

# ***AIFMD***

*for non-EU fund managers  
marketing non-EU AIFs in the EU*

3rd Edition



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# Foreword

Pursuant to article 42 of the Alternative Investment Fund Managers Directive (“AIFMD” or “the Directive”) non-EU/Asian Alternative Investment Fund Managers (“AIFMs”), as from 2013, can only market the non-EU/Asian Alternative Investment Funds (“AIFs”) they manage to EU investors via National Private Placement Regimes (“NPPRs”), where available and applicable. Access to the European Union (“EU”) passport has not yet been granted to non-EU AIFMs.

There was much controversy at the onset of the drafting of the Directive in respect to providing access to the EU market to non-EU managers and non-EU funds. On one hand, those wanting to create a “European Fortress” and on the other, those believing access to the EU market should be maintained subject to full compliance with the Directive.

After much debate, a compromise was reached non-EU AIFMs will not be subject to the full directive and as a result will not have access to the EU Passport. Access to the EU market for funds managed by such Holding a “passport” under the AIFMD means that the AIFM can market within Europe, shares or units of the AIFs managed to **professional investors**, as defined in Annex II of the Markets in Financial Instruments Directive (“MiFID”) without having to obtain a license or approval in each of the member states where the AIF is marketed.

As of today, with the AIFMD depending on whether the domicile of the AIFM/AIFs is EU or non EU, a specific regime or mechanism for marketing must apply:

- either, the marketing passport, that applies only to EU authorised AIFMs managing EU AIFs (art 32 of the AIFMD); or
- the marketing without passport regime or NPPR applicable only to:
  - EU authorised AIFMs managing non-EU AIFs, EU authorised AIFMs managing EU feeder AIFs with a non EU master AIF (art of the 36 AIFMD); and
  - non-EU AIFMs managing EU AIFs or non-EU AIFs (art 42 of the AIFMD).

With regards to the potential application of the passport to the marketing of non-EU AIFs by EU AIFMs and/or the marketing of AIFs by non-EU AIFMs, European Securities and Markets Authority (“ESMA”) was expected to issue to the European Parliament, the Council and the Commission an advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs and/or the marketing of AIFs by non-EU AIFMs.

In order to do so, ESMA decided to opt for a country by country assessment for the extension of the AIFMD passport.

On the 30th of July 2015, ESMA issued:

- its advice on whether the passporting regime should be extended to the management and/or marketing of AIFs by non-EU AIFMs and to the marketing of non-EU AIFs by EU AIFMs; and
- its opinion on the functioning of the marketing of non-EU AIFs by EU AIFMs in the EU and the management and/or marketing of AIFs by non-EU AIFMs in the EU.

As there have been some delays in the transposition of the AIFMD in some member States, the ESMA considers that another opinion on the functioning of the NPPRs is needed.

In addition, regarding to application of the AIFMD passport to the Singapore and Hong Kong, the Asian countries in the scope of its first the wave of assessment, ESMA

- advises the European Parliament, the Council and the Commission to delay their decision on the potential application of the AIFMD passport to Singapore; and
- ESMA considers that more time is needed to complete its assessment on the potential application of the AIFMD passport to Hong Kong, because notably detailed information on the Hong Kong regulatory framework remains incomplete.

On the 17th December 2015, The European Commission, agreeing with ESMA's suggestion, asked ESMA to complete its assessment of the regimes of, among others countries, Hong Kong, Singapore, Japan by 30 June 2016.

The main purpose of this document is to provide an useful overview of the main requirements and steps to follow in order to market without passport within the European Union.

As no two asset managers operate in the same manner, the impacts of the AIFMD on each asset manager established outside the EU differ from one manager to another. Generally, however, one may summarise the main consequences on asset managers established outside the EU as:

- Transparency rules;
- Ability to raise capital from EU investors;
- Application of remuneration requirements for non-EU managers acting as delegate to EU AIFMs.

This note summarises the impacts of the AIFMD to asset managers established outside the EU and should not be understood as advice. Throughout this document, we have used the terms non-EU AFMD & Asian AIFM interchangeably.

# Scope

As a preliminary remark, prior to assessing the potential impact of the Directive, Asian asset managers will need to determine whether they meet the definition of an AIFM and whether the investment vehicles they manage meet the definition of an AIF. Asian AIFMs with operations in the EU will also need to determine whether their EU entities could be considered AIFMs.

## What are the AIFs/AIFMs in scope of the AIFMD?

AIFs are in scope of the AIFMD if one of the following three criteria is fulfilled:

1. AIF domiciled in the EU
2. AIF marketed in the EU
3. AIFM domiciled in the EU

## What is an AIFM?

Under the Directive, every AIF must have a single AIFM. The AIFM can be external or the AIF can itself be the AIFM (internally managed AIF) if its legal structures permits it.

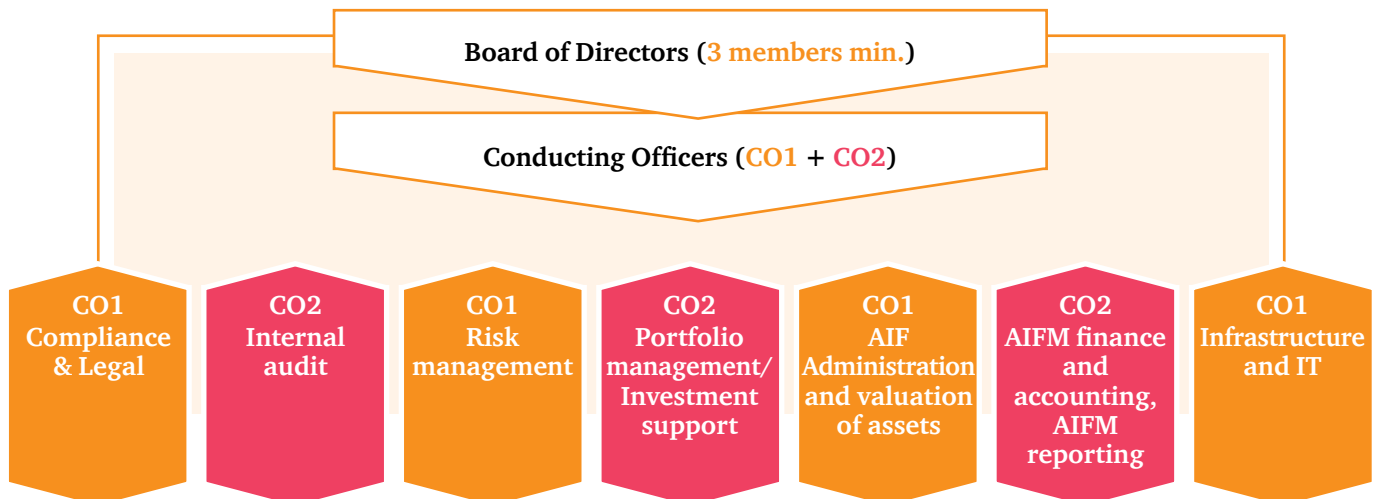
### “An AIF must have an AIFM”

