

# ALLEN & OVERY

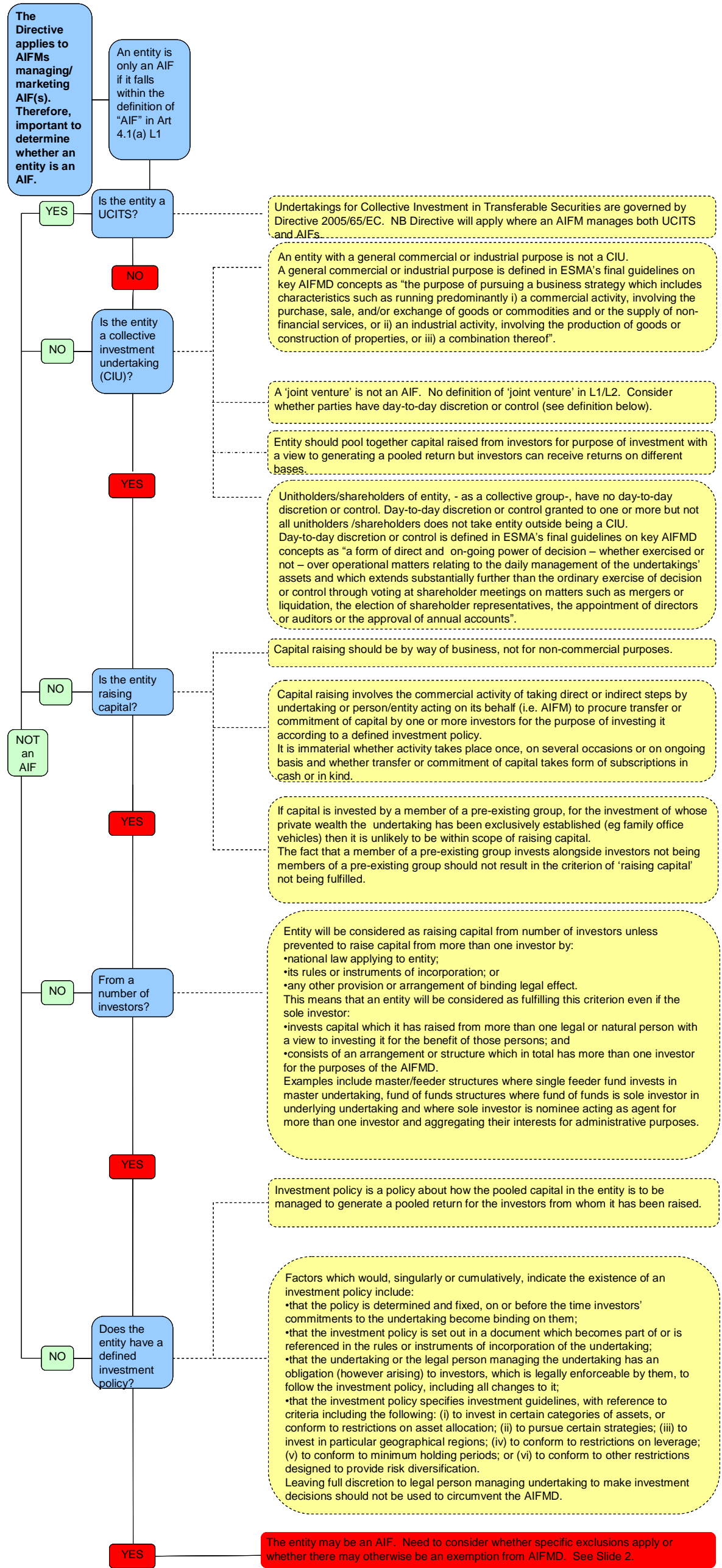
## AIFMD ROADMAPS

OCTOBER 2013

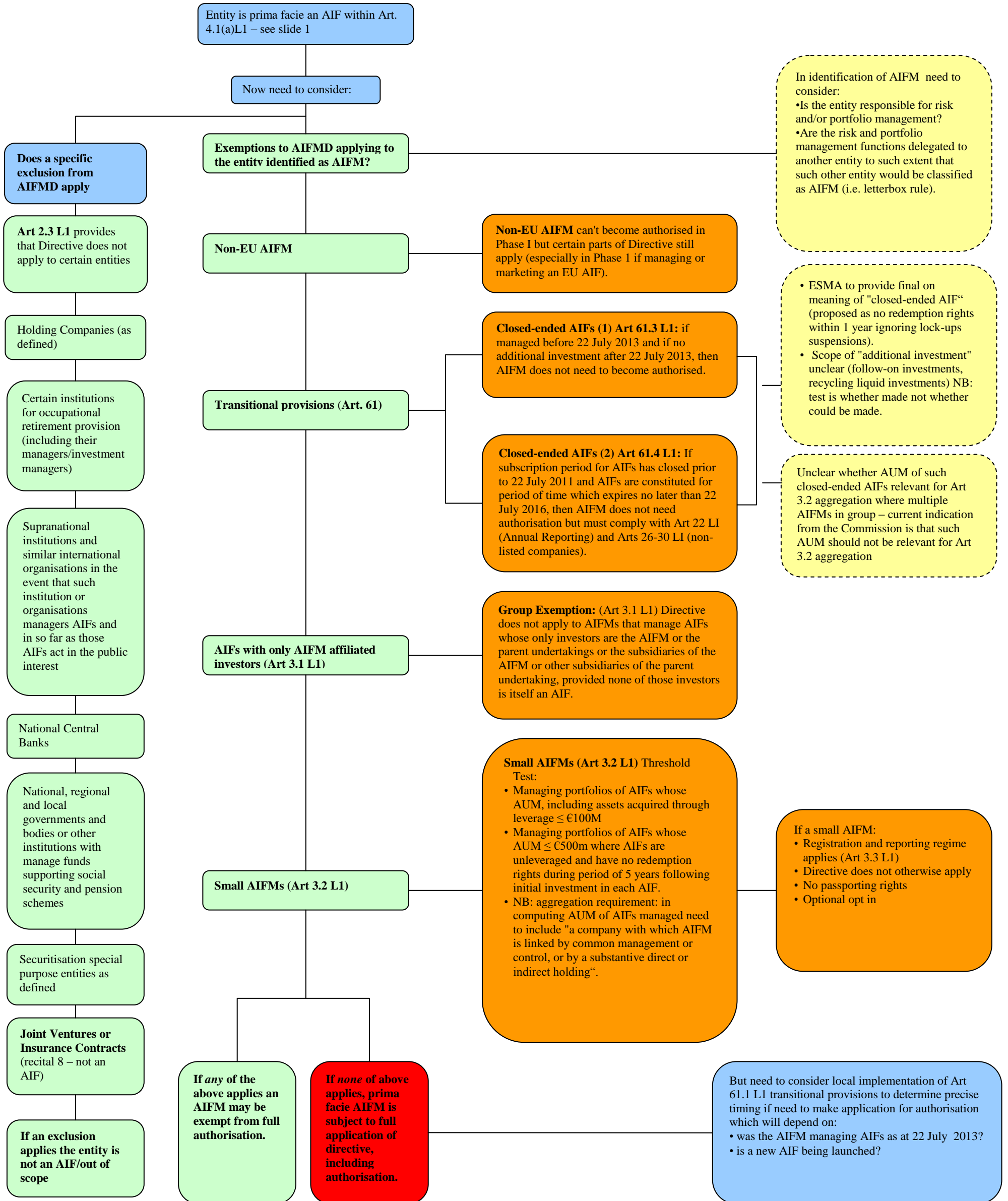
### CONTENTS

<b>AIFMD – Article 4 – Do you have an AIF? .....</b>	<b>2</b>
<b>AIFMD – You have an AIF, do you have any exclusions/exemptions? .....</b>	<b>3</b>
<b>AIFMD Phased Implementation.....</b>	<b>4</b>
<b>AIFMD – You have an AIFM, what must you comply with in phase 1 (i.e. pre 2015)?.....</b>	<b>5</b>
<b>AIFMD – Article 17 - Do you need to comply with the requirements related to investment in securitisation positions?.....</b>	<b>6</b>
<b>AIFMD – What key policies and procedures must an authorised AIFM have in place?.....</b>	<b>7</b>
<b>AIFMD – Article 20 – Delegation .....</b>	<b>7</b>
<b>AIFMD – Article 21(1) to (13) – Depositary Functions.....</b>	<b>9</b>
<b>AIFMD – Article 21(11) to (14) – Depositary Delegation and Liability .....</b>	<b>10</b>
<b>AIFMD – Article 26 to 30 –Non-Listed Companies and Issuers .....</b>	<b>11</b>
<b>AIFMD Annex II – ESMA Final Remuneration Guidelines Slide I – Scope.....</b>	<b>11</b>
<b>AIFMD-ESMA Final Remuneration Guidelines Slide II – Specific Guidelines.....</b>	<b>13</b>
<b>AIFMD-ESMA Final Remuneration Guidelines Slide III – Annex II Principles .....</b>	<b>14</b>
<b>AIFMD-ESMA Final Remuneration Guidelines Slide IV – Governance .....</b>	<b>15</b>
<b>AIFMD-ESMA Final Remuneration Guidelines Slide V – Risk Alignment.....</b>	<b>16</b>
<b>Key contacts .....</b>	<b>17</b>

