

# Legal 500

## Country Comparative Guides 2024

### Luxembourg

### Alternative Investment Funds

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This country-specific Q&A provides an overview of alternative investment funds laws and regulations applicable in Luxembourg.

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# Luxembourg: Alternative Investment Funds

## 1. What are the principal legal structures used for Alternative Investment Funds?

An Alternative Investment Fund ("AIF") is defined as "a collective investment undertaking, including investment compartments thereof, which raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors (...)" in article 1(39) of the Luxembourg act of 12 July 2013 on alternative investment managers, as amended (the "AIFM Act"). The AIFM Act transposed Directive 2011/61/EU on Alternative Investment Fund Managers ("AIFMD" and "AIFMs") into Luxembourg law but does not include restrictions on legal structuring in addition to AIFMD. Consequently, (i) any company, partnership or other structure under the Luxembourg act of 10 August 1915 on commercial companies, as amended (the "Companies Act") will qualify as an AIF if it falls within the scope of this definition and (ii) in addition structures that are not qualifying under the Companies Act can qualify as AIFs as well (please see below).

Common limited partnership (*société en commandite simple*, SCS) and special limited partnership (*société en commandite spéciale*, SCSp) are the two legal forms often used by Luxembourg AIFs, especially for investments in venture capital, private equity and private debt.

Luxembourg allows for additional structuring by submitting the AIF to one of the fund specific product laws (the "Fund Product Laws"):

| Fund Type    | Fund Product Law   | Investors  | Assets  | Supervised   |
|--------------|--|--|---|--|
| Part II UCIs | Part II of the act of 17 December 2010 on undertakings for collective investment, as amended | Any type of investor (including retail investors)                          | Any type of asset   | Yes, subject to supervision by the <i>Commission de Surveillance du Secteur Financier</i> ("CSSF") |
| SIF          | Act of 13 February 2007 on specialised investment funds, as amended                          | Restricted to Well-Informed Investors (see below, item 29), not all retail | Any type of asset   | Yes, subject to supervision by the CSSF  |
| SICAR        | Act of 15 June 2004 on investment companies in risk capital, as amended                      | Restricted to Well-Informed Investors (see below, item 29), not all retail | Exclusively invest in securities representing risk capital  | Yes, subject to supervision by the CSSF  |
| RAIF         | Act of 23 July 2016 on reserved alternative investment funds, as amended                     | Restricted to Well-Informed Investors (see below, item 29), not all retail | Either structured (i) like a SIF or (ii) like a SICAR, i.e., investing in securities representing risk capital other than an FCP (see below, "Risk Capital RAIF") | No, but must appoint an AIFM authorised European Economic Area ("EEA") and an "Authorized AIFM"    |

While SIFs were a very popular fund vehicle in the past, the most popular fund vehicle under the Fund Product Laws is currently the RAIF. While RAIFs may be formed as

common funds (*fonds commun de placement*, "FCP"), most RAIFs are formed either as investment companies with variable capital and adopting the legal form of a public limited liability company (*société anonyme*, "SA") or a corporate partnership limited by shares (*société en commandite par actions*, "SCA") or established as SCSp.

Since the adoption of Regulation (EU) 2023/606 that amends Regulation (EU) 2015/760 on European long term investment funds ("ELTIF") on 15 March 2023 (the "ELTIF Regulation"), Part II UCIs which can be marketed to any type of investor including retail investors are increasingly popular. The law of 28 July 2023 amended all Fund Product Laws and the AIFM Act and inter alia now allows a Part II to use the legal forms of SCA, SCS or SCSp.

## 2. Does a structure provide limited liability to the investors? If so, how is this achieved?

The general principles of corporate and civil liability under the Companies Act and the Luxembourg civil code respectively as well as specific liability regimes under the Fund Product Laws and the AIFM Act apply to the shareholders, partners, unitholders, managers, and directors of the relevant AIF. Depending on which role the sponsor and/or manager takes, liability applies accordingly.

