COLLECTIVE INVESTMENT SCHEMES IN LUXEMBOURG

Law and Practice

SECOND EDITION

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Definition of Undertaking for Collective Investment

Rather than introducing a general definition of undertaking for collective investment (UCI), the authors of the 2010 Act, in line with the 2002 Act and the previous 1988 Act, sought to define its constituent elements.[1] Three basic criteria are required to constitute a UCI. A UCI is an investment structure: **1.01**

(1) whose funds have been raised from the public, and are used for collective investment;
(2) the exclusive object of which is the collective investment of savings;
(3) which invests in assets (transferable securities or other assets) and operates in accordance with the principle of risk-spreading.

Whereas the first of those three criteria—the raising of funds from the public—may be dispensed with in certain cases specified by law, the second and the third ones must always be met. These criteria were considered and clarified by the CSSF, the prudential authority for UCIs, in Circular 91/75.[2] **1.02**

[1] The authors want to thank G Schneider for her valuable contribution to this chapter.

[2] Ch B, I, Circular 91/75. A fourth criterion, not included as such in Circular 91/75, stipulates that Luxembourg-based UCIs must issue units or securities in accordance with Arts 2(2), 89(1), 93, and 97 of the 2010 Act. This requirement excludes certain structures from the scope of the legislation governing UCIs. See 2.173.

1.03 Luxembourg UCIs are for the most part governed by Directive 2009/65 or, through their managers (AIFM), by AIFMD.[3] AIFM is a legal person whose regular business is managing one or more AIFs. AIFMD applies to all types of alternative investment funds, without distinction between regulated[4] and non-regulated structures. It does not abolish such distinction but merely creates sub-categories within these structures. Before the adoption of AIFMD, the concept of UCI necessarily referred to a regulated fund structure. AIFMD, on the contrary, may now apply also to unregulated AIFs which are not themselves subject to regulatory supervision. Only regulated UCIs are dealt with in this book. This book also uses the terms 'coordinated UCITS' and 'coordinated AIF'. The term 'coordinated UCITS' means UCITS meeting the requirements contained in in Directive 2009/65.[5] Reference to 'coordinated AIF' in this book is to be understood as a reference to an AIF that is subject to the 'product' requirements contained in AIFMD and imposed on it via an AIFM. In a similar manner, the terms 'coordinated management company' and 'coordinated AIFM' are used to describe the managers that are subject to the full scope of requirements contained in Directive 2009/65 or AIFMD respectively.

1.04 The definition of the AIF in AIFMD is much broader than that of the UCI. According to it, an AIF is an investment fund other than a UCITS which raises capital from a certain number of investors with a view to investing it in the interests of these investors, in accordance with a defined investment policy. When AIFMD applies to their managers, it governs structures which were not considered UCIs in Luxembourg before its entry into force.

1.05 The definition of an investment fund under AIFMD also contains the criteria set out above, with two essential differences.[6] Firstly, an AIF is not subject to the principle of risk diversification.[7] Secondly, an AIF must always raise capital from a number of investors.[8] No derogation is provided in this regard.

An AIF shares the following characteristics with other UCIs:

(1) it raises capital from investors;
(2) it invests capital raised for the benefit of those investors;
(3) it invests capital raised in accordance with a defined investment policy.[9]

1.06 Although very similar, the definition of an investment fund in Luxembourg law and that of an AIF is not identical. An AIF may hold only one investment, contrary to other Luxembourg funds. Certain other types of investment funds may be reserved for a single investor. This is not the case with respect to AIFs.

[3] Although AIFMD does not directly regulate the AIFs, internally-managed AIFs that have not appointed an external manager are subject to AIFMD directly.

[4] It would be more precise to refer to the distinction between supervised entities and non-supervised entities. This however is not the terminology used in practice.

[5] As more fully described under 2.06.

[6] It is not certain that these differences were fully desired by the European legislature. For the latter, it was necessary that AIFMD applied to 'AIFMs managing all types of funds that are not covered by Directive 2009/65/EC[...], irrespective of the legal or contractual manner in which the AIFMs are entrusted with this responsibility' (Preamble to AIFMD, 3rd Recital). A careful reading of the definition of an AIF does not however permit such a universal application of AIFMD.

[7] Art 4(1)(a)(i), AIFMD.

[8] Art 4(1)(a)(i), AIFMD.

[9] Art 4(1)(a)(i), AIFMD.

The European legislature specifically precluded an AIF from seeking to qualify both as an AIF and a UCITS by providing that an AIF may not be subject to the authorization provided for in Directive 2009/65. **1.07**

Raising capital from the public

Capital is raised from the 'public' when it is raised from a group of investors which extends beyond a 'small circle of persons'.[10] There is no fixed minimum number of investors beyond which the target investors cease to be a 'small circle of persons'. The threshold in question is considered on a case-by-case basis by the CSSF, which does not, for example, regard family holding companies and investment clubs as collecting savings from the public albeit they are 'pursuing the objective of the collective investment of savings'.[11] **1.08**

Similarly, the European legislature specifies that 'family office' investment structures which invest the private assets of certain persons without raising external funding are not to be deemed funds covered by AIFMD.[12] **1.09**

In the course of Parliamentary debates prior to the enactment of the 2002 Act it had been proposed not to regulate groups of investors comprising fewer than twenty persons.[13] An undertaking that does not wish to place its units with a larger number of investors therefore would not have come within the sphere of the 2010 Act. However, the legislation did not expressly provide for this clarification. **1.10**

In addition the launch by a promoter of a UCI intended to be sold only to entities within its own group, is not an offering of units to the 'public'. Investors should be sought from 'outside' the group of companies rather than 'within' the relevant corporate group. An offer to the 'public' is effected only when marketing efforts are targeted at a promoter's clientele or the clientele of one or more group entities. **1.11**

A UCI must intend to place its units or shares with the public, regardless of whether or not it achieves this result. Failure to sell to the public does not automatically result in failure to satisfy the requirement, provided the UCI can demonstrate its bona fide intention to market its units or shares to the public. **1.12**

There is no other definition of the term 'public'. The investor can be either institutional or private and an investor in the case of an offer to the 'public' is not required to meet any requirement as to status or capacity. **1.13**

However, the term 'public' can have several meanings in the context of UCIs, depending on the situation. For example, in the context of raising funds for a UCI, it can mean a relatively large group of persons. In contrast, in other circumstances, it can be used to distinguish the type of investor concerned, for example to draw a distinction between well-informed investors and the 'general public'. This distinction is particularly relevant in differentiating the scope of the 2010 Act and the Act of 13 February 2007 respectively. The 2010 Act refers **1.14**

[10] Ch B, I, Circular 91/75.
[11] Ch B, II, Circular 91/75.
[12] Preamble to AIFMD, 7th Recital.
[13] This figure was also mentioned in the Parliamentary documents for the Act of 2 August 2003, which amended amongst others the 1993 Act (*Parliamentary doc* No 5085, Explanatory Statement, 14).

to the public as an 'unrestricted circle of persons' whereas the Act of 13 February 2007, in limiting the eligibility of investors in funds it governs to well-informed investors, refers to 'the public' as any investor who is not well informed. Similar features apply in the context of AIFMD which refers to 'professional' investors.

1.15 Thus, it is not always necessary for a UCI to raise capital from the public. The Act of 13 February 2007 permits the creation of UCIs whose units or shares are sold to one or more well-informed investors. UCIs authorized under this Act will therefore not necessarily raise funds from an unrestricted circle of persons, (ie the public as defined in the 2010 Act),[14] and can, indeed must, target a select investor group.[15] An AIF, in term, needs to 'raise capital from a number of investors'.[16]

Collective investment of savings

1.16 The collective investment of savings is defined as the common investment of a number of individual investment contributions raised from the public. They may be invested in transferable securities or other assets.

1.17 Investment suggests that the purchase or sale of portfolio assets is carried out with the objective of generating a yield or capital gains. In contrast with other types of financial vehicles, a UCI does not acquire interests in order to obtain influence or control, albeit certain UCIs, such as those investing in venture capital assets, can in fact hold significant interests in certain companies. However, even in those circumstances, the UCI's main purpose is not to exercise control over the target company but rather to generate a return. The objective of a UCI is to show a capital gain once the scheme is sufficiently mature.

Investment according to the principle of risk spreading

1.18 Spreading investment risks avoids the excessive concentration of a UCI's investments and reduces investment risk. A minimum level of diversification of investments between assets of different types and issuers is required, although this requirement is interpreted differently, depending on the type of UCI.

Historical Background

1.19 UCIs have existed since the late nineteenth century, even though they only came into their own in the twentieth century. For instance, the years between 1880 and 1900 saw the rise in

[14] An investment structure that does not canvass the public is not necessarily governed by the Act of 13 February 2007. An undertaking engaged in the collective investment of assets according to the principle of risk spreading, which reserves its units or shares for well-informed investors and does not canvas the public for funds, may either opt for application of the Act of 13 February 2007 and the regulations laid down by the CSSF or adopt, for example, the status of a non-regulated financial company whose activity is not supervised by the CSSF. For further explanations about these aspects, see 2.88 and 2.89.

[15] Art 1(1), Act of 13 February 2007, under which SIFs may reserve their securities for 'one or several well-informed investors'.

[16] Art 4(1)(a)(i), AIFMD. ESMA consultation paper of 19 December 2012 on Guidelines on key concepts of AIFMD (ESMA/2012/845) seems to clarify this concept, see Annex V in particular.

Scotland of the investment trust company whose objective was to invest in farm mortgages.[17] This Scottish innovation subsequently crossed the Atlantic to the United States, where it became a popular investment vehicle, especially after the First World War. Emboldened by their success, the managers of such investment companies borrowed increasingly large amounts for investment purposes. The assets managed by some of those companies were out of all proportion to their share capital, resulting in their demise during the Wall Street crash of 1929.