**AIFMD – ARTICLE 4 – DO YOU HAVE AN AIF?**

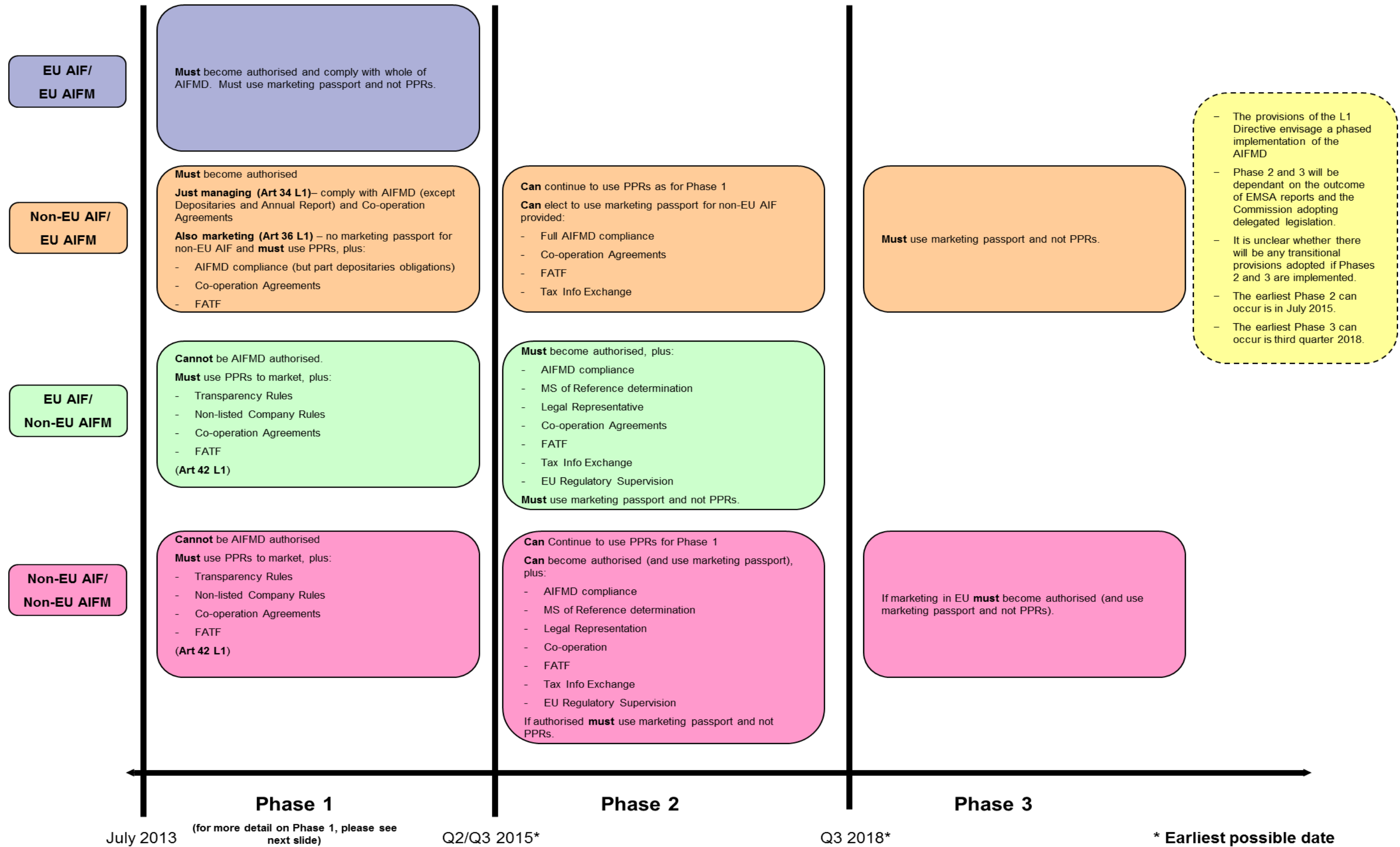


**AIFMD – YOU HAVE AN AIF, DO YOU HAVE ANY EXCLUSIONS/EXEMPTIONS?**



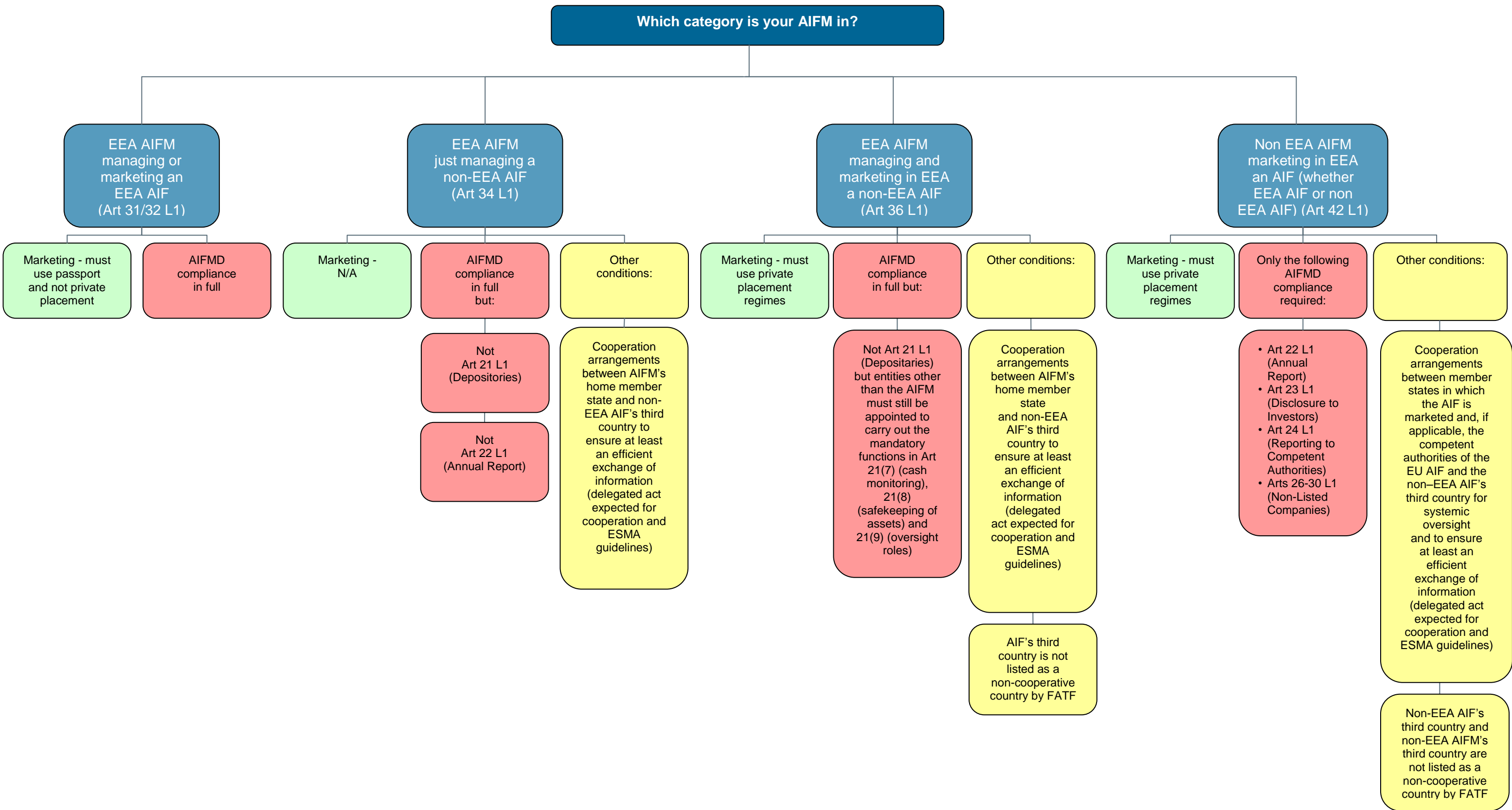
These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

## AIFMD Phased Implementation



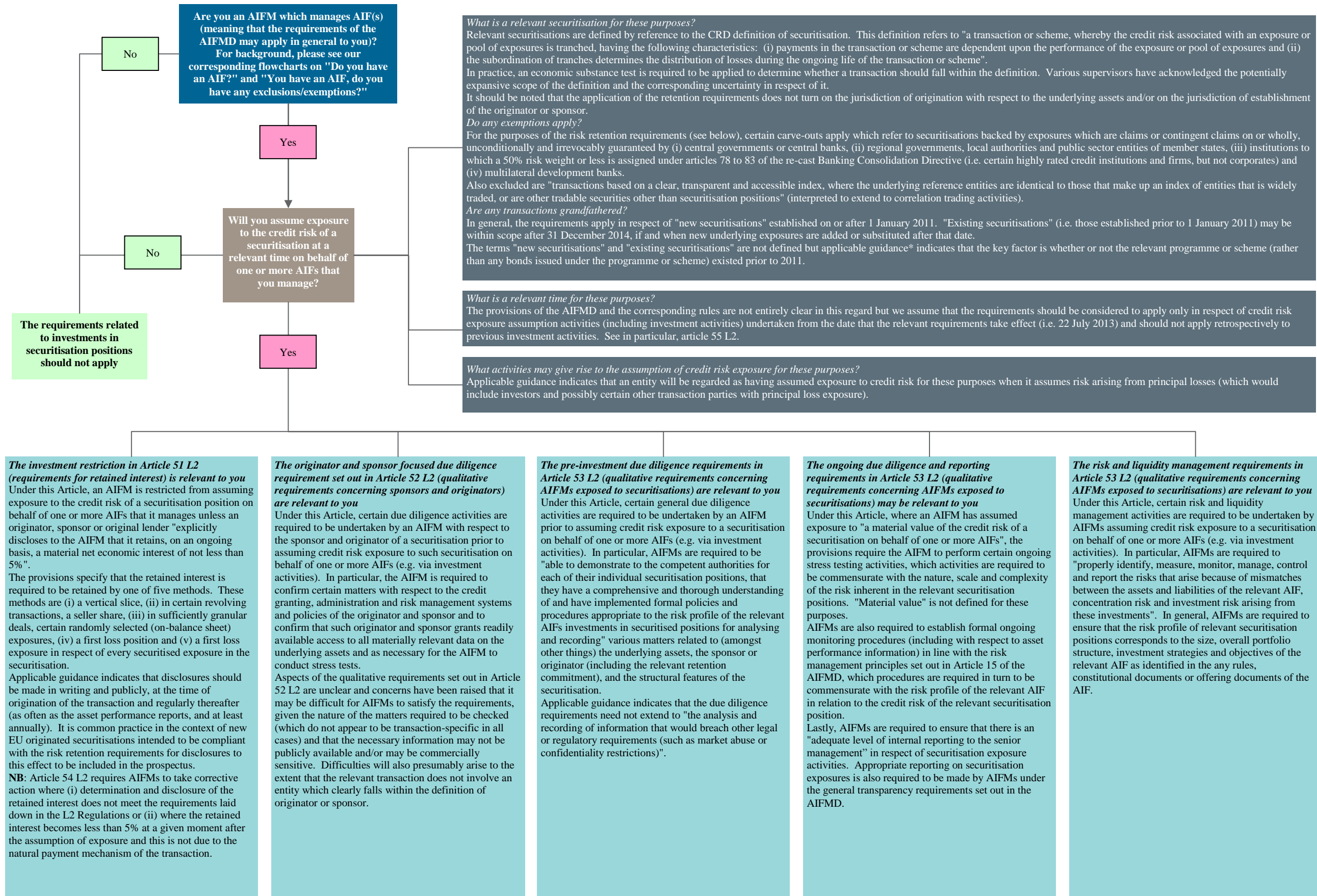
These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

