

Deloitte.
Legal



ANBIMA

28th September Seminar

Ingrid Dubourdieu

AI FMD Introduction:

Basic recap

AIFMD Introduction

Basic Recap

Definitions

- **EU** (European Union): the term EU includes the EEA MSs: Iceland, Liechtenstein and Norway
- **AIFs** (alternative investment funds, art. 1 (39) AIFMD): collective investment undertakings, including compartments
 - Raising capital from a number of investors, with a view to investing it in accordance with a defined policy for the benefit of those investors
 - Not requiring authorisation pursuant to Article 5 of the UCITS directive
- **AIFMs** (alternative investment fund managers, art. 1 (46) AIFMD): legal persons whose regular business is managing one or more AIFs
- **Management** (art. 1 (50) AIFMD): the management includes both the activity of "portfolio management services" and the activity of "risk management services"
- **Raising capital** (§VII (13) ESMA/2013/611): the commercial activity of taking direct or indirect steps by an undertaking or a person or entity acting on its behalf (typically, the AIFM) to procure the transfer or commitment of capital by one or more investors to the undertakings for the purpose of investing it in accordance with a defined investment policy [...]

AIFMD Introduction

Basic Recap

To whom does AIFMD apply?

- AIFMD applies to any nonEU* fund manager
 - Managing one or more EU AIF (non-UCITS funds)
 - Marketing one or more EU or NonEU AIF in the EU



Exclusions: holding companies, institutions for occupational retirement, supranational authorities, national central banks, government bodies which manage social security and pension systems, employee participation/savings schemes

AIFMD Distribution Regime:

Marketing AIFs in the EU

AIFMD Distribution Regime

Marketing AIFs in the EU

Marketing in the EU

- AIFMD marketing: any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM, of units in a fund it manages to or with EU investors domiciled
- Reverse solicitation out of the scope of AIFMD



Chapter VII, Specific Rules in Relation to 3rd Countries

AIFMD Distribution Regime

Marketing AIFs in the EU

Art. 35 AIFMD

- NonEU AIF + LUX AIFM
 - Marketing with a passport to **professional investors** requires
 - a) EU AIFM compliant (except chapter VI)
 - b) MoU to guarantee an efficient exchange of information
 - c) AIF country not included in the Non-Cooperative Country and Territory FAFT's list
 - d) Agreement between the two countries on the standards of art. 26 of the OECD Model (Income and Capital)
 - Luxembourg: **notification to the CSSF** must be done for each nonEU AIF
 - CSSF delay: 20 working days
 - Single notification to CSSF for each country in which the LUX-AIFM intends to market the units

AIFMD Distribution Regime

Marketing AIFs in the EU

Art. 36 AIFMD

- NonEU AIF + LUX-EU AIFM
 - Marketing **without a passport** to professional investors in Luxembourg requires
 - a) AIFM compliant (except art. 21 AIFMD – Depository)
 - b) Cooperation between authorities to ensure exchange of information
 - c) AIF country not included in the Non-Cooperative Country and Territory FAFT's list



**Cash-monitoring, Safekeeping of assets and oversight of certain operational functions; §7,8 and 9 Art. 21 AIFMD)*

AIFMD Distribution Regime

Marketing AIFs in the EU

Art. 37 AIFMD

- NonEU AIFM + EU AIF
 - Management or marketing of the EU AIF by NonEU AIFM requires:
 - a) prior authorisation by the competent authorities of their MS of reference
 - b) non-EU AIFM AIFMD compliant (excluded chapter 6), unless this duty is incompatible with its national laws (ESMA intervention, but decision not binding for the competent authority of the reference MS)
 - c) a legal representative of the AIFM is required in the reference MS(contact point)
 - d) (i) Cooperation between authorities to ensure exchange of information; (ii) AIF country must be not included in the Non-Cooperative Country and Territory FAFT's list

AIFMD Distribution Regime

Marketing AIFs in the EU

Art. 39 AIFMD

- NonEU AIFM + EU AIF (**with passport**) + LUX reference MS
 - Marketing to professional investors
 - a) Notification to CSSF concerning the list of countries where the units or shares will be marketed
 - b) 20 days to authorise or deny (possible restrictions only if the AIF or AIFM violate the AIFMD rules)
 - c) CSSF directly notifies the other MS where the AIFM is going to market the AIF
- NonEU AIFM + EU AIF (**with passport**) + Lux not reference MS

Same as above, but it is the competent authority of the reference MS that must notify CSSF of the intention of marketing the AIF to professional investors in Lux

AIFMD Distribution Regime

Marketing AIFs in the EU

Art. 40 AIFMD

- Non-EU AIFM + Non-EU AIF (**with passport**) + Lux reference MS
 - Marketing to professional investors
 - a) Cooperation between the supervisory authorities
 - b) 3rd country not listed as a Non-Cooperative Country and Territory by FAFT
 - c) Tax arrangements under art. 26 OECD Model Tax Convention
 - **Luxembourg:** notification to CSSF of each Non-EU AIF the AIFM intends to market
 - a) 20 working days to allow or deny
 - b) Notification required for each MS involved in the marketing