In case of delegation by the AIF or the AIFM to an entity of the sponsor/manager, contractual liability can be limited to the extent permitted under the AIFM Act and, where applicable, the relevant Fund Product Law. Liability for gross negligence and fraud cannot be contractually limited.

Where the AIF adopts certain legal forms under the Companies Act (e.g., SA), it is worth mentioning that directors will in addition be liable under the Companies Act toward the AIF for the execution of their mandate and for any misconduct in the conduct of the AIF's management. They are jointly and severally liable towards the AIF or any third party for damages resulting from the violation of the Companies Act or the AIF's articles of incorporation. They may be discharged from such liability if they were not a party to the violation if no misconduct is attributable to them and if they reported the violation during the first meeting of the board after they became aware of the violation.

For AIFs adopting the form of an SCS, SCSp or SCA, the management is in principle carried out by one or more general partners or the unlimited shareholders who are jointly and severally liable for the AIF. To absorb this unlimited liability, they are normally formed as a separate limited liability company (*société à responsabilité limitée*, SARL).

For Part II UCI, SIFs and SICARs, the applicable Fund Product Law also provides for administrative sanctions and criminal law sanctions for directors and other persons conducting the management of such an AIF.

### 3. Is there a market preference and/or most preferred structure? Does it depend on asset class or investment strategy?

The selection of the preferred legal form and the regulatory regime depends on multiple factors including tax and marketing requirements.

For illiquid asset classes including venture capital, private equity, private debt, the most used legal form is the SCSp – either being subject to one of the Fund Product Laws (generally as a RAIF) or not. We note that for venture capital, Luxembourg AIFs are often structured as SCSp that are managed by AIFMs exempted from the AIFMD under the so-called 'sub-threshold regime' explained under item 12 (the "Registered AIFM").

For liquid assets and certain real estate and infrastructure investment strategies, a corporate form may be preferred (e.g., SA or SCA) which are fully taxable companies – in this case, the AIF is most often structured as a RAIF to avoid negative tax consequences.

### 4. Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs. hedge)) and, if so, how?

Any Luxembourg AIF may either be structured as an open-ended or as a closed-ended vehicle – redemption rights may freely be granted under the constitutive documents of the AIF irrespective of the investment strategy pursued by the relevant AIF. Except for the SICAR or the Risk Capital RAIF, Luxembourg AIFs may choose any strategy. Luxembourg AIFMs, on the other hand, must be authorized for a specific strategy to be able to manage a relevant AIF.

For Part II UCIs, SIFs and SICARs, the CSSF will assess the rights of investors to withdraw from the AIF in light of the liquidity risks.

For AIFs managed by an external AIFM, the latter will be responsible for the liquidity risk management which has to be considered when granting redemption rights to investors.

### 5. Are there any limits on the manager's ability to restrict redemptions? What factors determine the degree of liquidity that a manager offers investor of an Alternative Investment Fund?

There are no legal or regulatory limits on the manager's ability to restrict redemption of units or interests of a Luxembourg AIF. Such limits must be contractually defined in the constitutive documents. For AIFs managed by an external AIFM, the limits will also have to be assessed by the AIFM in light of the liquidity risk management system which is put in place for the relevant AIF.

In case of Part II UCIs, SIFs and SICARs, the limits will need to be approved by the CSSF within the authorisation process.

In case of an ELTIF, the requirements under the delegated regulation supplementing the ELTIF Regulation adopted by the EU Commission on 19 July 2024 will need to be complied with.

### 6. What are potential tools that a manager may use to manage illiquidity risks regarding the portfolio of its Alternative Investment Fund?

As an introductory point, each AIFM must establish and maintain liquidity risk management systems and procedures to monitor the liquidity risk of each AIF it manages and ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations. These systems and procedures are reviewed at least on an annual basis and updated for any changes or new arrangements.