**AIFMD – YOU HAVE AN AIFM, WHAT MUST YOU COMPLY WITH IN PHASE 1 (I.E. PRE 2015)?**



These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

## AIFMD – ARTICLE 17 - DO YOU NEED TO COMPLY WITH THE REQUIREMENTS RELATED TO INVESTMENT IN SECURITISATION POSITIONS?



\* It has been confirmed that the provisions outlined above should be interpreted in a manner consistent with the corresponding risk retention and due diligence requirements which apply to credit institutions under the Capital Requirements Directive and with the guidelines to such requirements issued by the Committee of European Banking Supervisors (CEBS) and subsequent amendments. The CEBS guidelines can be found on the website of the European Banking Authority.

**These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.**

## AIFMD – WHAT KEY POLICIES AND PROCEDURES MUST AN AUTHORISED AIFM HAVE IN PLACE?

### Due Diligence policies

Art 12 L1/Art 18 L2

AIFMs must have written policies and procedures for the purpose of ensuring that investment decisions on behalf of an AIF are carried out in compliance with the objectives, investment strategy and, where applicable, the risk limits of the AIF.

The policy must be regularly reviewed and updated.

N.B. Specific DD requirements apply when investing in illiquid assets (see Art 15 L2)

*cf UCITSD*

### Policy to prevent malpractice

Art 12 L1/Art 17 L2

AIFMs must have effective policies and procedures to prevent malpractices including those that might adversely affect the stability and integrity of the market.

*cf MiFID and UCITSD*

### Order Aggregation

Article 12 L1/Art 29 L2

Before being able to allocate aggregated orders AIFMs must first have an order allocation policy in place.

The policy needs to provide, in sufficiently precise terms, for the fair allocation of aggregated orders, including how the volume and price of the orders will determine the allocations and the treatment of partial executions.

Order aggregation only permitted if it can be reasonably expected that aggregation will not work to the disadvantage of any AIF, UCITS or other clients whose order is to be aggregated.

*cf MiFID and UCITSD*

### Organisational Requirements – General

Art 18 L1/Art 22, 57, 58, 60, L2.

AIFMs must use appropriate human and technical resources necessary for the proper management of AIFs. The L2 Regulations set out in extensive detail the organisational requirements imposed on AIFMs, including specific requirements imposed on governing body, senior management and supervisory functions as well as a permanent compliance function. The arrangements that AIFMs need to have in place include, but are not limited to the following:

#### Implementation of a Business Continuity Policy

Art 18 L1/Art 57 L2.

AIFMs need to have an adequate business continuity policy to ensure, in the event of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of services and activities, or, where this is not possible, the timely recovery of such data and functions and timely resumption of their services and activities. *cf MiFID and UCITSD*

#### Implementation of an Accounting Policy

Art 18 L1/ Art 59 L2.

AIFMs must have accounting policies and procedures and valuation rules that will enable them to deliver in a timely manner to the competent authority financial reports which reflect a true and fair view of their financial position and which comply with all applicable accounting standards and rules.

Accounting records must be kept in such a way that all assets and liabilities of the AIF or investment compartments of it can be directly identified at all times. *cf UCITSD*

#### Establishment of a Permanent Compliance Function

Art 18 L1/Art 61 L2.

AIFM must have adequate policies and procedures designed to (i) detect any risk of failure by the AIFM to comply with its obligations under the Directive and (ii) to minimise such risk.

The AIFM will take into account the nature, scale and complexity of its business, and the nature and range of services and activities undertaken in the course of that business.

The compliance function must operate independently and discharge the specific duties listed in Art 61 L2. In particular it must monitor and assess the adequacy of the compliance policies and procedures adopted to ensure that an AIFM is operated in accordance with the Directive. Whilst the compliance function must be independent and there are certain requirements set out in L2 to ensure such independence, certain of these independence requirements do not need to be met by an AIFM where to do so would not be proportionate in light of the AIFM's nature, scale, complexity of its business and the nature and range of its services. *cf MiFID and UCITSD*

#### Implementation of Valuation Policies and Procedures

Art, 18 L1/ Art 67, 68, 69 ,70, 71, 72, 74. L2.

AIFMs must make sure that, for each AIF they manage, there is a written valuation policy to ensure a sound, transparent, comprehensive and appropriately documented valuation process.

The valuation policies need to identify the valuation methodologies used for each type of asset in which the AIF may invest.

They must also set out the obligations, roles and responsibilities of all parties involved in the valuation process, including the senior management of the AIFM.

The policies will include inputs, models and the selection criteria for pricing and market data source and ensure that prices are obtained from independent sources whenever possible and appropriate.

The L2 Regulation sets out points that must be covered by valuation policies and procedures as well as rules relating to the interaction between AIFM and any external third party valuer where one is appointed. *cf UCITSD*

This slide provides a high level overview of the general policies and procedures that an authorised AIFM needs to have in place.

On this slide organisational requirements have been shaded purple, risk management and liquidity management requirements have shaded green and remuneration requirements pink. Where similar requirements exist under the UCITS Directive (**UCITSD**) and/or under the Markets in Financial Instruments Directive (**MiFID**) we have indicated this in the relevant box.

### Inducements

Art 12 L1/Art 24 L2

Payment/receipt of inducements is restricted by AIFMD and AIFMs will need to have appropriate arrangements and inducement policy in place.

*cf MiFID and UCITSD*

### Order Handling

Art 12 L1/Art 25 L2

AIFMs must have procedures to provide for prompt, fair and expeditious execution of orders on behalf of AIFs.

*cf MiFID and UCITSD*

### Best Execution

Art 12 L1/Art 27 and 28 L2

AIFMs have a duty to act in the best interests of the AIFs or the investors in the AIFs they manage when executing decisions to deal on behalf of the managed AIF or when placing orders to deal on behalf of AIFs with other entities for execution.

AIFMs must establish in writing and implement an execution policy to allow AIFs and their investors to obtain, for AIF orders, the best possible result.

The policy must take into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order.

Where an AIFM places orders with other entities for execution, the policy must identify, in respect of each class of instruments, the entities with which the orders may be placed.

AIFMs must monitor and review the effectiveness of the policy on a regular basis. Where an AIFM places orders with other entities for execution, the AIFM must also monitor the quality of the execution by the entities identified in that policy. Where appropriate an AIFM must correct any deficiencies.

N.B. Specific best execution requirements are not applicable if there is no choice of different execution venues but AIFM must still act in best interest of AIF/investors and be able to demonstrate that there is no choice of execution venue. *cf MiFID and UCITSD*

### Conflicts of Interest – General

Art 14 L1/Art 30-37

AIFMs must identify conflicts of interest arising in course of managing AIFs and must have arrangements in place to identify, prevent, manage and monitor conflicts of interest. Where a risk of damage to investors' interest due to conflicts of interest cannot be prevented, AIFM must disclose conflicts to investors.

The L2 Regulation provides detail around the identification of conflicts of interest and the procedure for preventing or managing conflicts. Such procedures envisage persons engaged in different business activities giving rise to the risk of conflicts of interest carry out activities with a degree of independence appropriate to size and activities of AIFM and of its group and to materiality of risk of damage to interests of AIF or its investors. The L2 Regulation provide procedures to be followed to ensure such independence.

A key part of conflicts management is the establishment of a conflicts of interest policy.

AIFMs must have, in writing, an effective conflicts of interest policy that is appropriate to the size and organisation of the AIFM and the nature, scale and complexity of its business.

The policy shall include criteria for the identification of circumstances which constitute or may give rise to a conflict of interest and procedures to be followed and measures to be adopted in order to prevent, manage and monitor such conflicts. Where AIFM is member of a group policy must also take into account conflicts that may result from structure and business activities of other group members.

Separately an AIFM must also disclose to investors (at their request) a summary description of its strategies for exercising voting rights held by an AIF and actions taken.

*cf MiFID and UCITSD*

### Conflicts of Interest – Redemptions

Art 14 L1/Art 32 L2

AIFMs managing **open-ended AIFs** need to identify, manage and monitor conflicts of interest arising between investors wishing to redeem their investments and investors wishing to maintain their investments in the AIF, and any conflicts between the AIFM's incentive to invest in illiquid assets and the AIF's redemption policy.

### Remuneration

Art 13 L1

AIFMs are required to have remuneration policies and practices for those categories of staff whose professional activities have a material impact on the risk profiles of the AIFMs or the AIFs they manage.

