

Group Briefing

April 2016

How to Establish an
Alternative Investment
Fund in Ireland

1. INTRODUCTION

There are two broad categories of regulated investment funds in Ireland. The first category comprises undertakings for collective investment in transferable securities (“UCITS”). The second category comprises alternative investment funds (“AIFs”). The term “AIF” is broadly defined and essentially comprises all non-UCITS funds. AIFs are subject to the regulations implementing the EU’s Alternative Investment Fund Managers Directive (“AIFMD”). AIFMD applies to

alternative investment fund managers (“AIFMs”) which manage and market AIFs within the EU. The Appendix 1 to this briefing includes a decision tree to determine: (i) whether a particular vehicle is an AIF; (ii) which entity will be the AIFM; and (iii) the extent to which the AIFM can market the AIF within the EU once authorised under AIFMD.

This briefing sets out the main steps involved in establishing an AIF in Ireland.

2. AIF LEGAL STRUCTURES

An AIF may be established in Ireland as a single fund or as an umbrella fund comprising one or more sub-funds. An AIF can currently take one of five forms: unit trust, investment company, common contractual fund (“CCF”), investment limited partnership and collective asset-management vehicle (“ICAV”). Each form of AIF may be established as an open-ended, closed-ended or limited liquidity vehicle. A comparison of the different structures is set out in the table below.

	Investment company	Unit trust	CCF	Investment limited partnership	ICAV
Structure	Variable capital investment company incorporated as a public limited company	Unit trust constituted by a trust deed entered into between a management company and a trustee	An unincorporated body constituted under contract by a deed of constitution between a management company and a depositary	A partnership between one or more general partners and one or more limited partners constituted by a partnership agreement	
Single stand-alone fund or umbrella fund	✓	✓	✓	x	✓
Separate legal personality	✓	x	x	x	✓
Board responsible for management	Board of directors of investment company or management company	Board of directors of management company	Board of directors of management company	Board of directors of general partner	Board of directors of ICAV or management company
Other notable features	Unlike the structures opposite, is subject to a statutory obligation to diversify risk		Tax transparent; unitholders are treated for tax purposes as if they directly own a share of the underlying investments. Investment in CCFs is limited to institutional investors		Meets the U.S. “check the box” taxation rules. Not subject to many of the types of rules applicable to Irish public limited companies which apply to investment companies

3. REGULATORY CATEGORIES OF AIFs

Once a decision has been made as to the appropriate structure, the next consideration is the type of regulatory

authorisation obtained by the AIF. The Central Bank of Ireland's ("Central Bank") AIF regime imposes varying investment and borrowing restrictions

depending on whether the AIF is established for retail investors (a "RIAIF") or qualifying investors (a "QIAIF").