The documents of open-ended Luxembourg AIFs generally include fund and/or investor related gating rules (e.g., the execution of a part of the redemption requests is postponed if a certain threshold has been reached – generally for a fund level gate, if aggregate redemption requests exceed 10% of the assets of the AIF or any of its compartments). In addition, the redemption frequency, and the notice periods to submit the redemption request

and to execute the latter may be freely determined in the fund documents. The same applies for the delay granted to the AIF to pay the redemption proceeds (within the restriction on leverage as set out in the fund documents). The fund documents may also grant the management or governing body of the AIF or the AIFM the power to suspend redemption requests completely in specific situations.

Luxembourg domiciled Authorized AIFMs must follow CSSF circular 20/752 which transposed ESMA Guidelines on liquidity stress testing in UCITS and AIFs. The same applies to Registered AIFMs if they manage an open-ended or leveraged closed-ended Part II UCI, SIF or SICAR.

Directive (EU) 2024/927 amending AIFMD ("AIFMD 2.0") which will be transposed in the laws of the EU member states including Luxembourg at latest on 16 April 2024 requires from AIFM to put in place for open-ended AIFs at least two liquidity management tools ("LMTs") out of five LMTs listed in AIFMD 2.0. The LMTs are (i) suspension of subscriptions, repurchases and redemptions of units, (ii) redemption gate, (iii) extension of the notice period, (iv) redemption fee, (v) swing pricing, (vi) dual pricing, (vii) anti-dilution levy, (viii) the redemption in kind whereby AIFMD 2.0 does not allow this mechanism to be used for retail investors, and (ix) the creation of side pockets. In practice, the fund documents of Luxembourg open-ended AIFs enable the AIFM to use the LMTs mentioned under (i) and (ii) and in many cases the LMTs mentioned under (iii), (iv) and (v). Anti-dilution levy is less frequent and dual pricing is very rare. For redemption in kind, the general principle is that an investor must agree to receive a redemption in kind. To be noted that the use of LMTs must always comply with the requirement of fair treatment of investors.

In the specific case of an ELTIF, the requirements under the delegated regulation supplementing the ELTIF Regulation adopted by the EU Commission on 19 July 2024 will need to be complied with.

## 7. Are there any restrictions on transfers of investors' interests?

From the point of view of the Companies Act, transfer of units and interests are not generally subject to restrictions (except for the SARL) and are therefore in practice subject to contractual restrictions set out in the AIF's constitutive documents. Typically, the transfer of units and interests is subject to the consent of the governing or management body of the AIF, inter alia, to check whether the transferee is an eligible investor for the

relevant AIF (general investor eligibility, distribution, tax or other concerns).

In case of an ELTIF, the delegated regulation supplementing the ELTIF Regulation adopted by the EU Commission on 19 July 2024 imposes specific requirements in the context of a transfer matching mechanism.

## 8. Are there any other limitations on a manager's ability to manage its funds (e.g., diversification requirements)?

Part II UCIs, SIFs and RAIFs (unless they are Risk Capital RAIFs) are subject to risk spreading requirements. In principle, the maximum exposure on a single asset is limited to 20% of the assets of a Part II UCI and 30% of the assets of a SIF or a RAIF. In case of ring-fenced compartments, the risk spreading is applied on a compartment-by-compartment basis. In case of investments through one or more intermediary vehicle controlled by the AIF, a look-through approach is applied to assess the risk spreading. The same applies where the Luxembourg AIF is the feeder fund of another AIF.

SICARs must exclusively invest in securities representing risk capital but no risk spreading is required. In practice, SICARs are only used for investments in venture capital and private equity.

For AIFs not managed under one of the Fund Product Laws, investment restrictions and risk spreading requirements can be freely determined in the fund documents.

For ELTIFs, the risk spreading requirements under the ELTIF Regulation applies in the addition of the requirements under the applicable Fund Product Law.

In case of an active breach of a risk spreading requirement, the process under CSSF circular 02/77 must be followed by a Part II UCI and by a SIF (unless the fund documents of the SIF states otherwise which is rare in practice). This process implies an indemnification mechanism for harmed investors. CSSF circular 02/77 will be replaced by CSSF circular 24/856 on 1st January 2025 which is extended its scope to SICARs and any type of Luxembourg AIFs under the ELTIF Regulation.