Senior management, risk takers, control functions and any employees receiving total remuneration that takes them into the same remuneration as senior management are caught by this provision.

The remuneration policy must be consistent with and promote sound and effective risk management and must not encourage risk taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs managed.

Please see the separate slides on "Remuneration".

### Risk Management

Art 15 L1/Art 38, 39, 40, 41, 42, 44, 45 L2

AIFMs must functionally and hierarchically separate risk management from operating units limiting portfolio management. L1 Regulation set out conditions to be satisfied to ensure separation.

AIFMs must implement adequate risk management systems to identify, measure, manage and monitor risks relevant to each AIF investment strategy. This includes the establishment of a permanent risk management function and the implementation of a risk management policy. Policy must identify all relevant risks to which the AIFs that the AIFM manages are or may be exposed to.

The policy must include the necessary procedures to enable the AIFM to assess for each AIF it manages the exposure of that AIF to market, liquidity and counterparty risks, and the exposure of the AIF to all other relevant risks, including operational risks, which may be material for each AIF it manages.

The policy must address certain elements specified in Art 40 L2 and must include a description of the safeguards against conflicts of interests referred to in Art 43 L2 and needs to be appropriate to the nature, scale and complexity of the business of the AIFM and of the AIF it manages.

*cf UCITSD*

### Liquidity Management

Art 16 L1/ Art 46, 47, 48, 49 L2

For each AIF, other than unleveraged closed-ended AIF, AIFM must have appropriate liquidity management systems and procedures to monitor liquidity risk of the AIF and to ensure liquidity profile of investments of AIF complies with its underlying obligations. L2 Regulation stipulates various minimum requirements that an AIFM's procedures for liquidity management must meet. These include ensuring that appropriate levels of liquidity are maintained, the liquidity profile if an AIF's portfolio is monitored, in relation to AIFs investing in other funds monitoring the liquidity arrangements of other managers, appropriate liquidity measurement arrangements are in place to assess quantitative and qualitative risks of positions and intended investments, tools and arrangements are in place to manage liquidity risk (e.g. special arrangements).

AIFMs need to consider whether liquidity / illiquidity limits should be imposed. AIFMs also need to conduct stress testing.

These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

## AIFMD – ARTICLE 20 – DELEGATION

**AIFM's Functions** - must perform at least risk management or portfolio management. It may choose to perform in the course of management of an AIF certain administrative or marketing functions or activities related to the assets of the AIF. Where permitted by its home Member State, it may also perform limited MiFID activities.

**Permitted Delegation** - delegation is permitted where:

- (a) the AIFM gives prior notification to its Competent Authority that it intends to delegate to third parties the task of carrying out functions on its behalf;
- (b) the AIFM reviews the services provided by the delegate on an ongoing basis;
- (c) the delegation meets all 6 conditions;
- (d) its not a prohibited delegation; and
- (e) the delegation does not cause the AIFM to become a letter-box entity.

**Permitted Sub-delegation** - the delegate may sub-delegate any of the functions delegated to it provided that:

- (a) the AIFM consents prior to the sub-delegation;
- (b) the AIFM notifies the competent authority before the sub-delegation becomes effective;
- (c) the sub-delegation complies with the conditions for delegation; and
- (d) it is not a prohibited sub-delegation.

The delegate must review the services provided by each sub-delegate on an ongoing basis.

**Prohibited Delegation and Sub-delegation** - the AIFM or delegate may not sub-delegate any portfolio or risk management to:

- (a) the depositary or a delegate of the depositary; or
- (b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

**Further Delegation** - a sub-delegate may further delegate its functions provided that the delegation satisfies the requirements for a delegation from an AIFM to a third party.

**Condition 2 - Sufficient Resources** - the delegate must have sufficient resources to perform the respective tasks and the persons who effectively conduct the business of the delegate must be of sufficiently good repute and sufficiently experienced and have an appropriate organisational structure supporting the performance of the delegated tasks.

Sufficient Experience - a person must have appropriate theoretical knowledge, appropriate practical experience in the relevant functions and their professional training and previous functions must be appropriate for the conduct of this business.

Good Repute - persons shall not be deemed to be of good repute where they have any negative records relevant both for the assessment of good repute and for the proper performance of the delegated tasks or if there is other relevant information which affects their good reputation such as criminal offences, judicial proceedings or administrative sanctions, in particular, those which are linked to financial activities.

Where the delegate is regulated in respect of its professional services within the Union, factors referred to in the first part of the paragraph above shall be deemed to be satisfied when the relevant supervisory authority has reviewed the criterion of 'good repute' within the authorization procedure unless there is evidence to the contrary.

**Letter-box Entity risk of Delegation** - an AIFM is no longer considered to be the manager of an AIF where it:

- (a) no longer retains the necessary expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegation;
- (b) the AIFM no longer has the power to take decisions in key areas or perform senior management functions;
- (c) the AIFM loses its contractual rights to inquire, inspect, have access or give instructions to its delegates or the exercise of such rights becomes impossible in practice;
- (d) the AIFM delegates the performance of investment management functions to an extent that exceeds by a substantial margin the investment management functions performed by the AIFM itself taking into account: (i) the types of assets invested in, and the importance of the assets managed under delegation for the risk and return profile of the AIF; (ii) the importance of the assets under delegation for the achievement of the investment goals of the AIF; (iii) the geographical and sectoral spread of the AIF's investments, (iv) the risk profile of the AIF; (v) the type of investment strategies pursued; (vi) the types of tasks delegated in relation to those retained; and (vii) the configuration of delegates and their sub-delegates, their geographical sphere of operation and their corporate structure, including whether the delegation is conferred on an entity in the AIFM's corporate group.

**Condition 1 - Objective Reasons for Delegation** - the AIFM must be able to justify its entire delegation structure on objective reasons and provide the Competent Authorities with a detailed description, explanation and evidence (and any further explanation or documents requested by the Competent Authority) of the objective reasons for delegation.

The following criteria shall be considered:

- (a) optimising of business functions and processes;
- (b) cost saving;
- (c) expertise of the delegate in administration or in specific markets or investments; and
- (d) access of the delegate to global trading capabilities.

**Conditions 3 and 4 - Delegation of Portfolio or Risk Management** - where the delegation concerns portfolio management or risk management, except where there is the prior approval of the Competent Authorities of the home Member State of the AIFM, only entities authorised or registered below may perform these functions:

- (a) UCITS authorised management companies;
- (b) MiFID authorised investment firms;
- (c) authorised credit institutions authorised to perform portfolio management under MiFID;
- (d) external AIFMs authorised under AIFMD;
- (e) third country entities authorised or registered for the purpose of asset management and effectively supervised by a competent authority in those countries.

Where the delegation is conferred on a third-country undertaking as in (e), a cooperation agreement between the Competent Authorities of the home Member State of the AIFM and the supervisory authority of the undertaking must be in place, in writing and such that it enables the Competent Authorities to obtain on request information and documents necessary to carry out their supervisory tasks under AIFMD, carry out on-site inspections on the delegate's premises, receive information from and cooperate with the supervisory authority in the third country.

**Condition 5 - Effectiveness of Supervision** - the delegation must not prevent the effectiveness of supervision of the AIFM, and, in particular, must not prevent the AIFM from acting, or the AIF from being managed, in the best interests of its investors.

A delegation shall be deemed to prevent the effective supervision of the AIFM where:

- (a) the AIFM, its auditors and the Competent Authorities do not have effective access to data or the Competent Authorities are not able to exercise those rights of access;
- (b) the delegate does not cooperate with the Competent Authorities of the AIFM; and
- (c) the AIFM does not make information available on request to the Competent Authorities.

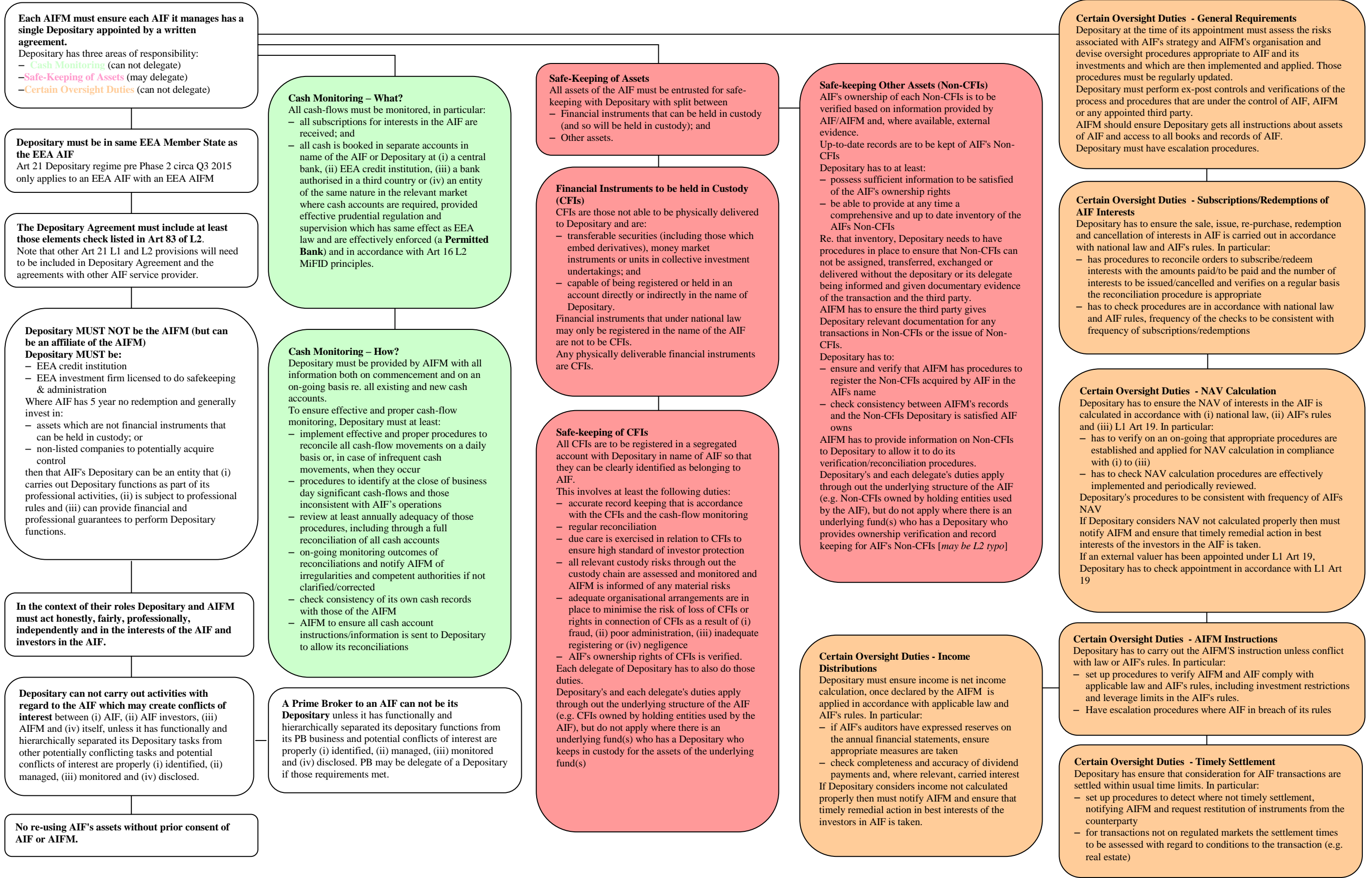
**The AIFM's liability towards the AIF and its investors is not affected by the fact that the AIFM has delegated functions to a third party or by any further sub-delegation.**