If Lux is not the reference MS, the competent authority of the reference MS that must notify the CSSF of the intention of marketing the AIF to professional investors in Lux

AIFMD Distribution Regime

Marketing AIFs in the EU

Art. 42 AIFMD

- NonEU AIFM + AIF (**without a passport**)
 - Marketing to professional investors via NPPR (if any)
 - a) NonEU AIFM compliant with art. 22-24 and 26-30 AIFMD (if applicable)
 - b) Cooperation arrangements between the countries involved, to facilitate the supervision and exchange of information
 - c) AIF country not included in the Non-Cooperative Country and Territory FAFT's list
 - No EU harmonisation for NPPRs
- Transparency, disclosure to investors and reporting duties to NCAs
- AIF acquires control of non-listed companies and issuers, duty to notify the acquisition of major holdings and control + disclosure in case of acquisition of control + specific reporting duties + asset stripping limitations

AIFMD Distribution Regime

Marketing AIFs in the EU



Are nonEU AIFMs allowed to market AIFs to professional investors in Lux without a passport?

YES

Is it necessary to notify the CSSF of the marketing to professional investors without a passport ?

YES (prior notification with standard file to be completed)

Do non-EU AIFMs have to inform the CSSF if they stop marketing?

YES

Are there any specific reporting standards to comply with?

YES (see art. 24 AIFMD, only for funds marketed in Lux, notification to the CSSF)

Is there any ESMA rule applicable?

YES (§13 Guidelines on sound remuneration policies under AIFMD)

Is it necessary for the non-EU AIFM to apply for an authorisation under art. 32(5) of the LSF (law of 1993)?

NO (it is limited to foreign banks and other financial intermediaries for deposit-taking tasks)

AIFMD Distribution Regime

Marketing AIFs in the EU

Art. 43 AIFMD

- AIF to RETAIL Investors
 - a) AIF supervised by a supervisory authority
 - b) Investors' protection equivalent with the one granted in Lux
 - c) Cooperation between CSSF and foreign authority



AIFMD Distribution Regime

Marketing AIFs in the EU



Is there a minimum frequency for the calculation of the NAV?

→ YES (at least once per month)

Is there any borrowing restriction?

→ YES (max 25% of the AIF net assets)

Are there any other restrictions?

→ YES (real estate no more than 20% of the assets in one real estate project)

Is there any specific national legislation applicable to the retail investors' marketing?

→ YES (law of April 2011 – Consumer code)

In case of marketing termination, is there a need to notify this intention to the CSSF?

→ YES

Has the AIF to demonstrate an adequate risk spreading?

→ YES (10% same type security of the same issuer + 10% in securities unlisted or not traded in an open and public market + 20% in securities of the same issuer)

AIFMD Distribution Regime

Marketing AIFs in the EU

- 3rd countries AIFM passport: ESMA positive recommendation of 19 July 2016



Green light to 12 non-EU Countries: Australia, Bermuda, Canada, Cayman Islands, Guernsey, Hong Kong, Japan, Jersey, Isle of Man, Singapore, Switzerland, and the United States

- Cooperation: Brazil signed a MoU with ESMA (2013)
- EU legislator involved with Brexit issues so no implementation yet of the passport package



AIFMD passport is an actor-based passport, concerning the AIFM, unlike the UCITS one placed on the product

Private Placement Regimes (PPR):

EU overview

PPR

EU Overview

EU

- NonEU AIFMs and AIFs must comply with each EU country's national regime when marketing funds in that country
- No EU harmonisation or guidance on PPRs = National PPRs (if any) vary from country to country
 - a) Favourable/less restricted PPR marketing access
 - b) Restricted marketing countries
- At the earliest during the first quarter of 2018, EU authorities should switch on the third country AIFMD passport and terminate the PPRs (unlikely to be respected)



Check costs and risks associated to comply with different rule packages

PPR

EU Overview

** Only closed-ended funds, not applicable to UCITS or other open-ended funds*

LUXEMBOURG

- After implementation of AIFMD (12/7/2013): PPR is no more defined in a comprehensive set of rules
- Prospectus law (10/7/2005)*: Exemptions from a prospectus publication for offer
 - a) Addressed to qualified investors only
 - b) Addressed to 150 natural/legal persons, other than qualified per EU country
 - c) When the investor is acquiring at least €100k of the relevant financial security
 - d) Where minimum security denomination is €100k
- Luxembourg opted in for the coexistence of the passport AIFMD regime and the possibility to market via the PPR
- CSSF: Placement should be considered private
 - a) Offer to EU professional investors only
 - b) Nominal value of the offered securities is €125k or more
 - c) Offer restricted to few investors (appreciation in concreto by CSSF case by case)
 - d) In particular cases, when there is no advertisement involved, being the offer reserved to existing customers or involving high sales amount

PPR

EU Overview

LUXEMBOURG



Is it necessary to notify the CSSF?

→ YES

Is the non-EU AIFM subject to any specific duty?

→ YES

Is the consumer code applicable?