1.20 The Wall Street crash led to an increased interest by US investors in another type of UCI, the unit trust rather than a corporate structure. First constituted in England in 1868, this type of UCI initially ran into legal difficulties. One judge considered it a breach of English company law. While that judgment was overturned on appeal, it prompted the conversion into limited liability companies or liquidation of many such trusts.

1.21 In unit trusts, securities are bought and vested in a trustee, generally a regulated institution such as a bank or an insurance company. In return for payment/subscriptions for units, investors become the trust's beneficiaries and are issued with 'units' representing their rights. The management of a trust's portfolio is entrusted to a management company separate and distinct from the trustee.

1.22 The unit trust structure offered two major advantages compared with investment companies. First, securities acquired by a trust were held in the custody of a trustee who was independent from the management company. Secondly, trust participants could at any time sell their units back to the trust, whereas an investment company was not entitled to buy back its own shares.

1.23 It was another fifty years before these structures re-emerged in Europe. The first Swiss trust was created in 1930. Similarly, the successful sale in Great Britain of units in US trusts prompted British financiers to revive this type of product in 1931.

1.24 Nevertheless, the British investment community quickly distinguished itself from its American counterpart. Chastened by the lessons learnt from the crash of 1929, the Americans had laid down extremely rigid management rules, whereas the British introduced ever greater flexibility. In a US trust, the composition of the portfolio had to be settled once and for all, and securities could be sold only under extremely strict conditions. The conditions imposed on trusts set up under English law were, from the outset, more flexible. The managers of English trusts were gradually authorized to sell portfolio securities when they considered this to be in the best interests of the unitholders, thereby boosting the popularity of this type of trust, of which there were 98 in England by 1939, covered by special regulations under the Prevention of Fraud (Investments) 1939 Act, which came into force on 8 August 1944.

1.25 The fund industry has continued to grow steadily ever since. In 1940, there were 111 investment funds in the United States, comprising 43 companies and 68 trusts. By 1957, there were 167 funds, comprising 24 companies and 143 trusts.[18]

[17] The following discussion is mainly drawn from CO Merriman, *Unit Trusts and How They Work* (Pitman & Sons, 2nd edn, 1959) 1–10.

[18] Merriman (n 17) 13.

1.26 1959 saw the creation of the first investment fund in the Grand Duchy of Luxembourg, under the prescient name 'FCP Eurunion'.[19] Broadly inspired by the trust structure described above, this was built around three components:

(1) a depositary bank responsible for keeping the securities in safe custody and overseeing their management;
(2) a management company responsible for managing and building up the portfolio;
(3) unitholders, the joint owners of the securities portfolio.

The relationships between the three parties were governed by management regulations.

1.27 During the same period, ie in 1959 and 1960, the first incorporated investment funds emerged in the Grand Duchy of Luxembourg. In contrast with the English model, such companies were able to repurchase their own shares indirectly from their shareholders, under a structure involving the creation of a separate company known as a 'repurchase company'. Having waited a long time before creating a UCI based on the British model, the Grand Duchy of Luxembourg thus took an additional step, offering investors an opportunity that English investment companies were unable to provide.

1.28 Investment funds soon became an integral part of Luxembourg's investment scene, helped by a flexible and robust legal and regulatory environment, attractive tax treatment, and the steadily growing expertise of local service providers. In 1970, there were 102 UCIs in the Grand Duchy of Luxembourg. In 2012, there were 3,841,[20] with aggregate net assets of €2,383.826 billion,[21] placing the Grand Duchy of Luxembourg second in the world behind the United States in terms of fund volumes.

Legal Sources

Specific laws and regulations applicable to UCIs

Chronological record of laws and regulations

Grand-Ducal Decree of 22 December 1972 concerning the supervision of investment funds

1.29 The Grand-Ducal Decree of 22 December 1972[22] was the first Luxembourg regulation to be adopted with regard to UCIs.[23] Prior to the adoption of that Decree, corporate UCIs had been created under the 1915 Act and for tax purposes were governed by the 1929 Act. This infrastructure was complemented by administrative decisions and recommendations, *inter alia*, from the Treasury Minister, the registration authority,[24] and the Banking

[19] M-J Chèvremont, 'Évolution de l'industrie des fonds d'investissement en Europe et au Luxembourg en particulier', in Les fonds d'investissement, réglementation-fiscalité-évolution, Seminar held on 24 and 25 November 1988, *Association Luxembourgeoise des Juristes de Banque* (ALJB), *Institut Universitaire International Luxembourg* (IUIL) 5.

[20] This figure comprises 1,379 traditional UCIs and 12,041 sub-funds of umbrella UCIs.

[21] Figures at 31 December 2012; source: statistics and figures published by the ALFI on the general situation of UCIs in Luxembourg (available on the website <http://www.alfi.lu>).

[22] Grand-Ducal Decree of 22 December 1972 concerning the supervision of investment funds (*Mémorial* A 1972, 2112).

[23] In the Grand Duchy of Luxembourg, the term *fonds d'investissement*, which is a literal translation of the English *investment fund*, was used until the 1983 Act and introduced the concept of 'undertaking for collective investment', also found in Directive 85/611.

[24] *Administration de l'Enregistrement*.

Commissioner. The Banking Commissioner designates the banking control function established in Luxembourg on 17 October 1945. Its role was subsumed by the Luxembourg Monetary Institute on 20 May 1983 and is now performed by the CSSF. The initial legal framework contained numerous loopholes and, particularly for FCPs, proved to be inadequate, as evidenced by the IOS scandal towards the end of the 1960s.[25]

1.30 The Grand-Ducal Decree of 22 December 1972 was adopted in response to the IOS scandal. The Decree defined the meaning of 'investment funds' for the first time[26] and conferred on the Banking Commissioner supervisory authority over all Luxembourg-based UCIs (whether of a contractual, corporate, or other type) and all foreign investment funds whose units or shares were offered to the public in or from the Grand Duchy of Luxembourg.[27] The Decree further required UCIs to have their accounts audited by an independent expert who, 'whilst providing assurances as to his probity and professional qualifications',[28] was also obliged to provide the Banking Commissioner with 'all information or certificates required by the Commissioner in the areas of expertise of the expert in the performance of the audit'.[29]

1.31 In its regulation issued on 8 November 1974,[30] the Banking Commissioner set out the rules governing the monthly financial reports to be prepared and submitted by UCIs under his supervision.

1983 Act concerning undertakings for collective investment

1.32 The rapid development of UCIs in the 1970s evidenced the need for more systematic regulation of the organization, operation, and supervision of collective investment undertakings. Initially presented in Parliament on 31 December 1979,[31] comprehensive legislation was finally adopted four years later in the form of the 1983 Act.

1.33 In the preamble to the Bill, the government noted the absence of specific regulations governing UCIs and stated that 'in order to protect savings, there is clearly an urgent need to specify the legal basis for such undertakings and to enact operating rules to eliminate any legal uncertainty in this area'.[32]

1.34 At the time, the government was aware of the need to align the regime for Luxembourg-based UCIs with European Community law. In Parliamentary documents, it stressed the need to 'provide the parties concerned with an instrument capable of surviving, without amendment, the transposition into national law of EEC directives'.[33]

[25] Following a large-scale advertising campaign, Investors Overseas Services (IOS) persuaded more than 700,000 persons to subscribe for units in two FCPs it had created in the Grand Duchy of Luxembourg: the International Investment Trust and the Fund of Funds. Management of these UCIs was a disaster. Moreover, their assets had no genuine substance. The investors lost nearly their entire investment.

[26] Art 1(1) of the Grand-Ducal Decree of 22 December 1972 concerning the supervision of investment funds (*Mémorial* A 1972, 2112).

[27] Art 1(2), Grand-Ducal Decree of 22 December 1972.

[28] Art 3(1), Grand-Ducal Decree of 22 December 1972.

[29] Art 3(2), Grand-Ducal Decree of 22 December 1972.

[30] Approved by Ministerial Decree of 19 November 1974 concerning the approval of Banking Commissioner Reg No VM/1 of 8 November 1974 concerning the monthly financial reports to be prepared and submitted by the investment funds under his supervision (*Mémorial* A 1974, 1718).

[31] *Parliamentary doc* No 2366, Contents, 1.

[32] *Parliamentary doc* No 2366, Explanatory statement, 18.

[33] *Parliamentary doc* No 2366, Explanatory statement, 17.

1.35 The 1983 Act specifically governed the operation of FCPs. It introduced the SICAV, inspired by French legislation, into Luxembourg law. It also provided the legal framework for the other structures available to Luxembourg-based UCIs, and confirmed earlier regulations on the public offerings of units or shares in foreign UCIs in or from the Grand Duchy of Luxembourg.

1.36 The Grand-Ducal Regulation of 25 August 1983[34] determined the amount of fixed capital duty applicable to UCIs governed by the 1983 Act.

1.37 This was followed by the Grand-Ducal Regulation of 29 December 1983,[35] which laid down the rules governing the publication and filing of financial statements and reports by UCIs subject to supervision by the *IML*, which succeeded the Banking Commissioner under the Act of 20 May 1983.[36]

1988 Act concerning undertakings for collective investment

1.38 **Content of the 1988 Act** Already in the pipeline when the 1983 Act was approved, Directive 85/611 was adopted two years later and transposed into Luxembourg law by the 1988 Act.

1.39 This Directive coordinated the legislation of EEA Member States with regard to UCIs which invest in transferable securities and—since 2003—in other liquid financial assets (UCITS). It did not deal with other types of UCIs, which Member States were free to regulate under local law and regulation.