**Condition 6 - General Principles** - the AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all due care and that the AIFM is in a position to monitor or instruct effectively at any time the delegated activity and to withdraw the delegation with immediate effect when this is in the interest of investors. In particular:

- (a) the delegation structure must not allow for the circumvention of the AIFM's responsibilities or liability;
- (b) the obligations of the AIFM towards the AIF and its investors must not altered as a result of the delegation;
- (c) the conditions with which the AIFM must comply in order to be authorised and carry out activities in accordance with the Directive are not undermined;
- (d) the delegation arrangement must be in writing between the AIFM and the delegate;
- (e) the AIFM must ensure that the delegate carries out the delegated functions effectively and in compliance with applicable law and regulatory requirements and must establish methods and procedures for reviewing on an on-going basis the services provided by the delegate and take appropriate action if necessary;
- (f) the AIFM must have at all times the necessary expertise and resources to supervise the delegated functions;
- (g) the AIFM must ensure that the continuity and quality of the delegated functions or of the delegated task of carrying out functions are maintained in the event of termination of the delegation;
- (h) the respective rights and obligations of the AIFM and the delegate must be clearly set out in the agreement. In particular, the agreement must set out its instruction and termination rights, its rights of information, its right to inspections and access to books and premises and that sub-delegation can take place only with the consent of the AIFM;
- (i) where it concerns portfolio management, the delegation must be in accordance with the investment policy of the AIF and the AIFM must monitor whether the delegate complies with it on an on-going basis;
- (j) the AIFM ensures that the delegate discloses to the AIFM any development that may have a material impact on the delegate's ability to carry out the delegated functions effectively and in compliance with applicable laws and regulatory requirements;
- (k) the AIFM ensures that the delegate protects any confidential information relating to the AIFM, the AIF and its investors; and
- (l) the AIFM ensures that the delegate establishes, implements and maintains a contingency plan for disaster recovery and periodic testing of backup facilities.

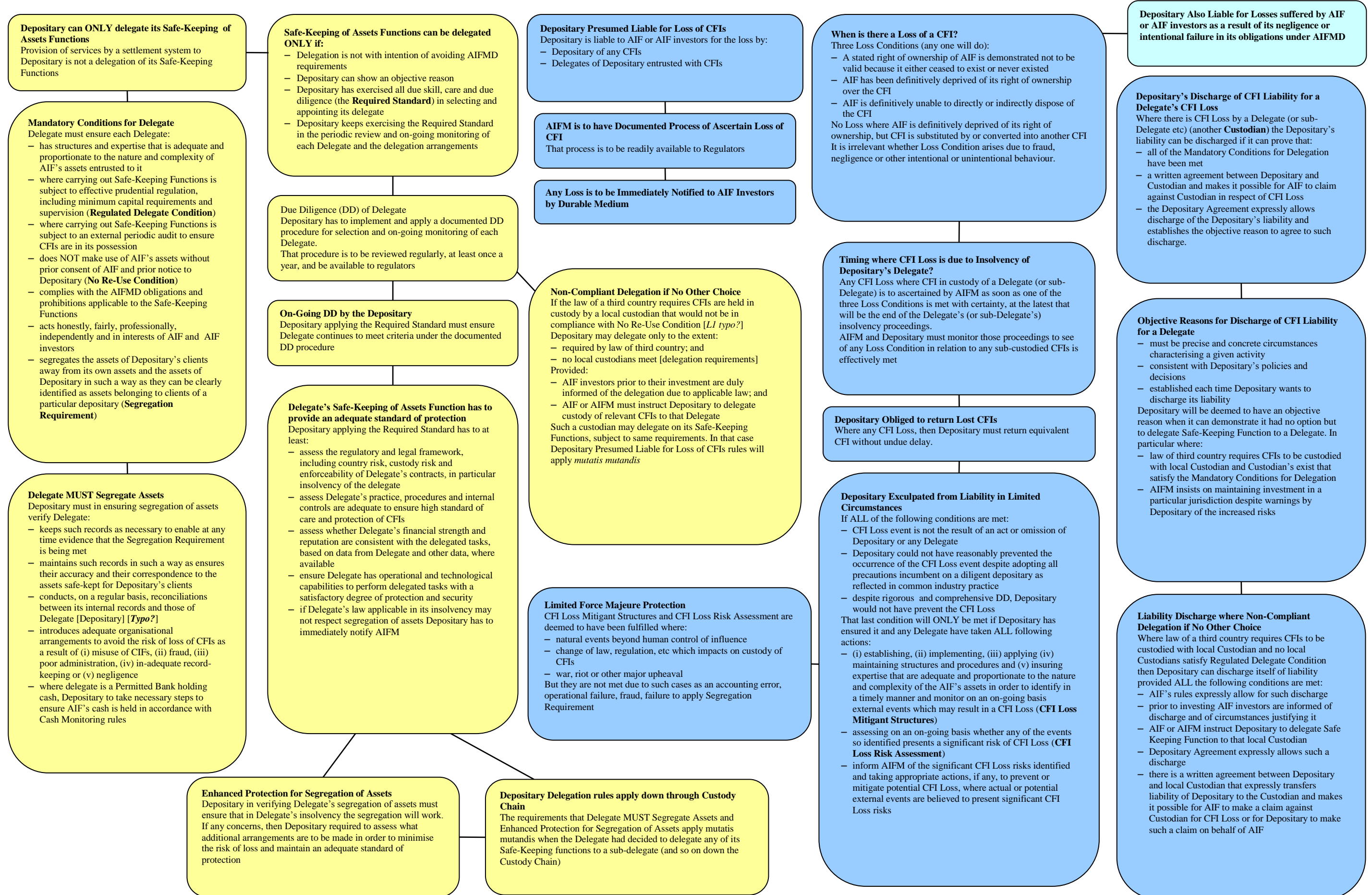


**AIFMD – ARTICLE 21(1) TO (13) – DEPOSITARY FUNCTIONS**



These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

**AIFMD – ARTICLE 21(11) TO (14) – DEPOSITARY DELEGATION AND LIABILITY**



These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

## AIFMD – ARTICLE 26 TO 30 –NON-LISTED COMPANIES AND ISSUERS

### Who is covered by the rules?

**AIFMs managing AIFs that acquire control of ‘non-listed companies’ or ‘issuers’ (each as defined below):** Specific disclosure and conduct rules apply (detailed below) to an AIFM where the control of a non-listed company or an issuer is acquired by: (i) a single AIF managed by the AIFM; (ii) multiple AIFs under an agreement aimed at acquiring control, managed by one AIFM; and (iii) multiple AIFMs co-operating on the basis of an agreement under which their AIFs jointly acquire control.

**AIFMs managing AIFs acquiring non-controlling participations of ‘non-listed companies’:** Specific notification requirements apply to an AIFM vis-à-vis competent authorities where an AIF managed by an AIFM reaches, exceeds or falls below certain percentage thresholds in relation to voting rights in a non-listed company. These provisions do not apply in relation to non-controlling voting rights held in issuers.

### What’s a non-listed company?

Companies, that have their registered office in the European Union, whose shares are not admitted to trading on a regulated market are caught by the definition of 'non-listed company'. Small and medium-sized enterprises and special purpose vehicles established to buy, hold or administer real estate are excluded.

### What’s an issuer?

An issuer with registered office in the European Union whose shares are admitted for trading on a regulated market.

### What does ‘control’ mean?

**Non-listed companies:** Acquiring, directly or indirectly, more than 50% of the voting rights of the company.

**Issuers:** The level of voting control at which a mandatory offer is required under the rules of the Member State in which the issuer has its registered office.

### **Specific Rules (1) Notification (applicable in respect of non-listed companies only)**

#### Stake building

(a) An AIFM must notify its home Member State competent authorities of the proportion of voting rights of the company held by an AIF that it manages when the proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.

#### Control

(b) Where an AIF acquires (whether individually or jointly) control, the AIFM is required to notify the company, the shareholders and its home Member State competent authorities of: (i) the level of voting control; (ii) the date it was acquired; and (iii) information concerning the conditions under which control was reached including details of any affiliated holdings.

