

Alternative Investment Fund Manager Directive

The Passporting and Third Country Framework

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

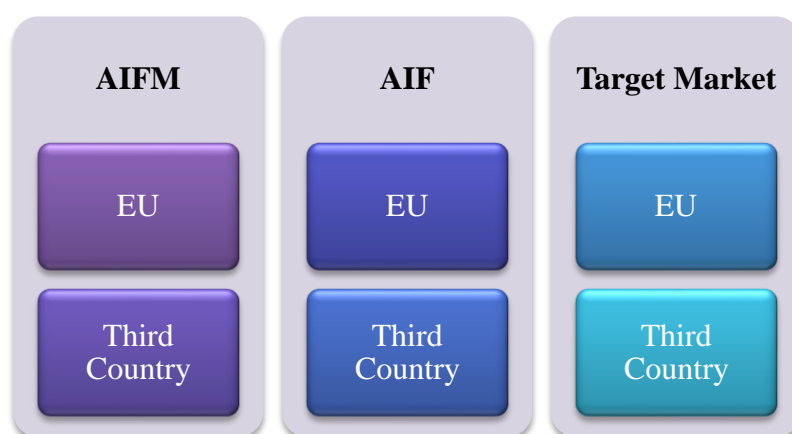
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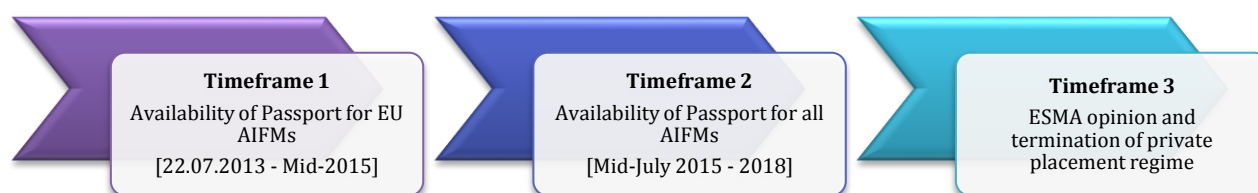
1 INTRODUCTION

The implementation by EU Member States of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers (“the Directive”) has set the groundwork for a harmonized framework for the marketing and management of non-UCITS funds (such as hedge funds, private equity funds and real estate funds).

The Directive provides different sets of rules premised on the scenarios envisaged through the interplay of three factors: (i) the location of the alternative investment fund manager (“AIFM”); (ii) the place of establishment of the alternative investment fund (“AIF”); and (iii) the AIF’s target market as illustrated below:



The applicability of the rules is not immediate but staggered under three distinctive timeframes as follows:



Timeframe 1 features the freedom to provide services and the freedom of establishment in respect of EU AIFMs marketing EU AIFs.

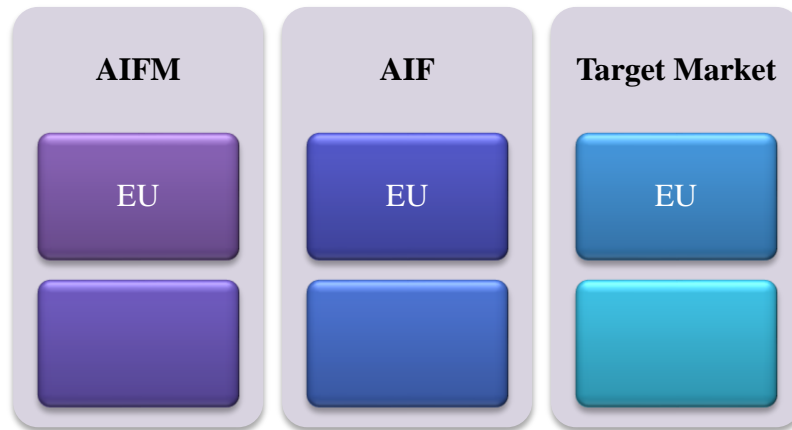
Timeframe 2 starts off in 2015, wherein the European Securities and Markets Authority (“ESMA”) will issue its advice on the availability or otherwise of the passport to EU AIFMs marketing third country AIFs and on the marketing of AIFs generally in the EU by third country AIFMs. In the case of a positive opinion, the European Commission will adopt a

delegated act within three months, specifying the date upon which the regime for third country AIFMs to register under the Directive and for third country AIFs to be marketed with a passport will commence. It is as yet unclear as to what the consequences of a negative advice will be.

Timeframe 3 will run from 2018 onwards. At the beginning of this period, ESMA will issue an opinion on the functioning of the passport under the Directive and on the possible termination of the private placement regime with respect to AIFs.

