

# Luxembourg Law of 12 July 2013 Implementing the AIFM Directive

The Luxembourg law of 12 July 2013 on alternative investment fund managers (AIFM Law) entered into force on 15 July 2013. It implements Directive 2011/61/EU of 8 June 2011 on alternative investment fund managers (AIFMD) and introduces a number of other changes to existing Luxembourg legislation, including the laws governing regulated investment vehicles.

In addition, the *Commission de Surveillance du Secteur Financier* (CSSF) published frequently asked questions (FAQ), as updated from time to time, which provide clarifications on certain aspects of the AIFM Law.

This client briefing gives an overview of the main features of the AIFM Law and its transitional provisions, as specified by the FAQ. It focuses on the key changes introduced by the AIFM Law to the current legal framework of Luxembourg regulated investment vehicles (i.e. Part II UCIs, SIFs and SICARs) and Luxembourg management companies.

## 1. Legal Framework

The AIFMD, which had to be implemented by Member States by 22 July 2013, imposes a licensing and regulatory compliance framework on managers of alternative investment funds other than retail funds regulated under the UCITS Directive<sup>1</sup> (referred to as AIFMs and AIFs, respectively in this briefing) which are managed or marketed in the EU<sup>2</sup>. Its provisions affect: (i) EU AIFMs managing and/or marketing EU and/or non-EU AIFs in the EU, (ii) non-EU AIFMs managing and/or marketing EU AIFs in the EU, and (iii) non-EU AIFMs marketing non-EU AIFs in the EU.

### 1.1 AIFM Law and Product Laws

In considering how to implement the AIFMD, Luxembourg authorities have decided to:

- adopt one specific new law on AIFMs, the AIFM Law, which replicates almost all the provisions of the AIFMD and contains, among others, rules on:
  - the substance, organisational, operating and transparency requirements to become authorised as Luxembourg AIFM by the CSSF;
  - the management and marketing of AIFs, including the passport introduced by the AIFMD and third country rules;

### Key issues

- Legal Framework
- Scope of the AIFM Law
- AIFM Authorisation Procedure
- AIFMD Passport
- Impact on Management Companies
- Impact on Part II UCIs, SIFs and SICARs
- Impact on Services Providers
- Transitional Provisions

- amend the UCI Law<sup>3</sup>, SIF Law<sup>4</sup> and SICAR Law<sup>5</sup> (collectively referred to as Product Laws) by introducing, among others, new product rules imposed by the AIFMD on UCIs, SIFs and SICARs qualifying as so-called "Full Scope AIFs" (i.e. AIFs which are required to be managed by an authorised and fully licensed AIFM under the AIFMD). These new product rules concern:
  - the content of the AIF's annual report;
  - the valuation of the AIF's assets;
  - the disclosure to the AIF's investors and the CSSF;
  - the AIF's depositary;
  - the delegation framework.

## 1.2 Luxembourg Legal Efficiency Package

The adoption of the AIFM Law has also been considered as an opportunity to introduce other changes which are unrelated to the AIFMD package in order to make the Luxembourg alternative investment fund regime more attractive as a whole.

The major innovations of the AIFM Law that are of particular interest to Luxembourg regulated investment vehicles are:

- the modernisation of the existing common limited partnership (SCS) regime and the creation of a new type of vehicle, the special limited partnership (SCSp), which has no legal personality of its own distinct from that of its partners and presents a competitive answer to the UK limited partnership. Both partnership forms are available to all SIFs of the corporate type and

SICARs as well as to Part II UCIs incorporated as SICAFs, regardless whether these vehicles qualify as AIFs or not;

- the introduction of a new type of professional of the financial sector, which may act as depositary for Luxembourg UCIs, SIFs and SICARs regardless whether they qualify as AIFs or not, but for which no right of redemption can be exercised during a 5 years period following the date of initial investments and which, in accordance with their principal investment policy, do not generally invest in assets which have to be kept in custody, or which generally invest in issuers or non listed companies to potentially acquire control over these companies (e.g. real estate and private equity);
- the introduction of various tax provisions aiming at, among others, ensuring full tax transparency of the SCS/SCSp (under relaxed conditions) and introducing a reduced tax rate for carried interest income (under conditions).

## 1.3 Other AIFMD Implementing Measures

### 1.3.1 Luxembourg Guidance

From a domestic perspective, it is worth mentioning that the remainder of the AIFMD will be implemented and/or clarified through, potentially, additional guidance and measures from the CSSF, which has already published on its website:

- a FAQ document on various AIFMD topics analysed from a Luxembourg perspective, including:

- the scope of the AIFM Law and the steps to be considered by a Luxembourg entity to determine its status as Luxembourg AIFM/AIF;
- the delegation requirements;
- the depositary aspects;
- the transitional provisions applicable to Luxembourg AIFMs and AIFs as well as to EU and non-EU AIFMs marketing their AIFs in Luxembourg;
- a list of the cooperation agreements signed by the CSSF with non-EU supervisory authorities, as required under the AIFMD for the purpose of (i) delegation of functions to non-EU undertakings and (ii) marketing in Luxembourg of non-EU AIFs and/or by non-EU AIFMs;
- various press releases providing information on the procedure to be followed and applicable timing in order to be registered (for small managers only) or authorised as AIFM by the CSSF<sup>6</sup>;
- template forms to be used under the authorisation or registration procedure with the CSSF, as the case may be;
- circular 14/581 clarifying certain technical details that Luxembourg AIFMs need in order to fulfil their reporting obligations under the AIFMD (e.g. operational issues, reporting frequency, etc.).

### 1.3.2 EU Level 2 and 3 Measures

At EU level, Luxembourg is also required to take into account further AIFMD implementing regulations (to be) adopted by the EU Commission (EC) and having direct effect in

Member States, such as:

- the delegated regulation 231/2013 of 19 December 2012 supplementing the AIFMD with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (Delegated Regulation);
- the implementing regulation 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt-in under the AIFMD;
- the implementing regulation 448/2013 of 15 May 2013 establishing the procedure for determining the Member State of reference of a non-EU AIFM pursuant to the AIFMD;
- the delegated regulation of 17 December 2013 with regard to regulatory technical standards determining types of alternative investment fund managers.

In addition, the EC has published a standard list of issues (Q&A) on the AIFMD on its website.

Finally, the EU Securities and Markets Authority (ESMA) has developed - and will continue to develop - additional guidelines on various issues arising from the AIFMD in order to minimise the risk of divergent application across the EU (collectively referred to as ESMA Guidelines), including:

- guidelines of 3 July 2013 on sound remuneration policies (ESMA/2013/232);
- guidelines of 13 August 2013 on key concept of the AIFMD (ESMA/2013/611);
- guidelines of 15 November 2013 on reporting obligations (ESMA 2013/1339);

- opinion of 1 October 2013 on the collection of information for the effective monitoring of the systemic risk under article 24(5) of the AIFMD.

#### Main AIFMD Texts to be considered in Luxembourg

- AIFMD
- AIFM Law and Product Laws
- CSSF FAQ and other domestic guidance (e.g. CSSF circulars and press releases)
- Delegated Regulation and other relevant EC's implementing regulations
- EC Q&A
- ESMA Guidelines

## 1.4 Complementary Regimes to the AIFMD

### 1.4.1 EuVECAs and EuSEFs

Two new optional regimes relating respectively to EU venture capital funds (EuVECA) and EU social entrepreneurship funds (EuSEFs) have been introduced by EU regulations 345/2013 and 346/2013 of 17 April 2013 and have entered into force in all EU Member States alongside the AIFMD<sup>7</sup>.

These regulations provide for new EuVECA and EuSEF designations or "labels", together with an EU passport in order to allow small EU AIFMs of unleveraged closed-ended EU AIFs, which have total assets under management below the €500 million threshold laid down in the AIFMD, to market these AIFs across the EU and grow while using a single set of rules, provided that they comply with certain "qualifying requirements" in respect of the manager, the fund, and the fund's investment policy and eligible

investors.

The EuVECA and EuSEF regulations are, in certain respects, complementary to the AIFMD as they offer an EU marketing passport to certain small EU AIFMs which are in principle exempted from the "full" AIFMD and only subject to some registration and reporting requirements (see 2.3.2). Even if such AIFMs may voluntarily opt-in for the application of the AIFMD, and consequently acquire an EU marketing passport on the basis of that directive, acquiring an EuVECA or EuSEF status and passport seems substantially less burdensome as they will not have to comply with the full set of the AIFMD rules. Nevertheless, an EuVECA or EuSEF manager that begins to exceed the AIFMD €500 million threshold may continue to make use of the EuVECA or EuSEF label, provided that it also complies with the full AIFMD regime.

### 1.4.2 ELTIFs

On 26 June 2013, the EC published a proposal for a regulation on a new collective investment vehicle, the EU long-term investment fund (ELTIF)<sup>8</sup>, which will only invest in businesses that need money to be committed for long periods of time, such as infrastructure and real estate projects.

The overall objective of the new regulation is to create a legislative framework for long-term EU funds and to increase the non-bank finance available for companies investing in the real economy within the EU. To that end, a new "ELTIF" label will be introduced, together with an EU cross-border passport, allowing EU managers to market their long-term funds to all types of institutional and private investors across the EU, subject to certain conditions designed

to protect both investors and the companies and projects they invest in.

In particular, the ELTIF label shall be reserved only to EU investment funds that qualify as EU AIFs and are offered across the EU by an authorised EU AIFM. As a result, both ELTIFs and their managers will be subject to the AIFMD rules such as, for example, the obligation to have a depositary and to comply with the valuation and disclosure requirements imposed by that directive.