→ YES

How the reverse solicitation is qualified?

→ It is not considered part of a marketing strategy and it is out of the scope of the PPR

Is it reverse solicitation admissible towards all types of investors?

→ NO

Sanctions in case of unlawful marketing?

→ YES

PPR

EU Overview

UNITED KINGDOM

- UK clear PPR: Chapter 3, Part 6 of the AIFM regulation of 2013 + FCA handbook
- No definition of PP
- FCA: “an offering or placement takes place for the purposes of the AIFMD UK regulation when a person seeks to raise capital by making a unit or share of an AIF available for purchase by a potential investor. (...)”

PPR

EU Overview

UNITED KINGDOM



Is it necessary to notify the FCA?

→ YES

Can a nonEEA AIFM use the private placement regime to market a nonEEA AIF?

→ YES

Is there any specific rule for small AIFM?

→ YES

Is the private placement limited to Professional investors only?


→ NO

Is the reverse solicitation regime exempt?

→ YES

Sanctions in case of unlawful marketing?

→ YES


 + criminal offence

PPR

EU Overview

FRANCE

- Impossible to market via PPR in France (full AIFMD compliance)



Is it necessary any prior authorisation to market the AIF without an AIFMD passport?

YES

Is the private placement available no matter what type of fund?

NO

Is the reverse solicitation allowed?

YES

Sanctions in case of unlawful marketing?

YES




+ criminal offence

PPR

EU Overview

GERMANY

- Germany prevented from the 22 July 2013 any distribution of funds shares or units on a private placement basis
- The German Capital Investment Code (Kapitalanlagegesetzbuch) does not provide for any exception for private placement



	Is it necessary any prior notification to market the AIF without an AIFMD passport?	→ YES <input type="text"/>
	Are there any specific requirements for the placement of non-EU AIF or by non-EU AIFM?	→ YES <input type="text"/>
	Is the reverse solicitation allowed?	→ YES <input type="text"/>
	Sanctions in case of unlawful marketing?	→ YES <input type="text"/>

PPR

EU Overview

ITALY

- No regulated PPR, any financial offer to professional investors exempt from the publication of a prospectus (art. 100 Decreto legislativo 58/1998 and art. 34-ter of the issuer regulation n. 11971/1999 by Consob)

	Is it necessary any prior notification to market the AIF without an AIFMD passport?	→ YES <input type="text"/>
	Is the reverse solicitation allowed?	→ YES <input type="text"/>
	Sanctions in case of unlawful marketing?	→ YES <input type="text"/>
	Administrative sanctions?	→ YES <input type="text"/>
	 + criminal offence	

PPR

EU Overview

Outcome

- Marketing in Europe via PPR (in friendly jurisdiction like the UK or Lux) only if the targeted market is limited to the domestic one
- Larger / long term distribution in the EU requires the establishment of an EEA fund managed by an EEA AIFM, so to profit of the EEA passport regime

AIFMD Management Regime:

Managing AIFs in the EU

AIFMD Management Regime

Managing AIFs in the EU

Full AIFM authorization

- **NonEU AIFM managing with passport**
 - Full AIFMD authorisation; cross-border cooperation arrangements and OECD tax information agreement
- **NonEU AIFM delegates EU AIF portfolio management to a EU AIFM**
 - Despite delegation, nonEU AIFM should be considered as the AIFM responsible for the compliance with the AIFMD
- **EU AIFM delegate the portfolio management to a nonEU AIFM**
 - Delegation is possible towards nonEU AIFM authorized or registered for the purpose of asset management and subject to supervision
 - Home country of the nonEU AIFM should comply with: a) AML standards; b) information exchange agreement in place; c) tax exchange agreement in place; d) reciprocal access to markets; e) cooperation agreement between the two authorities

AIFMD Management Regime

Managing AIFs in the EU

Exemption from AIFM authorization

- **NonEU registered AIFM**

- Exemption of full AIFM AIFM managing leveraged assets of below EUR 100m and those who managed unleveraged assets of below EUR 500m (+ no redemption rights within the first 5 years) are not subject to full AIFMD compliance
- No passport benefit

- **Other exemptions may apply**

- When fund does not comply with AIF definition
- When AIF is dedicated to a single individual or a family
- When AIF is dedicated to the AIFM or group companies

AIFMD Management Regime

Managing AIFs in the EU

Delegation regime

- **NonEU AIFM delegates EU AIF portfolio management to a EU AIFM**
 - Despite delegation, nonEU AIFM should be considered as the AIFM responsible for the compliance with the AIFMD
- **EU AIFM delegate the portfolio management to a nonEU AIFM**
 - Delegation is possible towards nonEU AIFM authorized or registered for the purpose of asset management and subject to supervision
 - Home country of the nonEU AIFM should comply with:
 - a) AML standards
 - b) Information exchange agreement in place
 - c) Tax exchange agreement in place
 - d) Reciprocal access to markets
 - e) Cooperation agreement between the two authorities

