries.

Responsibility of the AIFM to monitor capacity of the delegate
Who may be a delegate? (3/3) - Exclusion

- **Exclusion for depositaries** and their delegates (AIFMD Art.20.2);
- **Exclusion** of entities with **conflict or interests** (AIFMR Art.80):
  - Presumption of conflict:
    - Control or influence the AIFM (same group or contractual relationship):
      - Because of the relationships between the delegate and the AIFM;
      - Because of the relationships between the delegate and investor.
    - Financial gain/loss at the expense of the AIF or the investors in the AIF;
    - Unstandardized inducement or financial or other incentive to favour the interest of another client over the interests of the AIF or its investors.
  - Presumption of absence of conflict:
    - Distinction portfolio management / controlling tasks staff;
    - Distinction risk management / operating tasks staff;
    - Staff responsible for the operating tasks does not supervise risk management / adequate hierarchical structure.
How to delegate? (1/2) - The arrangement with the delegate

- **Principles**: the agreement must provide for (AIFMD Art.20.1(f)):
  - Extent of the delegation;
  - Efficient monitoring by the AIFM (AIFMR Art.79);
    - Access to the premises of the delegate by the AIFM, its auditors and regulator;
    - Cooperation with, and provision of information on demand to, the AIFM’s regulator.
  - Compliance with the instruction of the AIFM;
  - Termination with immediate effect.

**Supervision of the delegate by the AIFM’s regulator**
AIFMR Art. 79.(c)
How to delegate? (2/2) - Portfolio or risk management and third countries

Additional conditions for the delegation of portfolio or risk management to third countries’ delegate (AIFMR Art.78.3):

- Agreement between the AIFM and the delegate’s regulator;
- Agreement with the delegate must provide for the possibility for the AIFM’s regulator to:
  - Obtain on request relevant information on the activities conducted;
  - Obtain access to the documents relevant for their supervisory duties;
  - Carry out on-site inspections on the premises of delegate;
  - Receive information from the delegate’s regulator;
  - Demand its cooperation in enforcing the national and international law applicable to the supervisory authority of the third country and the EU competent authorities.
The secret French (AMF’s) touch !!!

- **AMF’s experience on delegation:**
  - A delegation must not result in the delegation by senior management of its responsibility;
  - AIFM must establish methods for assessing the standard of performance of the delegate;
  - The procedures for terminating the delegation must ensure the continuity and the quality of the activities carried out; and
  - Both the AIFM and the delegate must establish and maintain an effective contingency plan for disaster recovery and periodic testing of backup facilities.

The AMF knows better !!!
Depository issues structure

- The depository agreement
- Custody
- Depositories and AIFMs
- Depositories and delegates
- Liability of depositaries
- **The secret French (AMF’s) touch !!!**
The depository agreement

- AIFMR Art.83 details the provisions of the depository agreement including:
  - For safe-keeping and oversight functions (including the process for new types of assets and sub-depository);
  - The extent of its liability;
  - Process on the exchange of information with the AIFM/third parties;
  - Process on how, upon request, information are exchanged on the criteria used to select and monitor third parties.
Cash monitoring

- Provision of information on all cash accounts (AIFMR Art.86):
  - Limitation on where cash accounts may only be opened with:
    - Credit institutions;
    - Central banks;
    - Third party countries banks subject to equivalent prudential regulation and supervision.
  - Daily reconciliation and, on each business day, identification of material cash movements;
  - Inform the AIFM on inconsistencies in relation with reconciliation and the AIFM’s regulator if the situation cannot be clarified;
  - Information at the close of business day on subscription monies received.
Custody (1/3) - Scope

- **Scope of the safe keeping of financial instruments:**
  - Financial instruments that can be held in custody (AIFMD Art.21.8.(a) and AIFMR Art.88):
    - financial instruments which may not be physically delivered but are capable of being registered or held in an account directly or indirectly in the name of the depositary;
    - financial instruments which may be physically delivered to the depository.
  - Financial instruments which are only, under applicable law, directly registered in the name of the AIF with the issuer itself or its agent shall not be held in custody.

