
CHAMBERS GLOBAL PRACTICE GUIDES

Investment Funds 2023

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Luxembourg: Law & Practice

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BSP

LUXEMBOURG

Law and Practice

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1. Market Overview

1.1 State of the Market

As the second largest fund market in the world after the US, Luxembourg has earned itself a reputation for stability, a business-friendly environment and excellence in the provision of services to the investment management industry. The world's leading asset managers have chosen Luxembourg as a centre for their international fund ranges, and Luxembourg regulated funds are now distributed in more than 81 countries throughout the world. Luxembourg had approximately EUR5.6 trillion in assets under management as of March 2022, with private equity as the fastest growing asset class by the end of 2021.

Since the first UCITS Directive in 1985, Luxembourg has been at the forefront of the implementation of European financial legislation, showing an ability to evolve and adapt quickly to changing requirements. There now exists a wide choice of vehicles, allowing managers to structure a fund (both alternative investment funds (AIFs) and retail funds) in Luxembourg that best suits their own needs as well as the needs of their investors.

The success of Luxembourg as a financial centre is testament to the strong regulatory and operational environment that Luxembourg has created. Its willingness to adapt to change will ensure that over the coming years, the industry will continue to thrive.

2. Alternative Investment Funds

2.1 Fund Formation

2.1.1 Fund Structures

The principal legal vehicles used to set up alternative funds in Luxembourg are the following.

- Undertakings for collective investment (Part II UCI) governed by Part II of the Law of 17 December 2010 (the “UCI Law”) which may be constituted in the form of a common fund (*fonds commun de placement*) (FCP), an investment company with variable capital (*société d'investissement à capital variable*) (SICAV) or an investment company with fixed capital (*société d'investissement à capital fixe*) (SICAF). Part II UCIs are supervised by the *Commission de Surveillance du Secteur Financier* (CSSF) which is the supervisory authority in Luxembourg. The main advantage of these funds is that they are open to all types of investors, including retail.
- Specialised investment funds (*fonds d'investissement spécialisé*) (SIF) governed by the law of 13 February 2007 (the “SIF Law”), which may be constituted as an FCP, SICAV or SICAF. While SIFs have the advantage of having almost no restrictions in terms of what they can invest in, they are only open to well-informed investors. As with the Part II UCI, they are supervised by the CSSF, but unlike the Part II UCI SICAV the SIF SICAV can be set up in a number of different corporate or partnership forms.
- The investment company in risk capital (*société d'investissement en capital à risque*) (SICAR) governed by the law of 15 June 2004 (the “SICAR Law”), which may only be constituted as a corporate or partnership entity (ie, it cannot be an FCP). It has the advantage of having no investment diversification rules, but it must invest in risk capital. As such,

it is generally used for investments in venture capital and private equity. The SICAR is supervised by the CSSF and is only open to well-informed investors.

- Reserved alternative investment funds (*fonds d'investissement alternatif réservé*) (RAIF) governed by the Luxembourg Law of 23 July 2016 (the “RAIF Law”), which may be constituted as an FCP, SICAV or SICAF (in the case of a SICAV or SICAF it can choose any of the available corporate or partnership forms). The RAIF can choose to follow the SIF or SICAR regime in terms of the type of assets it invests in. Its particular advantage is that it is not subject to the supervision of the CSSF and, as such, a RAIF can potentially be brought to the market more quickly than the supervised entities. Unlike the Part II UCI, SIF and SICAR, the RAIF must appoint an authorised external alternative investment fund manager (AIFM).
- The Luxembourg special limited partnership (*société en commandite spéciale*) (SLP), which is an unregulated and unsupervised entity. It is characterised by its contractual freedom and is not subject to any investment or diversification constraints.

RAIFs, Part II UCIs, SIFs, SICARs and SLPs that have designated an AIFM established in the European Economic Area (EEA) can market their shares, units or limited partnership interests to professional investors throughout the EEA pursuant to the specific notification procedure provided for by the Alternative Investment Fund Managers Directive (AIFMD).

Each Part II UCI, SIF, SICAR and RAIF may be established as an umbrella fund allowing creation of multiple compartments. This option is not available to the unregulated SLP.

Any of these vehicles, which are set up in the form of an FCP, issues units. Those in corporate form issue shares, and those in the form of partnerships issue limited partnership interests.

2.1.2 Common Process for Setting Up Investment Funds

The Part II UCI, the SIF and the SICAR are subject to authorisation by the CSSF prior to establishment. An application file must be submitted to the CSSF consisting of at least the following documents (there are certain ancillary documents and the CSSF may always request further information):

- an offering document;
- a constitutive document;
- agreements with key service providers including the depositary, the AIFM, any delegated portfolio manager and the central administration agent;
- information on the directors or managers, who must be of sufficiently good repute and be sufficiently experienced;
- a PRIIPs key information document (PRIIPs KID) if retail investors are targeted; and
- application forms.

The RAIF is not subject to approval by the CSSF, but the following documents will still be required:

- an offering document;
- a constitutive document; and
- agreements with key service providers including the depositary, the AIFM, any delegated portfolio manager and the central administration agent.

The SLP is frequently structured as an unregulated AIF, which is not authorised and not regulated by the CSSF. There is no requirement to have an offering document, though one is frequently

prepared for marketing reasons. The limited partnership agreement is the key document for an SLP. Given there is no approval process at the CSSF, the set-up time is shorter for the RAIF and the SLP.