An AIFM is defined as any “legal person whose regular business is managing one or more AIFs”.

“Managing AIFs” is further defined as “performing at least investment management functions for one or more AIFs (the investment management functions being portfolio management and risk management).”

The core functions of an AIFM are **portfolio and risk management of the AIFs** that they manage.

- An AIFM cannot delegate both portfolio and risk management (no “letter box”)
- The typical organization of an EU AIFM is as follows:





## The following EU AIFMs are exempted from the Directive:

- AIFMs managing AIFs which altogether have AuMs of less than €100 million
- AIFMs managing AIFs which altogether have AUMs of less than €500 million, which are not leveraged and which do not grant investors redemption rights during a period of 5 years following the date of initial investment in each AIF

Exempted AIFMs must register with the competent authorities and comply with reporting requirements to enable the competent authorities to effectively monitor systemic risk.

Exempted AIFMs do not benefit from any of the rights granted under the AIFM Directive (no passport), unless the AIFM chooses to opt-in.

## Non EU AIFMs

- A non EU AIFM managing a EU AIF / marketing an AIF in the EU does currently not need to comply with (most of) the AIFM Directive requirements. The grandfathering should apply until 2018/9
- But it has no access to the EU passport for distribution of the AIF shares to EU professional investors
- The non EU AIFM has however access to EU professional investors subject **to compliance with art. 42 of the AIFM Directive AND with specific local requirement that each Member State may additionally impose**
- Section 3 below provides (i) an insight on the concept of marketing in Member States and (ii) an overview of the requirements of art. 42 and of the additional local requirements imposed by Member States
- Non EU AIFMs should be able to **opt in** for a license under the AIFM Directive as from 2016? – *the exact date remains to be confirmed*
- When licensed, the non EU AIFM will have to fully comply with the AIFM Directive but will benefit from a passport

## Identify AIFs

While the AIFMD does not regulate AIFs, it is fundamental to identify each product/vehicle which meets the definition of an AIF. This is important in order to understand if there is a need to adapt the existing vehicles and make them compliant with AIFMD requirements. AIFs are defined as (i) collective investment undertakings which (ii) raise capital from (iii) a number of investors, (iv) with a view to investing it in accordance with a defined investment policy.

First and foremost, European Securities and Markets Authorities (the “ESMA”) highlights the fact that a vehicle must meet all the criteria provided by the AIFMD in order to meet the definition of an AIF. These are:

- Raising capital;
- Collective Investment Undertaking;
- Number of investors;
- Defined investment policy.

These criteria will apply equally to regulated and non-regulated vehicles.

## Further explained:

**What is meant by raising of capital?** One of the key characteristics of this criterion is the need for a commercial communication between the capital seeking person or entity and the prospective investors. Such communication may occur once or on an ongoing basis. Based on these characteristics, it is likely that many special purpose vehicles used by EU or non-EU funds would not be considered an AIF. It will, however, be necessary to analyse each vehicle carefully before coming to this conclusion.

### **The characteristics of a Collective Investment**

**Undertaking (CIU):** A CIU is not an ordinary company with general commercial purpose. It pools together capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors from investments and the investors have no day to day discretion or control over the management of the undertaking's assets.

**Number of Investors:** The presumption is that an AIF must have a number of investors. As such, a structure with a single investor would not be considered an AIF. In its guidelines, ESMA reemphasises two key concepts. First there must be the existence of a legally enforceable restriction to raise capital from a single investor. A structure which “happens” to have just one investor but whose legal documentation did not restrict the capital raising to a single investor would be regarded as having a number of investors. Second, a “look through” approach should be applied. Behind one unit holder/shareholder such as nominee, a fund or a feeder fund, are potentially a number of beneficial owners which needs to be considered.

**Defined Investment Policy:** In its consultation paper, ESMA lists a number of factors which would tend to indicate the existence of a defined investment policy. Such investment policy would:

- Be determined and fixed up-front;
- Be documented as part of its prospectus: offering memorandum or incorporation documents;
- Be enforceable by the investors, and;
- Include investment guidelines.

### **Non-EU managers managing EU AIFs**

The AIFMD permit non-EU managers to manage and market non-EU AIFs in the EU via NPPRs without complying with all the requirements of the Directive.

This possibility will remain in place until NPPRs are terminated. This is expected to occur following ESMA advice to be issued in 2018. At that point in time, such non-EU managers will need to fully comply with the Directive as any other EU AIFM. Compliance with some of the provisions may prove to be difficult for certain non-EU jurisdictions.

### **So what does this mean for Asian AIFMs?**

An Asian AIFM marketing in the EU an Asian AIF will be subject to the NPPR, where available and applicable.

NPPR corresponds to a specific mechanism to allow AIFMs, under preliminary obligations (further detailed in section “Requirements applicable to an Asian AIFM marketing an Asian AIF in the EU), to market AIFs that are unable to benefit from the marketing passport regime.