## 2. Scope of the AIFM Law

Subject to the exclusions, exemptions and grandfathering provisions set forth under 2.3, the AIFM Law will apply to all Luxembourg AIFMs<sup>9</sup>, which manage one or more AIFs, irrespective of whether the AIF is a Luxembourg, EU or, to a certain extent, non-EU AIF and regardless of its legal form and/or regulatory regime.

### 2.1 AIFM Concept

#### 2.1.1 Definition

The AIFM Law defines the "AIFM" as any legal person whose regular business is managing, i.e. providing at least the key functions of portfolio management and/or risk management to, one or more AIFs.

According to the AIFM Law, the AIFM can either be:

- an external manager, which is the legal person appointed by the AIF or on behalf of the AIF and which, through this appointment, is responsible for managing the AIF; or
- the AIF itself (which shall then qualify and be authorised as the AIFM), where the legal form of

the AIF permits an internal management and where the AIF's governing body chooses not to appoint an external AIFM.

In its press release 13/32, the CSSF has clarified that any legal person established in Luxembourg and potentially qualifying as AIFM (be it as internal or external AIFM) has to make a self-assessment in order to:

- see if it qualifies as AIFM under the AIFM Law, and, if it does so;
- assess if it is subject to registration with (see 2.3.2), or authorisation by (see 3), the CSSF, depending on whether the value of the AIF(s)' assets under management in total is below or above the €100/500 million thresholds laid down in the AIFM Law.

#### Potential Luxembourg AIFMs

- Management companies governed by Chapter 15 of the UCI Law if they manage at least one AIF in addition to UCITS (see 5.1)
- Management companies governed by Chapter 16 of the UCI Law if they manage at least one AIF (see 5.2)
- Internally managed UCIs governed by Part II of the UCI Law (see 6.1)
- Internally managed SIFs qualifying as AIFs (see 6.2)
- Internally managed SICARs qualifying as AIFs (see 6.2)
- Any other Luxembourg entity going to adopt the status of a manager of AIF regulated under the AIFM Law, this status applying to (i) any Luxembourg entity providing management services to AIFs which are not

regulated under any of the Product Laws and (ii) any internally managed Luxembourg entity qualifying as AIF which is not regulated under any of the Product Laws (e.g. Soparfi)

#### 2.1.2 Scope of Activities

##### Mandatory investment management functions

According to the AIFM Law, any duly authorised AIFM must, when managing an AIF, be capable of providing, and taking the responsibility for, at least the following key investment management functions, with the possibility however to delegate to third parties the task of carrying out part of these functions on its behalf:

- portfolio management; and
- risk management.

##### Complementary management functions

In the course of the collective management of an AIF<sup>10</sup>, an authorised AIFM may, in addition to the key functions of portfolio and risk management, perform part or all of the following other management functions that may also be delegated under certain conditions:

- administrative services (e.g. legal and fund management, accounting services, customer inquiries, valuation and pricing, regulatory compliance monitoring, maintenance of unit-/shareholder register, distribution of income, unit/shares issues and redemptions, contract settlements, and record keeping);
- marketing services;
- activities related to the assets of an AIF (namely services necessary to meet the fiduciary

duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the AIF and the companies and other assets in which it has invested).

#### Ancillary and non-core services

External AIFMs (but not internally managed AIFs) may also provide part or all of the following additional and non-core services, provided they are expressly authorised to do so by the CSSF:

- management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement, in accordance with mandates given by investors on a discretionary, client-by-client basis;
- non-core services (only if the additional management of portfolios of investments is provided) comprising:
  - investment advice;
  - safe-keeping and administration in relation to units/shares of collective investment undertakings;
  - reception and transmission of orders in relation to financial instruments.

However, the AIFM Law stresses that the management of AIFs will remain the principal function of the AIFM, which cannot be authorised to exclusively exercise the "additional and non-core" functions without performing at least the key functions of portfolio and risk management.

#### UCITS/MiFID licenses

Finally, an external AIFM may also engage in the management of UCITS, provided that it obtains a separate authorisation by the CSSF as UCITS management company under the UCITS Directive.

For the avoidance of doubt, the CSSF has clarified in its FAQ that the status of AIFM cannot be combined with the status of credit institution or MiFID investment firm authorised under the Financial Sector Law<sup>11</sup>. However, these credit institutions and MiFID investment firms may manage AIFs on the basis of a delegation agreement with the AIFM in accordance with the provisions of the AIFM Law (see 2.1.3)

#### 2.1.3 Delegation of Functions

Subject to strict conditions laid down in the AIFM Law and Delegated Regulation, some of the functions of an AIFM may be delegated (and sub-delegated) to third party service providers with the requisite resources and expertise.

As a general principle, the AIFM must remain in charge of some of its basic functions, i.e. it must not delegate so many of its functions that it is no longer considered, in substance, as the AIFM or it is reduced to a so-called "letter-box entity". According to the Delegated Regulation, an AIFM will be deemed to become such a letter-box entity if:

- it is no longer able to effectively supervise the delegated tasks and manage the risks of the delegation;
- it no longer has the power to take senior management decisions or perform senior management functions, in particular in relation to the implementation of

investment policies and strategies;

- it loses or can no longer exercise its contractual rights to inquire, inspect, have access to, or give instructions to, its delegates;
- it delegates the performance of investment management functions to an extent that exceeds by a substantial margin the investment management functions performed by it. In Luxembourg, the CSSF has indicated in its FAQ that a Luxembourg AIFM may delegate the two key investment management functions (i.e. portfolio management and risk management), provided that the AIFM does not delegate both functions in whole at the same time.

In addition to the letter-box entity test, the following conditions must, in any case, be complied with in respect of the delegation and sub-delegation of its functions by the AIFM:

- the delegation is subject to prior notification to the CSSF;
- the AIFM must be able to justify its entire delegation structure with objective reasons, such as optimising the business functions and processes, cost saving, expertise of the delegate in administration, in specific markets or investments, or access of the delegate to global trading capabilities;
- the delegate must have sufficient resources to perform the relevant tasks and the persons who effectively conduct the delegated activities must be of sufficiently good repute and sufficiently experienced;

- where the delegation relates to portfolio management or risk management, delegation may only be made to undertakings which are authorised or registered for the purpose of asset management and subject to supervision. Where this condition cannot be satisfied, delegation may only be given after prior approval of the CSSF;
- where the delegation concerns the portfolio management or the risk management and is given to a third-country undertaking, in addition to the above, there must be a co-operation agreement in place between the CSSF and the supervisory authority of that undertaking. In this respect, the CSSF has confirmed in its FAQ that it has already signed a memorandum of understanding with the non-EU supervisory authorities for which ESMA approved centrally-negotiated co-operation arrangements;
- the delegation must not prevent the effectiveness of supervision of the AIFM. In particular, it must not prevent the AIFM from acting, or the AIF from being managed, in the best interests of investors;
- the AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question and that it has been selected with all due care, and the AIFM must be able to effectively monitor at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors;
- in order to avoid conflicts of interests, the AIFM may not

delegate portfolio or risk management functions to the depositary or to a delegate of the depositary, or to any other entity whose interests may conflict with those of the AIFM or the investors of the AIF. The delegation to such latter entity may, however, be allowed if it has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interests are properly identified, managed, monitored and disclosed to the investors of the AIF.

Finally, it is worth mentioning that sub-delegation is permitted subject to similar conditions and that the AIFM will remain liable towards the AIF and its investors with respect to the delegated (and sub-delegated) functions, and it is obliged to supervise the third party service providers on an ongoing basis.

## 2.2 AIF Concept

### 2.2.1 Definition

The AIFM Law defines the "AIF" very broadly as any 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; and
- which does not qualify and require authorisation as a UCITS pursuant to the UCITS Directive.

The legal structure, legal regime and location of the AIF are irrelevant for the purpose of the AIF definition.

Moreover, the AIFM Law does not limit AIFs in terms of the types of assets in which they invest. Therefore, assets can include, for example, traditional assets (equity, debt, etc.), private equity, venture capital, real estate and also other non-traditional asset classes such as ships, art, wine, patents/rights, forestry, coins, precious metals, endowment policies, carbon instruments, life sciences (pharmaceuticals and biotechnology), commodities, as well as any combination thereof.

### Potential Luxembourg AIFs

- All UCIs governed by Part II of the UCI Law (Part II UCIs), irrespective of their legal form (FCP, SICAV, SICAF) (see 6.1)
- SIFs (FCP, SICAV, SICAF) that fulfil the criteria of the AIF definition (see 6.2)
- SICARs that fulfil the criteria of the AIF definition (see 6.2)
- Any entity not regulated under the Product Laws that also meets the criteria of the AIF definition (e.g. Soparfi)

### 2.2.2 Designation of an AIFM

According to the AIFM Law and Product Laws, each Luxembourg Part II UCI, SIF and SICAR qualifying as a Full Scope AIF must have a single, duly authorised AIFM responsible for ensuring compliance with the AIFM Law.

That AIFM can either be an external Luxembourg, EU or, to a certain extent, non-EU AIFM appointed by or on behalf of the AIF, or the AIF itself, which shall then qualify and be authorised as the AIFM (see 2.1.1).