However, for all vehicles, time for due diligence performed by the service providers as well as time to complete bank account opening processes needs to be factored into the establishment process.

The largest set-up costs are generally legal costs, though service providers also sometimes charge a set-up or onboarding fee. In addition, there are fees payable to the CSSF for regulated funds. For a Part II UCI, SIF and SICAR, the CSSF charges an examination fee and an annual fee for its supervisory activity. The fee amount differs depending on whether the fund is a standalone or an umbrella fund, and on whether it is self-managed or not. For example, the examination fee for a standalone Part II UCI, SIF or SICAR is EUR4,650, whereas for an umbrella fund it is EUR9,250.

2.1.3 Limited Liability

The liability of an investor is generally limited to its commitment or subscription to the fund. No particular reporting requirements attach to this.

2.1.4 Disclosure Requirements

For a Part II UCI, SIF, RAIF and SICAR a prospectus or offering document and an audited annual report must be made available to investors. A PRIIPs KID must also be made available if the fund is to be marketed to retail investors.

The Part II UCI must also prepare a semi-annual report.

For an SLP there are no specific disclosure requirements unless it has appointed a fully authorised AIFM, in which case it is obliged to also prepare audited annual accounts.

Pursuant to the AIFMD, certain disclosures must be made to investors in the offering documents of those funds managed by an AIFM.

In addition, regulated vehicles (SIF, SICAR and Part II UCI) are subject to periodic reporting to the CSSF for statistical and oversight purposes.

Finally, any fund vehicles which are managed by a fully authorised AIFM will be indirectly subject to the Annex IV reporting required to be submitted to the CSSF, pursuant to the AIFMD.

2.2 Fund Investment

2.2.1 Types of Investors in Alternative Funds

There has been an increased demand for access to alternative investment funds in recent years. Investors are seeking more diversification than that offered by retail funds. Well-informed and institutional investors represent the majority of investors in alternative investment funds in Luxembourg, though there has been a trend towards retailisation of AIFs.

2.2.2 Legal Structures Used by Fund Managers

The legal structure used will depend on the type and location of the investors, as well as the nature of the investment. SIFs, SICARs and RAIFs are intended for well-informed investors, and Part II UCIs are often used if there is an intention to target retail investors.

Increasingly, unregulated RAIFs or SLPs (managed by an authorised AIFM) are used as they offer more certainty in terms of time to market.

2.2.3 Restrictions on Investors

SIFs, SICARs and RAIFs are restricted to investment by well-informed investors. The Part II UCI can be marketed to both professional and retail investors in Luxembourg. There are no restrictions under Luxembourg law on who the limited partnership interests of an SLP can be sold to. However, for marketing in other jurisdictions, the AIFMD marketing passport will only allow marketing of the interests in an SLP to professional investors.

Pursuant to the Law of 12 July 2013 on alternative investment fund managers (the “AIFM Law”), authorised AIFMs established in Luxembourg, in another EEA member state or in a third country are authorised to market AIFs they manage to retail investors in Luxembourg, provided certain conditions are met, as follows.

- The AIFs must be subject in their home state to permanent supervision in order to ensure the protection of investors.
- The AIFs must be subject in their home state to regulation providing investors with guarantees of protection at least equivalent to those provided by Luxembourg laws governing AIFs authorised to be marketed to retail investors in Luxembourg. The home state supervision must also be equivalent to that provided in Luxembourg.

2.3 Regulatory Environment

2.3.1 Regulatory Regime

The regulatory regime applicable to an alternative investment fund differs depending on the type of fund. All AIFs are indirectly subject to the provisions of the AIFM Law. The extent to which the AIFM Law is applicable depends on whether they are managed by a fully authorised AIFM or a registered AIFM.

The Part II UCI is subject to investment restrictions and risk diversification rules arising from the Law of 17 December 2010 on undertakings for collective investment (the “UCI Law”) and various implementing CSSF circulars. For example, generally a Part II UCI:

- cannot invest more than 10% of its assets in securities which are not listed on a stock exchange and are not traded on another regulated market which operates regularly and is recognised and open to the public;
- cannot acquire more than 10% of the same type of securities issued by the same issuing body; and
- cannot invest more than 20% of its net assets in securities issued by the same issuing body.

These general investment restrictions do not apply to Part II UCIs which are fund of fund structures, if the investment funds, in which the Part II UCI shall invest, are open-ended and themselves subject to similar general investment restrictions. In addition, these general investment restrictions do not apply to Part II UCIs which are either mainly investing in venture capital, real estate or pursuing alternative investment strategies.

Part II UCIs may in principle borrow the equivalent of up to 25% of their net assets without restriction as to the intended use thereof.

Part II UCIs which are mainly investing in real estate may borrow the equivalent of up to an average of 50% of the valuation of all their properties.

Borrowings of Part II UCIs which are mainly pursuing alternative investment strategies (hedge funds) may be up to 400%.

For SIFs there are no asset restrictions, but the SIF may not invest more than 30% of its assets or commitments in securities of the same type issued by the same issuer.

A RAIF that has chosen the SIF regime is subject to similar rules.

The SICAR is obliged to invest its funds in assets representing risk capital, but is not subject to any diversification rules. A RAIF that has chosen the SICAR regime is subject to the same rules.

In general, the SLP is not subject to any investment restrictions or risk diversification rules.