1.40 Directive 85/611 could have been transposed into Luxembourg law simply by amending the 1983 Act. The government nevertheless felt that, 'in order to improve the previous regime in certain areas and . . . to permit broader application of the instrument of undertakings for collective investment', it was necessary to 'review the entire subject-matter and to develop a law governing all undertakings for collective investment'.[37]

1.41 The Grand-Ducal Regulation of 30 March 1988[38] determined the amount of the fixed capital duty applicable to UCIs governed by the 1988 Act, without changing the situation which had existed since 1983.

1.42 The 1988 Act was repealed by the 2002 Act with effect from 13 February 2007. During the interim period, the two laws coexisted under a parallel system.

[34] Grand-Ducal Regulation of 25 August 1983 determining the fixed duty applicable to the capital collected in undertakings for collective investment governed by the Act of 25 August 1983 (*Mémorial* A 1983, 1476).

[35] Grand-Ducal Regulation of 29 December 1983 concerning the publication and periodic submission of financial statements and reports by UCIs subject to supervision by the *Institut Monétaire Luxembourgeois* (*Mémorial* A 1983, 2676).

[36] Act of 20 May 1983 concerning the creation of the Luxembourg Monetary Institute (*Mémorial* A 1983, 915), as amended by the Acts of 24 December 1984 (*Mémorial* A 1984, 2103), 22 December 1986 (*Mémorial* A 1986, 2403), 21 September 1990 (*Mémorial* A 1990, 734), 16 August 1991 (*Mémorial* A 1991, 1253), 5 April 1993 (*Mémorial* A 1993, 462), 23 December 1995 (*Mémorial* A 1995, 2303) and 22 April 1998 (*Mémorial* A 1998, 466).

[37] See the Parliamentary documents accompanying the 1988 Act (*Parliamentary doc* No 3172, Explanatory statement, 32).

[38] Grand-Ducal Regulation of 30 March 1988 determining the fixed duty applicable to the capital collected in undertakings for collective investment governed by the Act of 30 March 1988 (*Mémorial* A 1988, 168).

Because the 2002 and the 2010 Acts contain most of the provisions of the 1988 Act, many comments on the 1988 Act, particularly the Parliamentary documents preceding its enactment, remain relevant and the 1988 Act will be frequently referred to in this work. **1.43**

Amendments to the 1988 Act

Act of 23 December 1994 The Act of 23 December 1994 introduced the first change in the rate of the annual subscription tax paid by Luxembourg-based UCIs,[39] as this tax had proved to be a disincentive for certain types of UCIs wishing to establish in the Grand Duchy of Luxembourg, particularly money market funds. **1.44**

This Act reduced the subscription tax to 0.03 per cent for UCIs investing in money market instruments or cash and subscriptions by Luxembourg UCIs into other Luxembourg-based UCIs. The conditions for the application of the reduced tax rate and the qualifying criteria for money market instruments were set out in the Grand-Ducal Regulation of 14 April 1995.[40] **1.45**

Act of 24 December 1996 The Act of 24 December 1996 further reduced the subscription tax rate for certain types of Luxembourg-based UCIs to 0.01 per cent.[41] This reduction[42] applied to UCIs investing in money market instruments and/or demand or time deposits, and institutional UCIs within the meaning of the 1991 Act which provided a framework for funds sold solely to institutional investors. In addition, subscriptions by Luxembourg UCIs into other Luxembourg-based UCIs were entirely exempted from subscription tax. **1.46**

Issued on the same day, another Grand-Ducal regulation[43] defined the concept of a 'money-market instrument' and set out the terms and conditions governing the reduced tax rate.[44] **1.47**

Act of 29 April 1999 The Community legislature did not remain idle after adopting Directive 85/611. The scope of certain Community standards, including Directive 85/611, was extended to the EEA within the framework of the Agreement on the European Economic Area (EEA) signed in Porto on 2 May 1992.[45] Pursuant to Annex IX to that Agreement and Protocol 1 on horizontal adaptations, all references in Directive 85/611 to the 'Community' or the 'common market' were deemed to refer to the EEA. The subsequent bankruptcy of Bank of Credit and Commerce International (BCCI) necessitated the increased supervision of financial intermediaries. This, in turn, necessitated the removal of obstacles such as **1.48**

[39] Art 12, Act of 23 December 1994 concerning State revenues and expenditure for the 1995 fiscal year (*Mémorial* A 1994, 2481), amending Art 108, 1988 Act.

[40] Grand-Ducal Regulation of 14 April 1995 adopted in application of Art 108 of the Act of 30 March 1988 concerning undertakings for collective investment, as amended by the Act of 23 December 1994 concerning State revenues and expenditure for the 1995 fiscal year (*Mémorial* A 1995, 906).

[41] Art 5, Act of 24 December 1996 amending certain direct and indirect tax provisions (*Mémorial* A 1996, 2911).

[42] For the sequence and stages of the reduction, see 11.76 *et seq*.

[43] Grand-Ducal Regulation of 24 December 1996 adopted in application of amended Art 108 of the Act of 30 March 1988 concerning undertakings for collective investment, as amended by the Act of 24 December 1996 (*Mémorial* A 1996, 2914).

[44] The content of the Grand-Ducal Regulation of 24 December 1996 is identical to that of the Grand-Ducal Regulation of 14 April 1995, adopted in application of Art 108 of the Act of 30 March 1988 concerning undertakings for collective investment as amended by the Act of 23 December 1994 (see n 40).

[45] Agreement signed between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Kingdom of Sweden ([1994] OJ L 1/3).

business secrecy and bars on the disclosure of information between supervisory authorities. After Directive 85/611 had been modified to reflect these changes, the Luxembourg legislature had to make the corresponding adjustments to Luxembourg's national standards. This was the underlying purpose of the Act of 29 April 1999,[46] which amended the 1988 Act in the following areas:

(1) detailed provisions were added to step up cooperation between supervisory authorities;
(2) the audit obligations of UCI auditors were broadened;
(3) references in the 1988 Act to the EEC were partly replaced by references to the EEA.

1.49 *Act of 17 July 2000* Independently of the various Community initiatives, the Act of 17 July 2000[47] amended several further aspects of the 1988 Act, and included the following changes:

(1) the subscription tax was reduced to 0.01 per cent for sub-funds or unit classes sold to institutional investors in UCIs governed by the 1988 Act;[48]
(2) in umbrella UCIs, sub-funds were segregated vis-à-vis third parties so that the assets of an individual sub-fund could only be used to offset the liabilities of that particular sub-fund unless otherwise provided in the constitutive documents.[49]

1.50 *Act of 21 December 2001* The Act of 21 December 2001 significantly changed the tax regime of UCIs by reducing the subscription tax rate across the board from 0.06 to 0.05 per cent[50] (other than in respect of money market funds and funds sold to institutional investors to which the reduced subscription tax rates referred to above continued to apply).[51]

Act of 19 July 1991 concerning undertakings for collective investment whose securities are not intended for the public

1.51 The 2002 Act and, before it, the 1988 Act apply only to UCIs whose units are intended to be placed with the public. They do not cover investment structures sold to a small circle of well-informed investors. Because such structures could also benefit from the UCI regulatory infrastructure, the 1991 Act introduced the concept of institutional UCIs into Luxembourg law. It was replaced some fifteen years later by the Act of 13 February 2007 relating to specialized investment funds.

[46] Act of 29 April 1999 concerning: (1) transposition of Directive (EC) 95/26 concerning the reinforcement of prudential supervision, in the amended Act of 5 April 1993 concerning the financial sector and in the amended Act of 30 March 1988 concerning undertakings for collective investment; (2) partial transposition of Art 7, Directive (EEC) 93/6 on the capital adequacy of investment firms and credit institutions, in the amended Act of 5 April 1993 concerning the financial sector; (3) various other modifications in the amended Act of 5 April 1993 concerning the financial sector; (4) modification of the Grand-Ducal Regulation of 19 July 1983 concerning the fiduciary contracts of credit institutions (*Mémorial* A 1999, 1301 *et seq*).

[47] Act of 17 July 2000 amending certain provisions of the Act of 30 March 1988 concerning undertakings for collective investment (*Mémorial* A 2000, 1226 *et seq*); commented upon in Circular 00/14.

[48] Art 108, para 3, 1988 Act.

[49] Art 111(2), 1988 Act.

[50] Art 10, Act of 21 December 2001 reforming certain direct and indirect tax provisions (*Mémorial* A 2001, 3312 *et seq*), which amended Art 108(1), 1988 Act.

[51] The subscription tax has been amended once again by the Act of 19 December 2003 concerning the State revenue and expenditure budget for the fiscal year 2004 (*Mémorial* A 2003, 3687 *et seq*). Art 12 of the Act of 19 December 2003 grants total exemption from subscription tax to certain categories of institutional money market funds, amending Art 129(3), 2002 Act (now Art 175, 2010 Act).