First and foremost these preliminary requirements are applicable only if and when the Asian AIFM markets an AIF he manages to professional investors residing in the EU.

For purposes of the AIFMD, “marketing” means a direct or indirect offering or placement at the initiative of the AIFM, or on behalf of the AIFM, of units or shares of an AIF he manages to or with investors domiciled or with a registered office in the EU.

If an investor acquires units or shares of an AIF managed by a non-EU asset manager through “**reverse solicitation**” it would not be considered as marketing and as such a non-EU asset manager would not be captured by any of the requirements of the Directive.

The difficulty, however, will reside on what constitutes marketing and reverse solicitation. No guidance has been provided by the European Commission or ESMA on the meaning of marketing under AIFMD. In addition, neither the Directive nor Level 2 Delegated Regulation for the AIFMD clarifies the meaning of reverse solicitation or where the boundaries lie between reverse solicitation and marketing.

Hence reverse solicitation and marketing remain largely dependent on local country's definitions of these concepts and may be difficult to manage in practice.

Similarly non-EU managers managing non-EU AIFs will not be captured by any of the requirements of the Directive if they no longer market these AIFs' even if such AIFs currently have EU investors.



# Requirements applicable to an Asian AIFM marketing an Asian AIF in the EU now

Before an Asian AIFM starts marketing in the EU the AIFs it manages, he must be aware of the main preliminary requirements that will be applicable to him for the use of NPPR. The main requirements are as follows:

## 1. Existence of appropriate cooperation arrangements.

It is required that there is an appropriate cooperation arrangement between:

- the competent authority of the EU Member State where the AIF is marketed and the competent authority of the Asian AIFM; and
- the competent authority of the EU Member State where the AIF is marketed and the competent authority of the Asian AIF.

These cooperation arrangements have been negotiated centrally by ESMA on behalf of all EU member states. Most non-EU jurisdictions playing a significant role in the asset management industry have been contacted by ESMA.



# AIFM MoUs signed by the EU authorities

	ALBANIA	AUSTRALIA	BAHAMAS	BERMUDA	BRASIL	BVI	CANADA (1)	CANADA OSFI	CAYMAN	DUBAI	EGYPT	FYROM	GUERNSEY	HONG KONG MA	HONG KONG SFC	INDIA	ISLE OF MAN	ISRAEL	JAPAN FSA
AFM (The Netherlands)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
AMF (France)	X	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
Bafin (Germany)	X	<	X	<	X	X	<	<	<	X	X	X	<	<	<	<	X	X	<
CBol (Ireland)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
CMVM (Portugal)	<	<	<	<	<	<	<	<	<	<	X	<	<	<	<	<	<	<	<
CNMV (Spain)	X	<	<	X	<	X	<	<	X	<	<	<	X	<	<	<	<	<	<
FSA (Romania)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
Consob (Italy)	X	<	X	X	<	X	<	<	X	<	<	X	X	<	<	<	X	<	<
CSSF (Luxembourg)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
CSEC (Cyprus)	<	<	X	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
CNB (Czech Republic)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	X	<	<
Finansinspektionen (Sweden)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
Finanssivalvonta (Finland)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
Finanstilsynet (Denmark)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
FKTK (Latvia)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
Finanzmarktaufsicht (Austria)	X	<	<	<	X	<	<	<	<	<	X	X	<	<	<	X	<	X	<
EFSA (Estonia)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
PFSA (Poland)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
FCA (UK)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
FSC (Bulgaria)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
FSMA (Belgium)	X	<	<	<	<	<	<	<	<	<	X	<	<	<	<	<	<	<	<
HCMC (Greece)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
Bank of Lithuania (Lithuania)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
MFSA (Malta)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
NBS (Slovak Republic)	<	<	<	<	<	<	<	X	<	<	<	<	<	<	<	<	<	<	<
MNB (Hungary)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
AVP (Slovenia)	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Fjármálaeftirlitið (Iceland)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
Finanstilsynet (Norway)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
Finanzmarkt. (Liechtenstein)	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<	<
CFSSA (Croatia)	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

(1) Includes the Ontario Securities Commission, Autorité des Marchés Financiers du Québec, British Columbia Securities Commission and Alberta Securities Commission

It should be noted that, in addition to the supervisory cooperation arrangements, there are other conditions that need to be satisfied in the AIFMD in order for the relevant cross-border activity to be permitted in the EU. First, the non-EU country must not be listed in any of the categories of the periodic Public Statement of the FATF (<http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc> (fatf\_releasedate). Second, as from the date of application of the passport for non-EU AIF managers, there should be an agreement between the non-EU country and the relevant EU Member State that complies fully with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters.



## 2. The Asian domicile country is not listed as a Non-Cooperative Country and Territory by FATF

The Asian country where the AIFM and the AIF are domiciled must not be listed as a Non-Cooperative Country and Territory (NCCT) by the Financial Action Task Force.

## 3. Compliance with the transparency requirements

The Asian AIFM must comply with the transparency requirements (further detailed below) of the Directive as well as with the controlling interests requirements regarding AIFs which acquire control of non-listed companies and issuers.

The AIFMD permits non-EU AIFMs to manage and market non-EU AIFs in the EU via NPPRs without complying with all the requirements of the Directive. This possibility will remain in place until NPPRs are terminated. This is expected to occur following ESMA's advice to be issued in 2015 but will not take effect until 2018 at the earliest. At that point in time' such non-EU AIFMs will need to fully comply with the Directive as any other EU AIFM but will also be subject to specific third country provisions. Compliance with some of the provisions may prove to be difficult for certain non-EU Jurisdiction.

## 4. Possibility of stricter requirements imposed by the EU member

The Directive however clearly states that EU Member States may impose stricter rules on non-EU AIFMs in respect of the marketing of units or shares of AIFs to investors of their territories. It is, therefore, important that Asian asset managers monitor the developments on marketing and private placement rules for each of the member states where they intend to market their fund products. It is particularly important to consider the impacts of AIFMD when launching new fund products where the non-EU Manager intends to raise capital from EU investors.