AIFMD Management Regime

Managing AIFs in the EU

Art. 37 AIFMD

- **NonEU AIFM + EU AIF**

- Managing of an EU AIF by NonEU AIFM

- a) prior authorisation by the competent authorities of their MS of reference

- b) non-EU AIFM AIFMD compliant (excluded chapter 6), unless this duty is incompatible with its national laws (ESMA intervention, but decision not binding for the competent authority of the reference MS)

- c) a legal representative of the AIFM is required in the reference MS (contact point)

- d) (i) Cooperation between authorities to ensure exchange of information; (ii) AIF country must be not included in the Non-Cooperative Country and Territory FAFT's list

AIFMD Management Regime

Managing AIFs in the EU

Art. 41 AIFMD

- **NonEU AIFM + EU AIF in MS other than reference MS**
 - Managing of an EU AIF by an **authorised** NonEU AIFM
 - a) directly
 - b) via the establishment of a branch
 - Communication to the NCA of reference MS
 - a) the MS in which it intends to manage AIFs, directly or through a branch
 - b) a programme of operations concerning the services it intends to perform
 - In addition, in case of establishment of branch
 - a) Organisational structure of the branch
 - b) Address where the relevant documents of the AIFs are available
 - c) Names and contacts of the management responsible of the branch

Trading Limits:

AIFM regime

Trading Limits

AIFM regime

- Outside AIFM, no explicit trading limit for AIFs' managers to invest in the EU (save strategical sectors)
- Mostly disclosure duties applicable no matter the nationality of the manager
- Luxembourg: disclosure duty applicable on major holdings of non-listed companies
 - Procedure: Notification to CSSF under art. 25 (1) of the AIFM law
 - Scope: Luxembourg Authorised AIFM and nonEU AIFM marketing to professional investors without a passport
 - Thresholds: AIF that acquires, disposes of or holds shares of a non-listed company, any time when the proportion of voting rights of the non-listed company held by the AIF reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%

MiFID II:

Overview and impact for
NonEU firms

MiFID II

Overview and impact for NonEU firms

Package

- Text: Market in Financial Instruments directive 2004/39/EC + Market in Financial Instruments Regulation UE 600/2014
- Entry into force: 3 January 2018
- Key changes for investment managers
 - Strengthen governance and organizational requirements
 - Strengthen investor protection rules
 - Affect how investment managers interact with the market
 - Increase transaction reporting requirements significantly
 - Introduce specific provisions with respect to commodity derivatives and for algorithmic and high frequency trading (HFT)
 - Introduce 3rd country equivalence regime: Allow firms to provide investment services to EU eligible counterparties and professional clients

MiFID II

Overview and impact for NonEU firms

Impact

- Indirect consequences of the implementation of the MiFID
 - If portfolio management function is delegated to MiFID regulated firms
 - If EU States will 'gold-plate' these rules towards collective portfolio asset managers (likely UK)
- Direct impact
 - Trading on the EU market using algorithmic trading systems or using investment firms as brokers
 - New rules concerning: inducements, best execution clause, transparency
 - AIFM dealing with EU broker-dealers
 - Affiliated manager groups, the EU manager opt in to harmonise its compliance with the new standards
 - Transparency extended for Exchange Traded Funds (ETF)
- Indirect impact
 - NonEU fund managers

MiFID II

Overview and impact for NonEU firms

Impact on nonEU fund managers

- Direct impact
 - Limited direct impact on nonEU fund managers
 - Direct impact if providing MiFID services to clients or
 - If a EU States extends these rules (eg. UK case)
- Indirect impact
 - When dealings with EU firms subject to full MiFID II requirements
 - Disclosure of all the EU data collected in the EU venues
 - Increase in organizational costs
 - 2nd and 3rd level legislation standards

. Bundled research costs (i.e., "soft dollars") will become unbundled and separately invoiced when it dealing with EU broker-dealers

. EU manager harmonizing its compliance with the new standards intragroup / impose back-to-back compliance on the nonEU sub-manager

MiFID II

Overview and impact for NonEU firms

3rd country equivalence-passport (art. 46 MiFID)

- Harmonised regime for 3rd country firms to access EU market
- Limit: Cross-border activity targeted to professional clients or eligible counterparties

MiFID II

Overview and impact for NonEU firms

Retail clients

- EU States
 - Apply (stringent) national rules; or
 - Opt-in for MiFID standard provisions: 3rd country provides services to via a EU branch
- Branch, EU NCA authorisation in each EU State
 - Firm supervised by a regulator and authorised to perform the same activities in its home country
 - 3rd country FATF and AML/CTF compliant
 - MoU between the countries
 - Sufficient minimal capital + governance requirements under MiFID II and CRD IV
 - Information exchange if a tax agreement is in place between the countries
 - Inscription (if needed) to an EU investor compensation scheme
- No branch procedure (if applicable) for unregulated 3rd country firms

MiFID II

Overview and impact for NonEU firms

Professional Investor and Eligible Counterparties

- Cross-border activity, ESMA registration for 3rd country firms
 - 3rd country prudential and business conduct provisions certified as equivalent by the EU Commission
 - EU Commission decision found effective and equivalent system for the recognition of investment firms in the 3rd country
 - 3rd country firm duly authorised and supervised in its home country
 - MoU between ESMA and the 3rd country authority
- 3rd country firm: Only marketing to professional investors and eligible counterparties