As part of notifying the company, the AIFM is required to use best efforts to ensure the board distribute this information to the employee representative (or employees where no representative) without undue delay.

The notifications in (a) and (b) must be made as soon as possible but no later than ten working days following the date of acquisition or disposal which gives rise to the obligation.

### **Specific Rules (2) Information Disclosure if Acquiring Control (applicable in respect of non-listed companies and issuers)**

Where an AIF acquires control of a non-listed company or an issuer, the AIFM is required to disclose the following information to the non-listed company/issuer, shareholders and competent authorities:

- the identity of the AIFM;
  - the policy 'preventing and managing conflicts of interest' between the AIM, AIF and the company, including details of how any arrangements will be at 'arms length';
  - the policy on external and internal communications;
  - *in relation to non-listed companies only*, information relating to 'its intentions with regard to the future business of the company' and the likely impact on employment. This information only needs to be provided to the company and other shareholders.
- Member States may require such additional information to also be provided to the competent authority of the non-listed company.

A similar best efforts obligation applies in relation to requiring the board of the non-listed company or issuer to disseminate the information.

### **Specific Rules (3) Annual Report Provisions if Acquiring Control (applicable in respect of non-listed companies only)**

Where an AIF acquires control, the AIFM is required to either: (i) use best efforts to ensure the 'additional information' set out below is included in the annual report of the non-listed company and made available by the board to the employee representative (or the employees where no representative) within the national time limit for drawing up the report; or (ii) include 'additional information' in the annual report for each relevant AIF no later than 6 months following the end of the financial year (and in any event no later the date when the annual report of the non-listed company is required to be drawn up under national law).

The **additional information** must include:

- a fair review of the development of the company's business over the period covered by the annual report;
- an indication of important events since the end of the financial year;
- an indication of the company's likely future development;
- prescribed details of acquisitions of own shares.

### **Specific Rules (4) Asset Stripping if Acquiring Control (applicable in respect of non-listed companies and issuers)**

For **24 months** following the acquisition of control by the relevant AIF, the AIFM must use its best efforts to prevent (and it is prohibited from voting in favour of or otherwise facilitating, supporting or instructing) any distribution, capital reduction, share redemption or acquisition of own shares relating to:

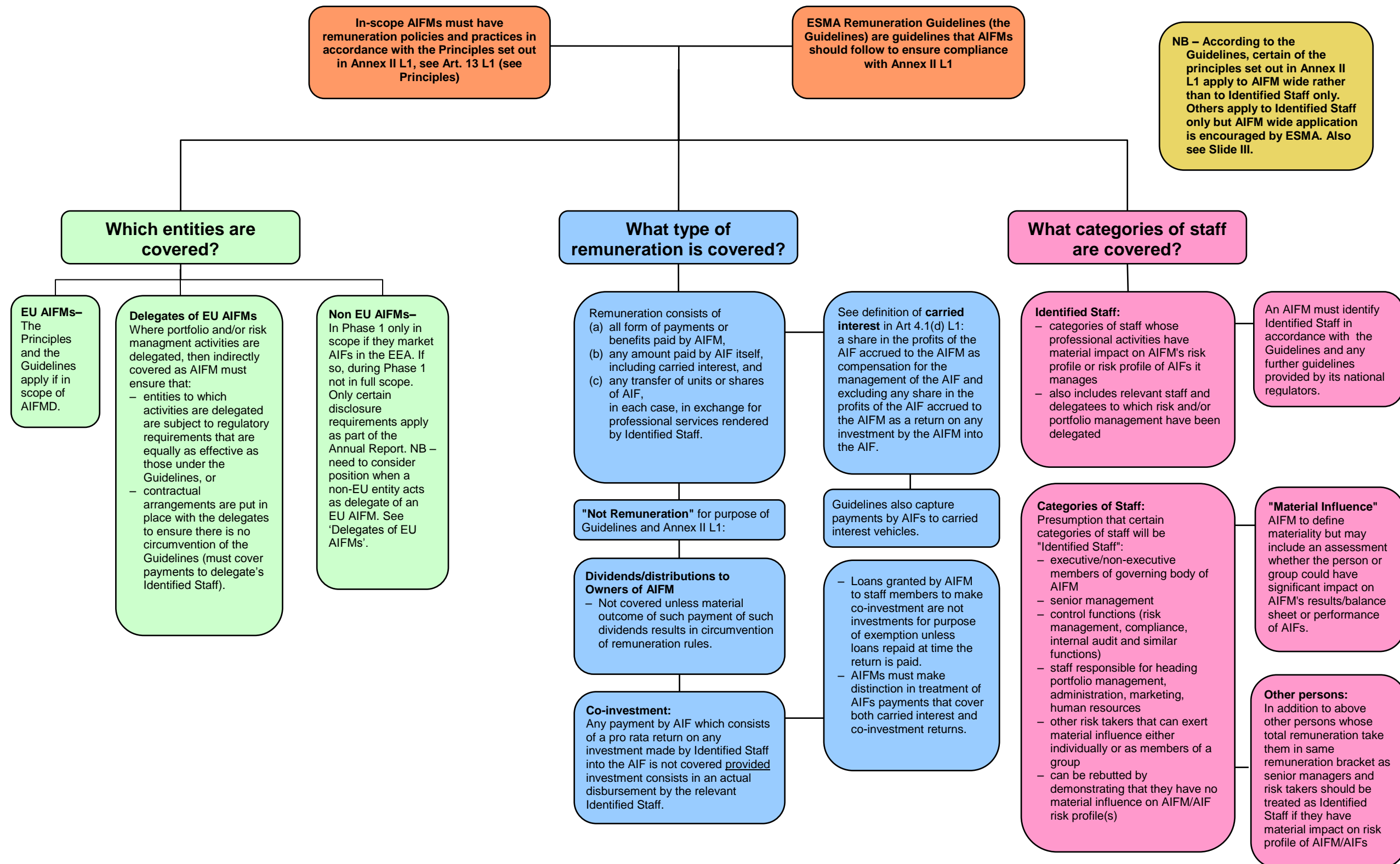
- (a) any distribution to shareholders by the company, where net assets are or would become lower than the amount of subscribed capital, plus undistributable reserves;
- (b) any distribution to shareholders by the company which would exceed the amount of the company's distributable profits at the end of the previous year (plus profits brought forward and distributable reserves), net of any losses and amount moved to undistributable reserves.
- (c) any acquisition by the company of its own shares (including shares previously acquired and held, and shares acquired on its behalf) if this would have the effect of reducing its net assets below the limit in (a).

There are a number of **limited exemptions** for acquisitions of own shares and capital reductions.

Although (a) and (b) only refer to 'distribution', the EU Commission has confirmed that it should be understood as generic and covering distributions, capital reductions, share redemptions or acquisition of own shares.

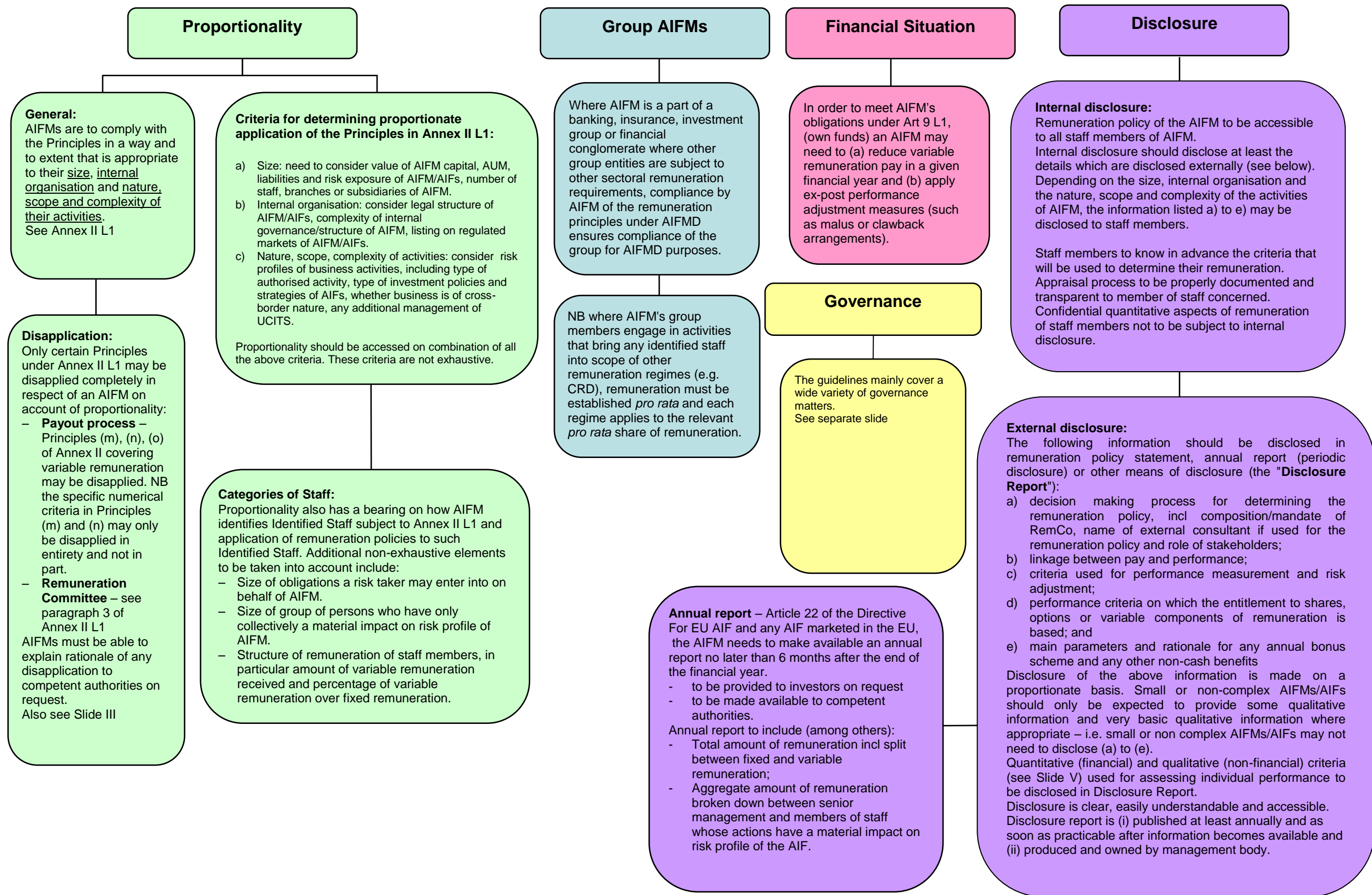
The 24 month period starts to run from the date of **first acquisition of control**.

