



AIFMD in Luxembourg

The law of 12 July 2013 relating to alternative investment fund managers (“the AIFM Law”) transposes into Luxembourg law the AIFM Directive 2011/61/EU (“the AIFMD”).

The AIFMD aims at providing a harmonised and comprehensive regulatory and supervisory framework within the European Union (“EU”) and the AIFM Law implements the applicable rules for authorisation, ongoing operation and transparency of AIFMs, ensuring an enhanced information and protection to investors.

Law of 12 July 2013

relating to Alternative Investment Fund Managers (AIFM)

I) General overview

The AIFM Law regulates AIFMs rather than AIFs themselves. The AIFM Law applies to all Luxembourg AIFMs of all EU and non-EU collective investment vehicles raising capital from a number of investors, with a view to investing it, in accordance with a defined investment policy, and which are not considered as UCITS.

In Luxembourg, the AIFM Law potentially applies to all regulated and non-regulated entities within the framework mentioned in the previous paragraph and amongst others, to the following vehicles, whose respective laws have also been updated in this context:

- SIFs (specialised investment funds) governed by the law of 13 February 2007, as amended, relating to specialised investment funds (“the SIF Law”);
- UCIs (undertakings for collective investment) governed by Part II of the law of 17 December 2010 relating to undertakings for collective investment (The “UCI Law”); and
- SICARs (investment companies in risk capital) governed by the law of 15 June 2004, as amended, relating to investment companies in risk capital (“the SICAR Law”).

II) Applicable AIFM regime

The main objective of the AIFM Law is to regulate AIFMs managing AIFs, regardless of the location of those AIFs (in Luxembourg, in an EU country or in a third country) and of the regulated or non-regulated nature of the relevant AIFs.

- Authorisation and registration of AIFM

According to the AIFM Law, every AIF must have one designated AIFM. Such AIFM can be either an external manager (i.e. a legal person whose regular business is managing one or more AIF(s)), or the AIF itself, when its governing body decides not to appoint an external manager, and must be registered or authorised by the CSSF as AIFM.

The AIFM Law provides a limited number of exemptions of authorisation requirements. In this case, relevant AIFMs are not required to be authorised by the CSSF but are nevertheless required to be registered.

Are exempt:

- AIFMs managing AIFs which are held only by the AIFMs or the parent companies or the subsidiaries of the AIFMs or other subsidiaries of their parent companies (provided that none of those entities is an AIF), and
- AIFMs that directly or indirectly manage (i) AIFs having combined assets under management, including any assets acquired through use of leverage, in total not exceeding a threshold of EUR 100 million, or (ii) AIFs with assets under management in total not exceeding a threshold of EUR 500 million, that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of the initial investment in each AIF (hereafter mentioned together as "the two minimal thresholds").

These AIFMs will not be required to be authorised but they may choose to opt into this regime in order to benefit from the European passport conferred to AIFMs.

In Luxembourg, the following entities are potentially considered as AIFMs and shall apply for an authorisation or registration:

- Chapter 15 and 16 ManCos under the UCI Law,
- Internally managed UCIs under part II of the UCI Law,
- Internally managed SIFs under the SIF Law,
- Internally managed SICARs under the SICAR Law,
- Each entity adopting the status of a "gestionnaire de fonds d'investissement alternatifs" as regulated by the AIFM Law.
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Concerning management companies and according to the AIFM Law, two different regimes apply:

- UCITS management companies (chapter 15 of the UCI Law), when they are under the scope of AIFM Law, can apply for an authorisation (with light requirements) and benefit from a "super licence" allowing them to manage and act as management company of both UCITS and AIFs.

Non-UCITS management companies (chapter 16 of the UCI Law) may without AIFM authorisation, act as manager or management company of any non AIF, as well as management company of FCP, SICAV or SICAF considered as AIFs according to the AIFM Law, if an external authorised AIFM has been appointed, and manager or management company of AIFs under the two minimal thresholds. However if these two thresholds are exceeded or if the relevant AIF intends to opt into the AIFM regime, it shall apply for an AIFM authorisation.

- Services to be performed by AIFM:

Each AIFM shall perform at least the following tasks when managing an AIF: portfolio management and risk management. These tasks must be managed separately, both functionally and hierarchically or which means that these tasks may not be performed by the same person and that the persons in charge may not have any hierarchical link.

However AIFM may, in line with the provisions of the AIFM Law, delegate these functions and services, being understood that the AIFM may not delegate both functions in whole at the same time, as it should be considered in this case as a letter box entity. Sub-delegation is possible. In any case, AIFM remains liable of the correct performance of the delegated functions and services.

It is specified that neither credit institutions nor investment firms are allowed to combine their respective licence with an AIFM licence according to the AIFM Law. However they are allowed to manage AIFs on the basis of a delegation granted by the AIFM of such AIF.

- Depository regime

Usually, all Luxembourg regulated vehicles are required to appoint a credit institution as their depository, as mentioned in the SIF Law or SICAR Law. The AIFM Law requires each AIF to appoint a single depository in their respective country. Credit institutions and, under some conditions, investment firms may act as depository.

In addition, the AIFM Law introduces in the law of 5 April 1993, as amended, relating to the financial sector, a new category of professional of the financial sector ("PFS") which is neither a credit institution nor an investment firm, i.e. "professional depository of assets other than financial instruments", which may act as depository for AIF, having no redemption rights exercisable during a period of 5 years from the date of the initial investment and which generally does not invest in financial instruments that must be held in custody or generally invest in issuers of non-listed companies in order to potentially acquire control over such companies.

- AIFM passport

A key measure of this new regulation involves the introduction of a European passport for AIFMs who wish to access the entire European market.

Several situations may occur in this context.

- Since 15 July 2013, AIFMs domiciled in EU benefit from the EU passport, which allows them to market EU AIFs across the EU.
- Until 2015, non-EU AIFs managed by EU or non-EU AIFMs have access to the EU passport. During the period from 2013 to 2015, access to EU professional investors will continue to be subject to national private placement rules. As from 2015, there may be a possibility for non-EU managers to benefit from the passport. Its introduction is subject to a recommendation by ESMA which has been issued on 22 July 2015. ESMA adopted a country-by-country assessment of the potential extension of the passport, and recommended for six non-EU countries to prioritise their assessment, i.e. United States, Switzerland, Jersey, Guernsey, Hong Kong and Singapore. The UE Commission will determine whether to extend the passport before the end of 2015.

- Carried interest income

The AIFM Law introduces a framework for taxation of carried interest income from AIFs consisting in profit participations paid to employees of AIFMs or AIF management companies. The provisions cover the taxation of gains realised at the disposal of units, shares or other securities issued by an AIF in the framework of a carried interest. This tax regime applies to relevant employees becoming tax resident in Luxembourg within a five years period of the introduction of the AIFM Law.

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