	RIAIFs	QIAIFs
Eligible investors	Retail investors	Investors who meet the qualifying investor criteria, namely: <ul style="list-style-type: none"> » a professional client within the meaning of Annex II of MiFID; or » an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIAIF; or » an investor who self-certifies that it is an informed investor.
Minimum subscription	None	€100,000 per investor
Requirement to have an AIFM	Must appoint an AIFM authorised within the EU	The AIFM may be: <ul style="list-style-type: none"> » an Irish authorised AIFM; » an EU authorised AIFM with a passport to conduct activities in Ireland; » a non-EU AIFM; or » where the AIF itself opts to be internally-managed and not to designate an external AIFM, the AIF itself.
Investment restrictions	Diversification limits for a RIAIF are more generous than the limits that apply to UCITS. For example: <ul style="list-style-type: none"> » up to 20% of the net assets may be invested in unlisted securities (UCITS limit:10%); » up to 20% of the net assets may be invested in securities issued by the same issuer (UCITS limit;10%); » borrowings cannot exceed 25% of net assets (in contrast to a UCITS, borrowings can be effected for investment purposes); and » unlike UCITS, RIAIFs may enter into physical short sales and may establish side pocket share classes for illiquid assets. 	A QIAIF is not subject to any borrowing or leverage limits set by the Central Bank. However, QIAIFs established as investment companies are subject to a statutory obligation to diversify risk. This obligation does not apply to other forms of QIAIFs such as unit trusts, CCFs or ICAVs.
Ability to market	Cannot avail of an EU passport to distribute their funds to retail investors in the EU. As a consequence, the marketing of a RIAIF in any EU country will depend on the fund offering rules in that country	A QIAIF with an EU authorised AIFM may be marketed on a passported basis across the EU to professional investors. A QIAIF with a non-EU AIFM may only be marketed according to the private placement rules applicable in individual EU jurisdictions and subject to the requirements of Article 42 of AIFMD.
Fund approval process	The prospectus and constitutive document (such as a trust deed or memorandum and articles of association) must be submitted to the Central Bank for review. A RIAIF is typically approved by the Central Bank within five to six weeks from the date of submission of the documents, depending on the complexity of the fund structure.	In contrast to RIAIFs, there is an accelerated authorisation procedure for QIAIFs. The Central Bank will approve a fund within 24 hours day of filing of the fund documents with the Central Bank provided the legal advisers to the fund provide certain confirmations to the Central Bank regarding the structure of the fund and the content of the fund documentation.

4. DIFFERENT CATEGORIES OF AIFM

It should be noted however, that, where the relevant AIFM is an EU entity, the process for approval of a RIAIF or a QIAIF is predicated on the AIFM having been authorised by the Central Bank, a process which can take between 3 to 6 months. In respect of QIAIFs only, the AIFM may be a “registered” or “sub-threshold” AIFM where the AIFM has assets under management below the de minimis thresholds prescribed in AIFMD. Under Irish regulation, registered AIFMs are only subject to certain of the requirements of AIFMD, including those dealing with annual reports and investor disclosure, but must be Irish and are not permitted to use the AIFM passport or market the QIAIF on a passported basis across the EU. Non-EU AIFMs are not subject to the authorisation process until the EU approves the introduction of an authorisation regime for non-EU AIFMs which will not occur until 2017 at the earliest.

4.1 Irish AIFM

If it is determined that an Irish entity will be the AIFM (either an external manager or the AIF itself, if internally-managed), that entity will need to seek authorisation from the Central Bank as an AIFM or, in respect of QIAIFs only, the AIFM may be “registered” (as described above).

a. Documents required for application to the Central Bank for approval as AIFM

The AIFM will need to submit:

- » a completed application form signed by two directors of the AIFM;
- » information on the persons effectively conducting the business of the AIFM;
- » details of the substantial shareholders of the AIFM;
- » a programme of activity setting out the organisational structure of the AIF and how it intends to comply with AIFMD (see below);
- » details of any proposed delegation arrangements;
- » a statement of responsibility for the AIFM;
- » board confirmation of capital

from the AIFM to the Central Bank; and

- » details of the relevant AIF’s investment strategies, policy on the use of leverage, risk profile, the constitutive document of the AIF, details of the depositary and the disclosures to investors required by AIFMD.

b. Programme of activity

Each AIFM is required to adopt a programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under AIFMD. In broad terms, this document corresponds to the business plan adopted by UCITS management companies and self-managed investment companies.

The programme of activity must identify the board member or other individual (“designated persons”) who will, on a day-to-day basis, monitor and control each of the various managerial functions prescribed by the Central Bank.

c. Other compliance obligations

The AIFM will need to adopt policies and procedures required under AIFMD, including, policies relating to the following: order handling and aggregation; best execution; remuneration; conflicts of interest; risk management; liquidity management; business continuity; accounting policies and procedures; compliance; personal transactions; and valuation.

In addition, the AIFM will need to ensure that agreements with key service providers (i.e., depositaries, administrators, delegate investment managers and external valuers) contain certain provisions prescribed by AIFMD.

