

FUND MANAGEMENT

Luxembourg



Fund Management

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Quick reference guide enabling side-by-side comparison of local insights into fund management issues, including regulatory framework and authorities; regulation of fund administration; fund authorisation and licensing; territorial scope of regulations; acquiring a stake in a fund manager; restrictions on compensation and profit sharing; fund marketing, including rules on commission payments; legal vehicles available for retail funds and non-retail pooled funds; investment, borrowing ownership, management and operating restrictions; tax, asset protection, governance, reporting, issue, transfer and redemption issues; separately managed accounts; re-domiciliation of funds; listing funds; foreign investor participation rules; funds investing in derivatives; hot topics, such as treatment of strategic industries, high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'; and other recent trends.

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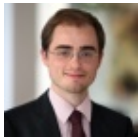
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FUND MANAGEMENT REGULATION

Regulatory framework and authorities

How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

There are two types of funds in Luxembourg: regulated funds (ie, authorised and supervised by the Financial Sector Supervisory Commission (CSSF)) and unregulated funds. Regulated funds are governed by one of the following (product) laws:

- the Law of 17 December 2010 on undertakings for collective investment (the UCI Law);
- the Law of 15 June 2004 on the investment company in risk capital (the SICAR Law); and
- the Law of 13 February 2007 on specialised investment funds (the SIF Law).

Unregulated funds may be governed by the Law of 23 July 2016 on reserved alternative investment funds (the RAIF Law) to the extent that they qualify as alternative investment funds (AIFs) within the meaning of the Law of 12 July 2013 on alternative investment fund managers (the AIFM Law).

Regulated and unregulated funds are also governed by the Law of 10 August 1915 on commercial companies (the Companies Law) to the extent that the above (product) laws (including the RAIF Law) do not derogate from the Companies Law.

Fund managers are subject to the UCI Law or the AIFM Law, or both.

Law stated - 13 April 2022

Fund administration

Is fund administration regulated in your jurisdiction?

Fund administration is a regulated activity in Luxembourg and either performed by an authorised Luxembourg management company (ManCo) or an alternative investment fund manager (AIFM), or delegated to an administrative agent authorised by the CSSF under the Law of 5 April 1993 on the financial sector (Financial Sector Law).

Law stated - 13 April 2022

Authorisation

What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

When setting up a regulated fund, a prior application for authorisation must be filed with the CSSF. Following the review of the application file, the CSSF usually asks additional questions or makes comments (or both) and, to the extent that the review phase is successfully completed, informs the applicant that the fund may be established.

Once the regulated fund is established (before a Luxembourg notary or, depending on the legal form of the fund, under private deed) and all agreements with the service providers have been executed, copies of the fund's constitutive document and fully executed agreements must be filed with the CSSF, together with the final version of the offering document, which shall be submitted to the CSSF for visa. Subject to the satisfactory receipt of all required documents,

the CSSF will register the fund on the relevant official list of supervised entities and issue the visa-stamped offering document.

The CSSF supervises regulated funds on a continuous basis. Regulated funds must apply for prior approval with respect to each change in their fund documentation (ie, constitutive document and offering document) or governance (eg, appointment of a new board member or replacement of administrative agent, depository or portfolio manager).

Unregulated funds do not require prior CSSF authorisation. Once the unregulated fund is established, the Luxembourg manager must inform the CSSF about its appointment as manager of the relevant fund.

A Luxembourg manager must obtain prior authorisation from the CSSF and comply with certain minimum requirements, including in respect of: own funds; appropriate infrastructure and internal governance; authorised shareholding and management; and external audit.

The central administration of a Luxembourg manager must be located in Luxembourg. Managers who wish to provide discretionary management services, besides collective portfolio management, must participate in an investor compensation scheme.

Law stated - 13 April 2022

Territorial scope of regulation

What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

Luxembourg law applies when the fund or the manager, or both, are established in Luxembourg, and when investors to whom a fund is marketed are domiciled in Luxembourg.

When management of a regulated fund is delegated to a non-Luxembourg EU manager, prior CSSF approval is required. The same will apply to unregulated funds once the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (AIFMD) third-country passport under article 38 of the AIFM Law is made available to non-EU AIFMs. A prior notification to the CSSF is required (pursuant to the procedure under article 45 of the AIFM Law) prior to any marketing of a foreign or Luxembourg fund by a non-EU manager to Luxembourg investors.

Law stated - 13 April 2022

Acquisitions

Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Yes. The identity of the shareholders directly or indirectly having a qualifying holding (ie, any direct or indirect holding that represents at least 10 per cent of the capital or of the voting rights or that makes it possible to exercise a significant influence over the management of the company in which that holding subsists) in the manager, as well as the amount of such holding, must be communicated to the CSSF.

When assessing the application, the CSSF takes into consideration the following criteria:

- professional standing and financial soundness of the applicant shareholder;
- professional standing and experience of each person responsible for managing the activities of the manager as a result of the acquisition transaction;
- compliance with prudential and supervisory requirements at group level; and
- risk of money laundering and financing of terrorism.

Both natural and legal persons are eligible to become shareholders of a Luxembourg manager.

Law stated - 13 April 2022

Restrictions on compensation and profit sharing

Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

Yes. Managers must comply with the European Securities and Markets Authority (ESMA) Guidelines on sound remuneration policies under the Undertakings for Collective Investment in Transferable Securities Directive (Directive 2009/65/EC) (UCITS Directive) and the ESMA Guidelines on sound remuneration policies under the AIFMD, as applicable. In addition, each manager must comply with CSSF Circular 10/437, which applies to all entities subject to CSSF prudential supervision.