## 9. What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in

## Alternative Investment Funds? Does the tax treatment of the target investment dictate the structure of the Alternative Investment Fund?

Luxembourg AIFs formed as SCS or SCSp are in principle tax transparent. Accordingly, non-resident investors not having a permanent establishment in Luxembourg are in principle not subject to taxes in Luxembourg on their participation in the SCS or SCSp to the extent there is no underlying Luxembourg income/assets. Resident investors will be taxed under a look through approach in accordance with the type of returns realized by the SCS or SCSp.

Luxembourg AIFs adopting one of the corporate forms (e.g., SA or SCA) – generally subject to one of the Fund Product Laws – are considered as opaque from a Luxembourg tax perspective. Non-resident investors not having a permanent establishment in Luxembourg are in principle not subject to taxes in Luxembourg on their participation in such an AIF, and no withholding tax will apply on the distributions by such an AIF. Luxembourg resident investors will be taxed in case of distribution by the AIF or upon disposal of their shares disregarding the type of profits realized by the AIF itself.

## 10. What rights do investors typically have and what restrictions are investors typically subject to with respect to the management or operations of the Alternative Investment Fund?

In principle, investors do not have the rights to be involved in the management and operations of a Luxembourg AIF which is reserved to the management or governing body of the AIF (e.g., the general partner of an AIF under the form of a partnership or the board of directors of an AIF under the form of an SA or SARL).

The constitutive documents of the AIF determine the voting rights of the investors within the limit of the Companies Act. Investors may also participate in committees established under the constitutive documents of the AIF or on an ad hoc basis by the management or governing body of the AIF where the rights and functions can be freely determined, provided the conduct of management remains with the management or governing body of the AIF.

For AIFs formed as an SCS, SCSp or SCA (irrespective of whether the AIF is subject to a Fund Product Law), acts of external management by an investor will expose this investor to the same unlimited liability the general partner of an SCS or SCSp or the unlimited shareholder of an SCA

has. Within the internal management of the AIF, nothing prevents however that certain decisions of the general partner or the unlimited shareholder are subject under the applicable constitutive documents to the consent of all investors or a committee. Rights to replace the general partner or the unlimited shareholder must be determined in the constitutive documents.

For AIFs adopting one of the corporate forms under the Companies Act (and generally subject to one of the Fund Product Laws), investors benefit from the shareholders' rights of the Companies Act and the applicable articles of incorporation. These shareholders' rights include for instance the right to appoint and revoke directors and to vote on the approval of the annual report.

For Part II UCIs, SIFs and RAIFs under the form of an FCP, investors do not have any specific rights unless otherwise stated in the management regulations.

In addition to the rights granted under the Companies Act and the applicable constitutive documents, AIFMD requires that for any AIF managed within the scope of the AIFMD, an annual report and the information listed under article 23 of the AIFMD are made available to the investors. This information encompasses, inter alia, information on the investment strategy and the amendments thereof, information on delegations of the AIFM and information on maximum fees charged to the AIF or the investors.

## 11. Where customization of Alternative Investment Funds is required by investors, what types of legal structures are most commonly used?

Luxembourg funds are easily customizable for the needs of an investor, or a sponsor and we see all variants of structures from managed accounts, parallel funds, feeder funds, and individual arrangements within umbrella funds or outside of them. The most flexible corporate forms are SCS or SCSp which are not subject to one of the Fund Product Laws which are almost always chosen for parallel fund structures.

## 12. Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

A Luxembourg domiciled AIF needs to be managed by an AIFM, i.e., either a Luxembourg Registered AIFM, a Luxembourg Authorized AIFM or an EEA Authorized AIFM. For Luxembourg AIFs other than RAIFs, the AIF can also



appoint a non-EEA AIFM<sup>1</sup>. These AIFMs may delegate portfolio or risk management to or seek advice from other entities inside or outside of Luxembourg.