Registration in the name of the depository = Luxalpha !!!
Custody (2/3) – Financial instruments

- **Extent of the safe keeping of financial instruments** (AIFMR Art.88):
  - Records and segregated accounts are accurately maintained;
  - Reconciliations are conducted on a regular basis with its delegates;
  - Due care is exercised to ensure a high standard of investor protection;
  - All relevant custody risks are assessed and monitored and the AIFM is informed of any material risk identified;
  - Same obligations are imposed on its delegates.
Custody (3/3) – Other assets

- **Other assets** (AIFMD Art.21.8.(b) and AIFMR Art.90):
  - Access and possession of all relevant information to be satisfied of the AIF’s ownership right over the assets;
  - Maintain a record of those assets:
    - Register in its record such assets;
    - Be able to provide a comprehensive and up-to-date inventory;
    - Ensure that there are procedures so that assets cannot be transferred without the depositary or its delegate being informed of such transactions;
    - Ensure that the relevant third party provides the depositary without undue delay with certificates or other documents.
  - Ensure that the AIFM has procedures to verify that such assets are appropriately registered in the name of the AIF;
  - Set up escalation procedure with notification to the AIFM and of the competent authorities if the situation cannot be clarified.
Depositories and AIFMs

- **Oversight duties**: (AIFMR Art.92)
  - Perform ex-post controls and verifications of processes and procedures that are under the responsibility of the AIFM;
  - Escalation procedures for situations where potential irregularities are detected (transmitted to the AIFM’s regulator on request);
  - Be able to have access to the books and visit the premises of the AIFM or service providers appointed by the AIF or the AIFM.

- **Carrying out of the AIFM’s instruction**: must verify compliance with applicable laws and the AIF’s rules (AIFMR Art.95),

- **Duties regarding subscription and redemptions** (AIFMR Art.94):
  - Ensure that the procedures regarding the sale/redemption of units of the AIF comply with the applicable national law and with the AIF rules;
  - Ensure proper reconciliation by the responsible entity.
Depositories and delegates (1/3) - Selection

- Selection and review (updated once a year) (AIFMR Art.98):
  - **Selection:**
    - Assess the regulatory and legal framework, in particular the implication of an insolvency of the delegate;
    - Assess delegate’s practice to ensure assets of the AIF are subject to a high standard of care and protection;
    - Assess delegate’s financial strength and reputation;
    - Ensure that the delegate has the operational and technological capabilities to perform the delegated custody tasks.
  - **Periodic review:**
    - Monitor the delegate’s performance and compliance its’ standards;
    - Ensure that the delegate exercises a high standard of care and diligence;
    - Review the custody risks associated with the delegate (frequency and the scope of the review shall be increased in case of crisis);
    - Devise contingency plans for each market in which it appoints a delegate.
Depositories and delegates (2/3) - Segregation

- Ensure segregation at the level of the delegate (AIFMR Art.99)
  - Delegate must distinguish assets of depositary’s AIF clients from:
    - Delegate’s own assets;
    - Delegate’s other clients,
    - Depositary’s own assets; and
    - Depositary’s other clients.
  - Ensure that the financial instruments belonging to AIF are protected from any insolvency of that delegate;
  - Additional arrangements are to be made in order to minimise the risk of loss.
Depositories and delegates (3/3) – Prime brokers

- Prime broker may not act as depository unless it has strictly separated the performance of its depositary functions (AIFMD Art.21.4.(b));
- A prime broker is required to make available to the depositary at the close of the next business day (AIFMR Art.91):
  - The value and details on assets:
    - Held under the safekeeping delegation;
    - Held as collateral (including cash);
    - Re-used by the prime broker.
  - The list of all the institutions at which the prime broker holds cash of the AIF.

Daily control on re-use
Liability of depositories (1/2) – Principles

- **Loss of financial instruments (AIFMR Art.100)**
  - A loss means:
    - Right of ownership of the AIF is demonstrated not to be valid because it either ceased to exist or never existed;
    - The AIF is definitively unable to directly or indirectly dispose of the financial instrument.
  - No loss if the financial instrument is substituted by another financial instrument or instruments;
  - Immediate ascertainment in case of insolvency.