The key principles are that the remuneration policy must:

- promote sound and effective risk management and must not induce excessive risk-taking;
- be drawn up in such a way as to create an appropriate balance between fixed and variable remuneration components; and
- when the variable component represents a significant part of remuneration, the payment of a considerable portion of this variable component must be deferred for a minimum period.

Remuneration rules apply to members of the board and staff whose professional activities have a material impact on the risk profile of the firm. Certain information must be made public.

Law stated - 13 April 2022

FUND MARKETING

Authorisation

Does the marketing of investment funds in your jurisdiction require authorisation?

Active marketing of funds to investors in Luxembourg is subject to a prior notification to the Financial Sector Supervisory Commission (CSSF).

Law stated - 13 April 2022

What marketing activities require authorisation?

Any provision of information or communication, direct or indirect, on investment strategies or ideas by an EU manager or on its behalf by a regulated third party, to potential Luxembourg-domiciled professional investors in order to test their interest in a not-yet-established alternative investment fund (AIF), or in an established, but not yet notified for marketing AIF, and which in each case does not amount to an offer or placement to the potential investors to invest in the units or shares of that AIF (pre-marketing), requires a prior notification to the CSSF.

Any direct or indirect offering or placement at the initiative of a manager or on behalf of such manager of units, shares or interests of a fund it manages for or with investors domiciled in Luxembourg requires a prior notification to the CSSF.

Managers authorised under the Law of 17 December 2010 on undertakings for collective investment (the UCI Law) or the Law of 12 July 2013 on alternative investment fund managers (the AIFM Law), or both, may perform marketing activities without requiring an additional authorisation from the CSSF.

A Luxembourg investment firm (which is not a manager under the UCI Law or the AIFM Law) that intends to distribute units, shares or interests of funds, must request prior CSSF authorisation under the Financial Sector Law.

Law stated - 13 April 2022

Territorial scope and restrictions

What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

If investors are located in Luxembourg, the non-EU manager must file a prior notification with the CSSF before pre-marketing or marketing its fund in Luxembourg.

Law stated - 13 April 2022

If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

In principle, no local entity must be involved in the fund marketing process, except in relation to retail funds.

Law stated - 13 April 2022

Commission payments

What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

Luxembourg investment firms are subject to inducement rules of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II), as transposed under Luxembourg law. In short, a distributor placing a fund with its clients may receive a commission from the manager or the fund only if:

- the relevant payment is designed to enhance the quality of the service to the clients;
- the relevant payment does not impair compliance with the distributor's duty to act honestly, fairly and professionally in accordance with the best interests of its clients; and
- the commission is clearly disclosed to the clients.

A distributor that also provides independent investment advice to its clients is, in principle, prohibited from receiving a commission from the fund or its manager.

Law stated - 13 April 2022

RETAIL FUNDS

Available vehicles

What are the main legal vehicles used to set up a retail fund? How are they formed?

There are two types of regulated funds that can be sold to retail investors in Luxembourg:

- undertakings for collective investment in transferable securities governed by Part I of the Law of 17 December 2010 on undertakings for collective investment (the UCI Law) (UCITS); and
- undertakings for collective investment governed by Part II of the UCI Law (Part II UCI).

Unregulated funds qualifying as alternative investment funds (AIFs) may also be marketed to retail investors, subject to certain conditions set out in the Law of 12 July 2013 on alternative investment fund managers (the AIFM Law).

Both UCITS and Part II UCI may be structured as:

- an investment company with variable capital (SICAV);
- an investment company with fixed capital (SICAF); or
- a common fund (FCP).

The share capital of a SICAV is always equal to its net assets and hence no formalities are required to increase or decrease the share capital. The decrease and increase of share capital of a SICAF is subject to formalities laid down in the Companies Law. A SICAV (UCITS or Part II UCI) must take the form of a public limited company (SA) and be formed before a Luxembourg notary.

An FCP is a co-ownership whose joint owners are only liable up to the amount they have contributed and whose ownership rights are represented by units. An FCP has no legal personality and shall be managed by a management company, which will draw up and execute the fund's management regulations.

A retail fund can be set up as a single fund or as an umbrella fund consisting of multiple compartments, each with a different investment policy. The fund and compartments may have an unlimited number of share classes, depending on the needs of the investors. Under certain conditions, cross-investments between compartments are allowed.

Law stated - 13 April 2022

Laws and regulations

What are the key laws and other sets of rules that govern retail funds?

The key laws and regulations applicable to retail funds are:

- the UCI Law;
- the Companies Law;
- the AIFM Law;
- the Financial Sector Law;
- the Luxembourg Civil Code;
- Luxembourg laws, regulations and circulars issued by the Financial Sector Supervisory Commission (CSSF) regarding anti-money laundering (AML) and counter-terrorist financing (CTF);
- the EU Packaged Retail and Insurance-based Investment Products Regulation (Regulation (EU) No. 1286/2014)

(PRIIPs Regulation);

- the European General Data Protection Regulation (Regulation (EU) No. 2016/679) (GDPR);
- CSSF Regulation No. 16-07 regarding out-of-court complaint resolution (if the fund is regulated); and
- various guidelines issued by the European Securities and Markets Authority (ESMA) and CSSF regulations and circulars.

Law stated - 13 April 2022

Authorisation

Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Regulated retail funds must be authorised and supervised by the CSSF.

Unregulated retail funds qualifying as AIFs do not require the approval of the CSSF, although their AIFM is subject to the supervision of the CSSF or the supervisory authority of its home member state.