2 THE DIFFERENT SCENARIOS UNDER THE AIFMD FRAMEWORK

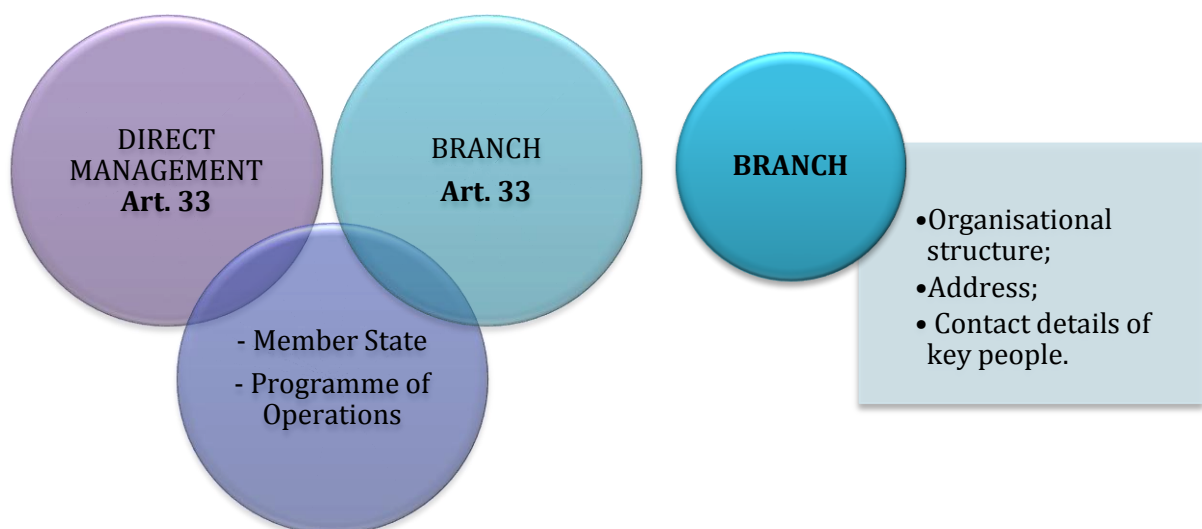
2.1 EU AIFM managing an EU AIF marketed in the EU



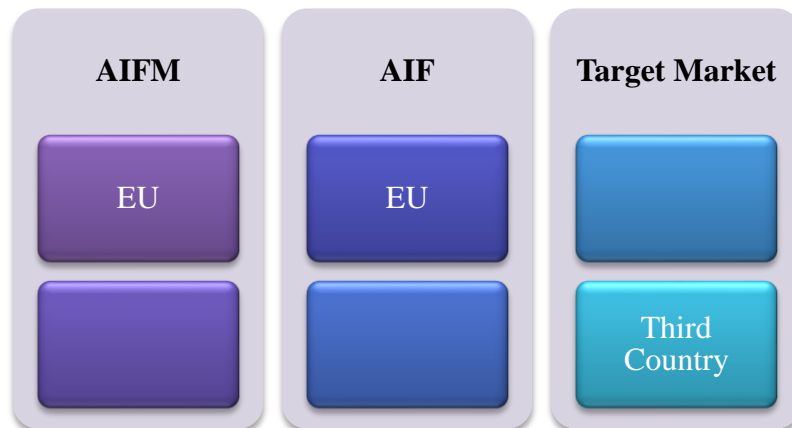
In this scenario, the EU AIFM may use a passport to manage an EU AIF in any Member State, either directly or through the establishment of a branch.

In both the context of direct management and that of establishment of a branch, the EU AIFM is required to submit to its regulatory authority the name of the Member State in which it intends to market the relevant AIF(s) together with its programme of operations.

An EU AIFM intending to establish a branch is also required to submit information on the organisational structure, the address and the names and contact details of the persons responsible for the management of the branch.