AIFs may choose one of the EU labels such as EUVECA, EUSEF or ELTIF, in which case they will also be governed by the rules applicable to those regimes.

2.3.2 Requirements for Non-local Service Providers

Luxembourg AIFs may be managed by an AIFM based in a member state of the EEA. If an AIFM established in another member state intends to market units or shares of an EEA AIF that it manages to professional investors in Luxembourg, the competent authorities of the home member state of the AIFM must transmit the notification file to the CSSF.

For RAIFs, SIFs, SICARs and Part II UCIs, the respective depositary must either have its registered office in Luxembourg or have a branch there if its registered office is in another EU member state. The central administration of these entities must be located in the Grand Duchy of Luxembourg.

Foreign investment fund managers with the appropriate licence may act as administrator for

non-regulated funds in Luxembourg (eg, SLPs). This was recently clarified by CSSF Circular 22/811.

2.3.3 Local Regulatory Requirements for Non-local Managers

Part II UCIs, SIFs or RAIFs established in the form of an FCP must appoint a Luxembourg AIFM.

AIFs in corporate or partnership form can appoint an AIFM established anywhere in the EEA.

In order to manage a Luxembourg fund, such AIFMs must provide a notification to their home supervisory authority, who will transmit it to the CSSF.

The portfolio management of Luxembourg AIFs can be delegated to managers situated in third countries, provided that in the case of regulated funds such delegation is subject to the prior approval of the CSSF.

AIFMs which intend to delegate to third parties the task of carrying out functions on their behalf must notify the supervisory authorities of their home member state before the delegation arrangements become effective.

2.3.4 Regulatory Approval Process

The approval process usually takes between three to six months and is dependent on a number of factors. These include:

- the completeness of the initial application;
- the speed with which the CSSF's queries are answered;
- whether it is a first-time fund; and
- the nature of the investment policy.

2.3.5 Rules Concerning Pre-marketing of Alternative Funds

Pursuant to the AIFM Law, an AIFM established in another member state and that is pre-marketing or intending to pre-market an AIF to professional investors in Luxembourg must notify the supervisory authority of its home country (the CSSF in the case of Luxembourg AIFMs):

- specifying in which countries and during which periods the pre-marketing is taking or has taken place; and
- providing a brief description of the pre-marketing including information on the investment strategies presented and, where relevant, a list of the AIF(s) and compartments of AIF(s) which are or were subject to pre-marketing.

Information presented to potential professional investors in the context of pre-marketing:

- cannot be sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
- cannot amount to subscription forms or similar documents, whether in draft or final form; or
- cannot amount to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in final form.

The AIFM must ensure that professional investors do not acquire units or shares in an AIF through pre-marketing, and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF after the formal marketing notification.

Any subscription by professional investors, within 18 months of the AIFM having begun pre-marketing, to units or shares of an AIF referred to

in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification procedures (see **2.3.8 Marketing Authorisation/Notification Process**).

2.3.6 Rules Concerning Marketing of Alternative Funds

AIFMs marketing AIFs in Luxembourg must comply with the provisions of the AIFMD. Where another firm is marketing in Luxembourg, it could be considered to be carrying out an activity of the financial sector and should thus be licensed or otherwise authorised to do so pursuant to the Law of 5 April 1993 on the financial sector. Firms from other EU member states with the appropriate licence pursuant to the Markets in Financial Instruments Directive (MiFID) would be authorised to carry out distribution activities in Luxembourg.

All marketing communications will need to comply with the requirements of Article 4 of Regulation 2019/1156 on facilitating cross-border distribution of collective investment undertakings. CSSF Circular 22/795 stipulates that Luxembourg AIFMs must provide the CSSF with information regarding marketing communications, and the CSSF will conduct testing to verify their compliance with the applicable requirements under Article 4.

2.3.7 Marketing of Alternative Funds

SIFs, SICARs and RAIFs are reserved for and can only be marketed to well-informed investors in Luxembourg. Well-informed investors are institutional investors, professional investors or any other investors who meet the following conditions:

- they have confirmed in writing that they adhere to the status of well-informed investor; and
- they invest a minimum of EUR125,000, or have been the subject of an assessment made by an entity such as a bank or a management company certifying their expertise, experience and knowledge in adequately appraising an investment in a fund.

Part II UCIs can be marketed to any type of investors (both retail and well-informed investors).

In addition to the above restrictions, EEA AIFs managed by an authorised AIFM can be marketed to professional investors in Luxembourg pursuant to Article 32 of the AIFMD.

As previously discussed, in certain circumstances authorised AIFMs may market non-Luxembourg AIFs to retail investors in Luxembourg.

European Venture Capital funds (EuVECAs) and European Social Entrepreneurship Funds (EUSEFs) governed by Regulation (EU) No 345/2013 and Regulation (EU) No 346/2013 respectively, can be marketed to professional investors and other investors, provided that each investor:

- commits to investing a minimum of EUR100,000; and
- states in writing that they are aware of the risks associated with the envisaged investment.

2.3.8 Marketing Authorisation/Notification Process

An AIFM wishing to market to professional investors in Luxembourg must submit a notification to the competent authorities of its home mem-

ber state (the CSSF for Luxembourg AIFMs) in respect of each EEA AIF that it intends to market. This does not apply to Luxembourg AIFMs marketing Luxembourg regulated funds. The notification must comprise certain information, including:

- a notification letter, with a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- the AIF rules or instruments of incorporation;
- identification of the depositary of the AIF;
- the indication of the member state in which it intends to market the units or shares of the AIF to professional investors; and
- information about arrangements made for the marketing of AIFs and, where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

The competent authorities of the home member state of the AIFM should, no later than 20 working days after the date of receipt, transmit the complete notification file to the CSSF. From the date of notification of such transmission, marketing can begin.

