

HOW TO SET UP

A NON-UCITS (“PART II”) FUND

DESCRIPTION

A company may wish to set up a fund under Part II of the Luxembourg law of 17 December 2010 on undertakings for collective investment (UCIs). Such funds can be sold to all types of investors and include: UCITS of the closed-end type, funds which do not meet the eligible investment criteria for a UCITS or which are not for sale to the public within the European Union.

Part II of the Law is widely used to create alternative investment funds (AIF). It contains no provisions regarding investment or borrowing rules. Such rules are specified in CSSF circulars or determined on a case-by-case basis by the CSSF.

LEGAL FORM

A UCI may be constituted as:

- an open or closed ended common contractual fund (*fonds commun de placement* – FCP). The FCP has no legal personality and must be managed by a management company (*société de gestion*);
- an open ended investment company (*société d’investissement à capital variable* – SICAV) or a closed ended investment company (*société d’investissement à capital fixe* – SICAF). A SICAV/F must appoint a management company or designate itself as “self-managed”.

The SICAV/F may be structured in one of the following legal forms:

- SA – *société anonyme* (public limited company);
- Sàrl – *société à responsabilité limitée* (private limited company);
- SCA – *société en commandite par actions* (partnership limited by shares);

- SCS – *société en commandite simple* (limited partnership);
- SCSp – *société en commandite special* (special limited partnership).

An FCP or a SICAV may be set up as an umbrella fund with multiple compartments. The constitutional documents must expressly provide for that possibility and the prospectus must describe the investment policy of each compartment.

AUTHORISATION AND SUPERVISORY AUTHORITY

A UCI must be authorised by the *Commission de surveillance du secteur financier* (CSSF) before commencing its activity. It is also subject to ongoing supervision by the CSSF.

LEGAL FRAMEWORK

UCIs other than UCITS are governed by Part II of the Law of 17 December 2010, unless they are governed by a specific product law (SIF law, SICAR law). Chapter 11 defines the legal requirements for a common fund (FCP) and Chapter 12 for an investment company (SICAV/SICAF).

The legal framework for a UCI management company is set out in Part IV of the Law and general provisions, including supervision and obligations to shareholders and unitholders, in Part V.

The managers of alternative investment funds (AIFM) are regulated by Directive 2011/61/EU, which was transposed into Luxembourg law by the Law of 12 July 2013 on AIFM. Exemptions are granted to certain actors and AIFM managing smaller AIF.

CAPITAL BASE

The net assets of an FCP may not be less than EUR 1,250,000. This minimum must be reached within a period of six months following its authorisation.

The minimum capital of a self-managed SICAV/SICAF may not be less than EUR 300,000 at the date of authorisation. The capital of any SICAV/SICAF must reach EUR 1,250,000 within a period of six months following its authorisation.

APPOINTMENT OF AN AIFM

UCIs are required to appoint an AIFM, unless they benefit from the limited exemptions provided by the AIFM law. The AIFM can be established in Luxembourg, in another EU Member State or in a third country. They may either appoint an external AIFM or choose to be internally managed. In the latter case, the UCI will itself be considered as the AIFM and will have to comply with all the legal obligations of the AIFM law.

UCIs managed by an EU authorised AIFM benefit from a passport allowing AIFMs to market the UCI's shares, units or partnership interests to professional investors within the EU through a regulator-to-regulator notification regime.

Management companies authorised under the UCITS Directive may apply for authorisation as AIFM (and vice versa) in order to manage both UCITS and AIF.

Exempted (smaller) AIFM are nevertheless subject to registration requirements, or can decide to opt for a formal authorisation to benefit from the passport.

CENTRAL ADMINISTRATION

The central administration of a UCI must be in Luxembourg.

A common fund must be managed by a management company which complies with the conditions set out in Chapter 16 of Part IV of the Law. Both the seat and the head office of the management company must be located in Luxembourg.

A SICAV may either be self-managed or it may designate a management company, as above. SICAVs may only manage assets of their own portfolio and may not manage assets on behalf of a third party.

DEPOSITARY

The eligible depositaries are Luxembourg established credit institutions but also Luxembourg established investment firms fulfilling certain requirements laid down by the Law of 5 April 1993 on the financial sector as amended. In addition to the type of depositaries described above, a new type of Luxembourg depositary, namely the professional depositary of assets other than financial instruments, has been introduced by the Law of 12 July 2013.

PROFESSIONAL STANDING AND EXPERIENCE

The conducting officers of the UCI and of the depositary must be of good repute and have sufficient experience in relation to the type of UCI concerned. "Conducting officers" (*dirigeants*) are persons who represent the UCI or the depositary or who effectively determine the conduct of the activities of the UCI.

EXTERNAL AUDITING

The annual report must be audited by an authorised external auditor with appropriate professional experience. The auditor is appointed and remunerated by the UCI.

SPECIFIC ASPECTS: EUVECA AND EUSEF

UCIs that qualify as European Venture Capital (EuVECA) or European Social Entrepreneurship (EuSEF) Funds have the option of being subject to the EuVECA or EuSEF regulation, respectively. Both regimes introduce a passport that permits the marketing of the fund to EU-based eligible investors.

AUTHORISATION PROCEDURE

The requirements for authorisation are set out in Chapter 19 of the law.

The draft documents and information to be submitted to the CSSF for approval are set out in Articles 129-132 and 150-158 of the 2010 Law and Chapter K of CSSF Circular 91/75. The contents of the full prospectus are set out in Schedule A of Annex I to the 2010 law and in Chapter L of CSSF Circular 91/75. Where a SICAV is self-managed, the application must be accompanied by a description of its organisational structure.

The above-mentioned documents are generally compiled and submitted to the CSSF with the assistance of a firm of lawyers/accountants and/or a bank in Luxembourg. Authorised UCIs are entered by the CSSF on a list which is published in the official gazette (the *Mémorial*). A UCI may start business as soon as authorisation has been granted.

Useful information sources

www.cssf.lu

Commission de Surveillance du Secteur Financier
(Luxembourg financial supervisory authority)

www.alfi.lu

Association of the Luxembourg Fund Industry