- **No liability if (AIFMR Art.101) if:**
  - Loss does not result from any act or omission of the depositary or its delegates; **and**
  - Depositary could not have *reasonably* prevented the occurrence of the event that led to the loss; **and**
  - Depositary could not have prevented the loss (identification and procedures).
Liability of depositories (2/2) – Consequences

- Presumption of absence of liability (AIFMR Art.101.2):
  - Natural events beyond human control or influence;
  - The adoption of any law, decree, regulation, decision or order that impacts the financial instruments held in custody;
  - Riots or other major upheavals.

- Presumption of liability (AIFMR Art.101.3):
  - Accounting error, operational failure, fraud, failure to apply the segregation requirements.

- Discharge of liability (AIFMR Art.102):
  - Limited, precise, consistent with its duties and objective reasons for the discharge;
  - Deemed objective if depository had no other options.
The secret French (AMF’s) touch !!!

- AMF’s experience on the Lehman case:
  • Strict obligation on the depository for assets that were not re-used.

The AMF ALWAYS knows better !!!
Contact details

Jérôme Sutour

Partner – Head of the Financial Services Department
CMS Bureau Francis Lefebvre, Paris

T: +33 1 47 38 56 22
E: jerome.sutour@cms-bfl.com
Cross Border Marketing & Third Country Funds

Dr. Joachim Kaetzler
Partner, CMS Frankfurt
Industry Overview/Importance of AIF in Germany 1/2

- While, according to EFAMA, the European UCITS sector was in 2011 about three times larger than the AIF sector, Germany is a major exception;
- Its AIF market plays a key role and is many times larger than its UCITS sector.

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<tr>
<th></th>
<th>All EFAMA Members</th>
<th>German EFAMA Members</th>
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<tbody>
<tr>
<td>UCITS assets</td>
<td>5,638.3</td>
<td>226.1</td>
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<tr>
<td>Non-UCITS assets</td>
<td>2,291.0</td>
<td>1133.5</td>
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</tbody>
</table>

1 EFAMA, Annual Report 2011 p. 53
Industry Overview/ Importance of AIF in Germany 2/2


<table>
<thead>
<tr>
<th></th>
<th>Special Funds</th>
<th>OEREFS</th>
<th>Closed-ended Real Estate AIF</th>
<th>Hedge Funds</th>
<th>Private Equity</th>
<th>Other Closed-ended funds</th>
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<tbody>
<tr>
<td><strong>Numbers</strong></td>
<td>3,659</td>
<td>43</td>
<td>N/A</td>
<td>20</td>
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<td><strong>AuM (in EUR bn.)</strong></td>
<td>812.9</td>
<td>84.63</td>
<td>4.98</td>
<td>0.69</td>
<td>0.47</td>
<td>4.41</td>
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- In particular, the special funds industry accounts for a significant share of the German AIF market and adds approximately 50% to the overall European special funds market;
- Besides special funds, OEREFs are the most relevant type of AIF in Germany;
- Closed-ended funds, e.g. real estate AIFs, hedge-funds or private equity-funds have only a small market share in Germany.
## Implementation of AIFMD in Germany

### Timeframe

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<td>21.12.12 disposal of draft to Bundesrat (Council)</td>
<td>01.02.13 1. discussion Bundesrat</td>
<td>21.02.13 German parliament 1. reading</td>
<td>13.03.13 hearing in BR-financial committee</td>
<td>24.04.13 final discussion in financial committee German parliament</td>
<td>23.05.13 discussion BR-financial committee</td>
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<td>27.02.13 Decision on hearing In financial committee German parliament</td>
<td>06.02.13 Cabinet-decision on comments/statements</td>
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<td>17.04.13 discussion in financial committee German parliament</td>
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Marketing rules pursuant to AIFMD

- AIFMD defines "Marketing" (Art. 4 Para 1 x) AIFMD) as
  - direct or indirect offering or placement
  - at the initiative of the AIFM or on behalf of the AIFM
  - of units or shares of an AIF it manages
  - to or with investors domiciled or with a registered office in the Union

- In terms of MiFID "Marketing" comprises of
  - Reception and transmission of orders
  - Investment advice
  - Portfolio management (?)
  - Dealing on own account (?)