4.2 Non-Irish EU AIFM

If it is determined that an EU entity located outside of Ireland will be the AIFM, it will need to submit an application for authorisation as AIFM from the competent authority in its home

Member State. Once authorised in its home Member State, it may make use of the AIFM passport under Article 33 of AIFMD to manage the Irish AIF either on a cross-border basis or by establishing a branch in Ireland.

4.3 Non-EU AIFM

If it is determined that an entity located outside of the EU will be the AIFM, it will not, at least in the short term, be able to be authorised as an AIFM and so will not be able to benefit from the marketing passport that comes with that authorisation. AIFMD does permit non-EU AIFMs to manage EU AIFs and market them on a private placement basis in EU member states. However, the private placement regimes differ from Member State to Member State.

While non-EU AIFMs are not required initially to comply with many of the substantive requirements of AIFMD, certain minimum conditions will need to be adhered to if the AIFM is to be able to avail of the private placement regime (if any) in a given Member State:

- » the AIFM must comply (in respect of the AIF) with the provisions of AIFMD dealing with annual reports, investor disclosure and reporting obligations to regulators in Member States where the AIF is marketed¹;
- » appropriate cooperation arrangements must be in place between the regulator of the Member State(s) where the AIF is marketed, the Central Bank and the regulator in the country of establishment of the AIFM; and
- » the country of establishment of the AIFM must not be a country listed as a Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

ESMA has published advice to the European Commission and an opinion on the issue of extending the management and marketing passports under AIFMD to non-EU AIFMs. This is likely to result in a passport regime being introduced by

¹ Also, if relevant to the AIF, compliance with the private equity provisions of AIFMD (Articles 26 to 30) must be adhered to.

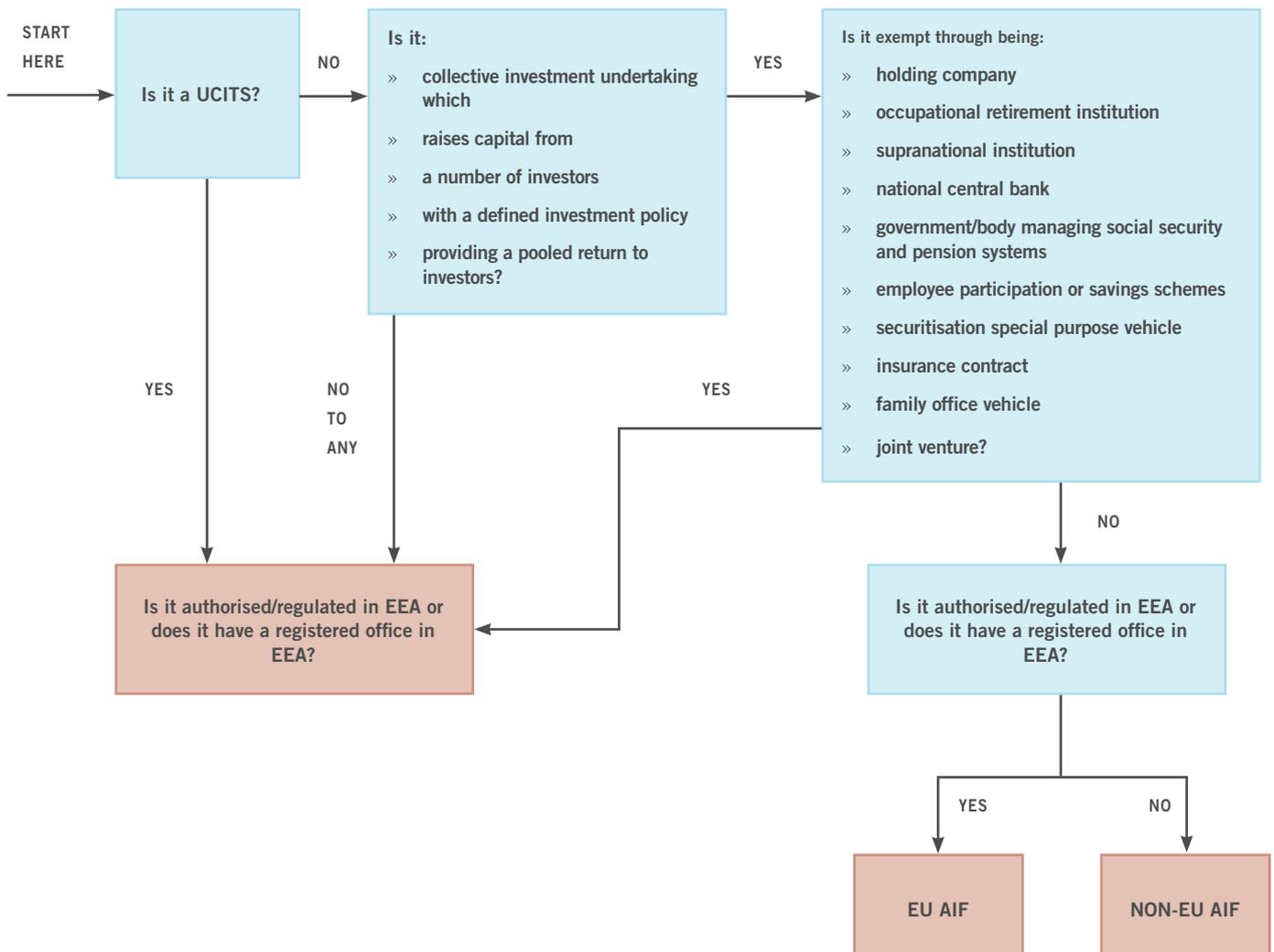
the European Commission for non-EU AIFMs under Article 37 of AIFMD which are located in certain non-EU jurisdictions. However, it is difficult to predict which countries will obtain the passport and the timing of the legislation to implement this. If this happens, a non-EU AIFM could market the AIF on a passported basis to professional investors across the EU. It may