## 1) AIFMs

Provided assets under management of the Luxembourg AIFM (including those managed by an entity under common control or management of the AIFM) do not exceed the thresholds set under article 3(2) of the AIFM Act (i.e., either EUR 100 million or EUR 500 million, provided no redemption rights are granted to investors for a period of at least five years after the first investment and no leverage is used), the AIFM may seek registration with the CSSF and does not need to submit itself to the full AIFMD rules except to fulfil certain reporting requirements. Contrary to the Authorized AIFM, the passport for marketing of the AIFs in the EEA is denied to the Registered AIFM.

A Luxembourg Authorized AIFM must seek authorization with and is under the direct supervision of the CSSF. It must ensure compliance with the requirements under the AIFM Act. Conditions for authorisation and requirements on the organisation of Luxembourg AIFMs are laid down in CSSF Circular 18/698, as amended. A Luxembourg AIFM may use its passport to manage and market AIFs within the EEA after notifying the CSSF.

Luxembourg AIFs can also be managed by an EEA based Authorized AIFM provided that AIFM has passported its management authorization. As the CSSF will be notified by the competent supervisory authority of the AIFM, no specific steps have to be taken by the latter toward the CSSF. Marketing of the AIF will be notified to the EEA Authorized AIFM's home regulator.

## 2) Portfolio Managers and Advisers

Luxembourg portfolio managers and advisers providing services in relation to financial instruments must be authorised by and is under the supervision of the CSSF in accordance with the act of 5 April 1993 on the financial sector, as amended (the "**Financial Sector Act**") which, *inter alia*, transposed Directive 2014/65/EU on the markets of financial instruments ("**MiFID**") into Luxembourg law. Where advisory services are not provided in connection with financial instruments (in the meaning of MiFID), the adviser is not required to be authorised under the Financial Sector Act but must have a business license granted by the Ministry of Economy.

### Footnote(s):

<sup>1</sup> While there is no explicit restriction for a Part II UCI or a

SIF to appoint a non-EEA AIFM, the CSSF may be reluctant to approve such a Part II UCI or SIF. This results that occasionally only AIFs formed as SCS or SCSp without being subject to one of the Fund Product Laws appointed a non-EEA AIFM.

## 13. Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Part II UCIs, SIFs and SICARs are subject to authorisation by the CSSF as set out above in item 1. They will be registered on the relevant official list by the CSSF and continue to be under the direct supervision of the CSSF until their liquidation.

RAIFs and any other Luxembourg AIF not being subject to one of the Fund Product Laws (e.g., SCSp) do not need any authorisation by the CSSF and are consequently not under the direct supervision of the CSSF.

## 14. Does the Alternative Investment Fund require a manager or advisor to be domiciled in the same jurisdiction as the Alternative Investment Fund itself?

No. To be noted that RAIFs must have an Authorized AIFM located in the EEA.

## 15. Are there local residence or other local qualification or substance requirements for the Alternative Investment Fund and/or the manager and/or the advisor to the fund?

For AIFs adopting one of the legal forms under the Companies Act, the domicile of the AIF must be located at the seat of its central administration which is deemed to coincide with the place where its registered office is located. For Part II UCIs, SIFs, SICARs and RAIFs, the requirement to have the administration of the AIF in Luxembourg is in addition explicitly mentioned in the applicable Fund Product Law.

AIFs established as an FCP must be managed by a Luxembourg management company which may (i) be registered or authorised as an AIFM by the CSSF or (ii) appoint an AIFM.

## 16. What service providers are required by applicable law and regulation?

Luxembourg AIFs must appoint an external Registered AIFM or an external Authorized AIFM (unless the AIF is a legal person and registered with or authorised by the CSSF as an internally managed AIF). RAIFs must always appoint an external AIFM authorised in the EEA.

Luxembourg AIFs managed by an Authorized AIFM (or authorised as an internally managed AIF) must appoint a Luxembourg based depositary for cash monitoring, safe keeping of assets and the oversight duties under the AIFM Act. In addition, these AIFs must have their annual reports reviewed by a certified auditor (*réviseur d'entreprises agréé*).