- Marketing of AIF falls in the scope of both, MiFID and AIFMD
Marketing rules pursuant to AIFMD

- MiFID rules regarding conduct of business obligations applicable to marketing of AIF (provided that AIFs qualify as financial instruments)
  - Suitability / Appropriateness
  - Inducements
  - Conflicts of interests
  - Information requirements
- AIFMD sets up further obligations to marketing of AIF
  - Information requirements e.g. specific prospectus / OM including information regarding leverage and illiquid assets
  - Indemnity insurance
EU Passport: Marketing and Passporting by EU AIFM of EU AIFs to Professional Investors

- AIFMD will offer an EU-passport for AIFMD-compliant EU AIFMs and EU AIFs as of 2013
- The passport will generally become available on the date of transposition of the Directive
- AIFMD provides for two types of passport
  - EU marketing passport
  - EU management services passport
- EU marketing passport allows marketing of EU AIFs to professional investors (the term “professional investors” is defined as any investor that is considered as, or may be treated as, a professional client under MiFID)
- The management services can either be provided on a cross border basis or from a branch entity.
Marketing to Retail Investors?

- Each Member State may allow EU AIFM and non-EU AIFM to market AIFs to retail investors on its territory
  - Irrespective of whether the AIF is marketed on a domestic or cross-border basis or where the AIF is established
  - Member State may impose stricter or additional requirements on such marketing (i.e. as compared to the requirements applicable to professional investors)
  - Member States will be required to notify the European Commission and the European Securities and Markets Authority (ESMA)
    - about the types of AIF which an AIFM may market to retail investors and
    - any additional requirements the Member State imposes on the AIFM (Pls. note: This requirement applies one year following transposition of the Directive)
Third Country Rules – EU AIFM Managing and Marketing Non-EU AIFs

- An EU AIFM may **manage** a non-EU AIF via the pan-European passport if
  - the AIFM fully complies with the directive (except the depositary requirements and the annual report requirements)
  - a co-operation arrangement is in place between the home regulator and the third country regulator where the non-EU AIF is based

- An EU AIFM may **market** a non-EU AIF via the pan-European passport two years after transposition of the Directive (i.e. from 22 July 2015)
  - EU-AIFM fully complies with the directive
  - Co-operation & OECD-compliant TIEAs are in place between the EU-AIFM and the relevant non-EU AIF domicile
  - The relevant non-EU AIF domicile is not FATF blacklisted
Third Country Rules - Non-EU AIFM
Managing and Marketing EU AIFs and Non-EU AIFs to Professional Investors

- Non-EU AIFM may use the pan-European passport in respect of their marketing and management activities two years after transposition of the Directive (i.e. from 22 July 2015) if
  - The AIFM is authorised by its "Member State of Reference"
  - The AIFM fully complies with directive and certain other requirements are fulfilled, i.e.
    - Co-operation & OECD-compliant TIEAs are in place between the Non-EU AIFM and the AIF domiciles
    - The relevant AIF domicile is not FATF blacklisted
    - The Non-EU AIFM establishes a legal representative in the relevant "Member State of Reference" to act as a contact with the regulator
Managing & Marketing Approval Process

**Marketing Approval Process EU AIFM**
- An EU AIFM must notify its home regulator that it intends to market an EU AIF on a cross-border basis
- The home regulator must transmit the notification documentation to the regulator of the relevant Member State within 20 working days.
- Upon transmission, the home regulator shall notify the EU AIFM ‘without delay’ of such transmission and the EU AIFM may market to professional investors in the relevant Member State from the date of such notification.