Act of 20 December 2002 with regard to undertakings for collective investment

Content of the 2002 Act Despite a few upgrades, Directive 85/611 enjoyed limited success as regards its stated objective of the free marketing of UCIs throughout Europe. **1.52**

The UCI markets had grown considerably since 1985, with UCIs investing in an increasingly diversified range of securities. Some of these, such as money market instruments, were still not considered transferable securities in all Member States. A UCI whose sole purpose was to invest in money market instruments was not freely able to distribute throughout Europe using the 'UCITS' passport in all markets. It could only claim the general principle of free movement of capital under the EC Treaty more or less respected by each host country. This was a frustrating situation for both the promoters of the relevant UCIs and the Community authorities, who wanted to give such products broader access to the internal market. **1.53**

It was further felt that investor protection would be strengthened by regulating the status of management companies. **1.54**

In addition, the fund industry expressed the need to simplify disclosure requirements, and called, *inter alia*, for the introduction of a simplified prospectus which could be provided to investors instead of the complete prospectus, thereby also facilitating the marketing of coordinated UCITS. **1.55**

The overhaul of Directive 85/611 turned out to be a long and laborious process, finally culminating in two directives amending Directive 85/611, ie Directive 2001/107 and Directive 2001/108. The 2002 Act transposed these two directives into Luxembourg law following the structure of the 1988 Act other than in relation to new changes introduced to comply with new Community standards. **1.56**

The 2002 Act was divided into five parts. Part I on coordinated UCITS transposed the new regime introduced by Directives 2001/107 and 2001/108 while retaining provisions from Part I of the 1988 Act which were not affected by the new Community legal framework. The changes mainly concerned the investment policies of coordinated UCITS to reflect the expanded range of authorized investments and related investment restrictions. **1.57**

It was still possible to establish UCIs outside the Community framework pursuant to Part II of the 2002 Act, which, for the most part, was identical to Part II of the 1988 Act. **1.58**

As in the 1988 Act, Part III contained a single provision with regard to the inward marketing into Luxembourg of foreign UCIs which are not coordinated UCITS. **1.59**

A new Part IV on management companies reflected the new Community requirements for companies managing coordinated UCITS. It also covered the standards governing other types of management companies (ie those managing only UCIs other than coordinated UCITS), merging provisions from the 1988 Act with new provisions derived from Directive 2001/107. **1.60**

Part V was very similar to Part IV of the 1988 Act and contained general rules applicable to coordinated UCITS and other UCIs. The new provisions inserted by the Luxembourg legislature dealt with the simplified prospectus introduced under Directive 85/611, cooperation between the CSSF and foreign management company supervisory authorities, and new methods of publishing UCI sales documents. **1.61**

Lastly, the law had two annexes. The first listed information to be supplied in sales documents (Schedule A to Directive 2001/107), periodic reports (Schedule B to Directive 2001/107), **1.62**

and the simplified prospectus (Schedule C to Directive 2001/107). The second annex repeated the collective portfolio management functions listed in Directive 2001/107.

1.63 The 2002 Act came into force on 1 January 2003. Its implementation had been relatively complex in the light of the transition regime flowing from Directives 2001/107 and 2001/108 and included transitional arrangements to allow existing coordinated UCITS to conform to the new standards while also providing the benefit of UCITS authorization and a European passport under Directives 2001/107 and 2001/108 for UCITS authorized under the 2002 Act.

1.64 To facilitate transitional arrangements, the 1988 and 2002 Acts both had legal effect for a period of time until 13 February 2007 when the 1988 Act was finally repealed.

Amendments to the 2002 Act

1.65 *Act of 19 December 2003* The Act of 19 December 2003 exempted certain categories of institutional money market funds from subscription tax, provided their residual portfolio maturity did not exceed ninety days and they had obtained the highest possible rating from a recognized rating agency.[52]

1.66 *Act of 15 June 2004* The Act of 15 June 2004 extended the exemption from subscription tax to UCIs established as pension pooling vehicles.[53]

1.67 *Act of 10 July 2005* The Act of 10 July 2005 transposes Directive 2003/71, generally referred to as the 'Prospectus Directive'. It sets out rules on the contents and dissemination of a prospectus in the case of a public offering or listing of transferable securities on a regulated market in Luxembourg. Insofar as they are governed by special legislation, UCIs generally fall outside its sphere of application with the exception of closed-end UCIs, ie UCIs whose unitholders are not allowed to unilaterally redeem their units under any circumstances.[54] To avoid a combination of requirements for the issue of prospectuses by closed-end UCIs under both the 2002 Act and the Act of 10 July 2005, the 2002 Act was amended so that the issue of prospectuses by closed-end UCIs is exclusively governed by the Act of 10 July 2005.[55]

1.68 The Act of 10 July 2005 also modified the treatment of foreign UCIs (other than coordinated UCITS) which are closed-ended within the meaning of the Act of 10 July 2005, to permit the marketing of their units in or from Luxembourg provided such closed-end UCIs comply with the Act of 10 July 2005.[56]

1.69 *Act of 13 February 2007* The Act of 13 February 2007 slightly amended the 2002 Act, so as to exempt from subscription tax an investment in a SIF made by a UCI.[57]

[52] Art 12, Act of 19 December 2003 concerning the State revenue and expenditure budget for the fiscal year 2004 (*Mémorial* A 2003, 3687 *et seq*).

[53] Art 45, Act of 15 June 2004 amending Art 129(3), 2002 Act.

[54] Closed-end UCIs are determined in juxtaposition to open-end UCIs, defined by Art 2(1)(o) of Directive 2003/71 as follows: 'collective investment undertaking other than the closed-end type' means unit trusts and investment companies: (1) the object of which is the collective investment of capital provided by the public, and which operate on the principle of risk-spreading; (2) the units of which are, at the holder's request, repurchased or redeemed, directly or indirectly, out of the assets of these undertakings.

[55] Art 63(5), Act of 10 July 2005 amending Art 109, 2002 Act. See also Art 150(3), 2010 Act and Art 52(3), Act of 13 February 2007.

[56] Art 76, 2002 Act.

[57] Art 72, Act of 13 February 2007 amending Art 129(3), 2002 Act.

Act of 13 February 2007 relating to specialized investment funds

1.70 The 1991 Act dealing with funds sold to institutional investors was a precise piece of legislation containing only seven articles and cross-referring for the most part to the 1988 Act. As a result of the repeal and replacement of the 1988 Act with new legislation on UCIs in 2002, it was necessary to amend the 1991 Act and the Luxembourg legislature took the opportunity of adopting a comprehensive and independent body of rules to replace this 1991 Act. This provided an opportunity to modernize the rules applying to institutional funds, bringing a larger pool of well-informed investors[58] within its scope, and to classify institutional funds as 'specialized investment funds'. The governing rules for specialized investment funds were simplified, although largely modelled on Part II of the 2002 Act. The main objective was to adapt the rules on institutional funds to meet an increased demand for alternative investment structures, such as hedge funds, real estate funds or private equity funds.[59]

Grand-Ducal Regulation of 8 February 2008 clarifying certain definitions

1.71 The Grand-Ducal Regulation of 8 February 2008 implemented into Luxembourg law the Eligible Assets Directive, which aimed at clarifying the definitions of transferable securities, money market instruments, liquid financial assets, transferable securities and money market instruments embedding derivatives, techniques and instruments for the purpose of efficient portfolio management and index-replicating UCITS. Since the adoption of Directive 85/611, the variety of financial instruments traded on financial markets had increased considerably, leading to uncertainty in determining whether certain categories of financial instruments are encompassed by those definitions. Uncertainty in applying these definitions gave rise to divergent interpretations of Directive 85/611.[60] In order to ensure a consistent application of the Directive and to help Member States to develop a common understanding as to whether a given asset category is eligible for a UCITS,[61] it was deemed necessary to provide supervisory authorities and market participants with more certainty of interpretation.

Act of 17 December 2010 with regard to undertakings for collective investment

1.72 As for the 2002 Act, the 2010 Act transposes a UCITS Directive into national law.

1.73 It became clear over recent years that Directive 85/611 could be improved in a certain number of respects. The management company passport did not really function and selling a coordinated UCITS outside its host Member State was not always easy. The information provided to investors was not generally adapted to their financial expertise and did not allow for comparisons to be made among coordinated UCITS. The market for European coordinated UCITS remained too fragmented, with an increasing number of funds which were extremely small, in particular when compared with their US equivalents, in addition to such funds proving more costly for investors. Remedying these difficulties required a reduction, or even the removal in certain cases, of national obstacles to the passport issued to coordinated UCITS and their service providers in addition to facilitating the merger of coordinated UCITS situated in different Member States. Increased cooperation between national

[58] For further details concerning the concept of well-informed investor, see 2.63 *et seq*.

[59] For further details on the genesis of the Act of 13 February 2007, see M Moulla and M Chantalangsy, 'Presentation of the law of 2007 compared to other existing legislation governing collective investment structures—historical overview of the law of 2007' in *Specialised Investment Funds* (Arendt & Medernach, 2007) 14, 15.

[60] Preamble to the Eligible Assets Directive, 2nd Recital.

[61] Preamble to the Eligible Assets Directive, 3rd Recital.

authorities was required to give full effect to the new cross-border opportunities. This need for cooperation was correlated to the need for a gradual elimination of the discretion of national authorities to interpret and apply the Directive. With the emergence of newly established European supervisory authorities and following the adoption of the Treaty of Lisbon, Directive 2009/65, also referred to as the 'UCITS IV Directive', reinforced in the broadest sense the powers of intervention and implementation of the European Commission and ESMA with respect to coordinated UCITS.

1.74 The 'UCITS IV Directive' proposal containing amendments to Directive 85/611 was first proposed by the European Commission on 16 July 2008. This proposal did not take into account the management company passport which, after having been debated at CESR (now ESMA) level, was reintroduced in early December 2008 (vote of the ECON Committee).

Similar to MiFID, Directive 2009/65 provided that the details of certain provisions would be determined by Level 2 implementing measures to be adopted by the European Commission with a view to harmonizing the implementation of the text.

1.75 On 13 February 2009, the European Commission submitted a provisional request for technical advice on the new UCITS Directive implementing measures to CESR (now ESMA), most of which were issued in July 2010.

The changes introduced by Directive 2009/65 address the following issues.

1.76 Management company passport: under the management company passport, coordinated UCITS may be managed by a management company authorized and supervised in a Member State other than its home Member State. The foreign management company may manage the coordinated UCITS on a remote basis or by establishing a branch in the country of incorporation of the coordinated UCITS, without any further requirements.

1.77 Fund mergers: Directive 2009/65 establishes a unified regime for both cross-border and domestic mergers of UCITS. Pursuant to the Directive, all UCITS are entitled to merge regardless of their structure (ie whether established as corporate, unit trust or contractual type funds).