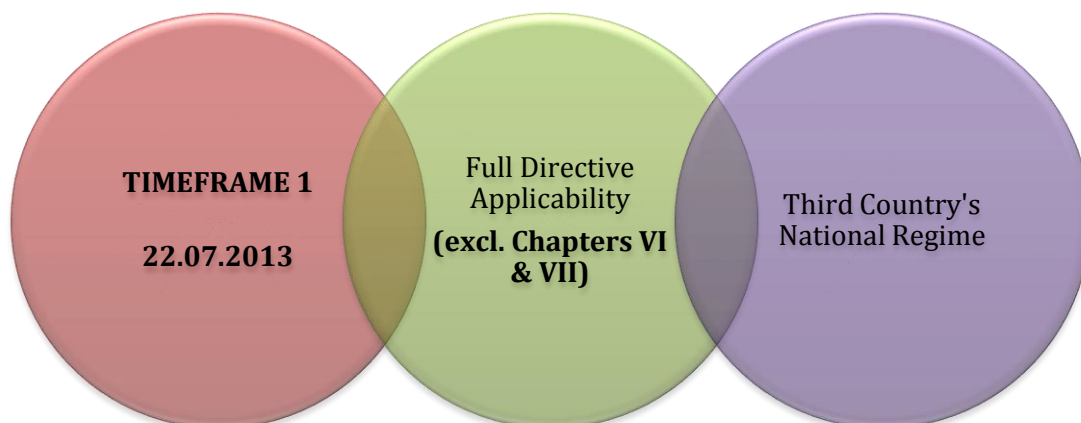


2.2 EU AIFM managing an EU AIF marketed in a Third Country

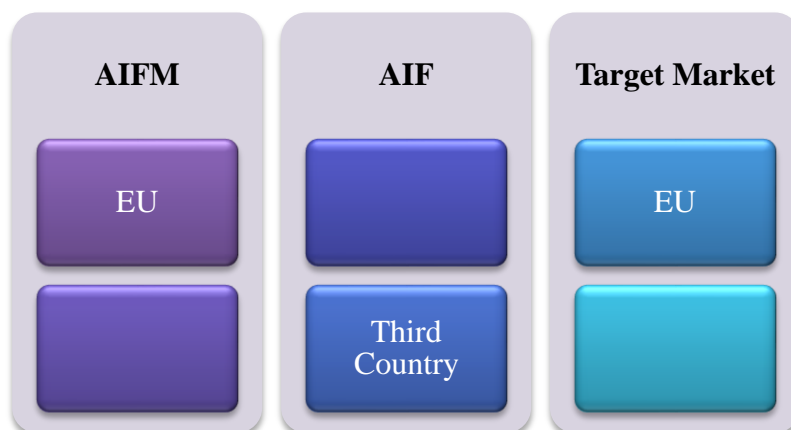


In this scenario, the EU AIFM is obliged to comply with all the provisions of the Directive concerning substantive matters with the exception of Chapters VI and VII which prescribe the rights of EU AIFMs to market and manage EU AIFs in the EU and the specific rules in relation to third countries respectively. A passport will at no time become available in this context.

The EU AIF will be marketed as usual in accordance with the relevant third country's national regime. These rules will become applicable immediately upon transposition.

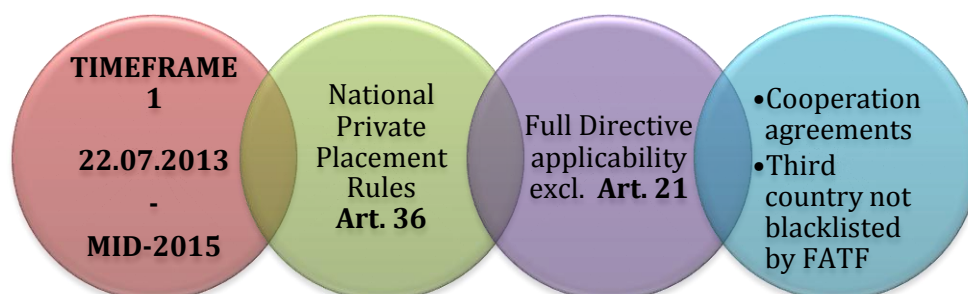


2.3 EU AIFM managing a Third Country AIF marketed in the EU

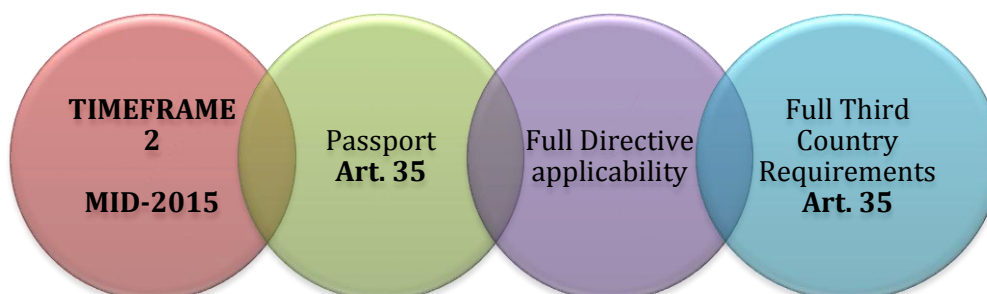


This scenario is characterised by a dual regime.

- During **Timeframe 1**, the following rules pertain:
 - marketing will continue to be regulated in accordance with national private placement regimes;
 - all of the provisions of the Directive, with the exception of those relating to the appointment of the depositary prescribed in Article 21, will apply;¹ and
 - cooperation agreements between relevant regulatory authorities are in place and the third country is not FATF-blacklisted.