**Managing Approval Process EU AIFM**
- An EU AIFM must notify its home regulator that it intends to manage an EU AIF on a cross-border basis

**Managing & Marketing Approval Process Non-EU AIFMs**
- The process (starting from 22 July 2015) is expected to be similar (i.e. with the Regulator of the non-EU AIFMs "Member State of Reference" carrying out the home regulator duties referred to above.)
Private Placement Regimes

- Member State private placement regimes may continue at the discretion of Member States
  - Provided the requirements at Articles 36 and 42 are complied with (e.g. third country cooperation arrangements are in place)
  - Member States are free to impose stricter rules beyond the minimum specified in the AIFMD
  - Until 2018 Private placement regimes are optional for Member States
    - The private placement regime in the EU is Member State specific and as such is fairly fragmented (i.e. no single EU-wide regime, in some EU Member State private placement is allowed and in others not)
    - Germany’s implementation of the Directive e.g. would abolish Germany’s current private placement regime
  - Following a review and the issue of technical advice by ESMA, private placement regimes may be gradually phased out from 2018 (i.e. subject to ESMAs opinion on the functioning of the pan-European passport)
Distribution and Placement – National Rules for Private Placement

Source: ALFI, Roadshow 2012
Outlook / Highlights

– Regulatory arbitrage (legal structures, private placements, taxation) might still be possible
  • Certain jurisdictions (Lux, Liechtenstein, Ireland) likely become management-hub for Europe

– Gold-plating (Germany)
  • Legal structures for AIFs are limited in Germany
  • No private placement rules
  • De minimis only for marketing to professional and semi-professional clients
  • Unclear taxation of foreign/domestic structures main obstacle
Thank you!
Contact details

Joachim Kaetzler

Partner - CMS Hasche Sigle, Frankfurt

T: +49 69 7170 1132
E: joachim.kaetzler@cms-hs.com
## Summary: EU Marketing Passport (1/2)

<table>
<thead>
<tr>
<th>AIFM</th>
<th>AIF</th>
<th>EU marketing passport</th>
<th>Depositary</th>
<th>Valuation</th>
<th>AIFMD requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU</td>
<td>EU</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Compliance with full AIFM</td>
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<td>From 2013</td>
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<td></td>
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<td></td>
<td>Location: home member state of AIF</td>
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<tr>
<td>EU</td>
<td>Non-EU</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Compliance with full AIFMD except provisions re: “rights of EU AIFM to market and manage EU AIF in EU”</td>
</tr>
<tr>
<td></td>
<td></td>
<td>From 2015 *</td>
<td></td>
<td></td>
<td>Additional requirements</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Location: country of AIF or home member state of AIFM</td>
<td></td>
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</tbody>
</table>

* subject to ESMA’s prior analysis and approval

- 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
### Summary: EU Marketing Passport (2/2)

<table>
<thead>
<tr>
<th>AIFM</th>
<th>AIF</th>
<th>EU marketing passport</th>
<th>Depositary</th>
<th>Valuation</th>
<th>AIFMD requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-EU</td>
<td>EU</td>
<td>Yes From 2015 *</td>
<td>Yes</td>
<td>Yes</td>
<td>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” Additional requirements &lt;ul&gt;&lt;li&gt;AIFM has a legal representative in its member state of reference&lt;/li&gt;&lt;li&gt;Co-operation in place between home member state of AIFM and AIF domicile&lt;/li&gt;&lt;li&gt;AIF domicile is not FATF blacklisted&lt;/li&gt;&lt;li&gt;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&lt;/li&gt;&lt;/ul&gt;</td>
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<tr>
<td>Non-EU</td>
<td>Non-EU</td>
<td>Yes From 2015 *</td>
<td>Yes</td>
<td>Yes</td>
<td>Same as box above and, in addition, re. the AIF: &lt;ul&gt;&lt;li&gt;Cooperation in place between member state of reference of AIFM and country of AIF&lt;/li&gt;&lt;li&gt;Country of AIF is not on FATF non-cooperative countries list&lt;/li&gt;&lt;li&gt;Country of AIF has signed OECD Model Tax Convention for exchange of information with member state of reference of AIFM&lt;/li&gt;&lt;/ul&gt;</td>
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</table>