## 2.3 Exclusions, Exemptions and Grandfathering

### 2.3.1 Full Exemptions

#### Vehicles specifically excluded

The following entities will not be subject to the AIFM Law:

- holding companies (as such term is defined, and within the limits set out, in the AIFM Law);
- ASSEPs, SEPCAVs and other institutions which are covered by the IORP Directive<sup>12</sup>, including, where applicable, the authorised entities responsible for managing institutions for occupational retirement provision and acting on their behalf or the appointed investment managers, insofar as they do not manage AIFs;
- supranational institutions, such as the EU Central Bank, the EU Investment Bank, the EU Investment Fund, the World Bank, the International Monetary Fund, EU development finance institutions (DFIs) and bilateral development banks, other supranational institutions and similar international organisations, in case such institutions or organisations manage one or several AIFs and insofar as those AIFs act in the public interest;
- Luxembourg central bank and other national central banks;
- national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems;
- employee participation schemes or employee saving schemes; and
- securitisation special purpose entities (as such term is defined,

and within the limits set out, in the AIFM Law).

#### Family offices, joint ventures and insurance contracts

By reference to Recitals 7 and 8 of the AIFMD, family office vehicles which invest the private wealth of investors without raising external capital as well as joint ventures and insurance contracts should, in principle, also be excluded from the scope of the AIFM Law<sup>13</sup>.

However, the EC has specified in its Q&A that the question as to whether a specific investment vehicle (such as a joint venture) can be excluded from the scope of the AIFMD should be assessed in light of the specific features of each envisaged structure in order to determine whether it falls under the exemptions exhaustively listed in the AIFMD and more generally if all the criteria of the definition of an AIF are fulfilled or not by that investment vehicle.

#### Group exemption

The provisions of the AIFM Law shall not apply to Luxembourg AIFMs insofar as they manage one or more AIFs whose sole investors are (i) the AIFM, (ii) the parent undertakings or the subsidiaries of the AIFM, or (iii) other subsidiaries of those parent undertakings, provided that none of the above investors is itself an AIF.

#### Single investor exemption

Investment fund structures with one single investor should not fall, in principle, within the scope of the AIFM Law as the AIF definition requires capital-raising from a "number of investors".

However, ESMA has clarified that an undertaking which is not prevented by its national law, its rules or instruments of incorporation, or any

other provision or arrangement of binding legal effect, from raising capital from more than one investor should qualify as an AIF even if it has in fact only one investor<sup>14</sup>.

ESMA has further specified that an undertaking which is prevented by its national law, rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should nevertheless

qualify as an AIF if it has one single investor who:

- invests capital which it has raised from more than one legal or natural person with a view to investing it for the benefit of those persons; and
- consists of an arrangement or structure which in total has more than one investor for the purposes of the AIFMD (as in the case of nominee arrangements, feeder structures or fund of fund structures).

### 2.3.2 Small Managers Partial Exemption

In line with the AIFMD, the AIFM Law provides for the so-called *de minimis* or small manager exemption for managers managing assets of AIFs below certain thresholds. As further detailed below, these small managers will not be entirely out of scope of the AIFM Law.

#### €100/500 million thresholds

Under the AIFM Law, the small manager regime applies to Luxembourg AIFMs which either directly or indirectly through a company with which the AIFMs are linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management:

- including any assets acquired through use of leverage, in total do not exceed a threshold of €100 million; or
- in total do not exceed a threshold of €500 million when the portfolio of AIFs managed consists of AIFs that are not leveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

#### Applicable AIFMD requirements

Small AIFMs are, in principle, only subject to the following requirements laid down in the AIFM Law:

- registration and identification requirements with the CSSF;
- certain regular disclosure and reporting requirements to the CSSF (re. instruments traded, main exposures and most important concentrations, etc.).

#### Registration Procedure for Luxembourg AIFM

In brief, the registration procedure of a small AIFM with the CSSF requires the introduction of a file including:

- a registration form (available on the CSSF website) containing, among others, the AIFM's name, registered office, legal form and contact person in Luxembourg as well as information on the AIF(s) managed such as their name, country of establishment, value of assets under management, and investment strategies; and
- a declaration form (also available on the CSSF website) to be signed by at least two legal representatives of the small AIFM.

Small Luxembourg AIFMs will not be registered on the official list of

authorised Luxembourg AIFMs kept by the CSSF.

#### Possible opt-in

Small AIFMs will not benefit from any of the rights granted under the AIFM Law unless they choose to opt-in into the AIFM Law regime. In this case, the small AIFM will become subject to the application of the AIFM Law in its entirety, including the obligation to apply for authorisation as AIFM by the CSSF by following the same procedure and using the same application form as those established for AIFMs that are obliged to seek authorisation by the CSSF (see 3).

#### 2.3.3 Closed-Ended AIFs Grandfathering Regime

According to the AIFM Law, a Luxembourg AIFM may benefit from a grandfathering regime allowing it to continue to manage the following closed-ended AIFs without being required to submit an application for registration or authorisation as AIFM with the CSSF:

- closed-ended AIFs whose subscription period for investors has closed prior to 21 July 2011 and have a fixed term which expires at the latest on 22 July 2016. In this case, the AIFM may continue to manage such AIFs without needing to comply with the AIFM Law, except for the provisions relating to the annual report and, where relevant, the provisions on the obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers;
- closed-ended AIFs managed prior to 22 July 2013 and which do not make any additional investments after that date, in which case none of the provisions of the AIFM Law will

apply. According to the Q&A of the EC, "making additional investments" should be interpreted widely and generally as implying a new contract that involves investment of capital for the purpose of obtaining a gain. However, the EC has indicated that the management of the AIF's portfolio falling under the grandfathering regime for the sole purpose of maintaining the value of the portfolio should be possible. Hence limited amounts of financial injection should be possible provided they are arising out of existing commitments, they represent a negligible percentage of the AIF's portfolio and they aim only to maintain the value of the portfolio.

## 3. Requirements for Authorisation as AIFM

Any Luxembourg entity qualifying as an AIFM which manages portfolios of AIFs whose assets under management in total exceed the €100/500 million thresholds must be authorised by the CSSF under the AIFM Law, unless it is excluded, exempted or otherwise grandfathered under the AIFM Law (see 2.3).

#### Authorisation Procedure for Luxembourg AIFM

In brief, the procedure for authorisation of an AIFM by the CSSF requires the introduction of a file including:

- an application form and declaration form (both available on the CSSF website) completed by various documents and information in relation to the



AIFM and the AIF(s) to be managed (see 3.2);

- compliance with several substance, organisational, and operating conditions by the relevant AIFM (see 3.1);
- preparation of AIFMD compliant contractual arrangements and internal procedures/policies (e.g. RMP as well as best execution, business continuity, conflict of interest, proxy voting, due diligence, remuneration policies, etc.) (see 3.1 and 3.2).

The Luxembourg AIFM will be informed by the CSSF, in writing, within 3 months of the submission of a complete application file, whether or not authorisation has been granted.

Any duly authorised and licensed AIFM will be registered on the official list of authorised AIFMs kept by the CSSF.

### 3.1. Substance, Organisational and Operating Conditions

In order to be authorised by the CSSF, an AIFM must comply with a set of substance, organisational and operating requirements imposed by the AIFM Law<sup>15</sup> which are similar to those imposed by the UCITS Directive on UCITS management companies and self-managed investment companies<sup>16</sup>.

Certain of these requirements are subject to the principle of proportionality, which gives some flexibility to the AIFM to take into account, in the application of these requirements, its size, internal organisation and the nature, scope and complexity of its business. The rules which are subject to such

principle will appear with the following reference in this client briefing: **[\*]**.

#### 3.1.1 Capital and Own Funds

An external AIFM must have an initial capital of at least €125,000. This amount is increased to €300,000 for internally managed AIF.

In addition, an external AIFM must maintain own funds equal to the higher of:

- the quarter of the AIFM's overhead costs; and
- where the value of the portfolios of the AIFs managed by the AIFM exceeds €250 million, the AIFM must provide an additional amount of own funds equal to 0.02% of the amount by which the value of those portfolios exceeds such €250 million threshold, provided that the AIFM's initial capital and the additional amount of own funds must not exceed €10 million. The additional amount of own funds may be reduced by 50% if such amount is covered by a bank or insurance guarantee.

Furthermore, both internally managed AIFs and external AIFMs must either have additional own funds or hold a professional indemnity insurance in order to cover potential professional liability risks resulting from the negligent performance of their functions.

#### 3.1.2 Governing Body

In line with the CSSF's regulatory practice, the board of directors or any other governing body of a Luxembourg AIFM must always be composed of at least three members who will be approved by the CSSF on the basis of supporting documents evidencing compliance with the following main conditions (see also

3.2.1):

- the members of the governing body possess honorability, adequate collective knowledge, skills and experience to be able to understand the AIFM's activities, in particular the main risks involved in those activities and the assets in which the AIF(s) managed are invested;
- the members of the governing body commit sufficient time to properly perform their functions in the AIFM;
- each member of the governing body acts with honesty, integrity and independence of mind;
- the AIFM devotes adequate resources to the induction and training of members of the governing body;
- in the case where an AIF has appointed an external AIFM, it is recommended that the governing bodies of both the AIF and the AIFM are not predominantly composed of the same persons.

For the avoidance of doubt, there is no provision in Luxembourg law imposing any condition of nationality or residence on the directors or members of the governing bodies of regulated AIFs.

#### 3.1.3 Conducting Officers

According to the AIFM Law, any AIFM must designate at least two persons, generally known as conducting officers, in charge of the effective conduct of its business.

The conducting officers will be approved by the CSSF on the basis of sufficient reputation and experience in relation to the investment strategies pursued by the AIFs managed by the AIFM.

**[\*]** In principle, the CSSF requires that

the two conducting officers permanently work during normal business hours in Luxembourg. By derogation, the CSSF may, when appropriate and proportionate and on the basis of a duly supported request made in advance, allow that only one conducting officer is permanently working in Luxembourg.