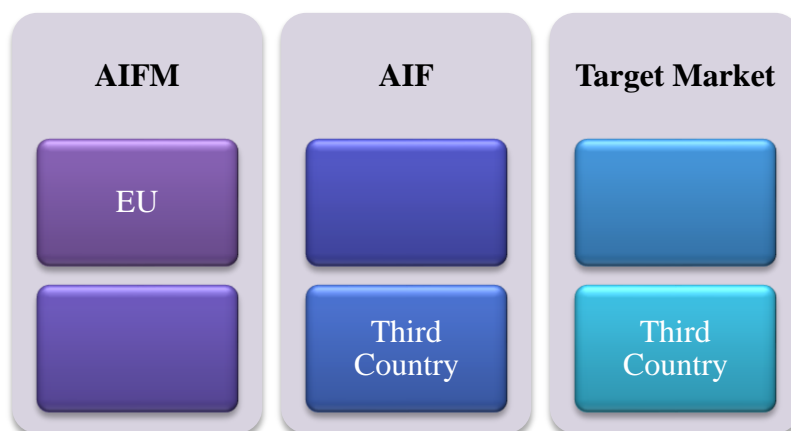


- During **Timeframe 2**, the EU AIFM may choose to be subject to the full Directive and to acquire passporting rights.



¹ However, an entity to carry out the duties referred to in article 21(7), (8) and (9) must be appointed.

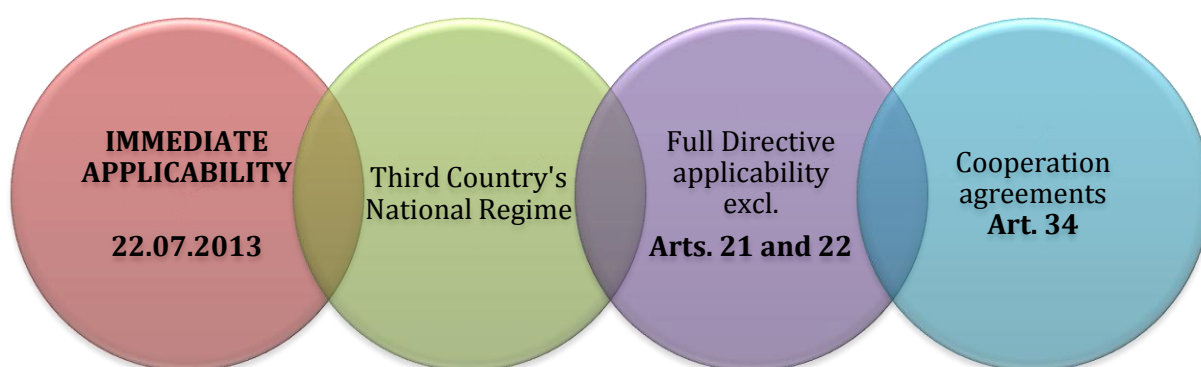
2.4 EU AIFM managing a Third Country AIF marketed in a Third Country



Under this scenario, the EU AIFM will be obliged to comply with all the provisions of the Directive with the exception of the appointment of the depositary and compliance with the annual reporting requirements. A passport will at no time become available in this context.

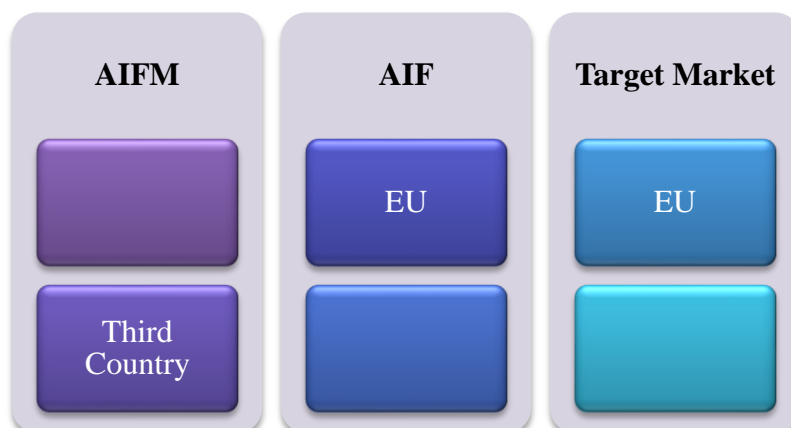
Appropriate cooperation agreements must be in place between the regulatory authority to which the AIFM is subject² and the supervisory authority of the third country where the AIF is established in order to ensure an efficient exchange of information allowing the EU regulatory authority to carry out its duties as competent authority appointed in terms of the Directive.

These rules will become applicable immediately upon transposition.