**AIFMD ANNEX II – ESMA FINAL REMUNERATION GUIDELINES  
SLIDE I – SCOPE**



These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

**AIFMD-ESMA FINAL REMUNERATION GUIDELINES  
SLIDE II – SPECIFIC GUIDELINES**



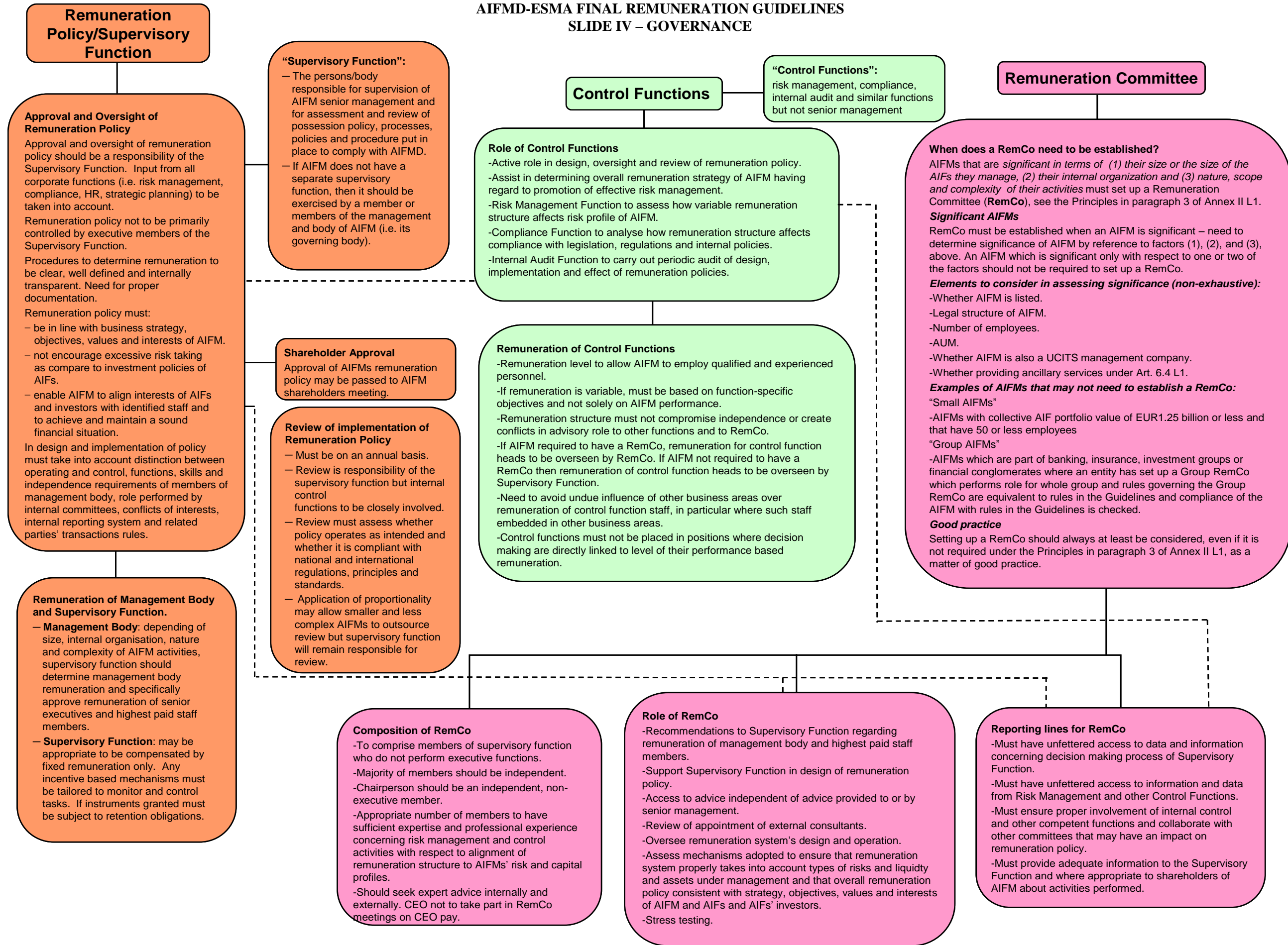
These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

**AIFMD-ESMA FINAL REMUNERATION GUIDELINES  
SLIDE III – ANNEX II PRINCIPLES**

Annex II L1 - The Principles		Scope	Possible disapplication of the requirement based on proportionality
Par. 1 (a)	The remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage;	Only to the <i>identified staff</i> , but AIFM-wide strongly recommended and AIFMs, if required, should be able to demonstrate why they applied the requirement to the <i>identified staff</i> only	No
Par. 1 (b)	The remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIFs it manages or the investors of such AIFs, and includes measures to avoid conflicts of interest;	Paragraphs 78 – 81 of the Guidelines → Only to the <i>identified staff</i> , but AIFM-wide strongly recommended and AIFMs, if required, should be able to demonstrate why they applied the requirement to the <i>identified staff</i> only Paragraphs 38 51 of the Guidelines → AIFM-wide obligatory	No
Par. 1 (c)	The management body of the AIFM, in its supervisory function, adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;	AIFM-wide obligatory	No
Par. 1 (d)	The implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;	AIFM-wide obligatory	No
Par. 1 (e)	Staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;	AIFM-wide obligatory	No
Par. 1 (f)	The remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee;	AIFM-wide obligatory	No
Par. 1 (g)	Where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;	Only to the <i>identified staff</i> , but AIFM-wide strongly recommended	No
Par. 1 (h)	The assessment of performance is set in a multi-year framework appropriate to the life-cycle of the AIFs managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIFs it manages and their investment risks;	Only to the <i>identified staff</i> , but voluntary AIFM-wide application is always possible	No
Par. 1 (i)	Guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year;	AIFM-wide obligatory	No
Par. 1 (j)	Fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy, on variable remuneration components, including the possibility to pay no variable remuneration component;	Only to the <i>identified staff</i> , but AIFM-wide strongly recommended	No
Par. 1 (k)	Payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;	Only to the <i>identified staff</i> , but AIFM-wide strongly recommended and AIFMs, if required, should be able to demonstrate why they applied the requirement to the <i>identified staff</i> only	No
Par. 1 (l)	The measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;	Only to the <i>identified staff</i> , but AIFM-wide strongly recommended	No
Par. 1 (m)	Subject to the legal structure of the AIF and its rules or instruments of incorporation, a substantial portion, and in any event at least 50 % of any variable remuneration consists of units or shares of the AIF concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments, unless the management of AIFs accounts for less than 50 % of the total portfolio managed by the AIFM, in which case the minimum of 50 % does not apply. The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the AIFM and the AIFs it manages and the investors of such AIFs. Member States or their competent authorities may place restrictions on the types and designs of those instruments or ban certain instruments as appropriate. This point shall be applied to both the portion of the variable remuneration component deferred in line with point (n) and the portion of the variable remuneration component not deferred;	Only to the <i>identified staff</i> , but voluntary AIFM-wide application is always possible	Yes
Par. 1 (n)	A substantial portion, and in any event at least 40 %, of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF in question. The period referred to in this point shall be at least 3 to 5 years unless the life cycle of the AIF concerned is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount is deferred;	Only to the <i>identified staff</i> , but voluntary AIFM-wide application is always possible	Yes
Par. 1 (o)	The variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned. The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;	Only to the <i>identified staff</i> , but voluntary AIFM-wide application is always possible	Yes
Par. 1 (p)	The pension policy is in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIFs it manages. If the employee leaves the AIFM before retirement, discretionary pension benefits shall be held by the AIFM for a period of 5 years in the form of instruments defined in point (m). In the case of an employee reaching retirement, discretionary pension benefits shall be paid to the employee in the form of instruments defined in point (m), subject to a 5 year retention period;	Only to the <i>identified staff</i> , but AIFM-wide strongly recommended and AIFMs, if required, should be able to demonstrate why they applied the requirement to the <i>identified staff</i> only	No
Par. 1 (q)	Staff are required to undertake not to use personal hedging strategies or remuneration and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;	Only to the <i>identified staff</i> , but AIFM-wide strongly recommended and AIFMs, if required, should be able to demonstrate why they applied the requirement to the <i>identified staff</i> only	No
Par. 1 (r)	Variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of the Directive.	AIFM-wide obligatory	No
Par. 2	The principles set out in paragraph 1 shall apply to remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of units or shares of the AIF, made to the benefits of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of the AIF that they manage.	AIFM-wide obligatory	No
Par. 3	AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities shall establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk. The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the AIFM or the AIF concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the AIFM concerned. The members of the remuneration committee shall be members of the management body who do not perform any executive functions in the AIFM concerned.	AIFM-wide obligatory	Yes

These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

**AIFMD-ESMA FINAL REMUNERATION GUIDELINES  
SLIDE IV – GOVERNANCE**



These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.

