

Luxembourg implements the modernisation of its fund toolbox

On 11 July 2023, the Luxembourg legislator has adopted the bill of Law N°8183 (the Bill) introduced by the Ministry of Finance on 27 March 2023 amending the following laws:

- the Law of 15 June 2004 relating to the investment company in risk capital (**SICAR**), as amended (the **SICAR Law**);
the Law of 13 February 2007 relating to specialized investment funds (**SIFs**), as amended (the **SIF Law**);
- the Law of 17 December 2010 on undertakings for collective investment (**UCIs**), as amended (the **UCI Law**);
- the Law of 23 July 2016 on reserved alternative investment funds (**RAIFs**), as amended (the **RAIF Law**, and together with the SICAR Law, the SIF Law and the UCI Law, the **Product Laws**); and
- the Law of 12 July 2013 on alternative investment fund managers (**AIFMs**), as amended (the **AIFM Law**).

The law of 21 July 2023 amending the Product Laws and the AIFM Law as adopted by the Luxembourg legislator further to the Bill (the **Law**) has been published in the Official Journal on 24 July 2023 and will enter into force on 28 July 2023.

The Law brings substantial improvements to the Luxembourg toolbox for investment funds and their managers as well as greater consistency between the Product Laws, with a view to further

increase the competitiveness of the Luxembourg fund centre, including in the context of the democratization of alternative investment funds, as evidenced by the increased interest for funds under Part II of the UCI Law (**Part II UCIs**), as well as the European Long Term Investment Fund (**ELTIF**) under Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules (**ELTIF 2.0**).

Below is an overview of some of the changes, which are deemed most relevant for fund managers.

1. Amendments related to Product Laws

1.1 Funds under Part II of the UCI Law

1.1.1 Extension of available legal corporate forms

The Law now extends the legal forms available for Part II UCIs organised as investment companies with variable capital (*sociétés d'investissement à capital variable*, **SICAVs**), thus providing an increased flexibility to fund initiators and managers for structuring the governance of their funds.

While as of today, Part II UCIs organised as SICAVs can only be incorporated as a public limited liability company (*société anonyme*, **SA**), the Law extends the choice of legal forms to the corporate partnership limited by shares (*société en commandite par actions*, **SCA**), the common and special limited partnerships (*société en commandite simple/spéciale*, **SCS/SCSp**), the private limited liability company (*société à responsabilité limitée*, **SARL**), as well as the cooperative organised as a public company limited by shares (*société cooperative organisée sous forme de société anonyme*, **SCoSA**).

However, with a view to increase the level of retail investor protection, such funds must be managed by an alternative investment fund manager authorised under the AIFM Law to the extent they are formed under the legal form of an SCA, SCS/SCSp, SARL or SCoSA.

1.1.2 Free determination of the issuance price

Under the Law, closed-ended Part II UCIs structured as SICAVs or common funds (*fonds communs de placement*, **FCPs**) now have the possibility to set in their constitutive

documents the rules for the determination of the issue price of their shares/interests, allowing therefore the possibility to not use the Net Asset Value (**NAV**).

1.1.3 Clarification on the marketing exemptions for foreign AIFs

The Law extends the exemption applicable to foreign alternative investment funds (**AIFs**) marketed by an AIFM to professional investors in Luxembourg under the AIFM Law from being supervised in their home State to foreign AIFs marketed to retail investors in Luxembourg, thus excluding the marketing of foreign AIFs to retail investors from the scope of the UCI Law and subjecting it solely to the AIFM Law.

2. Other changes to Product Laws

2.1 Lowering the eligibility threshold for “Well Informed Investors”

The Law amends the definition of “Well Informed Investors” contained respectively in the SICAR Law, the SIF Law and the RAIF Law to harmonise investor eligibility conditions within the Product Laws, in line with European Union standards that can be found in the European Social Entrepreneurship Funds (**EuSEFs**) and European Venture Capital Fund (**EuVECA**) regulations. The minimum investment threshold regarding well-informed investors, which do not qualify as professional or institutional investors, has been reduced from EUR 125,000 to EUR 100,000.

2.2 Doubling the timeframe for reaching the minimum regulatory capital

As per the Law, SICARs, SIFs and RAIFs will now have 24 months, while Part II UCIs will have 12 months, to reach their minimum regulatory capital.

2.3 Increased flexibility regarding notice period of the depositary agreement and suspension of redemptions of shares/interests

In respect of SICARs, SIFs, Part II UCIs and UCITS, the replacement of the depositary no longer has to occur within 2 months following the termination of the depositary agreement. The Law provides that the depositary agreement shall provide a notice period allowing for the depositary’s replacement and, should no new depositary be appointed, the Luxembourg regulator (the *Commission de Surveillance du Secteur Financier* – **CSSF**) will withdraw the fund from the official list where it has been registered by the CSSF, leading to its liquidation.