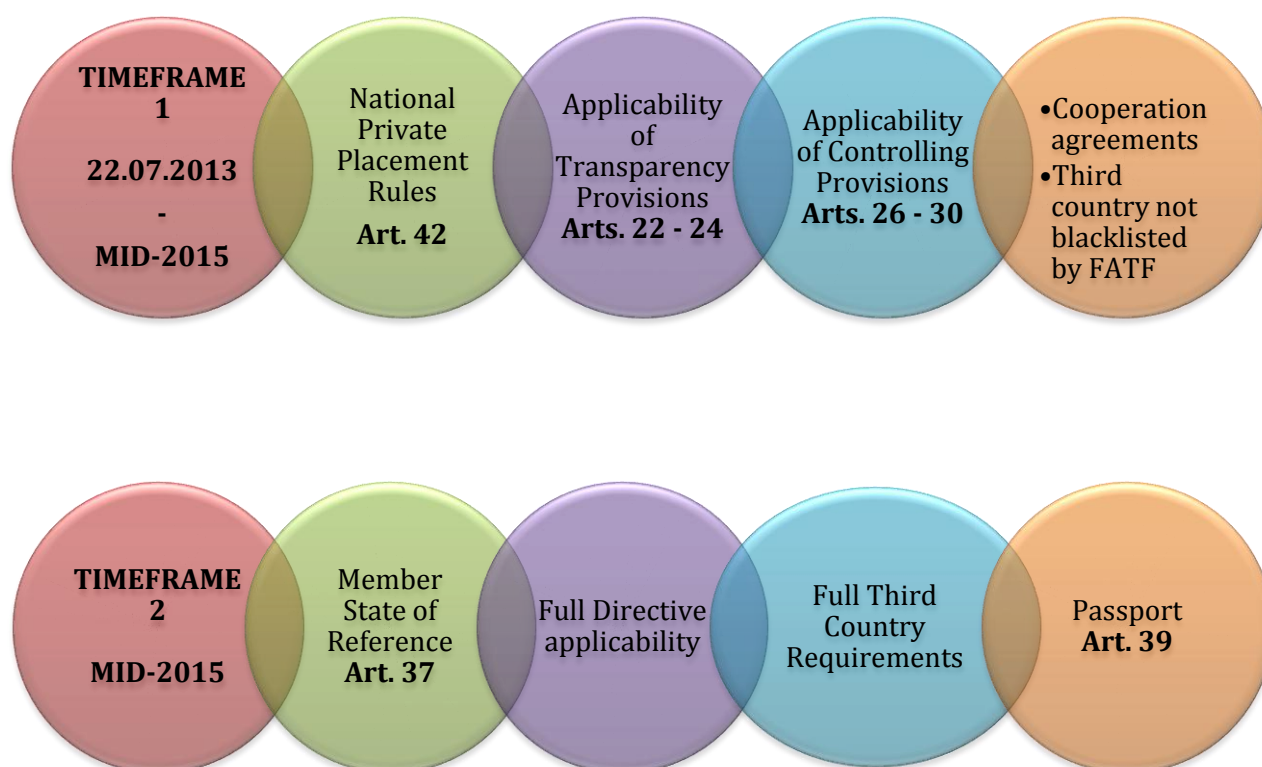
² In the case of a Maltese AIFM, the authority would be the MFSA.

2.5 Third Country AIFM managing an EU AIF marketed in the EU



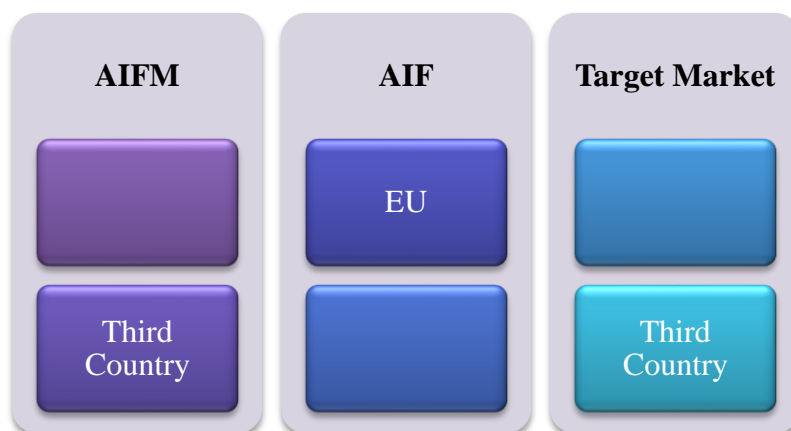
This scenario features a similar dual regime to that described in section 2.3 above. However, only the transparency provisions and the controlling interests prescribed in the Directive provisions are applicable under Timeframe 1.

One important requirement to be fulfilled under this scenario prior to the acquisition of passporting rights is the licensing of the third country AIFM in the AIFM's Member State of Reference³.