Law stated - 13 April 2022

Marketing

Who can market retail funds? To whom can they be marketed?

A retail fund may be marketed in Luxembourg to retail investors by its manager or by an authorised distributor.

While UCITS avail of the EU marketing passport and can be marketed to retail investors throughout the EU, Part II UCI can be marketed to retail investors in the EU only in compliance with article 43 of the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (AIFMD).

Law stated - 13 April 2022

Managers and operators

Are there any special requirements that apply to managers or operators of retail funds?

Managers of Luxembourg UCITS and Part II UCI must be authorised by the CSSF (or any other EU regulator) before commencing their activity in Luxembourg. EU managers benefit from the EU management passport under the UCITS and AIFMD regimes.

Where a manager envisages marketing the units, shares or interests of the AIFs it manages to retail investors in the territory of Luxembourg, the following restrictions or additional conditions apply:

- compliance with article 46 of the AIFM Law;
- compliance with articles 59, 100 and 129 of the UCI Law, if the fund is an open-ended non-Luxembourg EU AIF;
- compliance with CSSF Regulation No. 15-03 and certain risk-spreading obligations set forth therein; and
- issuance of a key information document in accordance with the PRIIPs Regulation.

Law stated - 13 April 2022

Investment and borrowing restrictions

What are the investment and borrowing restrictions on retail funds?

UCITS are subject to strict rules on:

- eligible assets;
- diversification requirements;
- borrowing, granting loans and short selling; and
- techniques and instruments relating to transferable securities and money market instruments (MMI), laid down in the UCI Law and specified in the various CSSF and ESMA guidelines.

The UCI Law contains no provisions regarding investment and borrowing rules in respect of Part II UCI. Such rules are specified in CSSF circulars 91/75 and 02/80. There are no restrictions on eligible assets for Part II UCI.

| | UCITS | Part II UCI |
|----------------------|--|--|
| Eligible assets | <p>Restricted to transferable securities admitted or dealt in on a regulated market, certain investment funds, deposits with a credit institution, financial derivative instruments, cash and MMI, subject to compliance with article 41 of the UCI Law.</p> <p>Prohibited from investing in real estate, commodities and loans. UCITS may not acquire control over an issuing body. Eligibility of the asset must be assessed on a case-by-case basis.</p> | <p>Unrestricted by law.</p> <p>Certain limitations are applied by the CSSF.</p> |
| Risk diversification | <p>Strict risk diversification rules are laid down in the UCI Law, such as (non-exhaustive list):</p> <ul style="list-style-type: none"> • maximum 10 per cent in transferable securities issued by the same body; • maximum 20 per cent in deposits made with the same body; • total value of transferable securities held in the issuing bodies in each of which the UCITS invests more than 5 per cent shall not exceed 40 per cent of the value of its assets; • maximum 20 per cent in one other fund and maximum 30 per cent in funds other than UCITS; and • global exposure relating to derivative instruments may not exceed the total net value of the UCITS portfolio. | <p>The CSSF imposes the following (less stringent) risk diversification requirements (unless a derogation is granted by the CSSF during the approval process) (non-exhaustive list):</p> <ul style="list-style-type: none"> • maximum 20 per cent in securities issued by one issuer; and • maximum 20 per cent in one real estate property. |

| | | |
|-----------|---|---|
| Borrowing | Not permitted (unless on a temporary basis and subject to restrictions laid down in the UCI Law). | Permitted. Certain restrictions apply (non-exhaustive list): <ul style="list-style-type: none"> • maximum 300 per cent of the value of net assets; and • in relation to real estate, maximum of 50 per cent of the value of the property. |
|-----------|---|---|

Law stated - 13 April 2022

Tax treatment

What is the tax treatment of retail funds? Are exemptions available?

Retail funds are subject to an annual subscription tax of 0.05 per cent (or, to the extent that money market funds are concerned, 0.01 per cent) of their net asset value, subject to certain exemptions. A reduced subscription tax rate applies to the portion of net assets constituted by investments in sustainable activities: the reduced rate ranges from 0.04 per cent when at least 5 per cent of the fund's assets are sustainable activities to 0.01 per cent when at least 50 per cent of the fund's assets are sustainable activities. An auditor's report certifying the percentage of investments in sustainable activities is required.

Retail funds are exempt from income taxes and net wealth tax, and distributions they make to investors are exempt from withholding tax. Foreign investors disposing of their interest in a retail fund having a corporate legal form are exempt from non-resident capital gains taxation in Luxembourg. A retail fund set up as a fiscally transparent entity (rather than a corporate entity) could be subject to the reverse hybrid rules; however, the carve-out for collective investment vehicles should typically apply to these funds.

Participants in fund structures, like in any other industry, may have reporting obligations to the Luxembourg tax authorities under the Luxembourg implementation of the EU Directive 2018/822 of 25 May 2018 (DAC6) if they are involved in a reportable cross-border arrangement and there is no EU intermediary involved in designing or assisting with setting up such arrangement, or all intermediaries involved are exempt from the obligation to report such arrangement.

Law stated - 13 April 2022

Asset protection

Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Yes. The assets of a retail fund must be entrusted to a local depositary and the fund's assets must be segregated from the depositary's assets. The depositary shall be liable to the fund and its investors for the loss by the depositary or by a delegate of financial instruments held in custody. In the case of loss of a financial instrument held in custody, the depositary must return a financial instrument of an identical type or the corresponding amount to the fund without undue delay. There is no possibility for the depositary to discharge its liability.