The administration of Luxembourg AIFs must be located in Luxembourg. In practice, the administration which encompasses accounting, net asset valuation calculation, preparation of the annual report, register-keeping and transfer agency services is delegated to a Luxembourg based registrar and administrator authorised under the Financial Sector Act.

### 17. Are local resident directors / trustees required?

The Companies Act does not specifically require that directors must be resident in Luxembourg but requires that effective management of a Luxembourg company has to take place in Luxembourg. In practice, Luxembourg AIFs have at least one resident director and no majority of directors resident in the same jurisdiction outside of Luxembourg. It should be noted that directors resident in the neighbouring parts of Belgium, France and Germany are considered as Luxembourg resident directors if they exercise their professional activity in Luxembourg.

For AIFs directly regulated by the CSSF, the administrative practice of the CSSF generally requires that the majority of the governing or management body is composed of Luxembourg resident directors, and it is good practice to include an independent director.

### 18. What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

EEA based investment firms (e.g., portfolio managers or investment advisers) authorised under MiFID may provide services to Luxembourg AIFMs and Luxembourg AIFs on an active solicitation basis by using the passport under MiFID.

Non-EEA investment firms may provide services to

Luxembourg AIFMs and Luxembourg AIFs (which are per se professional clients) on a reverse solicitation basis (i.e., upon the sole initiative of the Luxembourg AIFM or AIF), provided a memorandum of understanding is in place between the CSSF and the competent supervisory authority of the investment firm.

To provide services to professional clients on an active solicitation basis, non-EEA investment firms do not need to establish a branch, but authorisation must be obtained by the CSSF in accordance with article 32-1 of the Financial Sector Act and CSSF Circular 20/743. To provide services to retail clients and opt-up professional clients, the establishment of a branch is required under article 31-2 of the Financial Sector Act.

### 19. What are common enforcement risks that managers face with respect to the management of their Alternative Investment Funds?

Distinction must be made between Luxembourg AIFMs and Luxembourg investment firms which are under the direct supervision of the CSSF and subject to the sanctions set out in the AIFM Act and the Financial Sector Act respectively and non-Luxembourg AIFMs and non-Luxembourg investment firms.

For Luxembourg AIFMs and investment firms, the most used sanctions are financial penalties and have been mainly given over the last years for breaches relating to AML policies and implementation as well as misconduct in delegation arrangements and other internal controls. Non-Luxembourg AIFMs and non-Luxembourg investment firms may only be sanctioned by the CSSF if they undertake activities on the territory of Luxembourg in violation of the AIFM Act or the Financial Sector Act respectively.

### 20. What is the typical level of management fee paid? Does it vary by asset type?

Management fees can generally be freely determined (except in certain cases where retail investors are admitted to the AIF). That said, ESMA has commenced a supervisory action and issued an opinion on undue costs in UCITS and AIFs which include proposed amendments to AIFMD. The level of fees follows the global market and generally depends on the asset class. Management fees may be defined in basis points either on a net or gross asset value basis (which is often the case for open-ended AIFs) or on a commitment or contribution basis (which is often the case for closed-ended AIFs).

**21. Is a performance fee typical? If so, does it commonly include a "high water mark", "hurdle", "water-fall" or other condition? If so, please explain.**

Performance fee are often charged to actively managed AIFs mainly investing in securities or other liquid assets. Such performance fees are generally subject to a high-water mark and a hurdle rate. Closed-ended AIFs investing in illiquid assets including venture capital, private equity and private debt often have a waterfall with a preferred return, a catch-up and a carried interest.

**22. Are fee discounts / fee rebates or other economic benefits for initial investors typical in raising assets for new fund launches?**

Earlybird discounts are a common mechanism. Other rebates are given for e.g., the type of investor, the minimum investment amount, and the involvement of intermediaries.

To implement these rebates, corporate AIFs are typically created with different classes or sub-classes of shares each having their own fee structure.

AIFs under the form of partnerships can operate with capital accounts where specific fee arrangements may easily be determined on an investor-by-investor basis in side letters.

**23. Are management fee "break-points" offered based on investment size?**

Management fee "break-points" are regularly offered on the size of the investment. Please see item 22 for the implementation of these break-points.