### 3.1.4 Head Office

The head office (*administration centrale*) and the registered office of a Luxembourg AIFM must be located in Luxembourg. This requirement implies that the presence of the AIFM in Luxembourg must not be restricted to a registered or statutory office only. According to the CSSF regulatory practice, an AIFM must also have its own office in Luxembourg, which means that the sharing of offices by several AIFMs will not be accepted by the CSSF.

### 3.1.5 Human and Technical Infrastructure [\*\*]

In addition to the two conducting officers, the AIFM shall employ sufficient, appropriate and adequate personnel and technical resources necessary for the management of the AIFs.

In particular, the AIFM must establish, implement and maintain:

- appropriate and sufficient arrangements for suitable electronic systems so as to permit a timely and proper recording of each portfolio transaction, subscription or redemption order;
- systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information;
- an adequate business continuity policy ensuring the preservation

of essential data and functions and the maintenance of services and activities.

The AIFM must also:

- maintain adequate and orderly records of its business and its internal organisation;
- establish and maintain effective internal reporting and communication of information at all its relevant levels, as well as effective information flows with any third party involved;
- establish, implement and maintain a best execution policy to allow it to obtain, for AIFs orders, the best possible result;
- establish procedures regarding personal transactions for any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information or to other confidential information and keep a list of all personal transaction at the AIFM's registered office;
- establish a precise and clear procedures manual which describes more specifically its internal functioning, the allocation of tasks amongst its staff, hierarchical lines, and, where applicable, the procedures for exchanging information with, and controls undertaken on, delegates.

### 3.1.6 Administrative and Accounting Procedures [\*\*]

The AIFM must put in place and maintain sound accounting policies and procedures in order to provide financial information reflecting a true and fair view on its financial situation.

This also includes the obligation for the AIFM to establish accounting

procedures in accordance with all applicable accounting standards and rules so as to ensure that all assets and liabilities of the AIFs managed or, where applicable, their compartments, can be directly identified at all times and valued in an accurate manner.

In line with the foregoing, the CSSF will be provided with the name of the person within the AIFM who will be responsible for the accounting function.

### 3.1.7 Internal Control Mechanisms [\*\*]

Each AIFM is required to implement adequate internal control mechanisms so as to secure compliance with decisions and procedures including, in particular, the establishment of risk management, compliance and internal audit functions.

Whilst the principle of proportionality can be applied by an AIFM in the organisation of its risk management, compliance and internal audit functions, this principle does not authorise any AIFM to have no risk management, compliance and internal audit functions at all.

#### Main Incompatibilities for AIFM Internal Control Functions

- The risk management officer, compliance officer and internal auditor of an AIFM cannot be a member of the board of directors of that AIFM
- The permanent risk management function cannot be combined with the internal audit function, but may be combined with the compliance function
- The permanent compliance and permanent internal audit functions cannot be carried out by the same person

- The internal auditor cannot be the approved statutory (external) auditor of the AIFM
- Under some conditions, one of the conducting officers of the AIFM may also be directly appointed as the risk management officer and/or the compliance officer of the AIFM

### Risk management function

Each AIFM is required to establish a permanent risk management function and to entrust it with specific tasks, including:

- the implementation of effective risk management policies and procedures;
- the monitoring and measurement of the quantitative and/or qualitative risk limits of the AIFs managed in order to ensure that the risk profile of these AIFs is consistent with these limits;
- the provision of reports to the conducting officers and governing body of the AIFM.

The risk management function of the AIFM must be functionally and hierarchically independent from the operating units, including the portfolio management function, such independence to be ensured in principle throughout the whole hierarchical structure of the AIFM up to its governing body. However, according to the AIFM Law and Delegated Regulation, the CSSF may allow derogations from that requirement where it is appropriate and proportionate and on the understanding that the AIFM shall, in any event, be able to demonstrate that specific safeguards against conflicts of interests allow for the independent performance of risk management activities and that the

risk management process satisfies the requirements of the AIFM Law and is consistently effective.

In practice, one person will be approved by the CSSF as responsible person for the risk management function. In principle, this risk management officer must be appointed amongst the personnel of the AIFM in Luxembourg. However, the CSSF may, where appropriate and proportionate, allow one of the conducting officers of the AIFM to be appointed as risk management officer if he/she has appropriate expertise.

Notwithstanding the above, the execution of all or part of the risk management function may be performed by third parties<sup>17</sup> in accordance with AIFMD delegation requirements and subject to a specific derogation request submitted to the CSSF.

### Permanent compliance function

Any AIFM (be it as internal or external AIFM) shall establish a permanent compliance function, which will be responsible, among others, for the monitoring and, on a regular basis, the evaluation of the adequacy and effectiveness of the compliance policies and procedures established and implemented by the AIFM in order to detect any risk of failure by the AIFM to comply with its obligations under the AIFM Law.

In order to enable the permanent compliance function to perform its responsibilities properly and independently, the AIFM shall ensure that a compliance officer is appointed and is responsible for the compliance function and for reporting on a frequent basis, and at least annually, to the conducting officers with regard to compliance, indicating in particular whether appropriate remedial

measures have been taken in the event of any deficiencies.

In principle, the compliance officer must be appointed amongst the personnel of the AIFM in Luxembourg. However, the execution of the permanent compliance function may also be performed by a third party<sup>18</sup> in accordance with the AIFMD delegation requirements and subject to a specific derogation request submitted to the CSSF.

### Permanent internal audit function

The permanent internal audit function, which shall be separate and independent from the other functions and activities of the AIFM, shall:

- establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the AIFM's systems, internal control mechanisms and arrangements;
- issue recommendations based on the results of work carried out in accordance with the first bullet point;
- verify compliance with the recommendations referred to in the second bullet point;
- report on internal audit matters.

In practice, the AIFM must provide the CSSF with the name and a description of the professional experience of the person within the AIFM which is responsible for the internal audit function and, if it is envisaged to delegate this function to third parties, the name of the proposed third party external expert and the reasons justifying the delegation.

### 3.1.8 Conflicts of Interests and Voting Rights Policies [∗]

The AIFM must establish, in writing, an effective conflicts of interests policy aiming at identifying, preventing, managing and monitoring conflicts of interests between the interests of, among others, the AIFM and the AIF managed or its investors. It shall also keep at its registered office, and regularly update, a record of the types of the situations which may give rise to a conflict of interests.

In addition, the AIFM shall develop an adequate and effective strategy for determining when and how voting rights attached to instruments held in the portfolios of the AIFs managed are to be exercised, so that the exercise is to the exclusive benefit of the AIF concerned and its investors.

### 3.1.9 Remuneration Policy [∗]

An AIFM must establish, implement and maintain a remuneration policy which is consistent with, and promotes, sound and effective risk management and which does not induce excessive risk-taking.

The remuneration policy must be established in accordance with Annex II of the AIFM Law and ESMA Guidelines (2013/232). For the avoidance of doubt, both components of the remuneration (i.e. fixed and variable) have to be covered by the remuneration policy, i.e. there is no exemption in case of fixed remuneration only.

### 3.1.10 Valuation and NAV Calculation

#### Valuation and calculation procedures

The AIFM must ensure that appropriate and consistent

procedures are established so that a proper and independent valuation of the assets of each AIF under its management can take place, and that the net asset value per unit or share is calculated, in accordance with the rules laid down in the law of the jurisdiction in which the AIF has its registered office and/or with such AIF's rules or instruments of incorporation and alongside with the rules set forth in the AIFMD.

Such valuations and calculations must take place at least once a year, it being understood that they will be carried out:

- for open-ended AIFs, at a frequency which is both appropriate to the assets held by the AIF and its issuance and redemption frequency;
- for closed-ended AIFs, in case of each increase or decrease of the capital.

#### External valuer

The use of an external valuer is not required by the AIFM Law that provides that independent valuation of the assets will be carried out for each AIF by either:

- the AIFM itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interests are mitigated and that undue influence upon the employees is prevented; or
- an external valuer, being a legal or natural person subject to mandatory professional registration and independent from the AIF, the AIFM and any other persons with close links to the AIF or the AIFM.

### 3.1.11 Liquidity Management [∗]

The AIFM must employ an appropriate liquidity management system and adopt procedures which enable it to monitor the liquidity risk of the AIF managed and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations. It must regularly conduct stress tests in order to assess the liquidity risk and monitor the liquidity risk accordingly. It must also ensure that the investment strategy, the liquidity profile and the redemption policy are consistent.

### 3.1.12 Leverage

According to the AIFM Law, each AIFM shall set leverage limits in respect of each AIF it manages. The AIFM must demonstrate that the leverage limits for each managed AIF are reasonable and that the AIF complies at all times with the leverage limits set by it.

### 3.1.13 Rules of Conduct

Finally, the AIFM must comply with a certain number of rules of conduct, including:

- the duty to act in the best interests of the AIF or the investors and the integrity of the market;
- the duty to perform appropriate due diligence in the selection and appointment of counterparties and prime brokers;
- the duty to act honestly, fairly and with due skills;
- the duty to comply with all regulatory requirements applicable to the conduct of its business;
- the duty to treat all AIF's investors fairly and to ensure that no investor in an AIF shall obtain preferential treatment, unless

such preferential treatment is disclosed in the relevant AIF's rules or instruments of incorporation.