1.78 Master feeder structures: Directive 2009/65 included the first European regulatory provisions concerning the setting up of master-feeder UCITS. A feeder UCITS is defined in Directive 2009/65 as a coordinated UCITS or a sub-fund thereof which has been approved to invest at least 85 per cent of its assets in units of another coordinated UCITS or a sub-fund thereof. It can also allocate a maximum of 15 per cent of its assets to investments in derivative instruments or liquid assets among other asset types.

1.79 Key investor information document ('KIID'): this document replaces the simplified prospectus which failed to provide investors with all the basic information required to enable them to make informed investment choices. It is intended to be a short pre-contractual document written concisely in non-technical language which provides easy to understand, accurate, clear, and unambiguous information on the UCITS to prospective or existing investors. This document contains essential information on the UCITS such as its investment objectives and policy, past performance or relevant future performance scenarios, costs and charges as well as its risk and reward profile (SRRI—synthetic risk and reward indicator).

1.80 Simplified notification procedure/cross-border marketing: a coordinated UCITS which wishes to market its units in a Member State other than its country of incorporation notifies its supervisory authority of its plans via a 'notification package' which will then be transferred

by its home authority to the competent supervisory authorities of the contemplated host Member State. This process is known as the new 'regulator-to-regulator' procedure.

1.81 Enhanced cooperation between supervisory authorities: Directive 2009/65 creates an enhanced framework for cross-border operations and full and timely cooperation between supervisory authorities. To that end, it encourages the exchange of information, harmonizes the powers of the supervisory authorities and allows for the possibility of on-the spot verifications and investigations, consultation mechanisms, and mutual assistance mechanisms.

1.82 Luxembourg was the first EU Member State to implement Directive 2009/65 in its national law: the law transposing Directive 2009/65 in Luxembourg was enacted on 17 December 2010.[62]

1.83 Further to the enactment of the 2010 Act, the CSSF adopted CSSF Regulations No 10-4 and No 10-5 implementing the European Commission's Level 2 Directives, ie Directive 2010/43 on management companies and the risk management process and Directive 2010/44 on fund mergers, master-feeder structures, and notification procedure respectively.

1.84 The European Commission also adopted Level 2 Regulations, ie Commission Regulation 583/2010, which provides detailed rules on the KIID, and Commission Regulation 584/2010,[63] specifying the new notification and the supervisory cooperation procedures between Member States' competent authorities. These regulations are directly applicable throughout the European Union and hence in Luxembourg without implementing measures.

1.85 Further to the enactment of the 2010 Act, the CSSF issued Circular 11/498 which summarizes the structure of the 2010 Act and the principal new measures introduced by the Act and its transitory provisions. It also lists the relevant implementing measures adopted by the European Commission, ESMA, and the CSSF. The CSSF also issued Circular 11/508 on organizational requirements, conflicts of interest, and other rules of conduct applicable to management companies and self-managed investment companies,[64] Circular 11/509 concerning the new notification procedure, Circular 11/512 detailing the new rules in relation to risk management process, and Circular 12/546 relating to the authorization and organization of coordinated Luxembourg management companies and self-managed investment companies.

1.86 Beyond the minimum requirements imposed by Directive 2009/65 in relation to the management company passport, cross-border mergers, master-feeder structures and the KIID, Luxembourg has further modernized its legal and regulatory environment to meet the investment industry's needs. As further detailed in para 1.87 *et seq*, the most important non UCITS IV-related changes compared to the 2002 Act are the introduction of measures permitting cross investments between sub-funds, certain tax exemptions as well as the refinement of certain rules regarding the delegation of investment management functions.

1.87 The 2010 Act permits a sub-fund to invest in another sub-fund of the same umbrella UCITS or UCI subject to a number of conditions.[65]

[62] The 2010 Act repeals the 2002 Act with effect as of 1 July 2012, except that certain tax provisions of the 2002 Act are repealed with effect as of 1 January 2011.

[63] Commission Regulation (EU) No 584/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities ([2010] OJ L176/16).

[64] Circular 11/508 has been repealed by Circular 12/546.

[65] For further details, see 3.223 *et seq*.

1.88 The tax exemption provided for in the 2010 Act applies to exchange traded funds (ETFs) whose exclusive objective is to reproduce the performance of one or several indices, coordinated UCITS and UCIs which are dedicated to pension funds and coordinated UCITS and UCIs which invest in microfinance institutions. All these funds are now exempted from subscription tax. The 2010 Act also provides that coordinated UCITS and UCIs established in a Member State other than Luxembourg but whose place of effective management is in Luxembourg (ie which are managed by a Luxembourg company) are not subject to corporate taxation in Luxembourg. Furthermore, the 2010 Act extended the exemption from Luxembourg capital gains tax in favour of non-residents, thus enabling foreign feeder funds to generally benefit from this exemption with respect to their investment in Luxembourg-based master funds, irrespective of the length of the holding period.[66]

1.89 The 2010 Act introduces similar requirements to those applicable to coordinated UCITS for UCIs and non-UCITS management companies which delegate the investment management function to a third party (as much as a third party is required to be authorized to conduct investment management business and subject to prudential supervision; if the third party is located in a country outside the European Union there must be a cooperation agreement between the relevant EU and non-EU Member States).[67]

Transposition of AIFMD into Luxembourg law

1.90 Once transposed into the national law in 2013,[68] AIFMD will be another major legislative instrument having a twofold impact on UCIs.[69] AIFMD is designed to address a number of risks relating to AIFs through closer regulatory oversight of systemic risks and more stringent regulation of activities in this sector. Firstly, AIFMD will affect the management of non-UCITS funds in the European Union by introducing a European passport for the managers of non-UCITS in the EU.[70] AIFMD will affect both AIFMs established in the European Union which manage and/or distribute AIFs (whether or not established in the European Union) and AIFMs established outside the European Union which manage and/or distribute AIFs established or marketed in the European Union. Secondly, and notwithstanding that AIFMD primarily aims at regulating AIFMs, it will also impact AIFs themselves, not least internally managed AIFs that have not appointed an external manager which will be subject to AIFMD rules.[71]

1.91 AIFMD framework consists of several layers of legislative acts. The first layer is the framework Directive of the European Parliament and the Council dated 8 June 2011 which has to be transposed into the national law of the Member States by 22 July 2013. The second

[66] For further details, see 11.137.

[67] For further details, see 6.473.

[68] AIFMD was approved on 8 June 2011. EU Member States will have to implement AIFMD into national laws by 22 July 2013 at the latest. In Luxembourg, the Bill of Law No 6471 transposing AIFMD was submitted to the Parliament on 24 August 2012.

[69] Impact Assessment of Regulation 231/2013 outlined in this publication is based upon our current understanding of the implementation process and options laid down in AIFMD and Regulation 231/2013. However, many aspects of AIFMD will be clarified in the national regime. It cannot be excluded that the Luxembourg legislator may or may not decide to levy some of the implementation options provided for in AIFMD.

[70] Preamble to AIFMD, 10th Recital. AIFMD ultimately aims at replacing (ie conditional phasing out by 2018) currently existing (European) private placement rules by introducing a European passport for AIFM to market European and non-European AIFs to professional investors established within the European Union.

[71] Under AIFMD, the management refers to both internal and external management. Thus, under certain circumstances, an AIF may be treated as self-managed and thus be treated as an AIFM and would then be subject to AIFMD.

layer consists of regulatory technical standards to be developed by ESMA and implemented by means of delegated legislative acts adopted by the European Commission (also known as Level 2 measures).[72] In addition, ESMA is empowered to issue guidelines and recommendations that constitute Level 3 measures and have binding effect on the competent authorities within the EU.[73]

1.92 The summary in para 1.99 *et seq* provides a brief overview of some of the key concepts of AIFMD based on the Level 1 Directive and Level 2 and Level 3 measures issued prior to 31 December 2012. As such it is subject to change. Each EU Member State's national regime will also clarify certain detailed requirements.

1.93 Although AIFMD is considered as a response to the global financial crisis, the idea of regulating investment structures other than coordinated UCITS at a European level was already considered some time prior to the 2008 financial crisis. Among other initiatives, the Purvis report of December 2003[74] recommended that hedge funds should be regulated, and in March 2007 a report of an expert group appointed by the Directorate General for Enterprise and Industry of the European Commission argued for harmonization of the rules applicable to venture capital funds.[75]

1.94 The financial crisis of 2008 and 2009 highlighted to the European legislature the possible systemic risks of some of these structures. In September 2008, the Rasmussen report,[76] and in February 2009, the de Larosière report[77] highlighted the need for introducing specific regulations (in particular for hedge funds and private equity funds). Those ideas were further developed in line with EU international commitments, in particular consensus expressed by the G20 leaders during the London summit in 2009 'that all systemically important financial institutions, markets, and instruments should be subject to an appropriate degree of regulation and oversight'.[78] The adoption of AIFMD has certainly been influenced by the global financial crisis as well as political response to it and related social concerns that are not, as yet, conclusively settled.[79]

[72] According to the Lamfalussy procedure, regulatory technical standards are proposed by ESMA and subsequently adopted by the European Commission; the European Parliament and the Council have three months from notification by the European Commission to raise objections to the delegated acts (such period can be extended for another three months) and therefore prevent the act from entering into force. If upon expiry of such period, neither the European Parliament nor the Council have objected to the delegated act, it shall be published in the Official Journal and enter into force (Art 58, AIFMD). ESMA has proposed draft regulatory technical standards on types of AIFMs dated December 2012 (ref ESMA/2012/844, Annex VI). Further legislative acts are expected to deal with such issues as scope, opting into AIFMD, and the relation of EEA entities with third countries. See DA Zetzsche (ed.), *The Alternative Investment Fund Managers Directive* (Kluwer, 2012) No 2.1., 7.

[73] Arts 34 to 38, 40, 42 and 47, AIFMD. At the reference date of this publication, ESMA has prepared and consulted on Guidelines on key concepts of AIFMD dated December 2012 (ESMA/2012/845) and Guidelines on sound remuneration policies under AIFMD dated June 2012 (ESMA/2012/406).