Among potential stricter requirements, it may happen that some EU member states require that:

- non-EU AIFMs marketing a non-EU AIF they manage must:
  1. comply with the so-called “depository lite regime” (as it is the case in France) or even comply with the “depository full regime” in Austria;
  2. a local agent is needed. This is the case as an example of Austria where a local legal representative is required, and in France, where a local centralising agent needs to be appointed;
- specific conventions are in place between the third country where the AIF is established and the host EU member state where the AIF is to be marketed. As an example, it is required that an agreement is signed with Finland to fully comply with standards laid down in Art. 26 of the OECD Model Tax Convention on Income and on Capital.

The table below provides an overview of main differences between the depository lite regime and the full depository regime that applies to EU AIFM managing EU AIF.

	Full depository	Depository lite
Functions (cash flow monitoring, asset safekeeping, oversight)	✓	✓
Single entity	✓	✗
Not AIFM	✓	✓
EEA credit institution/ investment firm etc	✓	✗
Not prime broker (unless functional/hierarchical separation)	✓	✗
Location requirements	✓	✗
Restrictions on delegation	✓	✗
“Strict liability” for loss of financial instruments	✓	✗

Source: Alternative Investment Management Association (AIMA)

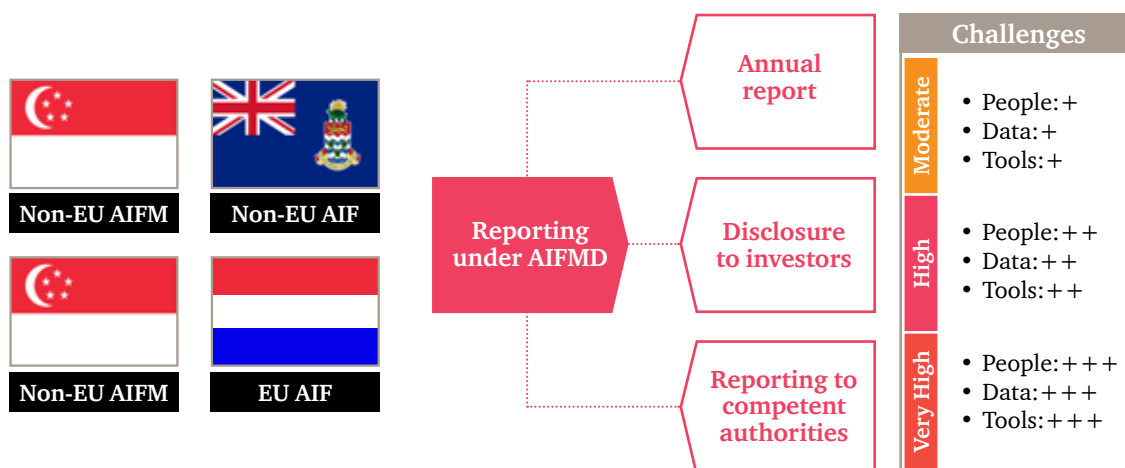
# Transparency requirements

AIFMD aims to provide greater investor protection, ensure investors receive regular and comprehensive information on the AIF they invest in, and ensure regulators receive detailed information on AIFs and AIFMs to enable them to identify any potentially systematically significant trends or events that may impact market stability so they can take action.

The transparency requirements' applicable as from July 2013 to non-EU AIFMs marketing AIFs in the EU' require reporting of information in the following areas:

- The annual report;
- The disclosure to investors;
- The reporting to regulators.

AIFMD reporting requirements are not limited to reporting to Regulators in a defined format. Additional requirements exist for PE funds.



## Disclosure to investors

Asian AIFMs must for each of the Asian AIF they market in the EU **make available to AIF investors**, in accordance with the AIF rules or instruments of incorporation, the information stated in article 23 of the Directive **before they invest in the AIF, as well as any material changes thereof**.

Aside from information that must be made available to investors before they invest, the Directive and Level 2 prescribe the content and frequency of disclosures and notifications to investors.

Disclosures are expected to be made **at least on an annual basis**, i.e. at the same time as the annual report, or in accordance with the AIFs usual reporting to investors if more frequent. Such disclosures include, among others, the percentage of assets subject to special arrangements (e.g. side pockets), any material changes in the policies and procedures adopted in order to monitor the liquidity risk of open-ended AIFs and leverage employed.

## Annual report

The AIFMD stipulates that the annual report must at least contain a balance sheet or statement of assets and liabilities, an income and expenditure account for the financial year, a report on activities of the financial year, and any material changes in the information disclosed to investors.

The AIFMD does not prescribe under which accounting principles (the “GAAP”) the annual report must be prepared. Certain EU member states may however require that such annual report be audited in accordance with International Auditing Standards (ISA).

The annual report must be made available to the relevant regulator(s) **within 6 months** following the financial year end and available upon request of investors.

The information required in the financial statements and report on activities may not lead to material changes for a number of AIFs. The extent of changes required will depend on the GAAP used and the current disclosure practices. For each AIF in scope for reporting, the AIFM will need to prepare a detailed mapping to identify gaps between existing information and expected disclosure.