Those AIFMs wishing to market non-Luxembourg AIFs to retail investors must follow the detailed rules laid down in CSSF Regulation 15-03 on the marketing of foreign alternative investment funds to retail investors in Luxembourg. Prior to marketing its units or shares to retail investors in Luxembourg, any foreign AIF must have obtained an authorisation for such marketing by the CSSF.

2.3.9 Post-marketing Ongoing Requirements Material Changes

In the event of a material change in the information contained in its original marketing notification file, an AIFM must provide written notice of this change to its home state competent authority (the CSSF in the case of Luxembourg AIFMs), by resubmitting a marked-up version of the original notification file, indicating the proposed changes.

All material changes planned by the AIFM must be notified to the CSSF at least one month before implementing the change, or immediately after an unplanned change has occurred.

De-notification

An AIFM may de-notify arrangements made for marketing as regards units of shares of some or all of its AIFs in Luxembourg, if the following conditions are met:

- other than in respect of closed-ended funds and ELTIFs, a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such units or shares held by Luxembourg investors;
- the intention to terminate arrangements made for marketing such units or shares is made public by means of a publicly available medium; and
- any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of such units or shares.

The de-notification procedure is carried out through the home supervisory authority of the AIFM, which then informs the CSSF.

However, if an AIFM intends to cease the marketing of its non-Luxembourg AIF to retail investors in Luxembourg, it must inform the CSSF about whether Luxembourg investors are still invested in the AIF.

2.3.10 Investor Protection Rules

SIFs, SICARs and RAIFs are intended for well-informed investors that are able to adequately assess the risks associated with an investment in such vehicles.

Part II UCIs can be marketed to retail investors, but the applicable investment restrictions, in addition to the fact that they are supervised by the CSSF, adds to investor protection.

The fact that all AIFs bar the unregulated SLP must appoint a depositary and an auditor provides additional protection for investors.

Any AIF managed by an authorised AIFM needs to provide audited annual accounts which, in the case of regulated AIFs, need to be provided to the CSSF. The CSSF is also made aware of the content of the management letters.

Additionally, such funds are required to disclose certain information to investors pursuant to the rules of the AIFMD, and inform investors of any changes thereto. The AIFMD imposes rules on preferential treatment of investors and disclosure to them, and the valuation of an AIF's assets must be carried out in accordance with such rules.

AIFMs are also required to have risk management, liquidity management and conflict of interest policies in place, all of which serve to add to the protection of investors.

Part II UCIs must, in addition, produce a half-yearly report for submission to the CSSF.

All of the regulated funds are subject to regular reporting to the CSSF, to enable it to carry out its supervisory function.

In the case of a dispute with a Part II UCI, a retail investor can request the CSSF to impartially intervene for an out-of-court resolution, though its out-of-court decision is not binding on the parties.

In the case of regulated funds, CSSF Circular 02/77, relating to the protection of investors in the case of NAV calculation errors and correction of the consequences resulting from non-compliance with the investment rules, sets out specific rules for dealing with such circumstances in a way that does not harm investors.

2.3.11 Approach of the Regulator

The CSSF takes a practical approach. They can be approached for face-to-face meetings, particularly in relation to a new entry to the market or in relation to new projects. As regards ongoing matters, they can be reached by phone or email. The CSSF has also set up an electronic platform to facilitate the exchange of documents and information.

2.4 Operational Requirements

See 2.3 **Regulatory Environment** for further discussion on investment restrictions, borrowing restrictions and risk diversification rules applicable to Luxembourg AIFs.

AIFs managed by a fully authorised AIFM and SIFs, SICARs and Part II UCIs that do not have an AIFM must appoint a depositary acting in the interests of investors, and provide services as required by their respective laws as well as

the AIFM Law (ie, safekeeping of assets, cash monitoring and monitoring of compliance with the legal and regulatory framework). Depositaries must be credit institutions established in Luxembourg and have a specific licence granted by the CSSF in order to carry out such business, or be so-called depositary-lites which may be appointed for certain types of AIFs that do not hold financial instruments and that must be held in custody.

AIFs must have an AML policy and comply with the AML Law for their business relationships (including for their investors).

Asset valuation of AIFs must be done in accordance with the laws applicable to them, as well as in accordance with the AIFM Law where the AIFs are managed by a fully authorised AIFM.

2.5 Fund Finance

Luxembourg AIFs frequently borrow either for bridging finance, working capital purposes, or in the case of some funds, for leverage.

While there are lenders on the Luxembourg market, lenders are often from outside Luxembourg.

There are no borrowing restrictions applicable to SIFs, SICARs, RAIFs or SLPs, though pursuant to the AIFMD there are rules around disclosing the maximum amount of leverage. Part II UCIs are subject to borrowing restrictions (generally 25% of net asset value (NAV) though in the case of hedge funds this can be increased).

The lender will generally always take security. The type of security will depend on the type of borrowing and types of assets involved. Security over undrawn commitments and pledges over Luxembourg bank accounts are often seen.