## 3.2 Application for authorisation

### 3.2.1 Information on the AIFM

The following main documents and information must be provided to the CSSF in relation to the AIFM<sup>19</sup>:

- an application questionnaire for the set-up of a fully licensed AIFM (available on the CSSF website), completed by various supporting documents and appendices which will vary depending on the type of AIFM;
- a declaration form (available on the CSSF website) to be signed by at least two legal representatives of the applicant AIFM;
- the AIFM's (updated) draft constitutive documents indicating the extended corporate purpose concerning authorisation as AIFM;
- draft framework agreement between the AIFM and its AIF(s);
- the name of the directors/managers and of the persons effectively conducting the business of the AIFM and, for each of them, a set of supporting documents evidencing, among others, honorability and relevant experience in relation to the functioning of the AIFM and the AIF(s) to be managed;
- an organisation chart showing the full ownership structure of the AIFM as well as the identities of the AIFM's shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings<sup>20</sup> and on the amount of these

holdings, it being understood that these shareholders or members must possess the requisite qualities to ensure a sound and prudent management of the AIFM;

- a programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with the authorisation requirements, the operating conditions, the transparency requirements and, where applicable, the conditions applying to leveraged AIFs, to AIFs acquiring control of non-listed companies and issuers, passport conditions, third countries rules and conditions for marketing to retail investors;
- a documented risk management process;
- the delegation and sub-delegation arrangements to third parties;
- information on the remuneration policies and practices; and
- any other relevant information and supporting documents as may be required by the CSSF regarding the substance as well as the organisational and operating structure of the AIFM (see 3.1).

### 3.2.2 Information on the AIF

An AIFM applying for authorisation by the CSSF must also provide certain information on the AIFs it intends to manage, such as<sup>21</sup>:

- the name, country of establishment and countries of marketing of these AIFs;
- the investment strategies pursued by these AIFs (including the types of underlying funds if the AIF is a fund of funds), and

the AIFM's policy as regards the use of leverage, and the risk profiles and other characteristics of the AIFs;

- information on where the master AIF is established if the AIF is a feeder AIF;
- the management regulations or instruments of incorporation of each AIF the AIFM intends to manage;
- the identity of the depositary and a description of the arrangements made for the appointment of the depositary of each AIF to be managed; and
- any additional information concerning disclosure to investors for each AIF the AIFM manages or intends to manage.

## 4. AIFMD Passport

The AIFMD allows fully licensed AIFMs, for the first time, to benefit from a "passport" to provide management services to AIFs on a cross-border basis and to market these AIFs to professional investors<sup>22</sup> in the EU<sup>23</sup> on the basis of a single authorisation and subject to the conditions laid down in the AIFMD.

### 4.1 Management Passport

EU AIFMs authorised under the AIFMD will be granted a management passport allowing them to manage AIFs on a cross-border basis, provided that certain conditions are complied with.

The management passport is available since 22 July 2013 (22 July 2014 in case of delayed authorisation under the AIFMD)<sup>24</sup> and will, in particular, allow Luxembourg AIFMs

to manage EU AIFs established in another Member State than Luxembourg. Under certain conditions, Luxembourg AIFMs may also manage, as from 22 July 2013 (respectively 22 July 2014), non-EU AIFs that are not marketed in the EU<sup>25</sup>.

## 4.2 Marketing Passport

### 4.2.1 Marketing to Professional Investors

The marketing passport will allow authorised AIFMs to market AIFs they manage to professional investors domiciled in the EU, by using a simplified regulator-to-regulator notification procedure.

In accordance with the AIFMD, "marketing" has to be understood as any direct or indirect offering or placement at the initiative of the AIFM, or on behalf of the AIFM, of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the EU.

Investments made at the initiative of professional investors are therefore not covered by the AIFMD. Moreover, the marketing provisions of the AIFMD do not apply to the marketing of shares or units of AIFs which are subject to a current offer to the public under a prospectus drawn up and published in accordance with the so-called Prospectus Directive<sup>26</sup> before 2013 as long as this prospectus is valid.

The benefit of the AIFMD marketing passport will, initially, be available as from 22 July 2013 only for EU AIFMs marketing EU AIFs to professional investors across the EU. However, this passport may be extended, at the end of 2015 at the earliest, in favour of EU AIFMs marketing non-EU AIFs as well as in favour of non-EU AIFMs marketing EU and/or non-EU AIFs<sup>27</sup>.

National private placement regimes will not terminate automatically by the extension of the AIFMD marketing passport to non-EU AIFMs/AIFs. Indeed, there will be a transitional period, from 2015 to 2018, during which both the AIFMD marketing passport and national private placement regimes will remain available to non-EU AIFMs and non-EU AIFs, it being understood that national private placement regimes may be phased out in 2018.

### 4.2.2 Marketing to Retail Investors

Even if there is no EU passport for the distribution of AIFs to retail investors under the AIFMD, AIFMs may, under certain conditions laid down in the AIFM Law<sup>28</sup>, market to retail investors in Luxembourg the AIFs they manage, irrespective of whether such AIFs are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIFs.

Clifford Chance has prepared separate client briefings and surveys dedicated to marketing under the AIFMD passport and national private placement regimes that are available upon request.

## 5. Impact on Management Companies

Luxembourg management companies will essentially be impacted as follows by the AIFM Law.

### 5.1 UCITS Management Companies (Chapter 15)

#### 5.1.1 AIFM Law Registration or Authorisation

#### AIFMD Impact on UCITS Management Companies

Chapter 15 of the UCI Law will continue to apply to UCITS

management companies, which are in principle not impacted by the AIFM regime, unless:

- they manage AIF(s) in addition to UCITS (and other UCIs); and
- they decide to be appointed as the designated AIFM of at least one of these AIFs.

In such a case, these management companies will, depending on the amounts of the AIFs' assets under management, have to be either registered or authorised as AIFM by the CSSF (see 2.3.2 and 3).

This registration/authorisation under the AIFM Law will be required in addition to their authorisation as management company under Chapter 15 of the UCI Law.

For the avoidance of doubt, a UCITS management company applying for authorisation as AIFM is not required to provide information or documents which have already been provided when applying for authorisation under Chapter 15 of the UCI Law, provided that such information or documents remain up-to-date.

Moreover, the minimum initial capital and basic own funds requirements imposed by the AIFM Law when the value of the portfolio managed by an external AIFM exceeds €250 million will not apply to AIFMs which are also UCITS management companies authorised under Chapter 15 of the UCI Law<sup>29</sup>, meaning that the required total of the initial capital and basic additional own funds amount for these management companies will remain €10 million. This being said, management companies cumulating

the UCITS and AIFM licenses will nevertheless need additional own funds or hold professional indemnity insurance to cover liability risks resulting from the performance of their functions as AIFMs under the AIFM Law.

### 5.1.2 UCITS/AIFMD Passport

The EU passport under both UCITS and AIFMD regimes will be available for UCITS management companies authorised - but not to UCITS management companies only registered - under both the UCI Law and the AIFM Law, provided that certain conditions are complied. This is generally referred to as the "super" or "double" license as it also allows management of non-AIFs and non-UCITS.

## 5.2 Non-UCITS Management Companies (Chapter 16)

### 5.2.1 AIFM Law Registration or Authorisation

#### AIFMD Impact on non-UCITS Management Companies

Chapter 16 of the UCI Law will continue to apply to non-UCITS management companies, but will be amended so as to introduce a distinction between:

- non-UCITS management companies subject to art. 125-1 of the UCI Law; and
- non-UCITS management companies subject to art. 125-2 of the UCI Law.

Only non-UCITS management companies subject to art. 125-2 of the UCI Law are eligible to be authorised and licensed as AIFM by the CSSF under the AIFM Law.

All non-UCITS management companies will remain regulated

entities authorised by the CSSF under Chapter 16 of the UCI Law. They can continue to operate without complying with the AIFM Law requirements, unless they manage AIF(s) and are appointed as the designated AIFM of at least one AIF. In such a case, these management companies will have, in addition to authorisation under art. 125-1 or 125-2 of the UCI Law (as the case may be), to apply for either registration or authorisation with the CSSF under the AIFM Law, depending on whether the value of their AIFs' total assets under management are below or above the €100/500 million thresholds laid down in the AIFM Law (see 2.3.2 and 3).

### 5.2.2 Non-UCITS Management Companies subject to art. 125-1

#### Scope of activities

The UCI Law (as amended by the AIFM Law) foresees that non-UCITS management companies subject to art. 125-1 can only engage in the following activities:

- manage regulated and/or non-regulated investment vehicles which do not qualify as AIFs under the AIFMD, regardless whether these vehicles are Luxembourg or foreign vehicles;
- act as the management company for one or more FCPs, SICAVs or SICAFs qualifying as AIFs but for which the management company has designated, on behalf of the relevant FCP, SICAV or SICAF, an external authorised AIFM (i.e. the management company will not act itself as the authorised AIFM of these FCPs, SICAVs or SICAFs);
- manage one or more AIFs the aggregate assets of which are less than the €100/500 million

thresholds provided for by the AIFM Law.

The UCI Law further foresees that non-UCITS management companies under art. 125-1 may not provide the services under the first bullet point above without also providing the services under the second and third bullet points, unless the investment vehicles referred to under a) are regulated by specific Product Laws (e.g. UCI Law, SIF Law and SICAR Law). This aims at avoiding that non-UCITS management companies under art. 125-1 solely manage non-regulated investment vehicles, such as Luxembourg Soparfis.

#### AIFM Law registration requirements

A non-UCITS management company subject to art. 125-1 which manages AIFs with assets under management up to a total value not exceeding €100/500 million (see 5.2.2, third bullet point of sub-section entitled "Scope of activities") will be subject to the following AIFM Law registration and identification requirements:

- it must be registered as AIFM with the CSSF under the AIFM Law<sup>30</sup>;
- it must:
  - identify the AIFs it manages with the CSSF;
  - provide information on the investment strategies of the AIFs managed to the CSSF; and
  - regularly provide the CSSF with information on the main instruments on which they are trading and on the principal exposures and most important concentrations of the AIFs managed in order to enable

the CSSF to monitor systemic risk effectively.