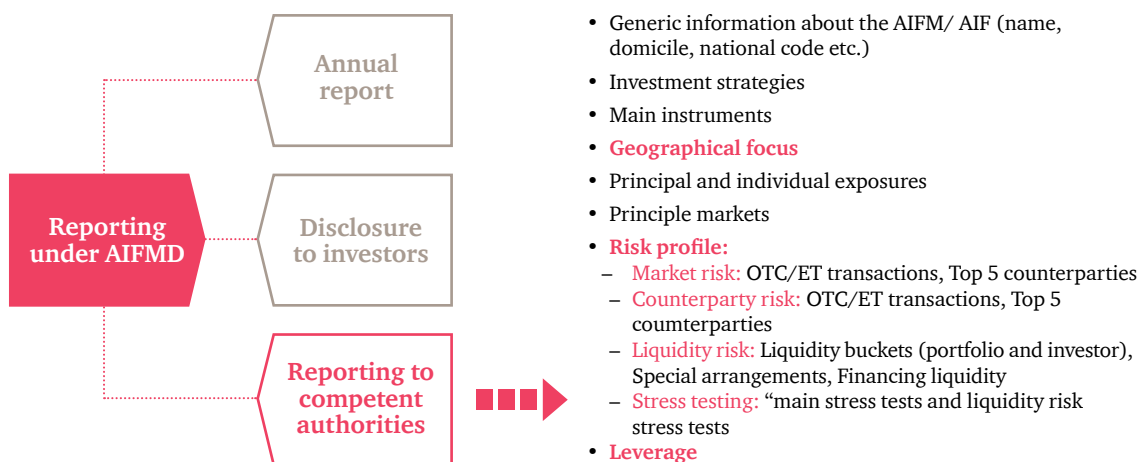
A non EU-AIF will warrant additional disclosures in the financial statements to comply with transparency and reporting requirements under AIFMD. The accounting standard to follow would be International Financial Reporting standards as adopted by the European Union. In addition to the same, the financial statements would have the following reporting requirements which today are or are not typically found in a fund’s financial statements.

Below is a high level overview of the requirements.

Requirement	Fund manager today typically meets requirement
A balance sheet or a statement of assets and liabilities which includes the information enumerated in Level 2 Delegated Acts (Article 104)	√
An income and expenditure account for the financial year which includes the information enumerated in Level 2 Delegated Acts (Article 104)	√
Report on year’s activities including overview of investment activities and portfolio and overview of performance	√
Any material changes in the information which is disclosed to investors (Article 23) before investment during the financial year or may be material to a reasonable investor	X
Total remuneration, split between fixed and variable remuneration	X
Remuneration: Number of beneficiaries	X
Remuneration: Carried interest paid	X
Aggregate amount of remuneration broken down by senior management and staff who have a “material impact on the risk profile of the fund”	X

## The reporting to regulators

The AIFMD aims to enhance the ability of regulators to effectively identify, assess, monitor and manage systemic risk. To achieve this, non-EU AIFMs will also be required to **provide this information to each EU regulator where their AIFs will be marketed.**



The reporting to national regulators is based on a frequency varying according to the level and nature of assets under management, as described below:

Asset under Management	Frequency (1)	Deadline
<b>Between EUR 100/500 million and 1 billion</b>	Semi Annually	30 days after the end of the quarter (45 days for fund of funds)
<b>Greater than 1 billion</b>	Quarterly	30 days after the end of the quarter (45 days for fund of funds)

(1) Individual regulators have the power to increase the reporting frequency for an AIFM if they deem it necessary.

Asset under Management	Frequency (1)	Deadline
<b>Unleveraged PE funds (2)</b>	Annually	30 days, 45 days for fund of funds

(2) Funds for which core investment policy is to invest in non-listed companies and issuers in order to acquire control.

The reporting is comprised of two reports to be filed with the regulators:

- One aggregated at Manager level; and
- One at individual AIF level for each AIF managed and for each AIF marketed in the EU.

The information to be reported, which consists of 41 questions, includes:

- Main instrument traded and individual exposures (level of the manager and each AIF);
- Value of assets under management (level of the manager and each AIF);
- Percentage of assets subject to special liquidity arrangements;
- New arrangements to manage liquidity;
- Risk management systems employed by the AIF;
- Breakdown of investments by type' geography and currency;
- Most important concentrations and exposures of each AIF (portfolio and investors);
- Risk profile: counterparty' market and liquidity;
- Borrowing and exposure risk;
- Results of stress tests; and
- When required: leverage.

There is no transitional period foreseen for reporting to regulators. Below are also some high level comparison between AIFMD & Form PF as per US SEC:

Gap Importance	Topics	Form PF	AIFMD
High	Trading market	Not required	AIF should report the principal market in which it trades
High	Leverage	Not required	Should be calculated with 2 methodology: Gross and Net
High	Value of derivatives	Gross national value	Should be converted into equivalent position in the underlying
High	Counterparty Risk	Margin, debt securities and equities should not be taken into account	Exposure should be considered in their market risk dimension <span style="color: red;">▢▢▢▶</span> Any issuer (bonds, underlying of derivatives etc.) is also a counterparty
High	Risk Metrics	Applicable only to Hedge Fund	Applicable to all Funds At least 3 metrics required for all funds
High	Turnover	Value of the transactions	Value of the transaction for securities/ Converted value for derivative
Medium	Geographical breakdown	Derivatives valued at fair value	Derivatives should be converted into equivalent position in the underlying
Medium	RAuM	Is the sum of all assets	Is the sum of all assets but derivatives should be converted



## Disclosure on remuneration

The AIFMD requires a disclosure on remunerations paid by the non-EU AIFM to its staff and its management.

These disclosure requirements are applicable to non-EU AIFMs despite the fact that such AIFMs are not yet subject to the remuneration provisions of the Directive.

The following information needs to be reported :

- Total remuneration for the financial year, split into fixed and variable remuneration, paid by the AIFM to all its staff, and number of beneficiaries, and, where relevant, carried interest paid by the AIF;
- The aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF;
- General information relating to financial and non-financial criteria of remuneration policies and practices; and
- Information to provide understanding of the risk profile of the AIFs and measures taken to avoid conflict of interest.

It is noted that the amount of remuneration disclosed can be made for the entire staff of the AIFM with a breakdown in relation to each AIF or those staff involved in the activities of the AIF or the proportion of those staff of the AIFM attributable to the AIF.

To the extent the non-EU AIFM manages AIFs that do not fall within the scope of the AIFMD (e.g., because they are not marketed to EU investors), there is no requirement for reporting information related to these AIFs. However, this means in practice that the operations of the AIFMs are structured in a manner which allows the AIFM to clearly identify which staff and management works for AIFs out of scope and which staff works for AIFs in scope.