2.6 Tax Regime

Part II UCI, SIF and RAIF-SIF

The Part II UCI, SIF and RAIF-SIF are exempt from wealth tax, municipal business tax and corporate income tax. Luxembourg withholding tax does not apply to distributions made by the SIF to investors. These entities also benefit from a value-added tax (VAT) exemption on management services.

A SIF and RAIF-SIF are subject to subscription tax at an annual rate of 0.01% based on their NAV. There are however several categories of exemptions. Part II UCIs are subject to a subscription tax at an annual rate of 0.05% of the NAV, reduced to 0.01% or exempted in certain conditions.

In addition, the SIF, RAIF-SIF and Part II UCI in the form of a SICAV or SICAF may benefit from double tax treaties which have been concluded by Luxembourg. The SIF, RAIF-SIF or Part II UCI in the form of an FCP do not, in principle, have access to double tax treaties.

SICAR and RAIF-SICAR

The tax regime applicable to a SICAR and a RAIF-SICAR will depend on the legal form adopted. Those taking a corporate form are fully taxable entities (corporate income tax and municipal business tax) but there is an exemption for income derived from transferable securities and income from cash held for a maximum period of one year prior to its investment in risk capital. Those taking the form of a common limited partnership (*société en commandite simple*) (SCS) or SLP are tax-transparent under Luxembourg law.

Luxembourg withholding tax does not apply to distributions made by these entities to investors.

These entities also benefit from a VAT exemption on management services.

The SICAR and RAIF SICAR are not subject to an annual subscription tax. They are however subject to a minimum amount of annual net wealth tax.

SICARs and RAIF SICARs in corporate form have full access to double tax treaties from a Luxembourg perspective. Those in the form of SLPs, or SCSs and RAIFs in the form of an FCP, do not.

SLP

An SLP is tax-transparent and is not subject to subscription tax, wealth tax or withholding tax. Corporate income tax is not applicable. Municipal business tax of 6.75% (Luxembourg City) may be applicable if the SLP carries out a commercial activity or is deemed to carry out a commercial activity.

SLPs do not benefit from the EU Parent-Subsidiary Directive and have no access to double tax treaties signed by Luxembourg.

3. Retail Funds

3.1 Fund Formation

3.1.1 Fund Structures

Undertakings for collective investments in transferable securities (UCITS) and undertakings for collective investment subject to Part II of the UCI Law (Part II UCIs – together with UCITS, the “retail funds”) are the two main investment funds for retail investors.

Retail funds are subject to direct supervision of the CSSF and require prior CSSF approval before they can be set up.

A retail fund may be set up as a standalone fund, or as an umbrella fund. However, the umbrella fund structure is most often used as it is cost-effective if several sub-funds are launched.

Each retail fund may issue classes and sub-classes of shares (or units depending on the legal form chosen, see **3.2.2 Legal Structures Used by Fund Managers**), enabling the retail fund's shares to be adapted to the needs of its investors and its sponsor.

UCITS

UCITS are highly regulated investment vehicles which can be easily marketed to retail investors in the EEA thanks to the EU passport, but also to professional and institutional investors.

Stringent diversification rules are laid down by the UCI Law. In particular, a UCITS may invest no more than 10% of its assets in transferable securities (which must be listed on a regulated market) or money market instruments issued by the same body, and specific restrictions apply to index funds, holdings of other funds, use of financial derivative instruments and deposits. Leverage is restricted, and a UCITS must be an open-ended fund – ie, investors must be able to redeem.

Part II UCIs

Although Part II UCIs always qualify as AIFs, they are open to retail investors.

Part II UCIs are subject to a less stringent diversification policy than UCITS:

- they may borrow money or securities (up to 400% of the NAV for Part II UCIs following alternative investment strategies);
- they can be closed or open-ended funds; and

- they can be used to invest beyond transferable securities (private equity, real estate, etc).

However, Part II UCIs remain subject to the supervision of the CSSF.

Part II UCIs are not entitled to the European UCITS passport for distribution to retail investors in the EEA, but they can rely on the AIFMD marketing passport if they fall under the scope of the full AIFMD regime.

3.1.2 Common Process for Setting Up Investment Funds

Retail funds must be authorised and supervised during their lifetime by the CSSF.

A retail fund set up in contractual form as an FCP shall only be authorised if the CSSF has approved its management company, which must be based in Luxembourg.

A retail fund set up in corporate form and appointing a management company or AIFM shall only be authorised if the CSSF has approved the management company or AIFM (if a Luxembourg entity), or if the relevant management company or AIFM has notified pursuant to the management passport. Where the management company or AIFM delegates portfolio management, the entity to whom they have delegated is subject to the approval of the CSSF.

Directors (who must be of sufficiently good repute and be sufficiently experienced) and other service providers of retail funds are subject to the approval of the CSSF.

The application is carried out online on a CSSF portal and requires the provision of, inter alia, the following documents:

- application questionnaire;
- draft instruments of incorporation;
- draft prospectus;
- draft PRIIPs KID or, in the case of UCITS exclusively distributed to professional investors, a UCITS key investor information document (KIID);
- key policies (generally already in place within the investment fund manager);
- various AML documents;
- confirmation letters regarding main service providers agreements;
- information on the directors of the fund in question; and
- business plan.

Once the application is complete, the authorisation process for a retail fund will range between three to six months. The actual length and cost depend mainly on the complexity of the investment strategy, the completeness of the application file and whether or not it is a first-time fund.