**AIFMD-ESMA FINAL REMUNERATION GUIDELINES  
SLIDE V – RISK ALIGNMENT**

**Risk Alignment  
General**

**Application**

- Must apply general requirements on risk alignment to remuneration packages of Identified Staff.
- Voluntary AIFM wide application is "strongly recommended".
- If applying to Identified Staff only, must be able to demonstrate reason for doing so to competent authorities.

**General principles**

- AIFM must ensure remuneration systems well designed and implemented.
- Consider how remuneration contributes to prevention of excessive risk taking, efficiency of AIFM and AIFs.
- Consider conservative valuation models emphasis on deferral and ex post risk adjustment mechanisms.
- Connect risk management elements to remuneration policy.

**Personal Hedging**

- AIFM staff should not engage in personal hedging/buy insurance to protect them from downward adjustment in remuneration.
- This does not prohibit insurance designed to cover personal payments (healthcare, health related mortgage coverage).
- Also applies to deferred and retained variable remuneration.

**Severance Pay**

- No "golden parachute" arrangements that are not able to be ex-poste and risk adjusted.
- AIFMs to set up framework in which severance pay is determined and approved, in line with AIFM's general governance structure for employment – framework to ensure no reward for failure.
- Must be able to explain to competent authorities criteria used to determine severance pay.
- Good practice to defer any outstanding variable payments or long term incentive plans in line with original deferral schemes.

**Pension Policy**

- Part of the remuneration policy.
- To be aligned with long term interests of AIFM and AIF.
- Discretionary pension benefits as part of variable remuneration, there must be consideration of the economic situation of AIFM or AIFs managed by relevant staff member and where legally possible discretionary pension benefits to be paid in instruments.
- At retirement discretionary pension benefits should be subject to a five year retention period.
- If staff member leaves before retirement, discretionary pension benefit should only vest five years later and be subject to performance assessment and ex post risk assessment.

**Risk Alignment  
Specific Requirements**

**Application**

- Must apply specific requirements on risk alignment to remuneration packages of Identified Staff.
- May also consider AIFM wide application or at least a "broader than strictly necessary" application.
- Annex II of the guidelines indicates certain principle for which AIFM wide application is strongly recommended. Also see Slide III.

**Full Flexibility on variable remuneration**

- Fully flexible policy on variable remuneration means that it can go down to zero.
- Also means that fixed remuneration should be sufficiently high in line with education, seniority, expertise required, constraints and job experience, business sector and region.

**Performance measurement.**

AIFM should use both **quantitative** (financial) and **qualitative** (non financial) **criteria** for assessing individual performance – use of both will depend on task and responsibility of staff and will be specified and clearly documented.

Quantitative measures cover long enough period to properly capture the risk of staff's actions – e.g. for asset managers by reference to IRR, EBITDA, Alpha Ratio, etc.

Qualitative measures – examples: achievement of strategic targets, investor satisfaction, adherence to risk management policy, cooperation with business units and controlled functions etc. NB: negative non-financial performance such as unethical or non-compliant behaviour should override good financial performance and diminish staff's variable remuneration.

**Risk measurement.**

All risks need to be taken into account – AIFM to use the same risk measurement methods as used in risk management policy but also (i) risks arising from additional management of UCITS, portfolio management services, investment advice, safe keeping and administration services or reception and transmission of orders and (ii) the potential professional liability risks that AIFM covers through additional own funds or professional indemnity insurance.

**Risk Alignment – variable remuneration**

**Process:**

- *Performance and risk measurement*

Risk alignment is achieved by using risk adjusted performance criteria or adjusting performance measures for risk awards.

Consider the objective of AIFM, the unit, the staff and investment strategy of the AIFs – objectives from the business plan. Right to receive variable remuneration is awarded at the end of the accrual period or during the accrual period of 1 year minimum. A proper performance process links remuneration with strategy of AIFs and business plan or objectives of AIFM (if any).

- *Award process:* after accrual period, performance assessment is translate into pools of variable remuneration. Need to adjust remuneration for potential adverse developments in the future – "ex-ante risk adjustment".

- *Payout:* Variable remuneration to be partly paid upfront (short term – paid at end of accrual period) and partly deferred (long term – paid during and after the deferral period). Reward staff for sustainability of performance in the long term. Need to align variable remuneration to risks and errors that appeared since the award – "ex-post risk adjustment".

**Common requirements:**

- Time horizon: When assessing risk and performance, take into account both current and future risks taken by staff, unit, AIF or AIFM.
- Align the horizon of risk and performance measurement with life cycle and redemption policy of the AIF – this implies accrual period and payout periods covering appropriate period in total. NB: prudent to have multi-year accrual periods.
- Amount of variable remuneration to be determined by individual performance, performance of the business line or AIF and performance of AIFM – e.g. for senior executives look at the performance of AIF or AIFM, for manager of business unit consider performance/ risk of that unit.
- Quantitative and qualitative measures should be used as part of risk alignment process.
- Judgemental measures – when used, the following should be in place: clearly written policy outlining parameters and key consideration for judgement; documentation of the final decision re risk/ performance adjustments; involvement of control functions experts; appropriate approvals of management body, supervisory function or RemCo; personal incentive consideration (scorecards).
- AIFM to be able to provide to competent authority detailed information if using judgemental measures leads to a significantly different outcome.

**Ex-post risk adjustment**

After initial variable remuneration component has been awarded and upfront part already paid, AIFM may adjust (reduce) the rest of variable remuneration. Remuneration adjusted by way of malus/ clawback clause – always performance-related. Clawback typically operate in case of established fraud or misleading information.

Implicit adjustments will apply to variable remuneration in the form of instruments. The evolution of the NAV of the AIF or evolution of share price should not be a sufficient ex-post risk adjustment.

Market price of instruments can go up but in no circumstances can explicit ex-post risk adjustment for both cash and instruments lead to an increase of deferred part.

**Award Process**

Risk adjustment criteria in the award process to take into account risks or stressed conditions. AIFM to look at what level they can risk adjust ex-ante variable remuneration calculations quantitatively and qualitatively.

*Quantitative ex-ante risk adjustment:* based on net revenue including all direct and indirect costs.

*Qualitative ex-ante risk adjustment:* applies at AIFM wide, business unit remuneration pools and individual levels. May include risk and control consideration e.g. compliance breaches, risk limits etc.

**Payout Process - Non deferred/deferred remuneration**

- Due to uncertainty, ex-post risk adjustments are necessary – hence applies to deferred remuneration.
- Deferral scheme to include 5 components: time horizon, proportion deferred, speed of vesting point, time span from accrual to payment and form of deferred variable remuneration.
- Minimum deferral period is 3 to 5 years but can be shorter – to be calculated on the basis of the life cycle and redemption policy of AIF and take into account level of responsibility and tasks of staff.
- Vesting point will happen over a number of years and should not take place more than once a year.
- the proportion of variable remuneration deferred ranges from 40% to 60% depending on staff impact on risk profile of AIF, responsibilities and tasks and amount of variable remuneration.
- First deferred amount should not vest sooner than 12 months after accrual.
- Retention policy to be put in place.

**Cash v. Instruments**

Staff should be remunerated using instruments provided it does not trigger interest misalignment or risk taking. For identified staff the instruments they receive should be related mainly with the activities they perform (provided it does not facilitate risk taking).

Instruments will depend on the legal structure of AIFs. For corporate funds – shares or share-linked instruments will ensure alignment of shareholders and staff. For common funds – instruments should consist of units of AIF. For these, alternative instruments should be used as share-linked instruments will not be appropriate.

Identified Staff may not receive variable compensation for management of AIF until investors have been returned all capital contributed and profit at agreed hurdle rate.

Compensation of Identified Staff is subject to clawbacks until liquidation of AIF.



## KEY CONTACTS



**Matthew Huggett**  
Partner – United Kingdom

**Contact**  
Tel +44 (0)20 3088 4929  
matthew.huggett@allenovery.com



**Frank Herring**  
Partner – Germany

**Contact**  
Tel +49 69 2648 5310  
frank.herring@allenovery.com



**Massimiliano Danusso**  
Partner – Italy

**Contact**  
Tel +39 06 6842 7613  
massimiliano.danusso @allenovery.com



**Nick Williams**  
Partner – United Kingdom

**Contact**  
Tel: +44 203 088 2739  
nick.williams@allenovery.com



**Brice Henry**  
Partner – France

**Contact**  
Tel +33 1 40 06 53 66  
brice.henry@allenovery.com



**Salvador Ruiz Bachs**  
Partner – Spain

**Contact**  
Tel ++34 91 782 99 23  
salvador.ruizbachs @allenovery.com



**John Goodhall**  
Partner – United Kingdom

**Contact**  
Tel: +44 203 088 2506  
john.goodhall@allenovery.com



**Ellen Cramer-de Jong**  
Partner – Netherlands

**Contact**  
Tel +31 20 674 1468  
ellen.cramerdejong@allenovery.com



**Sylvia Kierszenbaum**  
Partner – Belgium

**Contact**  
Tel +32 3 287 74 10  
sylvia.kierszenbaum@allenovery.com



**Jan Gruter**  
Senior Associate – United Kingdom

**Contact**  
Tel: +44 203 088 2178  
jan.gruter@allenovery.com



**Jean-Christian Six**  
Partner - Luxembourg

**Contact**  
Tel +352 44 44 5 5710  
jean-christian.six@allenovery.com

**These slides represent an overview of key areas covered by the AIFMD. They are based on the L1 Directive and the L2 Regulation as well as ESMA consultation papers and guidance published to date. ESMA may issue further guidance on key aspects of the AIFMD which may require further updates to the information set out herein. Relevant local jurisdiction implementing legislation and national regulator guidance, where applicable, must be checked. Nothing in these slides constitutes legal advice.**