In respect of SICARs, SIFs, Part II UCIs and UCITS, the Law further provides that the last appointed depositary shall take all necessary measures in the interest of the fund’s unitholders, which includes the obligation to retain the fund’s account opened and open any account required

for assets safe-keeping until completion of the fund’s liquidation. Such an amendment enshrines into the SICAR Law, the SIF Law and the UCI Law an already established administrative practice from the CSSF in this respect, thus increasing the level of investor protection.

The Law further extends to UCITS, Part II UCIs and SIFs organised as SICAVs the obligation, which is already imposed on UCITS, Part II UCIs and SIFs organised as FCPs, to suspend the subscriptions and redemptions of shares/interests where there is no longer a depositary, or in case of its liquidation, declaration of bankruptcy, suspension of payments, arrangement with the creditors or management supervision. An exception is provided where such actions are necessary for the purpose of liquidation proceedings.

The Law has, however, not extended the possibility to suspend subscriptions and redemptions of shares/interests when there is no longer a management company of UCITS, Part II UCIs and SIFs organised as SICAVs, as they could be converted into and authorized by the CSSF as self-managed investment firms contrary to FCPs due to their absence of legal personality.

2.4 Notarial acknowledgement no longer required for RAIFs established by public deed

Pursuant to the Law, the requirement for a notary to acknowledge that a RAIF has been established and an AIFM duly appointed within five (5) days from its establishment is only maintained for RAIFs formed under private deed.

2.5 Obligation to maintain up-to-date information on the RAIF list with the RCS

The Law introduces a new obligation imposed on RAIFs to inform the RCS within twenty (20) business days following an amendment to any information communicated with a view to be registered on the RAIF list held by the RCS.

2.6 Confirmation that RAIFs can be marketed to non-professional investors in Luxembourg

The Law clarifies that RAIFs can also be marketed to non-professional investors in Luxembourg, provided they qualify as well-informed investors. Indeed, currently, the CSSF FAQ on the AIFM Law (Question 11 (D), which is expected to be updated following the adoption of the Law) sets out that with respect to non-regulated Luxembourg AIFs, the marketing is limited to professional investors in the territory of Luxembourg.

2.7 Rules on judicial and voluntary liquidation for SICARs and SIFs

The Law adds a few new rules to the current legal framework regarding judicial and voluntary liquidations of SIFs and SICARs, as further described under Sections “3.4” and “3.5”.



3. Amendments related to AIFMs and Management Companies

3.1 New requirements for Management Companies' own funds

The Law introduces new own fund requirements for management companies of UCIs (**Management Companies**) in line with the own fund requirements applicable to AIFMs under the AIFM Law. Management Companies are now obliged to invest their own funds in liquid assets or in assets that are easily convertible in short term liquidities and should refrain from taking speculative positions with their own funds. This enshrines the CSSF practice which already requested Management Companies to comply with those requirements.

In addition, the Law provides that, if the requirements related to own funds are not met by the Management Companies governed by Chapter 16 of UCI Law, the latter may be granted an additional deadline by the CSSF in order to comply with the legal requirements or to cease its activities.

3.2 Extension of certain rules of conduct

The Law extends the rules of conduct applicable to Management Companies subject to Chapter 15 of the UCI Law to those subject to Chapter 16 of the UCI Law which do not also qualify as AIFMs. The latter are now required to, inter alia, act honestly and fairly, with due skill, care and diligence, in the best interest of the fund they manage and the integrity of the market.

3.3 Specification of the notion of 'dirigeant' of Management Companies

One of the conditions to be authorised by the CSSF as a Management Company under the UCI Law is that its 'dirigeants' shall be of sufficiently good repute and be sufficiently experienced in relation to the UCIs to be managed. Prior the adoption of the Law, it was however unclear whether the notion of 'dirigeants' in

this context referred to the persons representing the Management Company pursuant to its constitutive documents, or to the persons effectively conducting the business of the Management Company. To alleviate any risk of confusion, the Law has replaced the notion of 'dirigeants' by members of the governing body of the Management Company, further specifying that, with respect to public limited company (*société anonyme*), it should be understood as the board of directors (*conseil d'administration*) or as the management board (*directoire*) and supervisory board (*conseil de surveillance*), as applicable.

3.4 Rules on judicial liquidation for AIFMs and Management Companies

The Law adds a few new rules to the current legal framework regarding the withdrawal of the approval by the CSSF and the liquidation of AIFMs and Management Companies. The same rules have also been included in the SIF Law and the SICAR Law and are applicable to, respectively, SIFs and SICARs.

The Law provides that once the AIFMs and Management Companies receive the notification of the withdrawal from the official CSSF list, they are not allowed to proceed to any legal acts, except conservatory acts, until the date of the decision pronouncing the liquidation, unless they are authorised to do so by a supervisory commissioner. One or more supervisory commissioner(s) are appointed by the District court (*Tribunal d'Arrondissement*) for this purpose at the request of the CSSF or any interested party. The supervisory commissioner(s) shall demonstrate sufficient professional expertise to exercise their functions. Until the commissioner(s) have been appointed by the District court, the CSSF is in charge of the supervision activity.