The largest set-up costs are generally legal fees, though service providers also sometimes charge a set-up or onboarding fee. In addition, there are fees payable to the CSSF for regulated funds. The CSSF charges an examination fee and an annual fee for its supervisory activity of retail funds. The fee amount differs depending on whether the retail fund is a standalone or an umbrella fund and on whether it is self-managed or not. For example, the examination fee for a standalone retail fund is EUR4,650, whereas for an umbrella fund it is EUR9,250.

3.1.3 Limited Liability

Regardless of the legal form or structure, investors in retail funds are only liable up to the amount of their contributions.

3.1.4 Disclosure Requirements

UCITS

UCITS must publish a prospectus that includes the information necessary for investors to be able to make an informed investment decision, and containing at least the information listed in Schedule A of Annex I of the UCI Law, as well as information about the remuneration policy. The prospectus must be kept up to date.

In addition, a three-page PRIIPs KID (or a two-page KIID for UCITS exclusively distributed to professional investors) summarising the key elements of the prospectus must be issued and kept up to date.

The following reports must be produced:

- annual report;
- semi-annual report covering the first six months of the financial year;
- semi-annual risk report (only intended for the CSSF);
- monthly financial report (only intended for the CSSF); and
- annual long form report (only intended for the CSSF).

Part II UCIs

As with UCITS, Part II UCIs must also publish a prospectus that includes the information necessary for investors to be able to make an informed investment decision, and containing at least the information listed in Schedule A of Annex I of the UCI Law. The prospectus must be kept up to date.

In addition, a three-page PRIIPs KID summarising the key elements of the prospectus must be issued if the Part II UCI is marketed to retail investors.

The following reports must be produced:

- annual report;
- semi-annual report covering the first six months of the financial year;
- semi-annual risk report (only intended for the CSSF);
- monthly financial report (only intended for the CSSF); and
- annual long form report (only intended for the CSSF).

3.2 Fund Investment

3.2.1 Types of Investors in Retail Funds

The majority of retail fund investors are located outside Luxembourg.

All types of investors invest in retail funds (retail, professional and institutional investors).

3.2.2 Legal Structures Used by Fund Managers

Usually, a retail fund is set up in the contractual form of an FCP or a SICAV (ie, a corporate entity with variable capital taking the form of a public limited liability company (*société anonyme*)).

However, in the case of a Part II UCI, it is possible to opt for an investment company with fixed capital (SICAF) in a different corporate legal form or in the form of a partnership.

3.2.3 Restrictions on Investors

There are no restrictions – all investors (ie, retail, professional and institutional investors investing for their own account and/or on behalf of retail investors) can invest in retail funds.

Non-Luxembourg investment funds that do not qualify as UCITS can be marketed to retail investors in Luxembourg provided that the provisions

of CSSF Regulation 15-03 are complied with and the CSSF has authorised them.

3.3 Regulatory Environment

3.3.1 Regulatory Regime

UCITS

Eligible assets are restricted to transferable securities admitted on a regulated market, investment funds, financial derivative instruments, cash and money market instruments.

Risk diversification requirements for UCITS include the following:

- cannot invest more than 10% of assets in transferable securities or money market instruments issued by the same issuer, and those holdings that exceed 5% cannot in aggregate exceed 40% of their assets;
- cannot invest more than 20% of assets in deposits made with the same body; and
- global exposure relating to financial derivative instruments cannot exceed the total value of the portfolio.

A UCITS cannot borrow more than 10% of its assets on a temporary basis.

Uncovered short positions are not allowed, but a UCITS can pursue a long-short investment strategy and achieve short exposure synthetically through the use of financial derivative instruments.

Various liquidity monitoring requirements are provided for.

Part II UCIs

The Part II UCI is subject to investment restrictions and risk diversification rules arising from the UCI Law and various implementing CSSF circulars. For example, generally a Part II UCI:

- cannot invest more than 10% of its assets in securities which are not listed on a stock exchange and are not traded on another regulated market which operates regularly and is recognised and open to the public;
- cannot acquire more than 10% of the same type of securities issued by the same issuing body; and
- cannot invest more than 20% of its net assets in securities issued by the same issuing body.

These general investment restrictions do not apply to Part II UCIs which are fund of fund structures, if the investment funds, in which the Part II UCI shall invest, are open-ended and themselves subject to similar general investment restrictions. In addition, these general investment restrictions do not apply to Part II UCIs which are either mainly investing in venture capital, real estate or pursuing alternative investment strategies.

Part II UCIs may in principle borrow the equivalent of up to 25% of their net assets without restriction as to the intended use thereof.

Part II UCIs which are mainly investing in real estate may borrow the equivalent of up to an average of 50% of the valuation of all their properties.

Borrowings of Part II UCIs which are mainly pursuing alternative investment strategies (hedge funds) may be up to 400%.

3.3.2 Requirements for Non-local Service Providers

The depositary, administrative agent, registrar and transfer agent, and approved statutory auditor of a retail fund must be established in Luxembourg, and are all subject to regulation in Luxembourg.

The management company of a UCITS can be established in the EEA, unless the UCITS is an FCP, in which case the management company must be established in Luxembourg. The AIFM of a Part II UCI can be established in the EEA unless the Part II UCI is an FCP, in which case the AIFM must be established in Luxembourg.

Portfolio managers and investment advisers located in third countries can provide advisory or portfolio management services, but this is subject to the CSSF's authorisation of any delegated portfolio management function.