**24. Are first loss programs used as a source of capital (i.e., a managed account into which the manager contributes approximately 10-20% of the account balance and the remainder is furnished by the investor)?**

First loss programs are rare for Luxembourg AIFs but may be legally implemented.

**25. What is the typical terms of a seeding / acceleration program?**

Seeding/acceleration programs are rarely defined at the

level of the fund documents (although disclosure to investors needs to be appropriate) but by way of separate contractual arrangements which do not necessarily need to be under Luxembourg law.

**26. What industry trends have recently developed regarding management fees and incentive/performance fees or carried interest? In particular, are there industry norms between primary funds and secondary funds?**

No specific dominant trend on management fees and incentive fees may be observed for Luxembourg AIFs. They may be explained by the fact that trends from the managers and investors in their respective jurisdictions and globally are replicated in the documents of a Luxembourg AIF.

Performance fees are generally used for strategies on liquid investments and certain real estate investments. In most cases, they are subject to a hurdle rate and a high-water mark.

Carried interest is generally used for strategies on illiquid investments. Generally, a European style fund-as-a-whole approach is adopted.

**27. What restrictions are there on marketing Alternative Investment Funds?**

There are no specific restrictions for marketing an EEA AIF to professional investors in Luxembourg, provided that the AIF is managed by an Authorized AIFM domiciled in the EEA which has notified its home regulator as set out above.

Non-EEA AIFs managed by an authorised EEA AIFM can be marketed to professional investors in Luxembourg, provided (i) the AIFM complies with all requirements under the AIFMD (except the requirements on the depositary where the so-called depositary lite regime applies), (ii) appropriate cooperation arrangements are in place with the supervisory authority in the jurisdiction where the non-EEA AIF is located and (iii) this jurisdiction is not listed as a non-cooperative country by the Financial Action Task Force ("**FATF**").

AIFs managed by non-EEA AIFMs can be marketed to professional investors in Luxembourg, provided (i) the marketing has been notified to the CSSF and the non-EEA AIFM reports to the CSSF on the AIF marketed in Luxembourg, (ii) information is provided to the investors in accordance with article 23 of the AIFMD, (iii) provisions



under the AIFMD on control of non-list companies and asset stripping are respected, (iv) appropriate cooperation arrangements are in place with the supervisory authority in the jurisdiction where the non-EEA AIF is located and (v) this jurisdiction is not listed as a non-cooperative country by FATF.

## **28. Is the concept of "pre-marketing" (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?**

Luxembourg transposed article 30a of AIFMD which provides the conditions and the notification procedure for pre-marketing in the EU by an Authorized AIFMs in articles 28-1 and 28-2 of the AIFM Act.

Pre-marketing is defined as provision of information or communication, direct or indirect, on investment strategies or investment ideas by an AIFM or on its behalf to potential professional investors domiciled or with a registered office in the EEA in order to test their interest in an AIF or a compartment which is not yet established or which is established but not yet notified for marketing in the relevant EEA member state where the targeted investors are domiciled and, which in each case, does not amount to an offer or a placement to potential investors to invest in the relevant AIF or compartment.

Article 28-1 of the AIFM Act provides that a Luxembourg Authorized AIFM may engage in pre-marketing in Luxembourg and any other EEA member state, except where the information presented to potential investors (a) is sufficient to allow investors to commit to invest in the relevant AIF, (b) amounts to subscription forms or similar documents whether in draft or in final form or (c) amounts to constitutive documents of a not-yet-established AIF in a final form.

## **29. Can Alternative Investment Funds be marketed to retail investors?**

Part II UCIs are AIFs that can be marketed to all types of retail investors in Luxembourg. To market a Part II UCI to retail investors outside of Luxembourg, the applicable national laws and regulations must be considered unless the relevant Part II UCI would be authorized as an ELTIF in which case it benefits from the marketing passport to retail investors across the EEA.