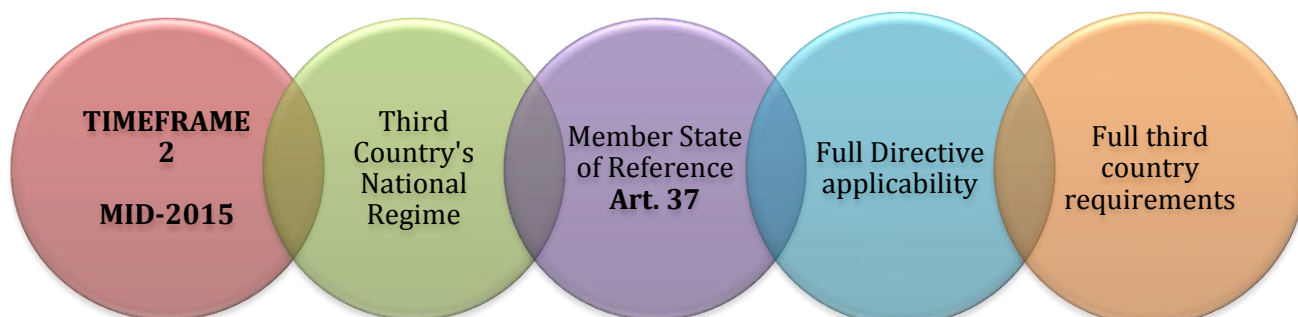


³ Reference should be made to Section 3 of this Brochure for the rules applicable to the determination of the Member State of Reference of a given AIFM.

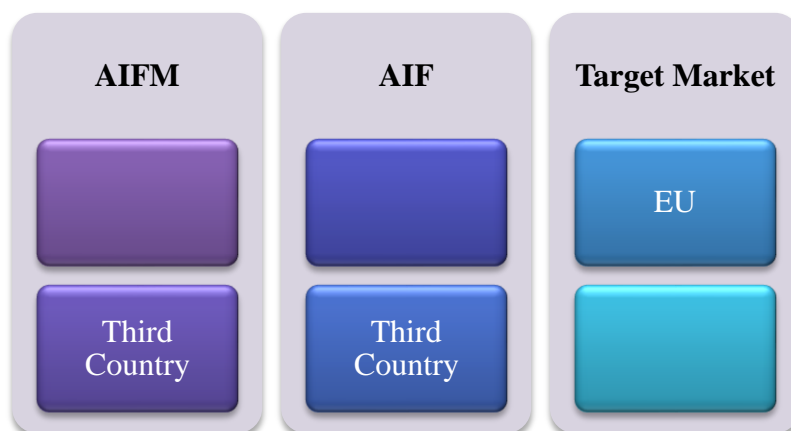
2.6 Third Country AIFM managing an EU AIF marketed in a Third Country



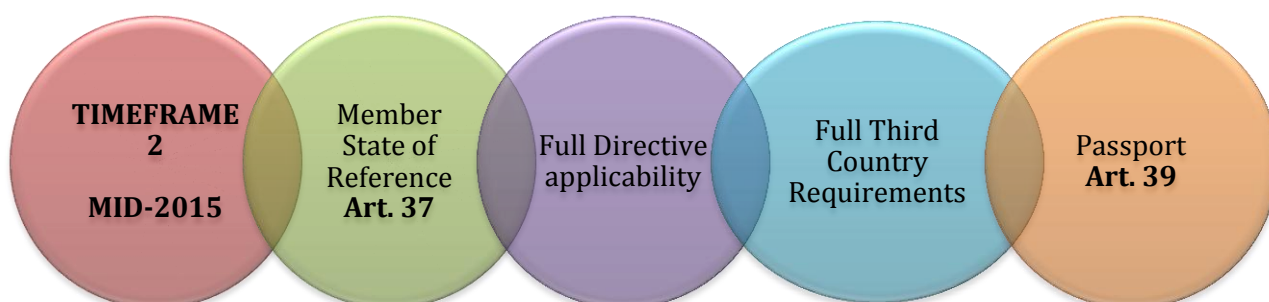
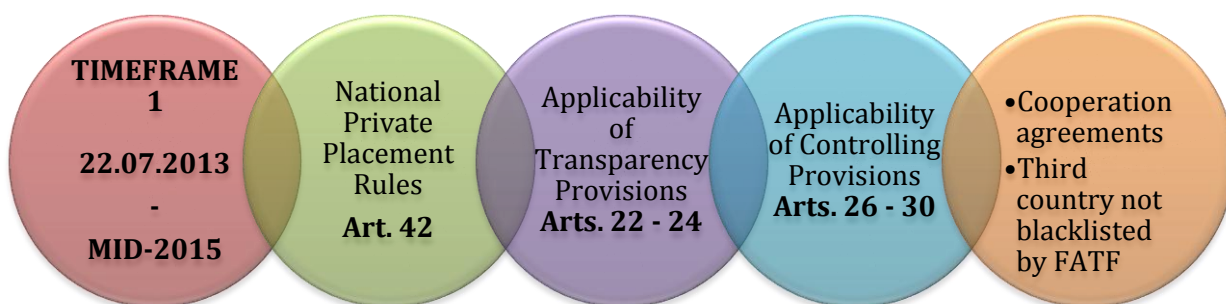
Under this scenario, the Directive provisions will only become applicable as at the start of Timeframe 2. The third country AIFM will market the EU AIF in accordance with the relevant third country's national regime. A passport will at no stage become available. However, the third country AIFM would be required to comply with full third country requirements, including licensing by the Member State of Reference.