3.3.3 Local Regulatory Requirements for Non-local Managers

UCITS in the form of an FCP must have their management company established in Luxembourg. The same applies to Part II UCIs established in the form of an FCP.

UCITS which are SICAVs and are not self-managed may have their management company established elsewhere in the EEA.

An AIFM from any jurisdiction in the EEA can be appointed to manage a Part II UCI. Those AIFMs established elsewhere than in Luxembourg need to notify their home supervisory authorities of their intention to manage a Luxembourg fund. Those authorities will in turn notify the CSSF.

The portfolio management of Luxembourg retail funds can be delegated to managers situated in third countries provided that such delegation is subject to the prior approval of the CSSF.

3.3.4 Regulatory Approval Process

For retail funds, the process for obtaining regulatory approval depends on the complexity of the investment policy, the completeness of the file that has been submitted and whether or not it is

a first-time fund. Generally, the time ranges from three to six months.

3.3.5 Rules Concerning Pre-Marketing of Retail Funds

Pre-marketing to Luxembourg retail investors is not allowed for UCITS and AIFs.

3.3.6 Rules Concerning Marketing of Retail Funds

No notification or authorisation is required for the marketing of Luxembourg UCITS or Part II UCIs in Luxembourg.

A UCITS located in another EEA country may be marketed in Luxembourg as soon as the home supervisory authority has duly notified the CSSF of the intended marketing. Such EEA UCITS must provide facilities in Luxembourg to facilitate the processing of subscription and redemption orders, and the provision of information. They need not appoint a third party or have a physical presence in Luxembourg (ie, facilities can be provided via the internet).

An AIF located in a country other than Luxembourg may be marketed to Luxembourg retail investors, in accordance with the provisions of CSSF Regulation 15-03, provided that, inter alia:

- it is subject to ongoing supervision by its home supervisory authority;
- it has obtained the authorisation of the CSSF for such marketing;
- its NAV is calculated at least once a month; and
- it follows certain risk diversification principles.

Retail funds and AIFs marketed in Luxembourg to retail investors must provide these investors with a PRIIPs KID.

All marketing communications will need to comply with the requirements of Article 4 of Regulation 2019/1156 on facilitating cross-border distribution of collective investment undertakings. CSSF Circular 22/795 provides that the CSSF requires investment fund managers to provide the CSSF with information regarding marketing communications and will conduct testing to verify their compliance with the applicable requirements under Article 4.

Closed-ended funds marketed to Luxembourg retail investors must generally issue a prospectus in accordance with EU Regulation 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

3.3.7 Marketing of Retail Funds

Retail funds can be marketed to all investors located in Luxembourg, whether retail, professional or institutional.

However, a number of rules stemming from the MiFID may nevertheless restrict the marketing of retail funds through MiFID-regulated firms, as the investor profile of a retail investor must be in line with the type of retail fund (eg, it is not appropriate to advise investing in or distributing a retail fund investing all its assets in stocks while the targeted retail investor has a conservative risk profile).

3.3.8 Marketing Authorisation/Notification Process

Notification or authorisation is required by the CSSF prior to the marketing of non-Luxembourg retail funds taking place.

In the case of cross-border marketing of a UCITS, the notification process described above must be complied with, and in the case of marketing

a foreign investment fund that is not a UCITS, there is an authorisation process to be complied with in accordance with CSSF Regulation 15-03.

3.3.9 Post-marketing Ongoing Requirements Change in the Content of the UCITS Marketing Notification Letter

Where an amendment has an impact on the notification letter sent to the CSSF, via the UCITS home supervisory authority, at the time when the UCITS intended to market its units in Luxembourg or regarding a change of the share classes to be marketed in Luxembourg, the UCITS must directly inform the CSSF before implementing this amendment.

De-notification

Investment fund managers may de-notify arrangements made for marketing as regards units or shares of some or all of their UCITS and/or AIFs marketed in Luxembourg, provided that:

- a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such units or shares held by Luxembourg investors;
- the intention to terminate arrangements made for marketing such units or shares is made public, by means of a publicly available medium; and
- any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification, in order to prevent any new or further, direct or indirect, offering or placement of such units or shares.

The de-notification procedure is carried out through the home supervisory authority, which then informs the CSSF. However, if an AIFM intends to cease the marketing of its non-Luxembourg AIF to retail investors in Luxembourg,

it must inform the CSSF whether Luxembourg investors are still invested in this AIF.

Other Ongoing Requirements

Please refer to **3.3.10 Investor Protection Rules** regarding reporting and other requirements.

3.3.10 Investor Protection Rules

To ensure compliance with the regulatory framework and to detect any potential non-compliance, retail funds must produce the following reports:

- an audited annual report;
- an unaudited semi-annual report covering the first six months of the financial year;
- a report in the case of NAV calculation error or non-compliance with applicable investment rules (only intended for the CSSF);
- a monthly financial report (only intended for the CSSF); and
- an annual long form report (only intended for the CSSF).

In addition, UCITS must provide the CSSF with a semi-annual risk report, and their management companies must have a remuneration policy and procedures designed to prevent conflict of interests, and discourage risk-taking inconsistent with the risk profile of the managed UCITS.

Furthermore, retail funds must appoint a custodian bank acting in the interests of investors and providing services as required by the UCI Law – ie, safekeeping of assets, cash monitoring and monitoring of retail funds' compliance with the legal and regulatory framework. The appointment of a custodian bank is ultimately intended to prevent embezzlement, ponzi schemes and other financial frauds.