In case the aggregate assets under management exceed the €100/500 million thresholds or if the management company decides to opt-in into the AIFMD regime, it will then have to apply for authorisation as AIFM by the CSSF. As a result, it will become a non-UCITS management company subject to art. 125-2 (see 5.2.3) and will be required to limit its activities to the management of AIFs.

For the avoidance of doubt, a non-UCITS management company subject to art. 125-1, which provides the services under the first and second bullet points of sub-section entitled "Scope of activities" under 5.2.2, does not have to be authorised or registered as AIFM under the AIFM Law.

#### AIFMD passport

The AIFMD passport will not be available for non-UCITS management companies subject to art. 125-1.

#### 5.2.3 Non-UCITS Management Companies subject to art. 125-2

##### Scope of activities

Non-UCITS management companies subject to art. 125-2 may only manage or act as the management company of AIFs. More specifically, the UCI Law (as amended by the AIFM Law) foresees that the activities of these management companies is limited to the following activities:

- investment management of AIFs (i.e. at least portfolio management and risk management of AIFs);
- complementary functions in relation to the collective portfolio management of an AIF, such as:

- administration;
  - marketing; and
  - activities linked to the assets of an AIF;
- additional and non-core services to the extent permitted by the AIFM Law (see 2.1.2).

#### AIFM Law authorisation requirement

In addition to their authorisation by the CSSF as management company under art. 125-2, these non-UCITS management companies will be subject to authorisation as AIFM by the CSSF under the AIFM Law.

As a result, they will comply with all the rules imposed by the AIFM Law to the extent applicable<sup>31</sup>, including the following:

- AIFM Law substance requirements (e.g. initial capital and own funds requirements, conducting officers, head office and other human and technical substance requirements);
- AIFM Law organisational requirements (e.g. risk management, compliance and internal audit functions, appropriate valuation procedures and delegation rules);
- AIFM Law operating requirements (e.g. risk management and liquidity management processes and systems, conflict of interest, best execution and remuneration policies);
- AIFM Law transparency requirements (disclosure and reporting obligations to investors and the CSSF).

However, the AIFM authorisation procedure may be lighter for non-UCITS management companies to the extent that the CSSF shall not

require these management companies to provide information or documents already provided when applying for authorisation as management company subject to art. 125-1 of the UCI Law, provided that such information or documents remain up-to-date.

#### AIFMD passport

Like UCITS management companies cumulating the UCITS and AIFM licenses, non-UCITS management companies under art. 125-2 will benefit from the AIFMD management and marketing passports, provided that certain conditions are complied with (see 4).

## 6. Impact on Part II UCIs, SIFs and SICARs

Although the main objective of the AIFM Law is to regulate AIFMs and not directly AIFs, it contains some provisions impacting AIFs, in particular as regards the depositary regime, the delegation of functions, the valuation of assets, as well as the reporting and disclosure obligations to investors and regulators.

Consequently, amendments to the UCI Law, SIF Law and SICAR Law are also envisaged by the AIFM Law. In a nutshell, the following changes are envisaged in relation to the current regulatory regimes of Part II UCIs, SIFs and SICARs.

### 6.1 Part II UCIs

#### AIFMD Impact on Part II UCIs

All Part II UCIs will always qualify as AIFs.

However a distinction is made between:



- Part II UCIs qualifying as Full Scope AIFs; and
- Part II UCIs benefiting from and using the so-called *de minimis* or small manager exemption (which fall only partially within the scope of the AIFM Law).

### 6.1.1. Full Scope AIFs

#### Designation of an AIFM

Unless it benefits from the *de minimis* exemption and effectively uses it (see 6.1.2 below), every Part II UCI must either:

- be managed by an authorised external AIFM; or
- be internally managed if the governing body chooses not to appoint an external AIFM (in which case the Part II UCI shall then itself qualify and be authorised as the AIFM).

#### New applicable product rules

For Part II UCIs qualifying as Full Scope AIFs, the following rules coming from the AIFM Law will apply:

- AIFM Law substance, organisational and operating requirements for internally managed Part II UCIs (e.g. minimum capital and conducting officers requirements, internal control mechanisms, etc.);
- new AIFM Law "product" rules concerning:
  - the content of the annual report;
  - the depositary regime;
  - the valuation of assets;
  - the delegation of functions;
  - the disclosure and reporting requirements to investors and the CSSF.

#### AIFMD passport

The shares or units of a Part II UCI

falling entirely within the scope of the AIFM Law, once admitted to marketing in Luxembourg, will benefit from the AIFMD marketing passport, which allows as from July 2013 the free marketing by an authorised EU AIFM of such shares or units to professional investors in the EU. Private placement of these Part II UCI's shares or units will in principle remain applicable until 2015 or 2018<sup>32</sup> for marketing to EU professional investors by non-EU AIFMs, subject to some requirements of the AIFM Law and the AIFMD.

The AIFM Law also foresees that the shares or units of Part II UCIs qualifying as Full Scope AIFs may be marketed, under certain conditions, to retail investors domiciled in Luxembourg by an authorised Luxembourg, EU or non-EU AIFM.

### 6.1.2 Non-Full Scope AIFs<sup>33</sup>

#### Current Part II UCI regime

Every Part II UCI qualifying as AIF, but which benefits from the *de minimis* exemption and decides to make use of it (i.e. it does not opt-in into the AIFM regime), will, to a large extent, remain subject to legal requirements substantially similar to those applicable under the current regulatory Part II UCI regime, subject however to some adjustments including the introduction of new eligibility criteria for the depositary (alignment with the AIFMD eligibility criteria).

#### New registration and reporting requirements

Every Part II UCI benefitting from, and using, the *de minimis* exemption will be subject to new registration and ongoing reporting requirements to the CSSF under the AIFM Law. These Part II UCIs are therefore not entirely out of scope of the AIFM Law (see

2.3.2).

#### No AIFMD passport

No AIFMD passport will be available for Part II UCIs benefitting from and using the *de minimis* exemption.

## 6.2. SIFs and SICARs

### AIFMD Impact on SIFs and SICARs

The AIFM Law has amended the SIF Law and SICAR Law by dividing these laws into two parts depending on whether the relevant SIFs or SICARs qualify as Full Scope AIFs or not:

- Part I of the SIF Law, respectively Part I of the SICAR Law, will include common rules applicable to all SIFs, respectively all SICARs; and
- Part II of the SIF Law, respectively Part II of the SICAR Law, will include new product rules coming from the AIFM Law and will be applicable only to SIFs/SICARs managed by an authorised AIFM (i.e. Full scope AIFs, hereinafter referred to as "Part II SIFs" and "Part II SICARs").

For the avoidance of doubt, Part II of the SIF Law, respectively Part II of the SICAR Law, will not apply to: (i) SIFs/SICARs that do not qualify as AIFs (e.g. SIFs/SICARs with one single investor), and (ii) SIFs/SICARs benefitting from one of the derogatory regimes provided for by the AIFM Law (e.g. group and *de minimis* exemptions).

### 6.2.1. Full Scope AIFs

#### Designation of an AIFM

SIFs/SICARs governed by Part II of the SIF Law, respectively Part II of the SICAR Law, must either:

- be managed by an authorised external AIFM; or
- be internally managed if the governing body chooses not to appoint an external AIFM (in which case the Part II SIF/SICAR shall then itself qualify and be authorised as the AIFM).

#### New applicable product rules

For Part II SIFs/SICARs, the following rules coming from the AIFM Law will apply:

- AIFM Law substance, organisational and operating requirements for internally managed Part II SIFs/SICARs (e.g. minimum capital and conducting officers requirements, internal control mechanisms, etc.);
- new AIFM Law "product" rules concerning:
  - the content of the annual report;
  - the depositary regime;
  - the valuation of assets;
  - the delegation of functions;
  - the disclosure and reporting requirements to investors and the CSSF.

#### AIFMD passport

Like Part II UCIs qualifying as Full Scope AIFs, Part II SIFs/SICARs will benefit from the AIFMD marketing passport for the distribution, by an authorised AIFM, of their shares or units to professional investors (see 4 and 6.1.1).

#### 6.2.2 Non-Full Scope AIFs

##### SIFs/SICARs out of the scope of the AIFM Law

SIFs/SICARs that do not qualify as AIFs are not impacted by the AIFM Law and will remain subject, to a large extent, to requirements similar

to those applicable under the current SIF/SICAR regimes.

Some adjustments to the current SIF/SICAR regimes have however been introduced by the AIFM Law "Legal Efficiency Package" in the SIF Law and SICAR Law. The main changes include the introduction of:

- new eligibility criteria for the depositary (alignment with the AIFMD eligibility criteria);
- new provisions relating to the modernisation of the limited partnership regimes (e.g. SIFs/SICARs may adopt the form of the new special limited partnership);
- new provisions relating to the management of conflicts of interests by SICARs (alignment with the SIF regime).

#### SIFs/SICARs partially in the scope of the AIFM Law

SIFs/SICARs benefitting from one of the derogatory regimes provided for by the AIFM Law (e.g. group and *de minimis* exemptions) remain subject, to a large extent, to requirements similar to those applicable under the current SIF/SICAR regimes (subject to the same adjustments as those referred to above in relation to SIFs/SICARs that do not qualify as AIFs).

However, new AIFMD registration and ongoing reporting to the CSSF must be done in relation to these SIFs/SICARs benefitting from and using the *de minimis* exemption.