[74] Report on the future of Hedge Funds and Derivatives Committee on Economic and Monetary Affairs of the European Parliament (ref 2003/2082 (INI)—FINAL A5-0476/2003).

[75] 'Expert group report on removing obstacles to cross-border investments by venture capital funds', 7.1. (document available on the website of the European Commission).

[76] Report with recommendations to the Commission on Hedge funds and private equity, Committee on Economic and Monetary Affairs (ref 2007/2238 (INI)—A6-0338/2008).

[77] The High-Level Group on Financial Supervision in the European Union chaired by J de Larosière (document available on the website of the European Parliament).

[78] G20, *Declaration on strengthening the financial system—London summit, 2 April 2009, Scope of regulation,* 3.

[79] See DA Zetzsche (ed.), *The Alternative Investment Fund Managers Directive* (see n 72) 137–158, 138.

1.95 Therefore, following political pressure, the draft directive was proposed by the European Commission in 2009 to regulate AIFMs. After intensive discussion and debate, AIFMD was passed on 11 November 2010 and entered into force on 21 July 2011. Its objective is two-fold: to protect investors in Europe and to strengthen the stability of the financial system by creating a pan-European regulatory and supervisory framework for alternative investment fund managers (AIFMs).

1.96 To that end, the European legislature decided to regulate entities the regular business of which is the management of AIFs established in the European Union.[80]

1.97 The European legislature had two options for regulating AIFs. Similar to the approach taken with respect to coordinated UCITS since 1985, it could either provide a body of rules governing alternative funds considered as products or focus on those entities operating AIFs, ie their managers, and develop a set of rules specific to them. In the case of the latter, the legislature would regulate AIFs via the entities providing services to such funds. Ultimately that was the preferred option.

1.98 A distinction is drawn between managers of AIFs based in Europe and non-EU managers managing and/or marketing (EU or non-EU) AIFs in the European Union. The funds themselves are not subject to harmonized regulation at European level and remain subject to the relevant national regime—whether regulated or not.[81] Indeed, given the variety of funds affected by AIFMD (ie all funds other than coordinated UCITS), the European legislature considered that it would not be appropriate to regulate the structure or composition of the investment vehicles.[82] Therefore, each Member State is free to establish or maintain specific rules for funds other than coordinated UCITS established in its jurisdiction. However Member States may not impose their own requirements on AIFs established in other Member States which are using the AIFMD passport.

1.99 AIFMD lays down the rules for the authorization and ongoing operation of AIFMs which manage and/or market AIFs in the EU, and establishes the information they must communicate.[83] Thus AIFMD regulates all EU AIFMs irrespective of the type, legal form, structure, and domicile of AIFs managed, non-EU AIFMs managing EU AIFs or marketing AIFs (whether EU or non-EU) in the European Union.[84] An EU AIFM managing an EU or non-EU based fund must be authorized by its Member State's competent authority and fulfil the requirements imposed by AIFMD.[85] Operating conditions include conduct of business rules, which encompass governance and remuneration policies, advanced risk and liquidity management organization, rules on valuation, delegation, appointment of depositary and limits on leverage. In return for the regulatory burden imposed, authorized AIFMs benefit from the European passport, similar to that under the UCITS framework, which allows for the cross-border management and distribution of AIFs.

[80] Preamble to AIFMD, 3rd and 5th Recitals; Art 4(1)(b), AIFMD. This however does not mean that before the adoption of AIFMD managers of alternative investment funds were not subject to any regulation. Such managers were subject to national regulation, as the case may be, with varying degrees of intensity depending on jurisdiction or licensed for eg portfolio management services under MiFID (as implemented into national law).

[81] Preamble to AIFMD, 10th Recital.

[82] Preamble to AIFMD, 10th Recital.

[83] Art 1, AIFMD.

[84] Preamble to AIFMD, 13th to 15th Recitals; Art 2(1) and (2), AIFMD.

[85] Art 6(1), AIFMD.

1.100 The system established by the European legislature is based on the authorization granted to the AIFM, within the meaning of AIFMD. The authorization, in particular the conditions under which it is granted and maintained, enables the European legislature to fulfil its objective of protecting investors, financial markets and, to some extent, the entities in which AIFMs invest. If authorization is granted, the AIFM will be able to manage AIFs established in any Member State[86] and benefit from a simple notification procedure enabling it to market EU AIFs to professional investors across the European Union.[87]

1.101 Instead of providing investment restrictions, AIFMD imposes on AIFMs comprehensive transparency requirements vis-à-vis investors and competent authorities. This approach is in line with the reasoning found in the de Larosière report which recommended 'imposing (. . .) registration and information requirements on hedge fund managers concerning their strategies, methods and leverage (. . .) with a view to improving transparency in all financial markets.'[88] Such transparency obligations are complemented by specific powers of intervention granted to regulatory authorities with the objective of maintaining financial stability—one of the main objectives of AIFMD.[89]

1.102 **Transitional provisions** AIFMD must be transposed into the national laws of Member States by 22 July 2013.[90]

1.103 The most important transitional provision relevant to managers is the one year period in which application for authorization as an AIFM can be made, ie up to 22 July 2014. This means that existing AIFM will have to comply with AIFMD, on a best effort basis, and submit the applications for authorization as an AIFM before 22 July 2014.[91] After the one year transitional period, all obligations arising under AIFMD will be fully and legally binding.

1.104 To what extent the provisions of AIFMD are applicable to all new AIFs launched between 22 July 2013 and 22 July 2014 depends on the transposition of the Directive into national law.

1.105 Pursuant to the Luxembourg Bill of Law No 6471 implementing AIFMD,[92] the compliance deadline will depend on when the structure is established. EU AIFMs commencing their activities on or after 22 July 2013 will have to apply for authorization as from the date of commencement of activities. Those performing management activities prior to 22 July 2013 may delay their application until 22 July 2014.

[86] Art 33, AIFMD.

[87] Arts 31 and 32, AIFMD.

[88] The High-Level Group on Financial Supervision in the European Union chaired by J de Larosière, Report (see n 77), recommendation 7, 25. See also items 86 to 88, 24 for more information. The same reasoning can be found in the background discussion on regulation of AIFs, in particular in the Rasmussen and Lehne reports of the European Parliament, that underlined the impact of the activities of highly-leveraged investment vehicles on the stability of the financial system and the lack of transparency of hedge funds vis-à-vis regulators and other financial market actors (see Consultation paper on hedge funds, 2008, document available on the website of the European Commission).

[89] ESMA's Technical Advice on AIFMD implementing measures, 217.

[90] Art 66(1), AIFMD.

[91] Art 61(1), AIFMD.

[92] The Bill of Law No 6471 amends Part II of the 2010 Act and introduces a Part II within the Act of 13 February 2007 and the Act of 15 June 2004. According to that, AIFs may be new Part II UCIs, Part II SIFs or Part II SICARs.

1.106 However the transitional provisions are silent with respect to those AIFMs that only have an obligation to register.[93] Further clarification or interpretation in this respect is therefore required either from the European legislature/ESMA or in the national regime. For the time being, there are at least two possible interpretations with respect to existing managers that benefit from the *de minimis* exemptions of AIFMD and have not opted for full compliance with AIFMD: (i) as there are no explicit grandfathering provisions for such AIFMs, AIFMD will apply to such AIFMs as of 22 July 2013; (ii) alternatively and in line with the interpretation of provisions with respect to AIFMs that have an obligation to request authorization, such AIFMs should be permitted to defer registration and compliance with AIFMD reporting requirements until 22 July 2014.[94]

1.107 Further transitional provisions apply to AIFMs managing existing closed-end funds,[95] where in certain circumstances the AIFMs may continue managing AIFs without having to apply for authorization. Such exemptions relate to:

(1) AIFMs managing closed-end AIFs before 22 July 2013 which will not make any additional investments[96] after 21 July 2013; and
(2) AIFMs managing closed-end AIFs which were closed for subscription prior to the entry into force of AIFMD (ie prior to 21 July 2011) and are constituted for a fixed period expiring before 22 July 2016.

This second category of AIFMs is however subject to specific transparency obligations and, in particular, must publish an annual report where relevant, and comply with additional obligations relating to the acquisition of control over portfolio companies as further described under chapter 3.[97]

1.108 Finally, AIFMD[98] provides that AIFs, which are the subject of a current offer to the public under a prospectus that complies with the Directive 2003/71 before 22 July 2013, may market their shares or units for the duration of the validity of such prospectus without complying with AIFMD rules related to the marketing of AIFs within the EU.[99]

Circulars issued by the Luxembourg supervisory authorities

1.109 Since the end of the 1970s, the supervisory authority has laid down, in the form of circulars, rules governing the operation of UCIs and SICARs. However, the concept of a circular does not technically form part of Luxembourg's legal panoply.

1.110 The 2010 Act[100] permits the adoption of standards governing the operation or risk diversification of certain types of UCIs in the form of CSSF regulations. The CSSF has made use of

[93] See chapter 4 for further description of AIFMs.

[94] No further guidance has been issued in this respect either on the European or on the national level in Luxembourg as of the date of reference of this publication (ie 31 December 2012). The UK regulatory authority provides for the interpretation similar to the second alternative, see FSA Consultation Paper 12/32 on Implementation of the Alternative Investment Fund Managers Directive, Part 1, para. 2.40, 21.

[95] Art 61(3) and (4), AIFMD.

[96] Although not clarified by the EU legislature, the term 'additional investment' should capture only the investment of new money (new capital contributions) and should exclude reinvestment of investment proceeds. Investment of committed capital drawn after 22 July 2013 should likewise not be considered as 'additional investment'.

[97] Art 61(4), AIFMD. See chapter 3, 3.476 *et seq* for further details.