Common Reporting Standard (CRS):

Overview

CRS

Overview

Background

- Source
 - Standard for Automatic Exchange of Financial Account Information (AEOI)
 - Set by the Organization for Economic Co-operation and Development (OECD)
 - Directive 2014/107/EU



Comprehensive reporting regime as legal basis for exchange of tax data among participating jurisdictions

- Luxembourg
 - Transposed on 24 December 2015
 - Applicable since 1 January 2016
 - Involved are: a) banks, b) funds, c) insurance companies (if applicable), d) others non-supervised investment entities

CRS

Overview

Key aspects

- CRS Multiple reporting in case of non-remediated indicia for the same client
- Multiple FATCA and CRS reporting in case a same person or controlling person of Passive NF(F)E is Specified US Person and CRS reportable person in one or several jurisdictions
- Different CRS due diligence cut-off dates between various legal instruments imposing CRS reporting, possibly resulting in repeated due diligence in the same jurisdiction
- Differences between FATCA and CRS principles; CRS reporting volume expected to be substantially increased compared to FATCA
- Possible differences based on EU Administrative Cooperation Directive vs other legal instruments imposing CRS reporting
- Possible link made between CRS and local reporting regimes (such as French IFU)



CRS reporting regarding all clients/investors tax residents of another MS, and any future partner jurisdiction outside the EU

CRS

Overview

Regime

- Financial institutions duties
 - a) Collect the information on their clients/investors
 - b) Identify the tax residence
 - c) Provide information to the local tax authority on an annual basis (the local tax authority transfer then certain information to the foreign tax authorities)
- 
- This duty prevail over any professional secrecy rules to refuse the reporting of required information
- Sanctions
 - Violation of due diligence rules or in case of lack to introduce procedures in view of reporting IF are liable to a penalty up to EUR 250,000
 - Omission to file the required report or if it files a late, incomplete or inaccurate report, an IF may be liable to a penalty of 0, 5% of the amounts that should have been reported, with a minimum of EUR 1,500

Impact of Brexit:

Considerations for the asset
management industry

Impact of Brexit

Timeline

Background

- UK referendum on the 23 June 2016 to close the EU experience (won by 51.9%)
- On the 29 March 2017 UK triggered art. 50 TEU (two years negotiation process with possible extensions with unanimity of all MSs)
 - UK suggests an Hard-Brexit: possibility to lose the access to the Single Market
 - UK should definitively leave the EU on the 29 March 2019
 - Great uncertainty on the outcomes due to the short and vague wording of art. 50 TEU

Impact of Brexit

Foreseeable Scenarios

UK Gov. proposal to adopt a 'Great Repeal Bill'

- Substitution of the 1972 European Communities Act to cancel the EU law from the system and dismiss the Court of Justice jurisdiction
 - Possible copy-paste into domestic law to grant continuity to businesses on a temporary basis
 - Acquis Communautaire: approx. 12,000 EU Regulations + 7,900 statutory instruments EU-like + 186 acts + EU case law influence (hard to discern and realize)



Impossible to predict the definitive outcome for Asset and Fund Managers

Impact of Brexit

'Passporting rights' are on the table

Access to the EU for UK Managers

- UK could become a 3rd Country and lose the passporting rights (likely to be)
- UK could join the EEA and retain the passporting rights (but must accept free movement and ECJ case law) (not likely to be – UK would be a passive rule taker)
- UK business firms could set up EU-based subsidiaries (hard to manage – cost and time consuming)
- Equivalence system if provided (unstable, easily revocable and not tested)

Impact of Brexit

Case study: Asset Management

Context

The context assumes that the UK will become a 3rd country upon Brexit

Funds

- OEIC: Loss of the distribution passport = no access to EU retail and institutional investors
- AIF with an authorized AIFM: Loss of the distribution passport = no access to EU institutional investors until the AIFM 3rd country passport regime is activated

**only PPR may be available*

Asset management

- AIFM or ManCo managing UK funds and focusing on the UK market: no impact unless they passport their funds in the EU
- OEIC ManCo: Loss of the management passport
- AIF ManCo : Loss of the management passport until the AIFM 3rd country passport regime is activated*
- MiFid asset manager: Loss of the management passport until the MiFid 3rd country passport regime is available