*subject to ESMA’s prior analysis and approval*
<table>
<thead>
<tr>
<th>AIFM</th>
<th>AIF</th>
<th>EU management services passport</th>
<th>AIFMD requirements</th>
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<tbody>
<tr>
<td>EU</td>
<td>EU</td>
<td>Yes From 2013</td>
<td>- AIFM must be authorised to manage that type of AIF</td>
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<tr>
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<td>(established in another member state than the AIFM)</td>
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<td>- 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)</td>
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<td>1)Member state in which AIFM intends to manage AIF (either directly or via a branch)</td>
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<td>2)Program of operations stating the services to be performed by AIFM and identifying the AIF it intends to manage</td>
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<tr>
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<td>Non-EU</td>
<td>Yes From 2015 *</td>
<td>- If the AIFM intends to establish a branch, it shall provide additional information:</td>
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<td>1)Organisational structure of the branch</td>
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<td></td>
<td>2)Address in the home member state of the AIF for which documents may be obtained</td>
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<tr>
<td></td>
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<td></td>
<td>3)Names and contact details of persons responsible for the management of the branch</td>
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</tbody>
</table>

* subject to ESMA’s prior analysis and approval
## Summary: EU Management Services Passport (2/2)

<table>
<thead>
<tr>
<th>AIFM</th>
<th>AIF (established in another member state than the AIFM)</th>
<th>EU management services passport</th>
<th>AIFMD requirements</th>
</tr>
</thead>
</table>
| Non-EU    | EU                                                     | Yes From 215 *                  | 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:
  - 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
  - In case of a branch, additional information required:
    - 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 *                 | 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"
  - Additional requirements:
    - 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) -

<table>
<thead>
<tr>
<th>AIFM</th>
<th>AIF</th>
<th>Management &amp; marketing</th>
<th>Private Placement</th>
<th>Depositary</th>
<th>Valuation</th>
<th>AIFMD requirements</th>
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<tr>
<td>EU</td>
<td>EU</td>
<td>Yes</td>
<td>Yes Until 2018 *</td>
<td>AIFMD provisions applicable</td>
<td>AIFMD provisions applicable</td>
<td>The manager of the AIF must be authorised as AIFM under AIFMD as from 2013 → Full AIFM applies</td>
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</tbody>
</table>
| EU     | Non-EU | Yes                          | Yes Until 2018 *  | AIFMD provisions not applicable | Yes | Full AIFMD applies ex. depositary  
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 is 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
An Irish perspective

Mark White
Partner – McCann Fitzgerald, Dublin
Implementation of AIFMD in Ireland

- Transposing Irish Regulations – expected towards end April 2013
- AIFMD Rulebook – expected to be in force at end April 2013 (replaces entire non-UCITS regime and non-UCITS notices)
- Application for authorisation will be accepted once AIF Handbook is in place so that AIFM authorisation and professional passport will be available from 22 July 2013
Transitional Arrangements

- Existing Irish AIFMs – must use “best efforts” basis from 22 July 2013 with AIFMD being legally binding from 22 July 2014. No express Grandfathering
- Effect on new fund/sub-fund launches post 22 July 2013 depends on whether AIF is self managed or externally managed
- Impact on depositaries – no clear transitional provisions
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. Private placement regime
4. Funds that remain below the threshold after 2 years
5. Delegation
UK Investment Manager managing Irish QIF Structure

- If QIF is a ‘self-managed’ fund, the QIF would be the AIFM and the UK investment manager would be a delegate. In this scenario, it is likely that the UK adviser could remain as a MiFID firm and would not need to comply with 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 (eg. business plan, managerial functions, risk management) with certain enhancements to reflect requirements of Article 82 of the Level 2 Regulation;
  - revision of material contracts (eg. custody agreement, prime broker agreement etc).
Irish QIF Delegation Model
(Self-Managed Investment Company)
Irish QIF Delegation Model
(Unit Trust with Irish ManCo)
Irish QIF Delegation Model
(Self-Managed Investment Company)

The QIF will be the AIFM
→ Business Plan
➢ Increased oversight/supervision
➢ Dedicated managerial responsibilities
➢ Conflicts of interest policy
➢ Remuneration policy
➢ Risk management processes
→ Amendments to Custody Agreement/Sub-Custody Agreement