[98] Art 61(2), AIFMD.

[99] Arts 31 to 33, AIFMD.

[100] Arts 91, 96, and 99, 2010 Act.

this power in certain cases.[101] In other cases, it has resorted to the publication of circulars in order to ensure maximum flexibility and adaptability of its rules.

1.111 In the 1970s and 1980s, numerous circulars were issued by the CSSF (and its predecessors, the *Institut Monétaire Luxembourgeois* and the Banking Commissioner). Circular 91/75 of 21 January 1991 revised and reviewed the rules applicable to Luxembourg-based UCIs governed by the 1988 Act. The same circular repealed and replaced previous circulars. The application and interpretation of the 2010 Act is not yet covered by a general circular such as Circular 91/75, so that Circular 91/75 largely remains in force.

1.112 The main circulars on UCIs and SICARs currently in force are as follows:

- IML Circular 91/75 of 21 January 1991;
- CSSF Circular 00/14 of 27 July 2000 on the adoption of the Act of 17 July 2000 amending certain provisions of the Act of 30 March 1988;
- CSSF Circular 02/77 of 27 November 2002 on the protection of investors in the event of net asset value calculation error and the correction of consequences resulting from non-compliance with the investment rules applicable to UCIs;
- CSSF Circular 02/80 of 5 December 2002 on the specific rules applicable to Luxembourg UCIs pursuing alternative investment strategies;
- CSSF Circular 02/81 of 6 December 2002 on guidelines concerning the duties of auditors of UCIs;
- CSSF Circular 03/87 of 21 January 2003 on the coming into force of the 2002 Act;
- CSSF Circular 03/88 of 22 January 2003 on the classification of UCIs governed by the provisions of the 2002 Act;
- CSSF Circular 03/97 of 28 February 2003 on the publication in the electronic database for the financial centre ('*Référentiel de la place*') of simplified and full prospectuses and the annual and half-yearly reports by UCIs;
- CSSF Circular 04/146 of 17 June 2004 on the protection of UCIs and their investors against late trading and market timing practices;
- CSSF Circular 04/155 of 27 September 2004 on the compliance function;
- CSSF Circular 05/177 of 6 April 2005 on the abolition of any prior approval by the CSSF of advertising material used by persons and companies supervised by the CSSF; revocation of point II of Chapter L of IML Circular 91/75; revocation of the two last sentences of point IV 5.11 of CSSF Circular 2000/15;
- CSSF Circular 05/178 of 11 April 2005 on administrative and accounting organization; outsourcing of IT services; revocation of point 4.5.2 of IML Circular 96/126 and substitution with point 4.5.2 of Circular 05/178;
- CSSF Circular 05/210 of 10 October 2005 on the drawing-up of a simplified prospectus within the scope of Chapter 1 of Part III of the Act on prospectuses for securities;
- CSSF Circular 05/225 of 16 December 2005 on the concept of 'offer to the public of securities' as defined in the Act on prospectuses for securities and the consequential 'obligation to publish a prospectus';
- CSSF Circular 06/241 of 5 April 2006 on the concept of risk capital under the Act of 15 June 2004;

[101] Hence, for example, the CSSF Regulation No 10-4 and CSSF Regulation No 10-5.

- CSSF Circular 07/277 of 9 January 2007 on the new notification procedure following guidelines issued by the Committee of European Securities Regulators (CESR) regarding the simplification of the UCITS notification procedure;
- CSSF Circular 07/283 of 28 February 2007 on the entry into force of the Act of 13 February 2007;
- CSSF Circular 07/290 of 3 May 2007 on the definition of capital ratios pursuant to Article 56 of the 1993 Act (application to investment firms and management companies subject to Chapter 13 of the 2002 Act, as amended);
- CSSF Circular 07/307 of 31 July 2007 on the MiFID Directive: Conduct of business rules in the financial sector;
- CSSF Circular 07/309 of 3 August 2007 on risk-spreading in the context of SIFs;
- CSSF Circular 07/310 of 3 August 2007 on financial information to be provided by SIFs, as amended by CSSF Circular 08/348;
- CSSF Circular 08/339 of 19 February 2008 on the guidelines of the Committee of European Securities Regulators (CESR) concerning eligible assets for investment by UCITS;
- CSSF Circular 08/348 of 17 April 2008 on the changes to Circulars IML 97/136 and CSSF 07/310;
- CSSF Circular 08/350 of 22 April 2008 on clarifications relating to the amendments introduced by the Act of 13 July 2007 to the status of professionals of the financial sector (PFS) referred to in Articles 29-1, 29-2, 29-3, or 29-4 and designated as 'support PFS', and on the amendment to the prudential supervisory procedures for support PFS;
- CSSF Circular 08/356 of 4 June 2008 regarding rules applicable to UCIs which employ certain techniques and instruments relating to transferable securities and money market instruments;
- CSSF Circular 08/371 of 5 September 2008 concerning the electronic transmission of prospectuses and financial reports of UCIs and SIFs to the CSSF;
- CSSF Circular 08/372 of 5 September 2008 establishing guidelines for depositaries of specialized investment funds adopting alternative investment strategies, where those funds use the services of a prime broker;
- CSSF Circular 08/376 of 23 October 2008 regarding the financial information to be submitted by investment companies in risk capital (SICARs);
- CSSF Circular 08/380 of 26 November 2008 regarding the guidelines of the Committee of European Securities Regulators (CESR) concerning eligible assets for investment by UCITS;
- CSSF Circular 10/483 of 25 August 2010 regarding amendments to CSSF Circular 07/290, as amended, defining capital ratios pursuant to Article 56 of the amended law of 5 April 1993 on the financial sector:
  1. Transposition of Directives 2009/27/EC, 2009/83/EC and 2009/111/EC
  2. Other amendments to CSSF Circular 07/290, as amended;
- CSSF Circular 10/497 of 22 December 2010 regarding amendments to CSSF Circular 07/290 defining capital ratios pursuant to Article 56 of the amended law of 5 April 1993 on the financial sector, as amended:
  – Transposition of Directive 2010/76/EU of the European Parliament and the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitizations, and the supervisory review of remuneration policies;

- CSSF Circular 11/498 of 10 January 2011 concerning the entry into force of the law of 17 December 2010 relating to undertakings for collective investment and CSSF Regulations No 10-04 and No 10-05 on implementing measures; Commission Regulations (EU) No 583/2010 and No 584/2010 of 1 July 2010 implementing Directive 2009/65/EC; and guidelines and other documents drawn up by the Committee of European Securities Regulators (CESR);
- CSSF Circular 11/505 of 11 March 2011 concerning the details relating to the application of the principle of proportionality when establishing and applying remuneration policies that are consistent with sound and effective risk management as laid down in Circulars CSSF 10/496 and CSSF 10/497 ('CRD III Circulars'), transposing Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitizations, and the supervisory review of remuneration policies ('CRD III');
- CSSF Circular 11/509 of 15 April 2011 regarding the new notification procedures to be followed by a UCITS governed by Luxembourg law wishing to market its units in another Member State of the European Union and by a UCITS of another Member State of the European Union wishing to market its units in Luxembourg;
- CSSF Circular 11/512 of 30 May 2011 concerning the presentation of the main regulatory changes in risk management following the publication of CSSF Regulation 10-4 and ESMA clarifications; further clarifications from the CSSF on risk management rules; the definition of the content and format of the risk management process to be communicated to the CSSF;
- CSSF Circular 12/539 of 6 July 2012 on technical specifications regarding the submission to the CSSF of documents under the law on prospectuses for securities and general overview of the aforementioned law;
- CSSF Circular 12/540 of 9 July 2012 concerning non-launched compartments, compartments awaiting reactivation and compartments in liquidation;
- CSSF Circular 12/546 of 24 October 2012 regarding the authorization and organization of Luxembourg management companies subject to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment and investment companies which have not designated a management company within the meaning of Article 27 of the Act of 17 December 2010 relating to undertakings for collective investment;
- CSSF Circular 12/548 of 30 October 2012 on the entry into force of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps and details on certain practical aspects of notification, disclosure, and exemption procedures;
- CSSF Circular 12/549 of 9 November 2012 on technical specifications regarding the submission to the CSSF of documents under the law on prospectuses for securities for offers to the public of units or shares of Luxembourg closed-end undertakings for collective investment and for admission of units or shares of Luxembourg closed-end undertakings for collective investment to trading on a regulated market;
- CSSF Circular 12/552 of 11 December 2012 regarding the central administration, internal governance and risk management.

1.113 The circulars issued by the CSSF are a very useful regulation tool for UCIs, which require a legal framework that can easily and rapidly be adapted to meet the needs of the investment industry.

1.114 Since the constitutional reform of 19 November 2004,[102] the CSSF has been authorized to adopt regulations within the framework of its responsibilities, provided it has the necessary regulatory authority under the relevant law.

1.115 While the Constitution only refers to the adoption of regulations by the CSSF this does not of itself mean that the CSSF is precluded from prescribing circulars in areas where it has regulatory authority. Regulations are typically used to specify certain legal norms whereas the CSSF has adopted circulars as a means of informing third parties of its general policy positions on various matters. As derogations from such positions are possible, it is difficult to argue that they decree or specify rigid legal norms. Circulars as issued by the CSSF are not so much a form of regulation as a tool to ensure transparency and adaptability.

Laws and regulations not limited to UCIs

1.116 Though not specifically limited to UCIs, two additional bodies of rules also apply to all Luxembourg funds.

1.117 The first is the 1915 Act, which has the status of a supplementary standard vis-à-vis UCIs.[103] It applies to situations not specifically legislated for by the 2010 Act and the Act of 13 February 2007.

1.118 The second is the Luxembourg Civil Code, which governs the contractual structure underlying FCPs. It also governs civil companies in general and as such applies to investment companies, save to the extent otherwise provided for by the 1915 Act, the 2010 Act, or the Act of 13 February 2007.