Any acts or decisions other than conservatory acts by the AIFM or the Management Company requires the prior written authorisation by the commissioner(s), on penalty of nullity. The District court may limit the scope of the acts subject to the commissioner(s)' approval or may subject

any act to the decision of the corporate body of the AIFM or the Management Company in its discretion. The commissioner(s) exercises this function until the dissolution and opening of liquidation of the entity by the District court. In case of liquidation, the court must receive a report from the supervisory commissioner(s) regarding the usage of the AIFM or the Management Company's assets prior to the designation of the liquidator.

when acting on behalf of the [investment firm] and it 'shall monitor the activities of their tied agents so as to ensure that they continue to comply with this Law when acting through tied agents' (see Art. 37-8 of the Law of 5th April 1993 on the financial sector, as amended).

3.5 Voluntary liquidation for AIFMs and Management Companies

The Law introduces new rules on the voluntary liquidation of AIFMs and aligns the rules applicable to Management Companies subject to Chapter 15 to the ones subject to Chapter 16 of the UCI Law. It provides that, for the purpose of the liquidation, the AIFM or the Management Company is deemed to exist after the dissolution and remain under the surveillance of the CSSF. The Law further requires that the liquidators must be approved by the CSSF and that the decision to liquidate taken by the AIFM can only take place once all management activities have come to a halt. Additionally, any documentation published by the Management Company, which finds itself in liquidation procedures, must mention that it is being liquidated. Moreover, in such a case, AIFMs and Management Companies must request the CSSF approval for the appointment of an (external) statutory auditor which is not the already appointed auditor.

Furthermore, at the end of the liquidation proceedings, a report on the liquidation shall be established by a certified statutory auditor. The report shall be presented to the AIFM's or Management Company's general meeting at which the liquidators report on the use of corporate assets and submit the accounts and other supporting documents. The same meeting shall resolve on the approval of the accounts of the liquidation, the discharge and the closure of the liquidation. This requirement also applies to SIFs and SICARs.

3.6 AIFMs allowed to use tied agents

The Law introduces the possibility for AIFMs that are established in Luxembourg to appoint tied agents as defined by Article 1, point 1) of the Law of 5 April 1993 on the financial sector, as amended, which must comply with the duties laid down in such law. Amongst others, the AIFM *'remains fully and unconditionally responsible for any action or omission on the part of the tied agent*

4. Exemption of subscription tax extended to ELTIFs and PEPPs

The Law contains an exemption from the subscription tax for SIFs, RAIFs and Part II UCIs authorised as ELTIFs under ELTIF 2.0 or if they are reserved to individual investors acting through a pan-European Personal Pension Product (**PEPP**) established under Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019.

Our team

Marjorie André

Partner

T +352 466 230 273

M +352 691 963 295

E marjorie.andre@loyensloeff.com



Veronica Aroutiunian

Partner

T +352 466 230 386

M +352 691 963 167

E veronica.aroutiunian@loyensloeff.com



Christophe Boyer

Partner

T +352 466 230 442

M +352 691 963 160

E christophe.boyer@loyensloeff.com



Marc Meyers

Partner

T +352 466 230 306

M +352 691 963 106

E marc.meyers@loyensloeff.com



Jérôme Mullmaier

Partner

T +352 466 230 269

M +352 691 963 158

E jerome.mullmaier@loyensloeff.com



Frank van Kuijk

Partner

T +1 212 437 9338

M +646 734 0620

E frank.van.kuijk@loyensloeff.com



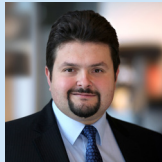
Vassiliyan Zanev

Partner

T +352 466 230 257

M +352 691 963 090

E vassiliyan.zanev@loyensloeff.com



Disclaimer

Although this publication has been compiled with great care, Loyens & Loeff Luxembourg, partnerships, persons and practices trading under the name 'Loyens & Loeff', cannot accept any liability for the consequences of making use of the information contained herein. The information provided is intended as general information and cannot be regarded as advice. Please contact us if you wish to receive advice on this specific topic that is tailored to your situation.



One Firm: Law & Tax, we are proud of the unique service we offer multinational enterprises, financial institutions, investors and High Net-Worth Individuals from our home markets of the Netherlands, Belgium, Luxembourg and Switzerland. With offices in key financial centres and a global partner network, we reach out and support you wherever you need.

As a leading law firm in continental Europe, we have a particular focus on Private Equity & Funds, Real Estate, Life Sciences & Healthcare and Energy & Infrastructure. We integrate tax, civil law and notarial expertise to support you with smart and efficient solutions through advice, transactions and litigation.

As a trusted partner, the best advice is not just about expertise, but also about cultivating an in-depth understanding of your business and finding the best solution for you. This commitment is fundamental to our success.

Join us in going **Further. Better. Together.**

Amsterdam, Brussels, London, Luxembourg, New York, Paris, Rotterdam, Tokyo, Zurich