Business Plan
¾ Increased oversight/supervision
¾ Dedicated managerial responsibilities
¾ Conflicts of interest policy
¾ Remuneration policy
¾ Risk management processes

Irish QIF Part XIII Company
[Self-Managed] - AIFM

Irish Custodian

U.K./U.S. Primebroker

U.K. Investment Manager

Irish Administrator

Custody Agreement

Sub-Custody Agreement

Investment Management Agreement

Prime Broker Agreement

Administration Agreement
Irish QIF Delegation Model
(Unit Trust with Irish ManCo)

Irish ManCo will be the AIFM
- Business Plan
- Increased oversight/supervision
- Dedicated managerial responsibilities
- Conflicts of interest policy
- Remuneration policy
- Risk management processes
- Amendments to Trust Deed/Sub-Custody Agreement

AIFMD: The level 2 regime - a pan-European perspective | 2 May 2013
Mark White  
Partner, Head of Investment Management Group, McCann FitzGerald  
T: + 353 1 607 1328  
E: mark.white@mccannfitzgerald.ie
A Luxembourg perspective

Evanthi Savvoulidi
CMS Luxembourg
Overview of Luxembourg funds

UCITS and UCI
Net assets under management: EUR 2,500 bn

- 1,800 UCITS representing EUR 1,950 bn of net assets
- 540 UCI representing EUR 200 bn of net assets
- 1,500 SIF representing EUR 280 bn of net assets
- 270 SICAR
Implementation measures in Luxembourg

1. 2012 Amendments on SIF Law
2. Bill of Law AIFM
3. Amendments to Product Laws (UCI Law, SIF Law, SICAR Law)
4. Amendments to Luxembourg company law
AIFM Law in a nutshell

- **Luxembourg AIFM**
  - External manager or internal management of AIF including:
    - Portfolio management function
    - Risk management function

**Delegation of functions**
- Not a "letter-box entity"
- Delegation not to circumvent AIMF’s liability
- Effective supervision of the delegate
AIFM Law in a nutshell

• AIF Concept

- no limit in terms of the types of assets

- UCI, Specialised Investment Funds (SIF) and Investment Companies in Capital at Risk (SICAR) covered

- Single AIFM responsible for ensuring compliance with AIFM Law

- Partial Exemptions in line with AIMFD
Impact on management companies

1) UCITS Management companies (Chapter 15)

When does AIFM Law apply to UCITS management companies?

• Management of the AIF in addition to UCITS

Advantages:

• Two licenses
• Lighter AIFM authorisation requirements
• EU passport under both UCITs and AIFM Law regimes
Impact on management companies

2) Non-UCITS management companies (Chapter 16)

A: Non-UCITS management companies without AIFM Status

- AIFM Law is not applicable
- No AIFM Law passport

B: Non-UCITS management companies with AIFM Status

- Subject to AIFM license
- Completion with AIFM Law rules
- Lighter AIFM authorisation requirements
- EU passport under both UCITS and AIFM Law regimes
Impact on Luxembourg UCI, SIF and SICAR

1) Luxembourg UCI

2) SIF and SICAR (Qualified Investors)
   
   A: Full scope SIF and SICAR (Part II of the SIF/SICAR law)
   
   • EU passport available

   B: Non-Full scope SIF and SICAR (Part I of the SIF/SICAR law)
   
   • AIFM is partially applicable
   • No EU passport
Impact on Luxembourg companies law

- Introduction of the new special limited partnership (S.C.Sp)
- Amendment of the legal and tax provisions regarding limited partnerships and partnership limited by shares
- Why are these vehicles more attractive for investors?
  - a large freedom;
  - a limited responsibility;
  - an excellent level of discretion.
- No separate legal personality for S.C.Sp.
- AIF status
Evanthi Savvoulidi | Associate

Areas of expertise
Banking & Finance
Investment Funds
Capital Markets

Contact details
E: evanthi.savvoulidi@cms-dblux.com
T: +352 26 27 53 23
Q&A Session

All speakers and the Panel will take part in this session