Impact of Brexit

Case study: Asset Management

challenge

Relocation to EU27 should be scrutinised

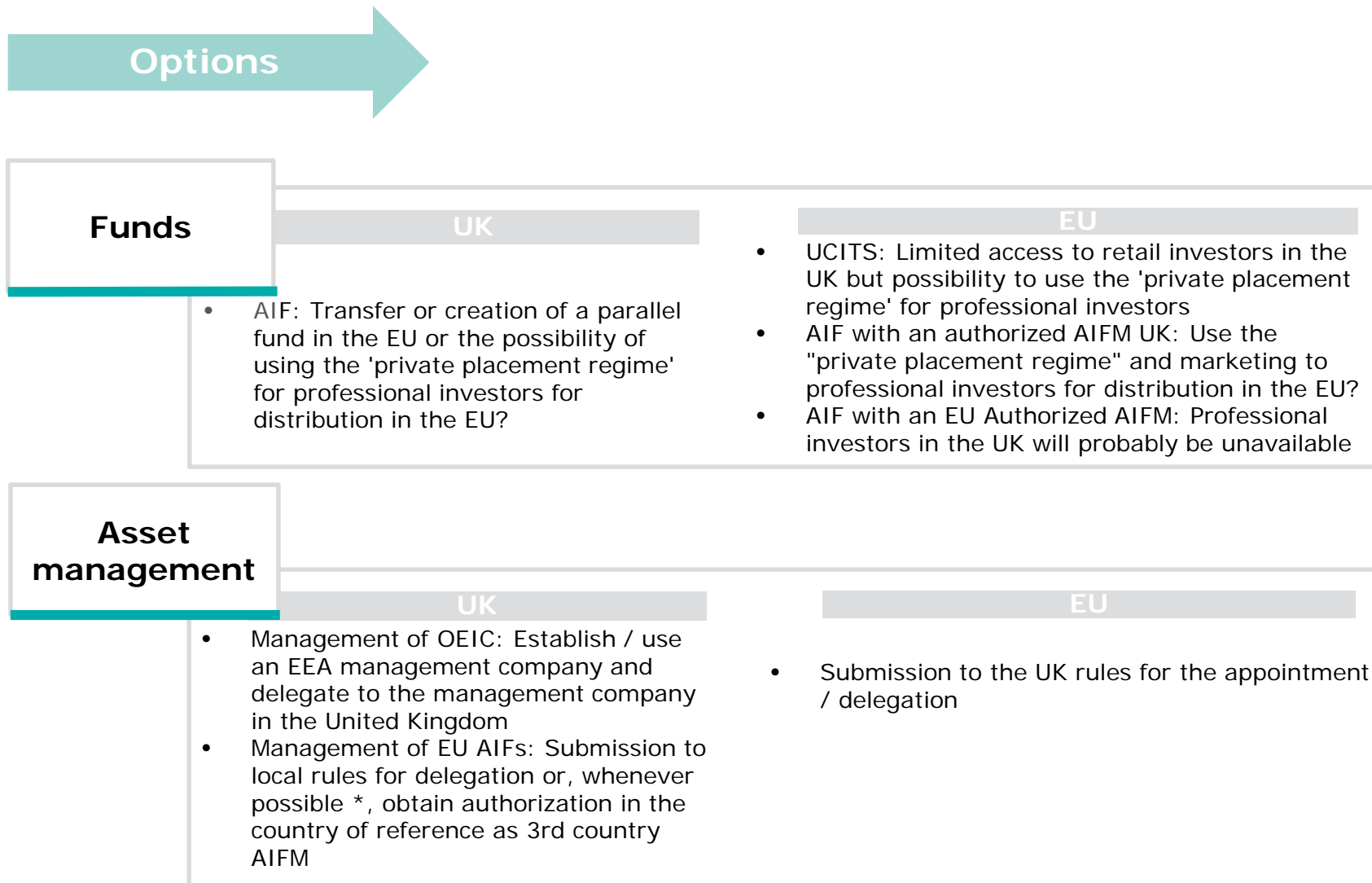
Funds and asset management

- Develop emergency plans based on different scenarios, included the possible loss of the passport
- Determine the extent of the fund/ManCo/Asset manager operations in the UK market or in the EU one, regarding services, clients and financial products offered
- Consider the extent to which the business models and group structures should change



Impact of Brexit

Case study: Asset Management



Impact of Brexit

Case study: Asset Management

Implications

Current trend when relocating: resort to AIFM licence instead of MiFID asset manager licence due to reporting costs under MiFID

Regulatory aspects

- Authorisation
- Governance and control
- Delegation
- Effective supervision

No letter-box

Local substance

- Locally-based conducting officers
- At least 3 locally-based full-time employees for portfolio and risk management and monitoring of delegates
- In principle, locally-based internal audit function

GDPR:

Implications for NonEU
managers

GDPR

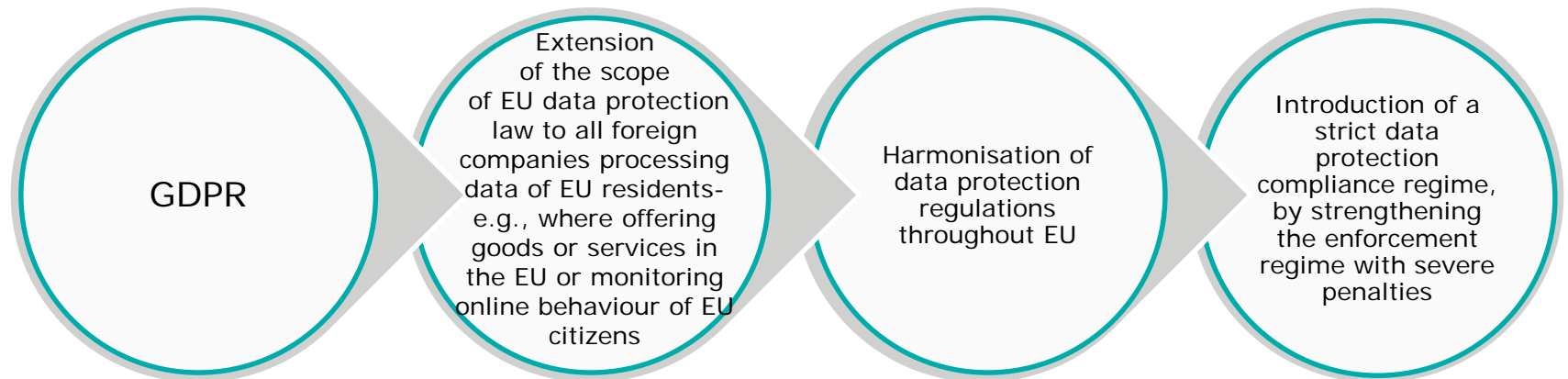
Implications for NonEU managers

Background

- Art. 7 and 8 of the EU Charter of Fundamental Rights
- Article 16 (1) of the Treaty on the Functioning of the European Union (Lisbon Treaty)



Personal data protection is a fundamental right in the EU and essential to the validity of EU legislation



GDPR

Implications for NonEU managers

Source and timeline

- EU
 - Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data
 - Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data
- Luxembourg
 - Enters into force on 25 May 2018

GDPR

Implications for NonEU managers

Point of attention

- **Scope**

- Applies to the processing of personal data of EU data subjects by a controller or processor even not established in the Union

- **Criteria**

- Purpose of processing: offering goods or services in the EU and monitoring online behaviour of EU citizens insofar as the behaviour takes place in the EU

- **Limitation**

- Prohibition to transfer data outside the EU except adequate standard of protection decided by the EU Commission



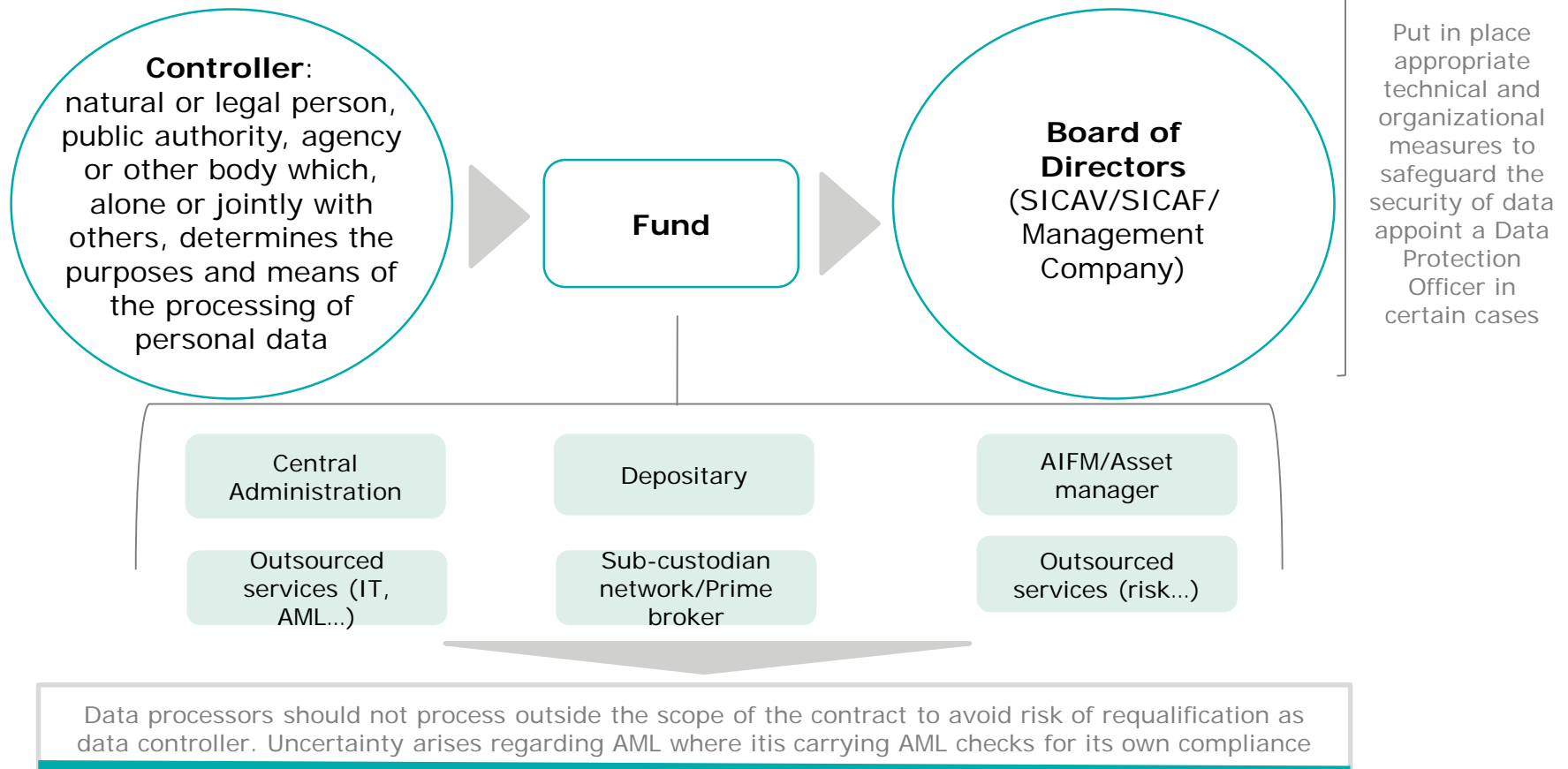
NonEU managers are impacted when they control or process personal data of EU employees or investors for such purpose