Investors in SIFs, SICARs and RAIFs are eligible when they qualify as well-informed investors. The definition of well-informed investors encompasses non-professional investors provided they (i) are self-certifying by adhering

in writing to the status of well-informed investor and (ii) either (a) committing to invest a minimum of EUR 100,000 in the AIF or (b) have been subject of an assessment made by a credit institution within the meaning of Regulation (EU) No 575/2013, by an investment firm within the meaning of MiFID, by a management company within the meaning of Directive 2009/65/EU, or, in case of a RAIF only, by an Authorized AIFM certifying the investor's expertise, experience and knowledge in adequately appraising an investment in the AIF (a "Well-Informed Investor"). Within the above restriction, SIFs, SICARs and RAIFs can be marketed to retail investors in Luxembourg. To market a SIF, SICAR or RAIF to retail investors outside of Luxembourg, the applicable national laws and regulations must be considered unless the relevant SIF, SICAR or RAIF would be authorized as an ELTIF in which case it benefits from the marketing passport to retail investors across the EEA (whereby an investor would still have to be eligible under the relevant Fund Product Law).

Non-Luxembourg AIFs managed by an EEA AIFM (including a Luxembourg AIFM) can be marketed to retail investors in Luxembourg if authorisation has been granted by the CSSF in accordance with CSSF Regulation N° 15-03 laying down the requirements of marketing to retail investors under article 46 of AIFMD. Amongst others, the non-Luxembourg AIF shall be subject to permanent supervision in its home jurisdiction and its portfolio shall be managed under the principle of risk spreading.

## **30. Does your jurisdiction have a particular form of Alternative Investment Fund be that can be marketed to retail investors (e.g. a Long-Term Investment Fund or Non-UCITS Retail Scheme)?**

Any Luxembourg AIF can submit itself to the ELTIF Regulation, provided it fulfils the requirements set under the ELTIF Regulation and it has been authorized by the CSSF.

In addition, Part II UCIs are AIFs that can be marketed to any type of investors including retail investors.

To be noted that RAIFs, SIFs and SICARs may be invested by some types of retail investors (please see above item 29).

## **31. What are the minimum investor qualification requirements for an Alternative Investment**

**Fund? Does this vary by asset class (e.g. hedge vs. private equity)?**

There are no specific requirements on professional investors in the meaning of AIFMD (which is the equivalent to the professional clients under MiFID).

For non-professional investors, please refer to item 29 above.

**32. Are there additional restrictions on marketing to government entities or similar investors (e.g. sovereign wealth funds) or pension funds or insurance company investors?**

There are no specific restrictions on marketing to government entities or pensions.

**33. Are there any restrictions on the use of intermediaries to assist in the fundraising process?**

There are no specific restrictions on the use of intermediaries to assist in the fundraising. Depending on the scope of their mandates, the activities of the intermediaries generally fall within the Financial Sector Act and can therefore only be assumed by a company regulated in accordance with the Financial Sector Act.

To be noted that CSSF Regulation n°12-02 of 14 December 2012 on the fight against money laundering and terrorist financing, as amended requires an enhanced due-diligence when using intermediaries to prevent

money laundering.

**34. Is the use of "side letters" restricted?**

There are no specific restrictions for the use of side letters. For AIFs directly regulated by the CSSF, the administrative practice of the CSSF tends to restrict the use of side letters when they derogate from the constitutive documents of the AIF as filed with the CSSF.

**35. Are there any disclosure requirements with respect to side letters?**

For AIFs managed within the scope of the AIFMD, the type of preferential treatment which may be included in a side letter and the criteria to grant such a preferential treatment are disclosed in the constitutive documents of the AIF.

For AIFs exempted from the scope of the AIFMD, there are no specific disclosure requirements, however, attention should be kept on triggering the liability for an eventual damage caused by insufficient disclosure on a preferential treatment of a side letter by applying the general principles of Luxembourg civil liability rules.

**36. What are the most common side letter terms? What industry trends have recently developed regarding side letter terms?**

The most common side letter terms are the provisions connected to fees or expenses, access to additional information or reporting, the right to participate in co-investments and "most favoured nation" or similar rights.

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