In the case of a dispute with a retail fund, a retail investor can contact the CSSF in order for the CSSF to impartially intervene for an out-of-court resolution, but its out-of-court decision is not binding on the parties.

Finally, NAV calculation errors are highly monitored by auditors and the CSSF, and incoming and redeeming investors are compensated in the case of NAV calculation errors.

3.3.11 Approach of the Regulator

The CSSF takes a practical approach. New Luxembourg market participants can have a face-to-face meeting with CSSF officials to present their projects, better understand the CSSF's expectations and ask questions.

Formalities and filings with the CSSF are mainly done through an online platform, though during an authorisation process, the CSSF can be contacted via telephone and email.

3.4 Operational Requirements

Retail Funds

Please refer to **3.1.4 Disclosure Requirements**, and **3.3.1 Regulatory Regime** regarding investment restrictions of retail funds.

Retail funds must appoint a custodian bank acting in the interests of investors and providing services as required by the UCI Law – ie, safe-keeping of assets, cash monitoring and monitoring of retail funds' compliance with the legal and regulatory framework. Custodian banks must be credit institutions established in Luxembourg and have a specific licence granted by the CSSF in order to carry out this business.

Retail funds admitted to trading on the Luxembourg Stock Exchange are subject to the Luxembourg law of 11 January 2008 on transparency

requirements (implementing Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC), and to the Luxembourg law of 23 December 2016 on market abuse (stemming from Regulation (EU) No 596/2014 of 16 April 2014 on market abuse).

Retail funds must have an AML policy and comply with the AML Law for their business relationships (including for their investors).

UCITS

Asset valuation of UCITS must be done in accordance with the UCI Law, which provides that listed securities should be valued at the last known stock exchange quotation unless not representative. Non-listed securities or listed securities for which the market price is not representative should be valued on the basis of the probable realisation value.

Management companies must have policies in place to prevent insider dealing and the misuse of confidential information by one of their employees or service providers.

Uncovered short positions are not allowed, but a UCITS can pursue a long-short investment strategy and achieve short exposure synthetically through the use of financial derivative instruments.

Part II UCIs

Asset valuation of Part II UCIs must be done in accordance with the UCI Law (as just described for UCITS), and also in compliance with the AIFM Law if managed by an authorised AIFM.

Authorised AIFMs of Part II UCIs must have policies in place to prevent insider dealing and the misuse of confidential information by one of their employees or service providers.

Part II UCIs may have uncovered short positions.

3.5 Fund Finance UCITS

A UCITS may borrow money and securities on a temporary basis provided that such borrowing represents no more than 10% of its assets. Generally, borrowing is used to finance redemption requests, not to invest.

UCITS may invest in derivative financial instruments which can provide leverage, and can enter into back-to-back loans to acquire foreign currencies.

For the above transactions, a UCITS may pledge its own securities as collateral provided that the custodian bank agrees.

Securities lending transactions, as well as repurchase agreement transactions and reverse repurchase agreement transactions can only be used by UCITS for the purpose of efficient portfolio management.

Part II UCIs

A Part II UCI may borrow money or securities up to 25% of its NAV on a permanent basis. However, this cap may increase depending on the investment strategy:

- 200% of its NAV for alternative investment strategies; and
- 400% of its NAV for alternative investment strategies with a high level of correlation between long positions and short positions.

A Part II UCI may invest in derivative financial instruments which can provide leverage, but it cannot borrow to finance margin deposits.

A Part II UCI is authorised to enter, as borrower, into securities lending transactions with first-class professionals specialised in this type of transaction.

For the above transactions, a Part II UCI may pledge its own securities as collateral.

Equity bridge financing can be used if the Part II UCI in question operates on a commitment basis.

3.6 Tax Regime

Regardless of the nature of the investors, retail funds:

- are exempted from corporate income tax, municipal business tax, and wealth tax;
- are not subject to withholding tax on dividends;
- do not benefit from the EU Parent-Subsidiary Directive;
- may benefit in a limited way from the Luxembourg double tax treaty network (only if established in corporate form); and
- are subject to an annual subscription tax of 0.05% of the NAV (paid quarterly), reduced to 0.01% in certain specific cases.

The annual subscription tax is exempted in the case of institutional money market cash funds, special pension funds, exchange-traded funds, microfinance funds, and for retail funds investing in other Luxembourg funds which are already subject to a subscription tax. These exemptions apply to the whole retail fund, the sub-fund or the class of shares qualifying for the exemption.

Investors located outside Luxembourg are not subject to Luxembourg capital gains tax.

4. Legal, Regulatory or Tax Changes

4.1 Recent Developments and Proposals for Reform

Approximately one third of the assets managed by sustainable funds in Europe are domiciled in Luxembourg. This trend towards more sustainable investing is expected to continue. At the European level, upcoming changes to the ELTIF regime and to the AIFMD framework, especially in the context of debt funds, will have an impact on the fund regulatory environment in Luxembourg.

BSP is an independent full-service law firm based in Luxembourg, and is committed to providing the best possible legal services to its domestic and international clients in all aspects of Luxembourg business law. The firm's lawyers have developed particular expertise in banking and finance, capital markets, corporate law, dispute resolution, employment law, investment funds, intellectual property, private wealth, real estate and tax. In these practice ar-

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