The Law of 27 February 2018 on interchange fees and amending several laws relating to the financial sector provides

for the following depositary regime with respect to Part II UCI:

- Part II UCI marketed to retail investors on Luxembourg territory must appoint a UCITS-compliant depositary, regardless of whether they are managed by a Luxembourg or EU-authorized or registered AIFM or a non-EU manager;
- Part II UCI managed by a Luxembourg-authorized AIFM whose offering documents expressly forbid the marketing to retail investors on Luxembourg territory may appoint a depositary compliant with the AIFM Law; and
- Part II UCI managed by a Luxembourg or EU-registered AIFM or by a non-EU manager and whose offering documents explicitly forbid the marketing to retail investors on Luxembourg territory should appoint a depositary bank compliant with the Law of 13 February 2007 on specialised investment funds.

Law stated - 13 April 2022

Governance

What are the main governance requirements for a retail fund formed in your jurisdiction?

Regulated retail funds, following the successful completion of the CSSF examination phase, have to be registered on the relevant official list of supervised entities held by the CSSF.

Regulated retail funds have to apply for prior CSSF approval with respect to any change in their fund documentation (ie, constitutive document and offering document) or governance (eg, appointment of a new board member or replacement of depositary or auditor).

For a retail fund structured as a company, as well as for a management company or an AIFM, there must be a board of directors composed of at least three members, half of which are recommended to be Luxembourg residents.

For externally managed funds, administrative tasks such as accounting, record-keeping, net asset value calculation and the keeping of a register of shareholders or limited partners are in general entrusted to an administrative agent (established in Luxembourg and subject to supervision by the CSSF). When marketing funds to retail investors in Luxembourg, a paying agent has to be appointed to ensure that facilities are available in Luxembourg for making payments to shareholders and repurchasing or redeeming shares.

Retail funds must produce key information documents (key investor information document for UCITS and key information document for AIFs) to be provided to retail investors before they invest in the fund. Essential elements of the key information document must be kept up to date.

Law stated - 13 April 2022

Reporting

What are the periodic reporting requirements for retail funds?

UCITS and Part II UCI must produce annual and semi-annual reports, in addition to ongoing reporting to the CSSF.

Law stated - 13 April 2022

Issue, transfer and redemption of interests

Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

The rules governing the redemption of interests vary depending on the type of fund and its regulatory status. UCITS are obliged to redeem their shares or units at the investor's request. Part II UCI can, on the other hand, be established as closed-ended vehicles or otherwise restrict the terms on which interests can be redeemed.

Transfer restrictions (including, but not limited to, in respect of the transferee meeting certain eligibility criteria for a certain class of shares) may also be provided for in the fund's constitutive document. The circumstances for any suspension of share or units issuances or redemptions (or both) shall be provided for in the fund's constitutive document.

Law stated - 13 April 2022

NON-RETAIL POOLED FUNDS

Available vehicles

What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Non-retail funds can be organised as:

- specialised investment funds (SIFs) governed by the Law of 13 February 2007 on specialised investment funds (the SIF Law);
- reserved alternative investment funds (RAIFs) governed by the Law of 23 July 2016 on reserved alternative investment funds (the RAIF Law);
- investment companies in risk capital (SICARs) governed by the Law of 15 June 2004 on the investment company in risk capital (the SICAR Law); or
- unregulated alternative investment funds (AIFs) governed by the Companies Law and the Law of 12 July 2013 on alternative investment fund managers (the AIFM Law).

Law stated - 13 April 2022

Laws and regulations

What are the key laws and other sets of rules that govern non-retail funds?

The key laws and regulations applicable to non-retail funds are:

- the SIF Law;
- the RAIF Law; and
- the SICAR Law.

In addition, the following key laws and regulations may apply:

- the AIFM Law if the fund qualifies as an AIF;
- the Companies Law;
- the Financial Sector Law;
- the Luxembourg Civil Code;
- the Luxembourg laws, regulations and circulars issued by the Financial Sector Supervisory Commission (CSSF) regarding anti-money laundering (AML) and counter-terrorist financing (CTF);
- the General Data Protection Regulation;
- CSSF Regulation No. 16-07 regarding out-of-court complaint resolution (if the fund is regulated); and

- various guidelines issued by the European Securities and Markets Authority and CSSF regulations and circulars.

Law stated - 13 April 2022

Authorisation

Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

SIFs and SICARs require prior CSSF approval. RAIFs and unregulated AIFs may be established and marketed without prior CSSF approval. If marketing or pre-marketing is intended to be performed based on the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (AIFMD) passport, notification requirements must be met prior to commencing any marketing or pre-marketing activity.

Law stated - 13 April 2022

Marketing

Who can market non-retail funds? To whom can they be marketed?

Non-retail funds may be marketed by authorised AIFMs on the basis of the AIFMD passport or by authorised distributors on the basis of the Markets in Financial Instruments Directive (MiFID) passport. Investors in SIFs, SICARs and RAIFs must qualify as well-informed investors. In the European Economic Area (EEA), non-retail funds may be marketed to professional investors within the meaning of the AIFM Law.

Law stated - 13 April 2022

Ownership restrictions

Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

SIFs, SICARs and RAIFs are reserved to well-informed investors only. Unregulated AIFs may only be marketed under the AIFMD passport in the EEA to professional investors. Well-informed investors are institutional investors, professional investors or any other investor that:

- has confirmed in writing that it adheres to the status of well-informed investor; and
- either invests a minimum of €125,000 in the fund, or obtains an assessment certifying its expertise, experience and knowledge in adequately appraising an investment in the fund, made by:
 - a credit institution within the meaning of Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms;
 - an investment firm within the meaning of MiFID II;
 - a management company within the meaning of the Undertakings for Collective Investment in Transferable Securities Directive (Directive 2009/65/EC); or
 - in respect of a RAIF, an AIFM.