#### No AIFMD passport

No AIFMD passport will be available for (i) SIFs/SICARs that do not qualify as AIFs (e.g. SIFs/SICARs with one single investor or qualifying as joint ventures, etc.), and (ii) SIFs/SICARs benefitting from one of the derogatory regimes provided for by the AIFM Law

(e.g. group and *de minimis* exemptions).

## 7. Impact on Services Providers

Besides the depositary, whose role and liabilities have been redefined by the AIFMD, other service providers to Part II UCIs, SIFs and SICARs (such as the central administration, valuers, investment managers, etc.) will be impacted by new AIFMD organisational and operational requirements in terms of, among others, valuation of assets, delegation of functions, risk and liquidity management, conflict of interests, remuneration, disclosure and reporting to investors and regulators.

### 7.1 Depositary

#### AIFMD Impact on Depositary

The AIFM Law has introduced a new depositary regime for Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs, including new eligibility criteria, duties and liability standards.

This new regime will require the AIFM/AIF to replace the depositary agreement not compliant with the requirements of the AIFM Law.

For the sake of completeness, the existing depositary regime will be maintained, to a large extent, for Part II UCIs, SIFs and SICARs which do not fall, or fall only partially, within the scope of the AIFM Law. Some adjustment to the existing depositary regime will however be made, in particular as regards the extension of the eligibility criteria to act as depositary of Part II UCIs, SIFs and SICARs that do not qualify as Full Scope AIFs and the possibility for these investment vehicles to appoint

a Luxembourg branch of a non-EU eligible entity as depositary.

### 7.1.1 Eligibility Criteria

The depositary of all Part II UCIs, SIFs and SICARs (regardless whether they are Full Scope AIFs or not) shall be:

- a credit institution (within the meaning of the Financial Sector Law); or
- a MiFID investment firm (within the meaning of the Financial Sector Law, which is also subject to own funds requirements and other conditions laid down in the AIFM Law).

A new category of professional of the financial sector (PFS) is also introduced in the Financial Sector Law that can act as depositary of any Part II UCI, SIF and SICAR which:

- is closed-ended for a period of 5 years from the date of their initial investments; and
- do generally not invest in assets to be held in custody or generally seek to acquire the control over the issuers or non-listed companies (e.g. mainly private equity and real estate AIFs).

### 7.1.2 Depositary's Duties (Full Scope AIFs only)

The main duties of the depositary of Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs shall include:

- safekeeping duties, where a distinction is made between:
  - the custody duties relating to financial instruments of the relevant Part II UCI, Part II SIF and Part II SICAR that can be held in custody by the depositary; and

- the verification duties over the ownership rights of the relevant Part II UCI, Part II SIF and Part II SICAR relating to the other types of assets (such as real estate or commodities);

- monitoring duties over the assets and transactions of the relevant Part II UCI, SIF and SICAR ;
- cash monitoring duties, implying the obligation for the depositary to ensure that the relevant Part II UCI's, SIF's and SICAR's cash in- and outflows are properly monitored.

### 7.1.3 Depositary's Liability (Full Scope AIFs only)

New liability standards have been introduced for depositaries towards Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs and their investors.

In general, the depositary of these funds shall only be liable towards the AIF or its investors for losses due to its negligence or intentional failure to perform its obligations. However, in case of loss of financial instruments held in custody, the depositary will be subject to stricter liability, being required to provide replacement assets (of identical type or corresponding amount) without undue delay. This being said, the depositary shall not be liable if it can evidence that the loss is due to external events beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. Equally, limitation and/or discharge of the depositary liability are possible in case of delegation of custody tasks relating to financial instruments, provided that the depositary has complied with all prescribed obligations under the AIFM Law and

there is an objective reason for the delegation of the custody tasks.

## 7.2 Central Administration Agent

### AIFMD Impact on Central Administration

One element that is likely to affect the central administration agent of Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs is the required compliance with and increased liability relating to the new valuation and net asset value calculation processes and procedures laid down in the AIFM Law (see 3.1.10).

Part II UCIs, SIFs and SICARs generally do not carry out valuation and net asset value calculation activities themselves but delegate this function to a Luxembourg central administration agent, under the prudential supervision of the CSSF.

In the case where, for example, such central administration agent would be appointed as external valuer for Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs, it would need to revisit its valuation policies, procedures and models to comply with the AIFMD requirements and also consider its liability to the AIFM for any losses suffered by the AIFM as a result of the central administration agent's negligence or intentional failure to perform its tasks as external valuer.

In any case, Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs will also need to rethink their current valuation model in terms of AIFM's liabilities. Indeed, under the current practice, the governing body of Part II UCIs, SIFs and SICARs is responsible for the proper valuation of the assets and the net asset value

calculation to the extent that it has the ultimate decision making power. However, the AIFM Law clearly foresees that the AIFM will remain liable towards the AIF and its investors for the proper valuation of the AIF's assets and the calculation as well as the publication of the net asset value.

For the avoidance of doubt, the central administration of Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs must be located in Luxembourg even if these AIFs are managed by an authorised foreign external AIFM (EU or non-EU after 2015).

### 7.3 Investment and Risk Managers

#### AIFMD Impact on Investment and Risk Managers

Aside from the AIFMs, entities to which investment/risk management of Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs have been delegated by the AIFM will also be indirectly impacted by the new AIFMD regime, which imposes, among others, strict delegation rules (see 1.1 and 2.1.3) and remuneration principles to be complied with also at the level of the delegates.

In practice, the delegation framework of Part II UCIs, Part II SIFs and Part II SICARs qualifying as Full Scope AIFs will need to be organised or reviewed and updated (as the case may be) to reflect and be compliant with the following main rules<sup>34</sup>:

- the substance of the AIFM must be ensured at all times against the letter-box entity criteria;
- an initial due diligence and ongoing supervision of the investment/risk manager must be

performed by the AIFM in order to ensure that the relevant delegate:

- has sufficient resources and personnel of sufficiently good repute and sufficiently experienced to perform the relevant tasks;
- belongs to the eligible categories of investment/risk manager depending on whether the delegate is an EU or non-EU entity;
- the AIFM must implement an operational business continuity plan for the case of termination of the contractual relationship, either by transferring the tasks to another third party or in-sourcing them;
- the AIFM must implement a best execution policy ensuring that the investment manager will always act in the best interest of the AIF when executing decisions to deal on behalf of the AIF.

Another potential AIFMD impact to be considered by investment/risk managers derives from ESMA Guidelines on remunerations policies which specifically provide that the entities to which portfolio management or risk management activities will be delegated by the AIFM, regardless whether these delegated entities are located within or outside the EU, must also be subject to remuneration policies which are equally as effective as those applicable under ESMA Guidelines or, alternatively, that ESMA Guidelines are contractually imposed on these delegated entities.

## 8. Transitional Provisions

The AIFM Law, including the proposed modifications it has introduced in relation to the Product Laws, was voted by the Luxembourg Parliament on 10 July 2013 and entered into force on 15 July 2013, subject to some transitional and grandfathering provisions.

### 8.1 Full Scope AIFMs/ AIFs

The main transitional and grandfathering provisions relating to the AIFM/AIF status of Part II UCIs, SIFs and SICARs qualifying as Full Scope AIFs and their Luxembourg management companies, are summarised below.

#### 8.1.1 Management Companies

##### UCITS Management Companies (Chapter 15) managing AIFs in addition to UCITS

Existing UCITS management companies authorised under Chapter 15 of the UCI Law that manage, **before 22 July 2013**, in their capacity as designated management company, one or more AIFs within the meaning of the AIFMD, will have **until 22 July 2014**:

- to comply with the new applicable provisions of the UCI Law coming from the AIFM Law (i.e. new art. 101-1 of the UCI Law containing new rules as regards, *inter alia*, the double license UCITS/AIFM); and
- to submit an application for authorisation as AIFM with the CSSF.

However, the requirements for authorisation as AIFM will be lighter for these management companies cumulating the UCITS and AIFM licenses. Amongst other things, the CSSF shall not require these management companies to provide information or documents already provided when applying for authorisation under Chapter 15 of the UCI Law, provided that such information or documents remain up-to-date.

Notwithstanding the transitional provisions of the preceding paragraphs, UCITS management companies which need an authorisation as AIFM under the AIFM Law are invited to submit to the CSSF, as soon as possible and by **1 April 2014** at the latest, their application file.

#### Non-UCITS management companies (Chapter 16) managing AIFs

Existing non-UCITS management companies authorised under Chapter 16 of the UCI Law that have already managed, **before 22 July 2013**, in their capacity as designated management company, one or more Full Scope AIFs, and which decide to be appointed as the designated AIFM of at least one of these AIFs, will have **until 22 July 2014** to comply with the new applicable provisions of the UCI Law coming from the AIFM Law (i.e. new art. 125-2 of the UCI Law containing new rules as regards, *inter alia*, the scope of activities of these management companies and the conditions to be complied with to obtain the AIFM license according to Chapter 2 of the AIFM Law).

As regards the deadlines for compliance with the AIFM Law requirements, non-UCITS management companies, which benefit from the one-year transition

period, are also invited to submit their AIFM application file to the CSSF by **1 April 2014** at the latest.

#### 8.1.2 Part II UCIs, SIFs and SICARs

##### Full scope AIFs created before 22 July 2013

Existing Part II UCIs, SIFs and SICARs qualifying as full scope AIFs that are created before 22 July 2013 will have **until 22 July 2014** to comply with the new "product rules" coming from the AIFM regime (i.e. new Chapter 10bis of the UCI Law, respectively new Part II of the SIF Law/SICAR Law containing new rules as regards, *inter alia*, the conditions for the designation of the authorised AIFM, the depositary regime, the delegation of functions, the valuation of assets, as well as the reporting and disclosure obligations to investors and regulators).