## Specific case for Private Equity

Scope	<ul style="list-style-type: none"> <li>• AIFMs managing one or more AIFs which <b>either individually or jointly</b> on the basis of an agreement aimed at <b>acquiring control</b> (SME and RE SPV not included)</li> <li>• AIFMs cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly</li> </ul>		
Definition	• Acquire <b>control</b> of a non-listed company i.e. acquire <b>more than 50% of the voting rights</b>		
	Notification	Disclosure	Annual Report
Impacts	<p>When an AIF <b>acquires, disposes of or holds</b> shares of a non-listed company:</p> <ul style="list-style-type: none"> <li>• AIFM notifies the competent authorities of the proportion of voting rights, any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.</li> <li>• When an AIF <b>acquires control</b> over a non-listed company, the AIFM notifies: <ul style="list-style-type: none"> <li>✓ the non-listed company;</li> <li>✓ the shareholders;</li> <li>✓ the competent authorities</li> </ul> </li> </ul>	<p>The AIFM shall make available:</p> <ul style="list-style-type: none"> <li>• the <b>identity</b> of the AIFMs which manage the AIF that have acquired control;</li> <li>• the policy for preventing and <b>managing conflicts of interest</b>;</li> <li>• the policy for external and internal <b>communication</b> relating to the company.</li> </ul> <p>To the following:</p> <ul style="list-style-type: none"> <li>• the company concerned;</li> <li>• the shareholders;</li> <li>• the competent authorities.</li> </ul>	<p>The AIFMD shall either:</p> <ul style="list-style-type: none"> <li>• ensure that the annual report of the non-listed company is made available to the <b>employees'</b> (representatives) within the period in accordance with the national applicable law,</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>• for each AIF, include in the annual report <b>additional information</b> relating to the relevant non-listed company.</li> </ul>

Therefore, to summarize:

Non EU AIFMs marketing AIFs in the EU following PPRs are subject to the same requirements as EU AIFMs in terms of reporting. Frequency is as follows:

Criteria	Frequency of reporting
«Below threshold» AIFMs (100/500 million EUR)	Annually
Above threshold but AUMs below 1 billion EUR	Semi-Annually
AUMs above 1 billion EUR	Quarterly

Exceptions	Frequency of reporting
For private equity AIFs without leverage	Annually
For AIFs with size in excess of EUR 500 million	Quarterly

### Asian manager acting as a delegate to an EU AIFM

Even when a Asian manager does not have any operations or funds in the EU, it may be impacted when it acts as a delegate to an EU AIFM. The Directive provides for specific rules surrounding delegation and in particular delegation of portfolio management or risk management.

Asian manager will be allowed to act as a delegate of an EU AIFM for portfolio management or risk management only if the following conditions are met :

- The Asian manager is authorised or registered for the purpose of asset management and subject to supervision; and
- A cooperation agreement between the regulator of the Asian manager and the regulator of the EU AIFM is in place.

In addition to the above prerequisites, the EU AIFM will need to demonstrate that the non-EU manager is qualified and capable to perform delegated functions. The EU AIFM will also need to be in a position to monitor effectively at any time the delegated activities.

Perhaps the most important consequence for the Asian manager acting as a delegate is the application of remuneration requirements. In its implementation guidelines on sound remuneration policies under AIFMD, ESMA clearly indicated that entities to which portfolio management or risk management activities have been delegated must be :

- Subject to regulatory requirements on remuneration that are equally as effective as those applicable under the AIFMD; or
- Subject to the remuneration requirements of AIFMD through appropriate contractual arrangements.



The remuneration requirements will not necessarily impact the entire firm of Asian manager but will impact the compensation of those “identified staff” performing portfolio or risk management activities on behalf of the EU AIFM. The ESMA guidelines provide detailed guidance on who should be considered an “identified staff”.

The remuneration requirements and guidelines are complex but include the following core principles :

- Fixed and variable components of the remuneration must be balanced;
- 50% of variable remuneration must consist of units of AIFs or equivalent;
- 40%/60% of the variable remuneration must be deferred over a period of at least 5 years;
- Guaranteed bonus exceptional and limited to first year; and
- Performance based remuneration must be assessed on the combination of individual and overall results and on a multi-year frame work.

The ESMA guidelines also describe the concept of proportionality and how it can operate for some of the specific requirements.

## Conclusion

The treatment of non-EU AIFMs was one of the most controversial issues in the drafting of the AIFMD. The final text is intended to create a level playing field between EU and non-EU AIFMs. However, the regime permitting a non-EU AIFM to register under the AIFMD and enjoy the same EU market access as EU AIFMs will not be available in the near future.