Directors and other persons who are involved in the management of the fund do not need to qualify as 'well-informed' to invest in the fund.

Professional investors within the meaning of the AIFMD are investors considered to be professional clients (or eligible, upon request, to be treated as such) within the meaning of Annex II of MiFID.

Managers and operators

Are there any special requirements that apply to managers or operators of non-retail funds?

Managers of non-retail funds qualifying as AIFs must be either authorised or registered as AIFMs in the EEA or meet the requirements of a third-country AIFM.

Although registered AIFMs are not subject to authorisation under the AIFM Law, they are not entirely exempt from the AIFM Law requirements. They must be registered with the CSSF, disclose the AIFs they manage (including their investment strategies) and regularly report to the CSSF the principal instruments in which they trade and relating investment exposures. Registered AIFMs may nonetheless elect to subject themselves to the AIFM Law (especially if they want to benefit from the AIFMD passport).

Law stated - 13 April 2022

Tax treatment

What is the tax treatment of non-retail funds? Are any exemptions available?

SIFs and RAIFs (except for RAIFs investing exclusively in risk capital) are subject to an annual subscription tax of 0.01 per cent, subject to certain exemptions. The subscription tax is payable quarterly; the taxable basis of the subscription tax is the fund's aggregate net assets as valued on the last day of each quarter. SIFs and RAIFs are exempt from taxes on income or capital gains (subject to the reverse hybrid rules – see below), as well as from net wealth tax. Any distributions (including dividends and liquidation surpluses) made by a SIF or RAIF to investors are not subject to withholding tax in Luxembourg.

A SICAR should be dedicated to risk capital investment only (most notably a classic private equity strategy of 'buy, develop and sell'). A SICAR that is structured as a tax-opaque entity is subject to the ordinary income tax regime. However, income from transferrable securities representing risk capital, as well as income derived from the transfer, contribution or liquidation thereof is exempt. All other income (eg, the income from risk capital not represented by a security) is fully subject to ordinary Luxembourg direct taxation rules. From a Luxembourg tax perspective, a SICAR organised as an opaque entity should qualify as a resident company for domestic and Luxembourg tax-treaty purposes and should benefit from the parent subsidiary directive. Other jurisdictions may take a different stance (see, eg, the Court of Justice of the EU's 'Danish cases').

Fiscally opaque SICARs are subject to a minimum net wealth tax. A SICAR formed as a fiscally transparent common limited partnership (SCS) or a special limited partnership (SCSp) is itself not liable for income taxes (subject to the reverse hybrid rules – see below), nor net wealth tax in Luxembourg. Neither dividends nor liquidation proceeds distributed by a SICAR (whether fiscally opaque or transparent) to investors are subject to withholding tax.

RAIFs investing exclusively in risk capital assets are taxed according to the same tax rules as those applicable to SICARs.

The tax treatment of unregulated AIFs depends on the legal form of the fund.

An SCS or SCSp is tax transparent for corporate income tax and net wealth tax purposes. It is normally also not subject to municipal business tax, provided its Luxembourg general partner does not hold an interest of 5 per cent or more in the partnership (and taking into account the fact that AIFs should not be conducting a commercial activity). However, as from 2022, these entities may become subject to corporate income tax if they fall within the scope of the reverse hybrid rules. These rules would result in the partnership being subject to corporate income tax if associated investors,

who hold in aggregate at least 50 per cent of the interests, voting rights or rights to profits in the partnership, are resident in jurisdictions that treat the (Luxembourg) partnership as opaque for tax purposes. Investors holding less than 10 per cent of interests and rights to profits in an AIF are deemed not to act together and should accordingly also not qualify as associated to the partnership for purposes of the reverse hybrid rules. For genuine fund structures these rules should not easily apply, as the threshold for triggering the rules is high and several exemptions are available. It is, however, important to monitor the threshold and potential impact of these rules continuously, depending on the investors base. Distributions by an SCS or SCSp are not subject to withholding tax.

Funds set up under other corporate forms are subject to the general tax regime. The consolidated corporate tax rate (corporate income tax, municipal business tax and solidarity surcharge) for companies in Luxembourg City is 24.94 per cent in 2022. The interest deduction limitation rule does not apply to financial undertakings, which includes AIFs. Net wealth tax is levied annually on the fair market value of the net assets of the company at a rate of 0.5 per cent for net assets up to €500 million, and 0.05 per cent for the portion of net wealth exceeding €500 million. There is a minimum net wealth tax. Distributions by an unregulated company are, in principle, subject to 15 per cent dividend withholding tax, unless a treaty or domestic rule allows for a reduction in the withholding tax rate or exemption from withholding tax.

Participants in fund structures, like in any other industry, may have reporting obligations to the Luxembourg tax authorities under the Luxembourg implementation of the EU Directive 2018/822 of 25 May 2018 (DAC6) if they are involved in a reportable cross-border arrangement and there is no EU intermediary involved in designing or assisting with setting up such arrangement, or all intermediaries involved are exempt from the obligation to report such arrangement.

Since 1 March 2021, the deduction of interest (and royalties) paid or owed to related enterprises (which are beneficial owners of the payment) established in a jurisdiction that is on the EU blacklist of non-cooperative jurisdictions is in principle denied. The rule does not affect Luxembourg funds that are not subject to income taxes, as they do not take deductions in the first place.