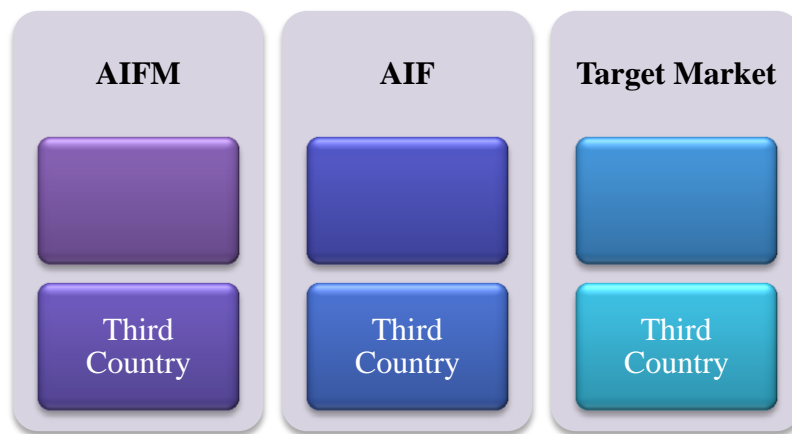
2.7 Third Country AIFM managing a Third Country AIF marketed in the EU



This scenario features the same dual regime described in section 2.5 above.



2.8 Third Country AIFM managing a Third Country AIF marketed in a Third Country



This scenario has no connecting factors with the EU and with the Directive. Consequently it is entirely unaffected by the Directive's framework.

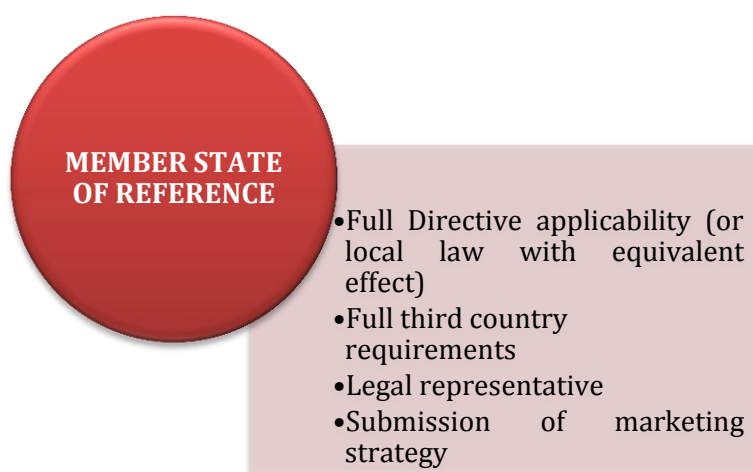
3 DETERMINATION OF MEMBER STATE OF REFERENCE

As seen in sections 2.5 to 2.7 above, it is envisaged that from mid-2015 third country AIFMs managing EU AIFs or marketing EU or third country AIFs in the EU will be required to designate a Member State of Reference and be licensed thereby.

Therefore, apart from ensuring compliance with the provisions of the Directive and the fulfilment of the full third country requirements⁴, a third country AIFM seeking to obtain licensing by a Member State of Reference must appoint a legal representative established in that Member State.

The legal representative will be the contact point of the third country AIFM within the EU as regards ESMA, the relevant supervisory authorities and the investors of the relevant AIFs. It will also be responsible for the compliance function relating to the AIFM's management and marketing activities in the EU.

Lastly, a third country AIFM will be required to give its reasons for the determination of a particular Member State as its Member State of Reference and will be required to disclose its marketing strategy in order to prove its intention to develop effective marketing in that Member State.



The determination of a Member State by a third country AIFM as its Member State of Reference is dependent on the interplay of certain criteria, the application of which is illustrated in Cases 1 to 9 below. The criteria are the following:

- whether the AIFM intends to manage one AIF or more than one AIF;
- the place(s) of establishment of the AIF/s; and
- the target market of the AIF; and
- whether or not a passport will be used to market the AIF.

⁴ Article 37(7) of the Directive

The application of these criteria may lead to more than one Member State being eligible for consideration as Member State of Reference. In the event of such a scenario, the regulatory authorities of all the Member States which are possibly eligible to be appointed as Member States of Reference will cooperate in determining which of them **is** to be the Member State of Reference.

Case 1



Since the AIFs concerned in this scenario are established in the same Member State, such Member State will be deemed to be the Member State of Reference and therefore will be the regulatory authority responsible for the licensing and prudential supervision of the AIFM.

Case 2



Under this scenario, the Member State of Reference will be either:

- i. the Member State where most of the AIFs are established; or
- ii. the Member State where the largest amount of assets is being managed.