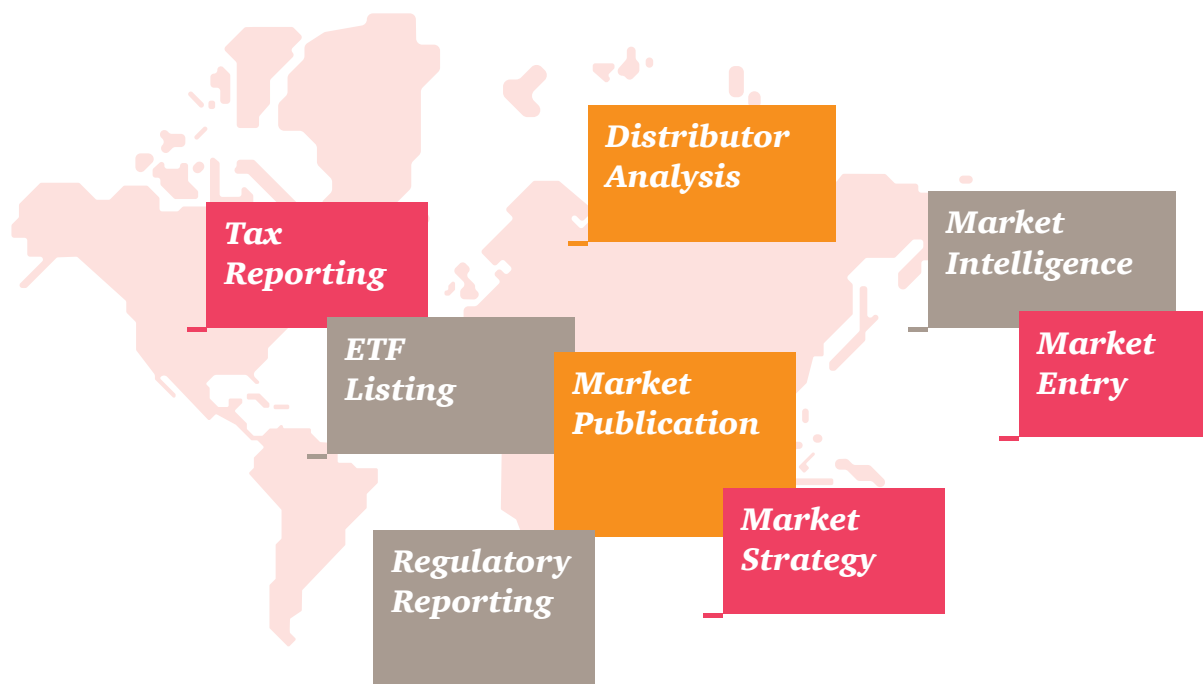
Many non-EU managers have been under the assumption that they will be able to continue to operate as they do today as long as it is not decided to extend the application of the AIFMD passport to third-countries. For many, the Directive has not been a priority. Aside from the regulatory requirements which they will need to meet from beginning 2013 (in particular transparency requirements), non-EU AIFMs need to continuously monitor the evolution of private placement regimes.

On a long term basis, when distribution to the EU is relevant for current and/or future strategies of the non-EU AIFM, such non-EU AIFMs need to carefully consider the impact of the AIFMD. With the likely termination of the private placement regimes in the coming years, non-EU AIFMs will have access to the EU passport but will also need to be fully compliant with the Directive. As a non-EU entity, the non-EU AIFM will be subject to additional specific third country provisions and one of the National European regulators will be designated (based on rules as described in the Directive) to become its regulator. Such non-EU AIFMs should potentially consider establishing an AIFM in the EU member state of their choice.

Ultimately, choices will also be driven by investors' attitudes: for example, their appetite for the EU passport and for a regulated framework, the manager's distribution strategy and the evolution of private placement regimes.



# About PwC Asian Investment Fund Centre



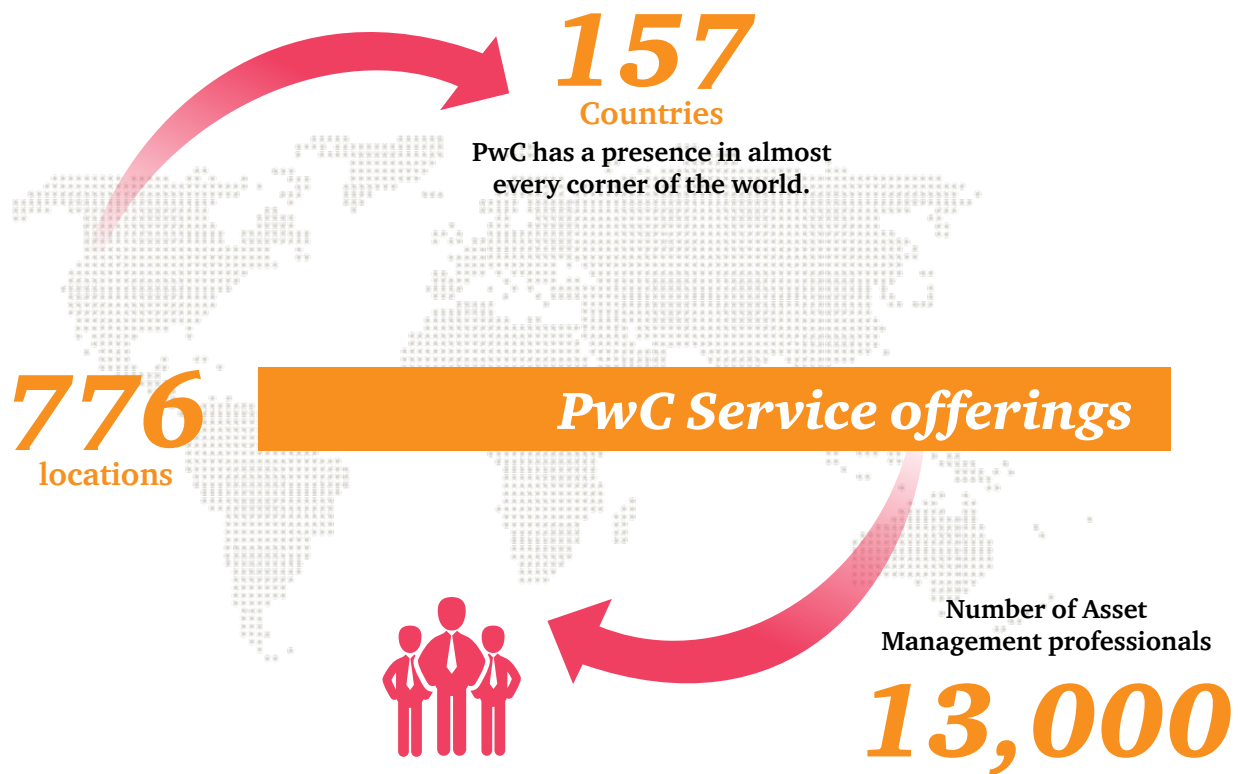
PwC's Global Fund Distribution (GFD) service, headquartered in Luxembourg, has over 14 years of experience in bringing out the best in fund promoters' visions for distribution in foreign markets. This expertise has now come to Asia's shores, with the launch of the Asian Investment Fund Centre in Singapore. The GFD team currently covers more than 40 countries worldwide, thus is able to offer efficient and multi-jurisdictional solutions. The in-depth knowledge and experience of our combined GFD team based in Singapore and Luxembourg, supported by our extensive network of local distribution experts where necessary, provide you with a single point of contact for all aspects of your fund distribution activity. Above all, it is our client focus that has contributed most to our standing as the market leader in fund distribution services. We tailor our solutions to your distribution footprint in order to meet your operational needs and thus free up your internal resources. The GFD service will support and guide you through the unique challenges of determining and managing a multi-jurisdictional fund distribution approach.