only do so if it is authorised by its “Member State of Reference” (broadly speaking, the EU Member State in which it has focussed its marketing activities) and complies with substantially all of AIFMD. The Central Bank has confirmed that non-EU AIFMs to QIAIFs may continue to be managed under the Central Bank’s transitional arrangements until the

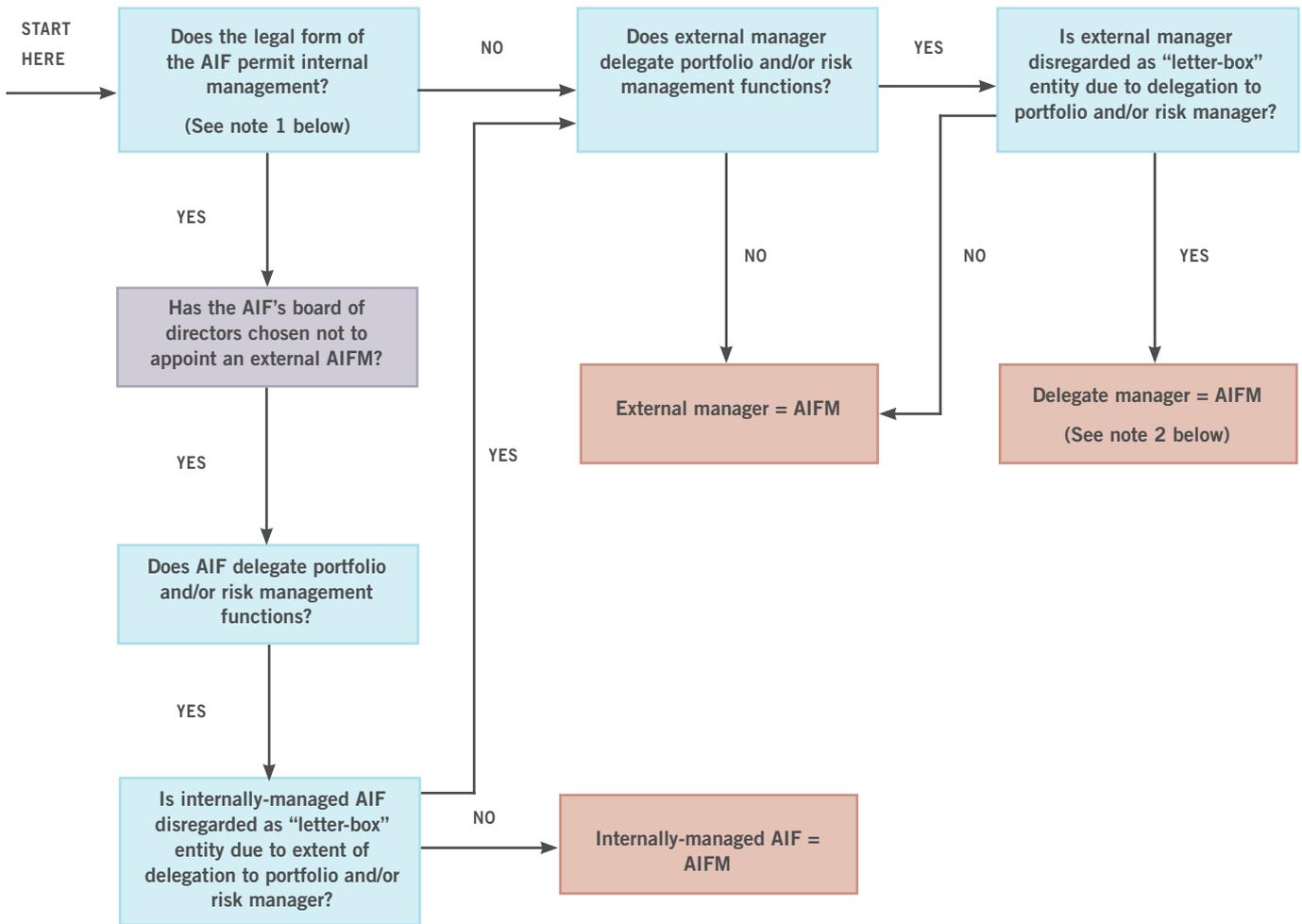
European Commission has reached a decision as to the application of the AIFMD passport to non-EU AIFMs and the Central Bank has confirmed that the extent of this transition will be kept under review to align with the coming into effect of Article 37 of AIFMD.