Law stated - 13 April 2022

Asset protection

Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The appointment of a Luxembourg-based depositary is required for SIFs, SICARs, RAIFs and unregulated AIFs that are managed by authorised AIFMs, and the fund's assets must be segregated from the depositary's assets. Unregulated AIFs that are managed by a registered AIFM are not required to appoint a depositary.

The depositary shall be liable to the fund and its investors for the loss of financial instruments held in custody either by itself or any third party to whom custody was delegated. In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of identical type or the corresponding amount to the fund without undue delay. The depositary may contractually discharge itself of its liability under certain circumstances.

There are two types of depositaries for private funds in Luxembourg: regulated banks and professional depositaries of assets other than financial instruments. A professional depositary may only be appointed by a fund that is closed for redemption for five years as from the date of the initial investments and that, pursuant to its main investment policy, generally does not invest in assets that shall be held in custody pursuant to the AIFM Law or generally invests in non-listed companies to eventually acquire their control.

Law stated - 13 April 2022

Governance

What are the main governance requirements for a non-retail fund formed in your jurisdiction?

Regulated funds, such as SIFs or SICARs, following the successful completion of the CSSF examination phase, must be registered on the relevant official list of supervised entities held by the CSSF.

For unregulated funds, such as RAIFs and unregulated AIFs, no prior authorisation from the CSSF is required before their set-up and there is no direct ongoing supervision by the CSSF.

A fund organised as a common fund (FCP) must be managed by a management company (ManCo) or AIFM, which is in charge of the governance of the FCP, under the oversight of the depositary in respect of certain aspects.

If organised as a SICAV or SICAR, the fund is managed by its governing body (ie, the board of directors or a general partner). In such a case, the fund may either appoint a ManCo or AIFM (ie, be externally managed) or manage itself (ie, internally managed AIF).

Luxembourg funds must have their central administration in Luxembourg.

Law stated - 13 April 2022

Reporting

What are the periodic reporting requirements for non-retail funds?

Both SICARs and SIFs must comply with certain disclosure requirements. They must, inter alia, produce an offering document and an annual report that they also need to communicate to the CSSF and to investors. These documents must include the information necessary for investors to be able to make an informed judgement on the proposed investment and the related risks. The annual report must be finalised within six months of the end of the financial period to which it pertains. Although the annual reporting obligations are in line with the common reporting obligations of commercial companies, neither the SICAR nor the SIF are subject to consolidated reporting.

The annual accounts must be audited, furthermore, by a certified Luxembourg independent auditor, which must inform the CSSF of serious violations of the applicable legal provisions or of any facts or decisions that could potentially threaten the continuity of the SICAR or SIF. A SICAR must submit half-yearly financial information to the CSSF. A SIF must submit yearly and monthly financial information to the CSSF.

Although a RAIF is neither subject to any prior regulatory approval nor to any ongoing direct supervision, it must qualify as an AIF and be managed by an authorised AIFM. It must also produce an offering document and an audited annual report.

In terms of reporting requirements, the AIFM Law contains obligations applicable to the manager of any AIF in scope. For SIFs and SICARs, those requirements will apply alongside the specific reporting rules of the SIF Law or SICAR Law that, to a large extent, are in line with the reporting rules of the AIFM Law. The AIFMD reporting framework mainly consists of annual reporting, disclosure to investors and regulators' requirements. Annual reports must be prepared at least once a year and within six months following the end of the financial year for each Luxembourg AIF managed or marketed in the EU. The annual reports will be audited and provided to investors upon request and to the CSSF. Disclosure requirements entails communication of certain information to be provided to investors before they invest in the fund (generally contained in an offering document). Such information relates, inter alia, to the AIF's investment strategy and objectives, techniques it may employ and associated risks, the use of leverage and collateral and the procedures for issue and sale of shares, units or interests. Further aspects that need to be disclosed are as follows:

- the AIF's valuation procedure and pricing methodology;
- a description of liquidity risk management and redemption arrangements;
- a description of all fees, charges and expenses and maximum amounts thereof, which are directly or indirectly borne by the investors;
- the policy on ensuring fair treatment of investors; and
- a description of any preferential treatment of investors.

In respect of reporting to the CSSF, a Luxembourg AIFM should regularly report on the principal markets and instruments in which its AIFs trade and is required to disclose certain additional information encompassing, inter alia, the following:

- the percentage of the AIF's assets that are subject to special arrangements arising from their illiquid nature;
- any new liquidity management arrangements;
- the AIF's risk management systems;
- information on the AIF's main categories of assets; and
- the results of any stress tests.

Frequency of reporting depends on the amount of assets under management.

Unregulated funds must report certain financial information to the Central Bank of Luxembourg in accordance with the BCL Circular 2018/241.

Following the publication of CSSF Circular 21/789 and Circular 21/790 on 22 December 2021, SIFs, SICARs and Luxembourg-authorized AIFMs (among other entities) will be required to complete a self-assessment questionnaire (SAQ) on a yearly basis regarding their compliance with the applicable legal and regulatory requirements. This new requirement will apply for financial years ending on or after 31 December 2021 (for authorized AIFMs and self-managed regulated funds) or 30 June 2022 (for regulated funds that are externally managed). Certain questions of the SAQ will be subject to a yearly review by the approved statutory auditor of the relevant entity, which will complete on that basis a separate report (the SAQ Report). The SAQ Report will be implemented gradually and be required for the financial years ending on or after 31 December 2021 for Luxembourg authorized AIFMs and 30 June 2023 for SIFs and SICARs.