## Our experience in AIFMD notification for NON-EU AIFM

PwC Global Fund Distribution (GFD) handles the AIFMD Notification under National Private Placement Regime (NPPR) under Art. 42 for NON-EU AIFM (**currently with registered office in the USA, Cayman, Hong Kong, Brazil and BVI**)

- With NON-EU AIF having their registered office **in the USA, Cayman, Brazil, Hong Kong and Mauritius**
- About 130 successful Notification Files under Article 42 AIFMD/NPPR between December 2014 and March 2015 performed by GFD
- The TOP requested countries under NPPR/Art. 42 AIFMD during this period were : **Ireland, The Netherlands, UK, Belgium, Finland, Sweden** and we have also recently received requests to notify under NPPR in **Denmark and Germany (and in Switzerland to Swiss Qualified investors)**
- As of March 2015: **100%** of all AIF initial registration files that GFD prepared and submitted were successfully approved by all regulators

# PwC Asian Investment Fund Centre contacts



**Justin Ong**  
Partner  
Asia Pacific Asset & Wealth Management Leader  
PwC Singapore

+65 6236 3708  
justin.ong@sg.pwc.com



**Armin Choksey**  
Director  
Asset & Wealth Management Advisory  
PwC Singapore

+65 6236 3359  
armin.p.choksey@sg.pwc.com



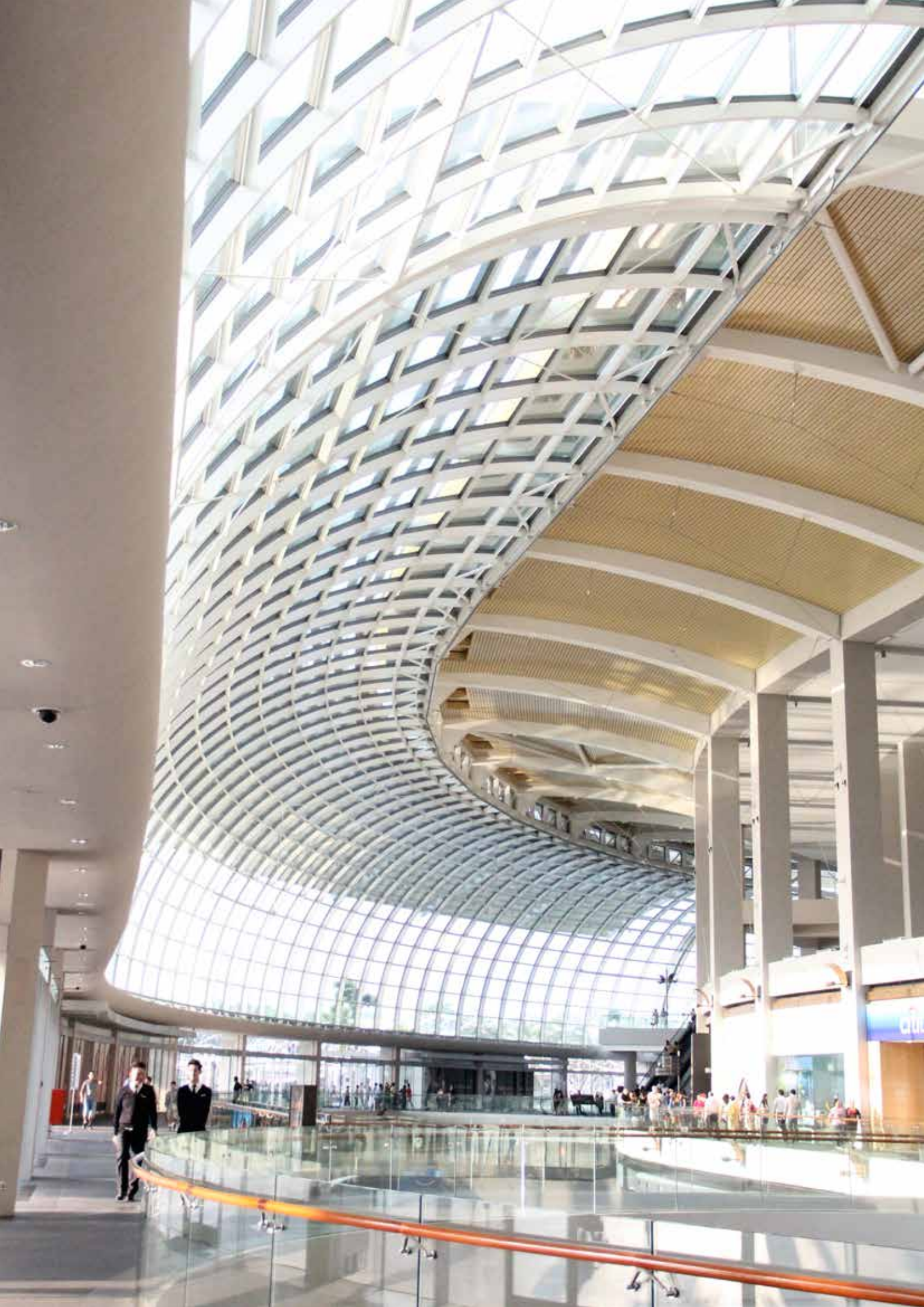
**Xavier Balthazar**  
Partner  
Regulatory and Compliance Advisory Services  
PwC Luxembourg

+352 49 48 48 3299  
xavier.balthazar@lu.pwc.com



**Christophe Saint-Mard**  
Partner  
Global Fund Distribution Advisory Services  
PwC Luxembourg

+352 49 48 48 2134  
christophe.saint-mard@lu.pwc.com





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