APPENDIX

1. IS IT AN AIF?



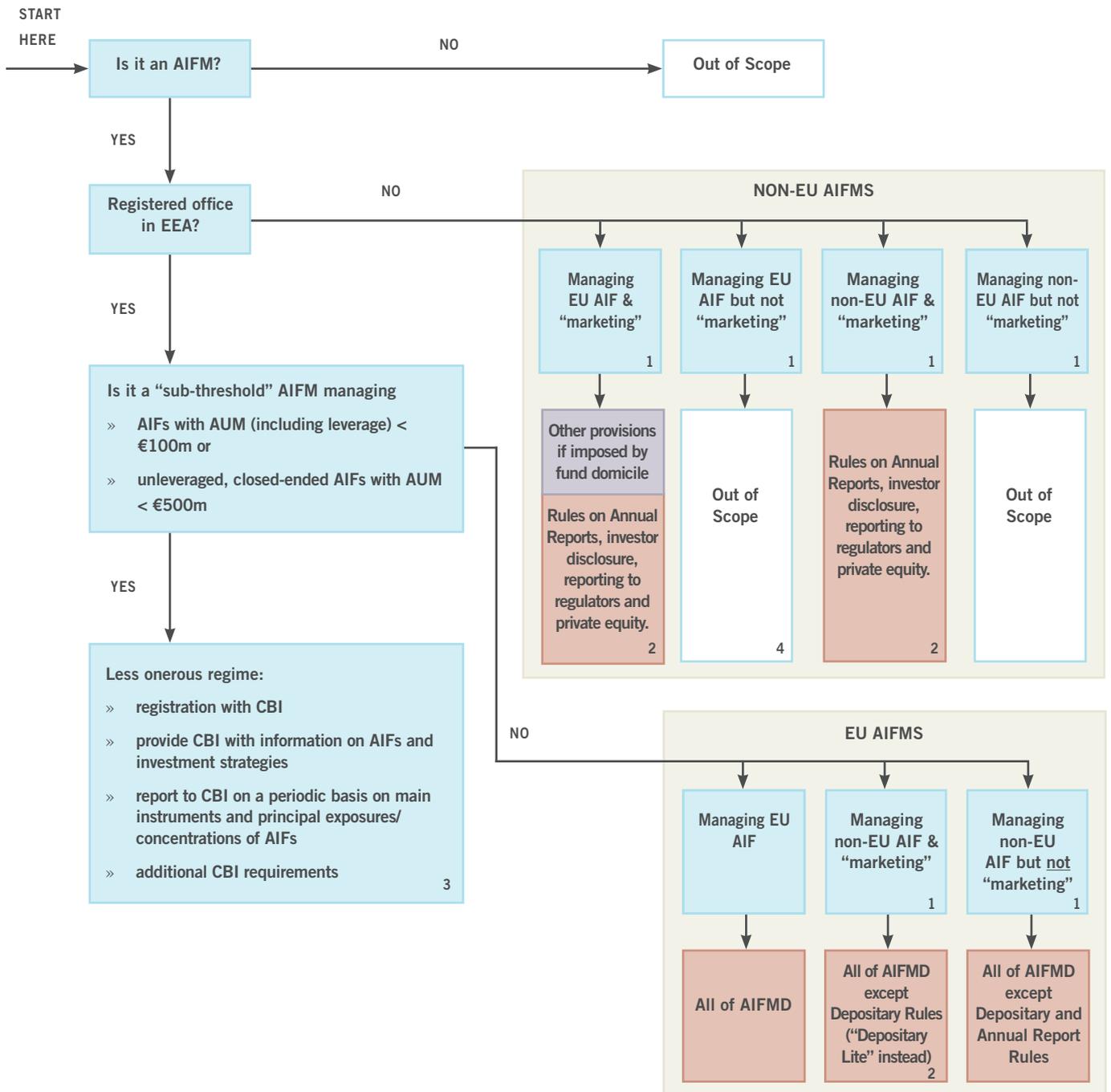
2. WHO IS THE AIFM?



NOTES:

1. Irish AIFs established as investment companies or ICAVs permit “internal management”. AIFs established as unit trusts, common contractual funds or investment limited partnerships do not permit internal management.
2. If the delegate manager delegates in turn the portfolio and/or risk management functions, the same “letter box” entity analysis needs to be undertaken to determine whether the delegate manager or sub-delegate manager is the AIFM.

3. HOW DOES AIFMD APPLY TO AIFMS LOCATED IN THE EU AND AIFMS LOCATED OUTSIDE THE EU?



NOTES:

1. "Marketing" means for this purpose marketing (as defined in AIFMD) in the EEA without a passport.
2. All of AIFMD will apply where an AIF is marketed with a passport (not currently expected to be available before 2017). Provisions permitting marketing without a passport may be terminated from a date not currently expected to be before 2018.
3. Less onerous regime not applicable to RIAIFs. QIAIFs authorised after 22 July 2013 with sub-threshold AIFMs must have a fully authorised AIFM within 2 years of launch.
4. Potential additional requirements imposed by regulator in Member State where EU AIF established. All of AIFMD will apply when Article 37 becomes applicable (not currently expected to be before 2017).

KEY CONTACTS

If you have any queries on this briefing or require any further details on any aspect of this briefing, please do not hesitate to contact a member of our team.



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