Case 3



Under this scenario, the Member State of Reference will be determined in the following manner:

- i. if the AIF is licensed or registered in a Member State, the Member State of Reference will be:
 - a. either the Home Member State of that AIF; or
 - b. the Member State wherein the third country AIFM intends to market the EU AIF;

- ii. if the AIF is not licensed or registered in a Member State, the Member State of Reference will be the Member State wherein the third country AIFM intends to market the AIF.

Case 4



Under this scenario, the Member State of Reference will be the Member State wherein the third country AIFM intends to market the AIF.

Case 5



Under this scenario, the Member State of Reference will be as follows:

- i. Where the AIF that is licensed or registered in a Member State, the Member State of Reference will be:
 - a. either the Home Member State of the AIF; or
 - b. one of the Member States wherein the AIFM intends to develop effective marketing;
- ii. Where the AIF that is not licensed or registered in a Member State, the Member State of Reference will be one of the Member States wherein the AIFM intends to develop effective marketing.

Case 6



Under this scenario, the Member State of Reference will be one of the Member States wherein the third country AIFM intends to market the AIF.

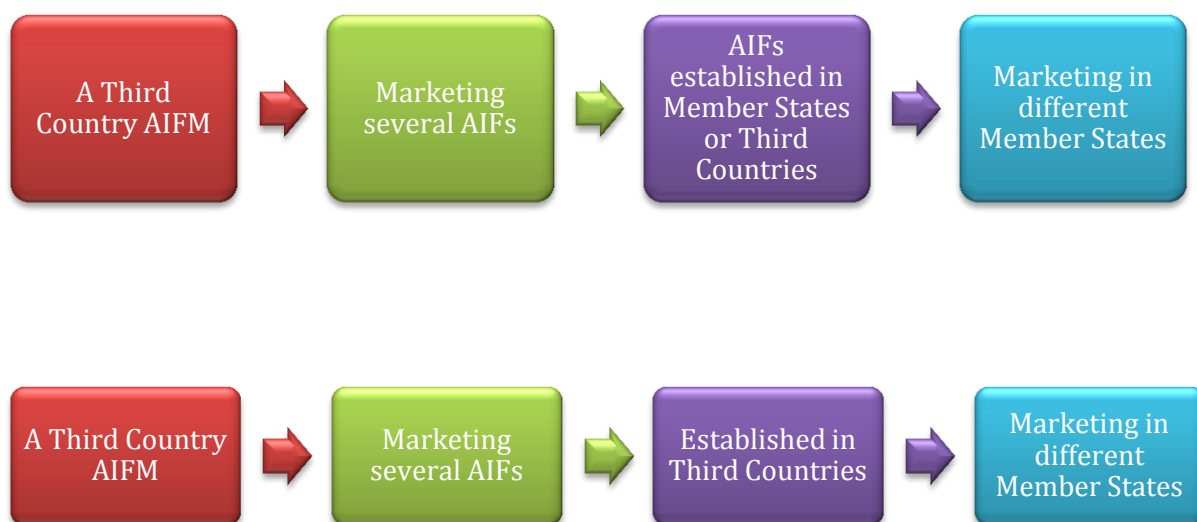
Case 7



Under this scenario, the Member State of Reference will be as follows:

- i. where the AIFs are all licensed or registered in one Member State, the Member State of Reference will be:
 - a. either the Home Member State of those AIFs; or
 - b. the Member State wherein the AIFM intends to develop effective marketing for most of the AIFs;
- ii. Where the AIFs are licensed or registered in different Member States, the Member State of Reference will be that wherein the AIFM intends to develop effective marketing for most of those AIFs.

Cases 8 and 9



Under these two scenarios, the Member State of Reference will be the Member State wherein the AIFM intends to develop effective marketing for most of the AIFs.

ANNEX 1 - NOTIFICATION FOR AUTHORISATION

AIFMs applying for authorisation under the Directive must submit a notification file to the relevant competent authority comprising various required items of information. There are two types of notification requirements, as described in this Annex.

1.1. Documentation and information to be provided in case of intended marketing in the Home Member State of the AIFM

The documentation and information to be provided in the case of intended marketing in the Home Member State of the AIFM includes the following:

- a notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- the AIF rules or instruments of incorporation;
- identification of the depositary of the AIF;
- a description of, or any information on, the AIF available to investors;
- information on where the master AIF is established if the AIF is a feeder AIF;
- any additional information referred to in Article 23(1) for each AIF the AIFM intends to market; and
- where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

1.2. Documentation and information to be provided in the case of intended marketing in Member States other than the Home Member State of the AIFM

The documentation and information to be provided in the case of intended marketing in Member State other than the Home Member State of the AIFM includes the following:

- a notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- the AIF rules or instruments of incorporation;
- identification of the depositary of the AIF;
- a description of, or any information on, the AIF available to investors;
- information on where the master AIF is established if the AIF is a feeder AIF;
- any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;
- the indication of the Member State in which it intends to market the units or shares of the AIF to professional investors;
- information about arrangements made for the marketing of AIFs and, where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.