Law stated - 13 April 2022

SEPARATELY MANAGED ACCOUNTS

Structure

How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts may be structured as funds of one, or via discretionary investment management agreements with an investment firm.

In practice, funds of one would, in the context of separately managed accounts, be structured either as a single-investor unregulated special limited partnership (SCSp) or as a dedicated compartment of a specialised investment fund (SIF) or a reserved alternative investment fund (RAIF).

Law stated - 13 April 2022

Key legal issues

What are the key legal issues to be determined when structuring a separately managed account?

The terms for an SCSp, including the duties and indemnification obligations of the manager, will be set out in a partnership agreement, and for a separately managed account, in an investment management agreement, which may both be negotiated by the investor.

The manager of a separately managed account is an agent (mandataire). In addition to any specific financial regulations applicable depending on the status of the manager (the Law of 12 July 2013 on alternative investment fund managers (the AIFM Law), the Financial Sector Law, etc), the agency (mandat) is subject to articles 1984 to 2010 of the Luxembourg Civil Code and the agent (mandataire) must act strictly within the scope of its appointment and report to the principal (mandant) on a regular basis.

Law stated - 13 April 2022

Regulation

Is the management or marketing of separately managed accounts regulated in your jurisdiction?

A regulated fund with a dedicated compartment for each investor will usually fall under the scope of the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (AIFMD). A single-investor SCSp will, in principle, and except if the vehicle is formed as a fully AIFMD-compliant AIF, not qualify as an AIF, subject to a condition that the vehicle has been formed at the express request of the investor (ie, reverse solicitation) and its constitutive document precludes the admission of other investors.

The marketing of funds of one will depend on the AIF status of the relevant fund, the licence and the country of origin of the manager.

The management of separately managed accounts is usually deemed discretionary portfolio management, which (except in respect of funds qualifying as AIFs and in respect of which the portfolio management done by the relevant fund's alternative investment fund manager (AIFM) is a regulated activity falling within the scope of the Financial Sector Law, implementing Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II) rules.

Law stated - 13 April 2022

GENERAL

Proposed reforms

Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

Fund managers must comply with Regulation (EU) 2019/2088 on the sustainability-related disclosures in the financial services sector and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Taxonomy), which impose new disclosure requirements relating to sustainability since 10 March 2021, despite the fact that the implementing technical standards have not been finalised as yet.

Since 2 August 2021, new pre-marketing rules provided for under Directive (EU) 2019/1160 and Regulation (EU) 2019/1156 have been transposed into Luxembourg, introducing a new notification requirement for pre-marketing of

alternative investment funds (AIFs) to professional investors in Luxembourg in order to test their interest. Under the new pre-marketing rules, EU alternative investment fund managers (AIFMs) that engage in pre-marketing activities will be required to notify their home member state national competent authority (NCA) within two weeks of having commenced pre-marketing by means of an 'informal letter'. The home member state NCA will further notify all relevant host member state authorities. Activities beyond the scope of the new harmonised definition of pre-marketing will be considered as marketing and will require a marketing notification under articles 31 and 32 of the Alternative Investment Fund Managers Directive (Directive 2011/61/EU).

The Financial Sector Supervisory Commission (CSSF) has further extended to non-EU AIFMs pre-marketing AIFs into Luxembourg the pre-marketing regime applicable since 2 August 2021 to EU AIFMs in order to create a level playing field between EU AIFMs and non-EU AIFMs.

In addition to the new definition of pre-marketing, Directive (EU) 2019/1160 and Regulation (EU) 2019/1156 introduce, inter alia, uniform requirements for marketing materials and rules for 'de-notification', which apply to undertakings for collective investment in transferable securities (UCITS) and AIFs.

Foreign UCITS or AIFM marketing AIFs to retail investors will no longer be required to provide local facilities and appoint local agents in Luxembourg. The managers of funds marketed to retail investors may provide the facilities (procedures for subscriptions, redemptions and payments to investors, making available information required by law) by other means (eg, electronically or via other distance communications).

Law stated - 13 April 2022

Public listing

Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The Luxembourg Stock Exchange (LuxSE) operates via the two following markets:

- the regulated market (within the meaning of Directive 2014/65/EU on markets in financial instruments, as amended (MiFID II), called Bourse de Luxembourg; and
- the Euro MTF market, that is a multilateral trading facility (MTF - within the meaning of MiFID II), which provides an alternative market to the Regulated Market (the Euro MTF).

Moreover, within the framework of the Prospectus Regulation, the LuxSE has established a professional segment for each of the two markets it operates. The professional segments are specifically designed for issuers targeting professional clients (within the meaning of MiFID II) only. Securities admitted to the professional segments are not accessible to retail investors. Trading on the professional segments is only allowed between professional investors.

Issuers of securities on the regulated market are subject to the obligations of various European regulations and directives that have been implemented in Luxembourg law, in terms of prospectus approval and ongoing disclosure obligations.

The CSSF is responsible for approving prospectuses for the admission to trading on the regulated market. Listing of securities on the regulated market is subject to the approval and the publication of a prospectus in accordance with the provisions of Regulation (EU) No. 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, as amended (the Prospectus Regulation). However, the requirements of the Prospectus Regulation and so the obligation to publish a prospectus do not apply to open-ended funds that are expressly excluded from the scope of the Prospectus Regulation.

Issuers whose prospectuses have been approved in accordance with the Prospectus Regulation may benefit from the

European passport regime for the admission to trading of their securities on one or more regulated markets operated in any member states.