Preliminary Analysis when high risk: Data Protection Impact Assessment / Privacy Impact Assessment including Profiling and consultation with NCA

GDPR

Implications for NonEU managers

Accountability



GDPR

Implications for NonEU managers

Impact

- Relevant impact on security costs to keep the data confidential
 - Extensive records duties
 - Appointment of a data protection officer
 - Regular and systematic monitoring on a large scale or large amounts of data re. criminal sanctions
 - Cybersecurity / By design-by default
 - Compliance through mechanisms which, by design and default ensure compliance with GDPR
 - Appropriate level of security
 - Pseudonymisation and encryption
 - New data subject rights
 - Right to object, restrict or have data erased and data portability
 - Consent
 - On a purpose by purpose basis; plain language; unambiguous; informed regarding withdrawal
 - Consequence of violation
 - Breach notification within 72H and high administrative fines up to €10Mio, or for undertakings up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher

4th and 5th AML Directive:

Implications

4th and 5th AML Directive

4th AML Directive 2015/849/EU

Broaden scope and strengthened sanctions

- Broadened scope of information
 - Require the availability to competent authorities and obliged entities of information on beneficial owner(s) for all companies
 - Maintain the 25% threshold for identification of beneficial owner(s) but clarifying the concept
 - New requirements for domestic PEPs/PEPs working in international organizations, with risk-sensitive measures
- Broadened scope of incrimination
 - Broadened scope of incrimination to cover on-line gambling beyond "casinos"
 - Explicit inclusion of tax crimes as a predicate offence
 - Reduced scope and customer due diligence thresholds for traders in high value goods from €15K to €7,5K for cash transactions
- Strengthened sanctions by introducing new minimum penalties
 - For suspicious transaction reporting/record keeping/ internal controls
 - For financial institutions
 - For non financial institutions

4th and 5th AML Directive

5th AML Directive

Scope extended to virtual currency exchanges and wallet providers

- 5 July 2016: EU Commission proposal (2016/450-2016/0208) for a revision of the IV AMLD
- Bring virtual currency exchange platforms and custodian wallet providers under the scope of the Directive to make them “obliged entities”
 - Obligation to implement preventive measures and report suspicious transactions
- Strengthen transparency measures applicable to prepaid instruments, such as prepaid cards
 - Lower thresholds for identification (from €250.- to €150.-)
 - Widen related customer verification requirements
- Enhance powers of Intelligence Units
 - Swift access to information on the holders of bank-and payment accounts, through centralized registers or electronic data retrieval systems

4th and 5th AML Directive

Implications

Tax structuring under scrutiny

- Luxembourg transposed 4th AMLD on 23 December 2016

3 types of fraud	Definition	Sanction
Simple offense	When the fraud is not an aggravated fiscal fraud nor a tax swindle	Administrative Courts
Aggravated fiscal fraud	When the amount of fraud is considered as significant, i.e. the tax defrauded (or fraudulently reimbursed): <ul style="list-style-type: none">- exceeds €200,000, or- exceeds 25 percent of the annual tax due (or fraudulently reimbursed) and is equal or exceeds €10,000	Imprisonment from 1 month to 3 years and a fine of between €25,000 and 6 times the amount of tax defrauded (or fraudulently reimbursed)
Tax swindle	If the fraud involves a significant amount either in absolute amount or in relation to the annual tax due or with the annual repayment due and has been committed by the systematic use of fraudulent practices intended to hide facts relevant to the authority or to persuade it of inaccurate facts	Imprisonment from 1 month to 5 years and a fine of between €25,000 and 10 times the amount of tax defrauded (or fraudulently reimbursed)

- CSSF circular 17/650
 - Applicable to all persons and undertakings falling under its supervision
 - List 21 indicative and non-exhaustive indicators that can raise a suspicion of money laundering offence to tax crime
 - Establish companies in foreign countries / tax structuring without economic reality and/or substance
 - No evidence of tax compliance in home country
 - back-ti-back loan without appropriate justification

Thank you!

Deloitte.
Legal