However, this 22 July 2014 deadline applicable to Part II UCIs, SIFs and SICARs created before 22 July 2013 is without prejudice of, and must be combined with, the transitional provisions applicable (as the case may be) to the AIFM itself as well as with the specifics of each envisaged transaction. In particular if a management company is licensed by the CSSF as AIFM prior to 22 July 2014, it must make sure that each AIF it manages also complies with the AIFMD requirements at the time of the AIFM license of the management company, irrespective of whether such management company could have applied for an AIFM license at a later stage (i.e. until 22 July 2014).

Moreover, the CSSF has indicated in its FAQs that Part II UCIs, SIFs and SICARs qualifying as externally managed AIFs and benefitting from the 22 July 2014 deadline have to

demonstrate by **1 April 2014** at the latest to the CSSF how they will ensure compliance with the new AIFMD product requirements by 22 July 2014.

##### Full scope AIFs created between 22 July 2013 and 22 July 2014

New Part II UCIs, Part II SIFs and Part II SICARs qualifying as full scope AIFs that are created between 22 July 2013 and 22 July 2014 must, in principle, comply with the new product rules introduced in Chapter 10bis of the UCI Law, respectively new Part II of the SIF Law/SICAR Law, **as from the date of their creation**.

By way of derogation to the above, Part II UCIs, Part II SIFs and Part II SICARs qualifying as full scope AIFs that are created between 22 July 2013 and 22 July 2014, but that have an **external manager that was existing and performing activities captured by the AIFM Law prior to 22 July 2013**, will have **until 22 July 2014** to comply with the new AIFM Law product rules and may also continue to be managed by a non- authorised AIFM until **22 July 2014**.

Again, this 22 July 2014 deadline applicable to SIFs created between 22 July 2013 and 22 July 2014 is without prejudice of, and must be combined with, the transitional provisions applicable (as the case may be) to the AIFM itself as well as with the specifics of each envisaged transaction. On their side, these externally managed AIFs have to demonstrate by **1 April 2014** to the CSSF how they will ensure compliance with the new AIFMD product rules.

**Full scope AIFs created after  
22 July 2014**

All Part II UCIs, Part II SIFs and Part II SICARs qualifying as full scope AIFs that are created after 22 July 2014 are *ipso jure* governed by the new provisions of Chapter 10bis of the UCI Law, respectively Part II of the SIF Law/SICAR Law.

Unless they benefit from the group exemption or the *de minimis* exemption (and effectively use the benefit of the latter), these Part II UCIs, Part II SIFs and Part II SICARs created after 22 July 2014 (or their managers, as the case may be), are *ipso jure* subject to the provisions of the AIFM Law.

**Closed-ended AIFs**

Part II UCIs, SIFs and Part II SICARs qualifying as closed-ended AIFs that are created before 22 July 2013 and which do not make any additional investments after that date are not required to be managed by an authorised AIFM within the meaning of Chapter 2 of the AIFM Law.

However, the AIFM Law specifies that closed-ended Part II UCIs (as above mentioned) or their managers, as the case may be, must comply with the provisions of the AIFM Law that are applicable to Part II UCIs benefiting from and making use of the *de minimis* exemption (e.g. they will be subject to registration and ongoing reporting requirements vis-à-vis the CSSF).

Part II UCIs, Part II SIFs and Part II SICARs qualifying as closed-ended AIFs whose subscription period for investors has closed prior to 21 July 2011 and have a fixed term which expires at the latest 3 years after 22 July 2013 do not need to comply with the provisions of the AIFM Law, except for the provisions

relating to the annual report and, where relevant, the provisions on the obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers, or submit an application for authorisation under the AIFM Law.

**8.2. Small AIFMs/AIFs**

According to CSSF press release 13/32, the date of entry into force of the obligation to become registered with the CSSF for small Luxembourg AIFMs is as follows:

- small Luxembourg AIFMs created and/or starting their activities on or after 22 July 2013 have to apply prior to starting their business;
- small Luxembourg AIFMs existing and performing activities before 22 July 2013 had to register immediately with the CSSF.

**Clifford Chance would be pleased to advise in more detail on any of the aspects covered in this briefing or relating to the AIFMD and AIFM Law more generally.**

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- <sup>1</sup> Directive 2009/65/EC of 13 July 2009 of the EU Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investments in transferable securities.
- <sup>2</sup> In this briefing, "EU" shall also mean, where applicable, "EEA" to the extent that the AIFMD assimilates Iceland, Norway and Liechtenstein (which are contracting parties to the agreement creating the European Economic Area (EEA)) to the Member States of the EU, within the limits of the EEA agreement and related acts.
- <sup>3</sup> Luxembourg law of 17 December 2010 (as amended) on undertakings for collective investment.
- <sup>4</sup> Luxembourg law of 13 February 2007 (as amended) on specialised investment funds.
- <sup>5</sup> Luxembourg law of 15 June 2004 (as amended) on the investment company in risk capital.
- <sup>6</sup> See in particular CSSF press releases 13/25 and 13/32.
- <sup>7</sup> Regulation (EU) 345/2013 of the EU Parliament and of the Council of 17 April 2013 on EU venture capital funds; Regulation (EU) 346/2013 of the EU Parliament and of the Council of 17 April 2013 on EU social entrepreneurship funds.
- <sup>8</sup> Proposal of the EU Commission of 26 June 2013 for a regulation of the EU Parliament and of the Council on EU long-term investment funds.
- <sup>9</sup> For the sake of completeness, the AIFM Law also applies to non-EU AIFMs where Luxembourg is defined as the Member State of reference of the non-EU AIFMs.
- <sup>10</sup> The formulation contained in point 2(a) and the first part of point 2 (c) of Annex I of the AIFM Law is general (i.e. it refers to "an AIF", respectively "AIFs", and not to "the AIF" managed by the AIFM). In our view, this formulation could be construed as permitting a Luxembourg AIFM, in addition to the key functions of investment management it provides to its own AIF(s), to also provide, additionally, administration services to other AIFs managed by another AIFM, either by means of delegation or by free provision of services.
- <sup>11</sup> Luxembourg law of 5 April 1993 (as amended) on the financial sector.
- <sup>12</sup> Directive 2003/41/EC of the EU Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision.
- <sup>13</sup> Parl.Doc. N°6471 dated 24 August 2012, Comments on the articles, pp. 118 and 120.
- <sup>14</sup> ESMA/2013/611, p. 6.
- <sup>15</sup> The list of documents and information to be provided to the CSSF is not exhaustive but for guidance purposes only.
- <sup>16</sup> Therefore, the CSSF considers that the substance, organisational and operating requirements applying to Luxembourg UCITS management companies and self-managed UCITS-SICAVs as laid down in CSSF Circular 12/546 apply by analogy to Luxembourg AIFMs.
- <sup>17</sup> Delegated Regulation, art. 60(2), point e).
- <sup>18</sup> Delegated Regulation, art. 60(2), point d).
- <sup>19</sup> The list of documents and information to be provided to the CSSF is not exhaustive but for guidance purposes only.
- <sup>20</sup> A qualifying holding means any direct or indirect holding in a management company which represents 10% or more of the capital or of the voting rights, in accordance with art. 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation of the holding laid down in art. 12(4) and (5) thereof, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists.
- <sup>21</sup> The list of documents and information to be provided to the CSSF is not exhaustive but for guidance purposes only. For a complete list, see AIFM Law, art. 6 and 21.
- <sup>22</sup> The concept of "professional investors" refers to any investor that is considered as, or may be treated as, a professional client under Annex II of the MiFID Directive.
- <sup>23</sup> As in the case of UCITS, the AIFMD and AIFM Law assimilate Iceland, Norway and Liechtenstein to the Member States of the EU within the limits of the agreement creating the EEA and related acts.
- <sup>24</sup> AIFMD, art. 61(1).
- <sup>25</sup> AIFM Law, art. 34.
- <sup>26</sup> Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (as amended).
- <sup>27</sup> Extension of the AIFMD passport is subject to ESMA positive assessment and EC appropriate implementing measures.
- <sup>28</sup> AIFM Law, art. 46.
- <sup>29</sup> Indeed, the minimum initial capital (i.e. €125,000) and additional amount of own funds required by the AIFM Law when the value of the portfolio managed by an external AIFM exceeds €250 million (i.e. 0,02% of the value of the portfolio which exceeds €250 million with a maximum of €10 million) are, to a large extent, similar to the requirements imposed to UCITS management companies governed by Chapter 15 of the UCI law.
- <sup>30</sup> CSSF FAQ, question 4.b).
- <sup>31</sup> Most of the requirements introduced by the AIFM Law are in fact similar to those applicable to UCITS management companies under the UCITS Directive and Chapter 15 of the UCI Law.
- <sup>32</sup> After 22 July/October 2015 at the earliest, the EU passport may be available to non-EU AIFMs managing and/or marketing EU and non-EU AIFs in the EU, subject to compliance with the entire AIFMD rules. Non-EU AIFMs of EU AIF may however have to become authorised and licensed as non-EU AIFM and to comply with the full AIFMD by July/October 2015.
- <sup>33</sup> The same regime applies to every Part II UCI qualifying as AIF benefitting from the group exemption, except that these Part II UCIs will not be subject to registration and reporting requirements under the AIFM Law.
- <sup>34</sup> The potential impact will however differ from one AIF to the other. In particular, most of the delegation requirements have already been anticipated and implemented into the SIF Law in March 2012 and should require limited adjustments only for Part II SIFs qualifying as Full Scope AIFs.