The Euro MTF was launched to offer an alternative market to issuers. Listing on the Euro MTF market does not require the publication of a Prospectus Regulation compliant prospectus. Prospectuses for an admission to trading on the Euro MTF must be drawn up in accordance with the rules and regulations of the LuxSE (the Rules and Regulations). In the case of a listing on the Euro MTF, the LuxSE is responsible for approving the prospectus. The only exemption from this rule applies to open-ended funds that are accepted by the CSSF for distribution in Luxembourg. The reason for that is that these type of issuers are already for the purposes of the distribution required to draw up a prospectus and have it approved by the CSSF under the relevant sector specific legislation.

The ongoing and periodic disclosure requirements applicable to issuers of securities depend on the market where the securities are admitted to trading.

For issuers whose securities are admitted to trading on the regulated market, these obligations mainly arise from the Law of 11 January 2008 on transparency requirements for issuers of securities, as amended (Transparency Law), the Rules and Regulations and Regulation (EU) No. 596/2014 on market abuse, as amended (MAR). Open-ended funds are however excluded from the scope of the Transparency Law. Furthermore, issuers whose securities are admitted to trading on the Euro MTF do not fall within the scope of the Transparency Law. However, they will need to comply with the ongoing and periodic obligations detailed in the Rules and Regulations and the MAR.

Such ongoing and periodic disclosure obligations include, for instance, the provision of annual reports and interim financial statements as well as the disclosure of all other important information affecting the securities or the issuer. The ongoing disclosure obligations applicable to issuers whose securities are admitted to trading on the regulated market are more stringent than those applicable to issuers whose securities are admitted to trading on the Euro MTF.

The LuxSE also offers the possibility for issuers to list their securities on its Securities Official List (SOL) without admission to trading. The SOL is designed for issuers looking for visibility without the possibility of having their securities traded. Securities listed on the SOL are not subject to the extensive regulatory framework applicable to securities admitted to trading on trading venues, such as the regulated market and the Euro MTF. Ongoing disclosure obligations will, in this case, be limited to certain communication requirements to the LuxSE as set out in the SOL rulebook.

Law stated - 13 April 2022

Overseas vehicles

Is it possible to redomicile an overseas vehicle in your jurisdiction?

It is possible to redomicile an overseas vehicle into Luxembourg if it is allowed under the law of the country where the overseas vehicle is domiciled.

Law stated - 13 April 2022

Foreign investment

Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Other than certain marketing restrictions, and international financial sanctions, prohibitions and restrictive measures with respect to the fight against terrorist financing, there are no special rules in this regard.

Funds investing in derivatives

Are there any special requirements in your jurisdiction relating to funds investing in derivatives?

Funds may invest in derivatives subject to compliance with the following provisions:

- article 41 of the Law of 17 December 2010 on undertakings for collective investment (UCI Law) for undertakings for collective investment in transferable securities (UCITS);
- CSSF circulars 91/75 and 02/80 for Part II of the UCI Law; and
- CSSF circular 07/309 for non-retail funds organised as specialised investment funds (SIFs) and SIF-like reserved alternative investment funds (RAIFs).

Investment companies in risk capital (SICARs) may only use derivative financial instruments for hedging purposes.

Funds investing in derivatives must comply with the clearing obligations, reporting obligations and risk and mitigation techniques set out in Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on over-the-counter derivatives, central counterparties and trade repositories (EMIR).

CSSF circular 18/698 includes detailed information on the obligations of the Luxembourg managers to monitor compliance with their obligations under EMIR.

Credit institutions, investments firms and trading venue operators shall comply with the provisions set out in Regulation (EU) No. 600/2014 on markets in financial instruments.

Law stated - 13 April 2022

UPDATE AND TRENDS

Recent developments

Are there any other current developments or emerging trends in your jurisdiction that should be noted? Please include reference to world-wide regulatory concerns, such as restrictions on foreign ownership in strategic industries, high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'.

The overhaul of the limited partnership regime in 2013 has produced significant effects, which have been accelerated since the successful introduction of the reserved alternative investment fund in 2016.

The impressive development of the alternative fund sector in Luxembourg over recent years has also been fuelled by a combination of other factors, among them the coming into effect of Directive 2011/61/EU of the European Parliament and of the Council on alternative investment fund managers (AIFMD) in 2013 and Brexit. As a result, on the one hand investors' appetite for AIFMD-compliant products has grown significantly, and on the other managers have been using Luxembourg increasingly as their hub, both for the formation of their vehicles and for the pooling of resources.

This development has also led to an increased complexity of Luxembourg fund structures, comprising, in the same jurisdiction, various layers, including parallel entities, feeders, co-investment and carry entities, depending on investors' or managers' needs.

Law stated - 13 April 2022

Jurisdictions

| | | |
|---|-----------------------|------------------------------|
|  | Cayman Islands | Loeb Smith Attorneys |
|  | Germany | POELLATH |
|  | Greece | Souriadakis Tsibris |
|  | Ireland | Dillon Eustace LLP |
|  | Italy | Legance - Avvocati Associati |
|  | Japan | TMI Associates |
|  | Luxembourg | Loyens & Loeff |
|  | Malta | Ganado Advocates |
|  | Monaco | Gordon S. Blair Law Offices |
|  | Portugal | VdA |
|  | Spain | Alter Legal |
|  | Sweden | Vinge |
|  | Switzerland | Walder Wyss Ltd |
|  | Taiwan | LCS & Partners |
|  | United Kingdom | Morgan, Lewis & Bockius LLP |
|  | USA | Morgan, Lewis & Bockius LLP |