Role of the CSSF

General presentation

1.119 The CSSF is a public law body established with legal status by the Luxembourg State. Its object is to maintain prudential supervision of the financial sector.[104] Within this role, it oversees UCIs established or marketing their units in the Grand Duchy of Luxembourg.[105] It also supervises management companies of UCIs.[106] Once AIFMD is transposed into

[102] Art 108*bis* of the Constitution, amended by the Act of 19 November 2004 with regard to (1) amendment of Arts 11(6), 32, and 76 of the Constitution; and (2) the creation of a new Art 108*bis* in the Constitution (*Mémorial* A 2004, 2784). This constitutional amendment followed the decision of 7 March 2003 of the Constitutional Court of the Grand Duchy of Luxembourg (*Mémorial* A 2003, 656) that the power to adopt regulations and decisions to implement legislation in accordance with Art 36 of the Constitution is in the hands of the Grand Duke. A law or regulation entrusting this power to an authority other than the Grand Duke is unconstitutional.

[103] Arts 26(1), 39, and 95(1), 2010 Act.

[104] Arts 2 and 3, Act of 23 December 1998 concerning the creation of a Commission for the supervision of the financial sector (*Mémorial* A 1998, 2985).

[105] For other comments on this issue, see 8.01 *et seq*. See also A Elvinger, 'Le rôle des autorités de surveillance' *ALFI Yearbook 1994* 33; C Kremer and J Baden, 'The role of the Luxembourg Monetary Institute in the supervision of undertakings for collective investment' (February 1995) *World Fund Industry/Gestion collective internationale* 3, 63.

[106] Arts 101 to 126, 2010 Act.

Luxembourg law, the CSSF will also carry out the duties provided for in AIFMD[107] in particular those relating to the monitoring of compliance by AIFMs with their obligations under AIFMD.

1.120 The CSSF actively engages in its supervisory duties with respect to UCIs. Its duties and involvement vary under the applicable regulations depending on whether the UCI is based in Luxembourg[108] or not, or has a European passport, or not.

1.121 The CSSF also supervises management companies based in Luxembourg. It supervises foreign entities to the extent they operate under the European passport introduced by Directive 2009/65. It authorizes management companies other than those which benefit from the European passport, from a Member State or a third country, wishing to establish a branch in Luxembourg.[109] Where UCITS management companies operate in Luxembourg under a passport, the CSSF's intervention is minimal as the primary regulatory authority is the supervisory authority in the company's home State.

1.122 The same principles apply with respect to supervision of coordinated AIFMs, which when established in Luxembourg are supervised by the CSSF. If they are based abroad and make use of their passports, they remain subject to the supervision of the authorities of their home Member State.[110]

1.123 Generally speaking, the CSSF has very extensive powers in its interpretation of Luxembourg fund legislation. In the exercise of those powers, it has specified the meaning of certain concepts, such as the substance required from Luxembourg self-managed investment companies and management companies governed by Directive 2009/65.[111] The 2010 Act also enables it to designate certain categories of UCITS, which, whilst investing in transferable securities, cannot be regarded as coordinated UCITS entitled to the European passport under Directive 2009/65. Last but not least, the 2010 Act refers to regulations to be issued by the CSSF with a view to determine specific implementing or interpretative rules with regard to certain provisions of the primary legislation. As mentioned above, in addition to adopting regulations, the CSSF has issued various circulars[112] detailing the principles adopted by it in its supervisory role in relation to matters not settled by the 2010 Act. The CSSF has also regularly made use of its power to adopt regulations.

Supervision of UCIs

UCIs established in the Grand Duchy of Luxembourg

1.124 The CSSF is responsible for authorizing UCIs established in the Grand Duchy of Luxembourg. Accordingly, it receives the incorporation documents and various other documents and information about each UCI. If, after examining such papers, it believes that the investor information is adequate and reflects the applicable legal standards, it adds the UCI

[107] Art 44, AIFMD.
[108] Part I or Part II, 2010 Act or Act of 13 February 2007.
[109] Art 127, 2010 Act.
[110] Art 45, AIFMD.
[111] Circular 12/546.
[112] Primarily Circular 91/75 and, as regards SIFs, Circular 07/309.

to the official list of UCIs. However, registration does not indicate approval of a UCI's investment objectives or investments, or of its ability to meet its objectives.

1.125 UCIs remain on the official list as long as they comply with the rules governing their operation and sales of units. The CSSF checks compliance against the monthly, semi-annual, and annual reports received from each UCI and against any other information requested by it. Similarly, it authorizes in advance proposed modifications to incorporation documents.

1.126 In addition, the CSSF is authorized to grant certain derogations from the 2010 Act.[113] It may waive the application of certain legal requirements for UCITS covered by Part I of the 2010 Act. It has more extensive powers in this regard with respect to UCIs governed by Part II of the 2010 Act and the Act of 13 February 2007.

1.127 The CSSF exerts wider control over so-called 'self-managed' investment companies, which are subject to similar substance and management obligations as management companies themselves.[114]

1.128 The CSSF also has the power to impose penalties. In particular, it may remove a UCI from the official list if it violates the laws and regulations governing its operation or the sale of its units.

UCIs established in foreign countries

Coordinated UCITS

1.129 Coordinated UCITS benefit from the rules governing the free movement of capital and freedom to provide services under Directive 2009/65. This allows coordinated UCITS approved by the supervisory authority of the Member State in which they are established (the 'home State') to market their units freely in another Member State of the EEA (the 'host State').

1.130 Only those aspects not covered by Directive 2009/65 remain under the supervisory authority of the host State, such as specific measures with regard to consumer protection, as to which the supervisory authority of the host State may lay down special requirements.[115]

1.131 Pursuant to those principles, the CSSF has only limited authority over foreign UCITS governed by Directive 2009/65.

Coordinated AIFs

1.132 Coordinated AIFs hold a passport subject to conditions and procedures which are very similar to those applicable to coordinated UCITS.

1.133 For AIFs established outside Luxembourg, the CSSF only exercises its supervisory power with regard to marketing arrangements and arrangements reserving the sale of securities issued by such AIFs to professional investors.[116]

Other UCIs under foreign law

1.134 Foreign open-end UCIs, within the meaning of the Act of 10 July 2005, other than coordinated UCITS and coordinated AIFs, must be authorized by the CSSF if they wish to market

[113] Arts 45(1) and 157, 2010 Act.
[114] Art 27, 2010 Act. For details see 6.95 *et seq*.
[115] Art 91(2), Directive 2009/65.
[116] Arts 32(5), 35(8), 39(7) and 40(8), AIFMD.

their units in the Grand Duchy of Luxembourg. They are only authorized by the CSSF when subject, in their home State, to permanent supervision by a supervisory authority created by law to protect investors. Such UCIs remain on the official list of the CSSF as long as they comply with the Luxembourg rules governing their operation and sales of units.[117]

1.135 Foreign closed-end UCIs, within the meaning of the Act of 10 July 2005, may market their units in the Grand Duchy of Luxembourg subject to compliance with the Act of 10 July 2005. They are not subject to the supervisory authority provided for by the 2010 Act.[118]

Supervision of management companies and AIFMs

Management companies and AIFMs established in the Grand Duchy of Luxembourg

1.136 The right to carry on the activity of a management company or coordinated AIFM established in Luxembourg is subject to prior authorization.[119] Such an authorization is granted either by the CSSF or by the Minister with responsibility for the CSSF (in the case of a management company for foreign UCIs other than coordinated UCITS or coordinated AIFs).[120] All applications are reviewed by the CSSF, whether or not the UCI in question is established in Luxembourg or another jurisdiction. This said, companies which only manage foreign UCIs other than coordinated UCITS or coordinated AIFs require another type of authorization in Luxembourg than that for UCITS management companies and for AIFMs. UCITS management companies may also manage UCIs other than coordinated UCITS, in which case they are subject to slightly different rules.

1.137 A management company seeking authorization to manage UCITS must comply with a series of conditions set out in the 2010 Act[121] and CSSF Regulation No 10-4. A coordinated AIFM managing AIFs is subject to AIFMD.[122] When a Luxembourg company other than a coordinated AIFM only engages in the management of foreign UCIs other than UCITS, it is governed by the 1993 Act.[123] On an ongoing basis the same rules apply to a UCITS management company and an AIFM wishing to retain its authorization.[124] The CSSF periodically checks compliance by UCITS management companies and AIFMs with their obligations, particularly through the quarterly information they are obliged to supply.[125] As envisaged by the 2010 Act,[126] the 1993 Act[127] and under AIFMD[128] the auditor of the relevant management company or AIFM also plays an important role in the continued retention of a management company's or AIFM's authorization.

117 Art 100, 2010 Act.
118 Art 100, 2010 Act.
119 The AIFMs established in Luxembourg that fall below the thresholds foreseen in AIFMD and that have not chosen to be authorized as AIFM are subject to registration and reporting requirements to the CSSF.
120 Arts 101(1) and 125(1), 2010 Act; Art 14(1), Act of 1993.
121 Arts 101 to 104, 125, and 126, 2010 Act.
122 Art 6(1), AIFMD.
123 Arts 15 to 22-1 and 28-8, 1993 Act.
124 Arts 107 to 112, 125, and 126, 2010 Act; Art 6(1), AIFMD.
125 Section IV, Circular 12/546; Art 24, AIFMD.
126 Arts 104 and 126, 2010 Act.
127 Art 22, 1993 Act.
128 Art 22(3), AIFMD.

1.138 Withdrawal of a management company's authorization is the ultimate penalty for non-compliance with the laws and regulations governing its authorization and activities. The CSSF determines whether an authorization should be withdrawn, although it does not have discretionary power to do so. An authorization may only be withdrawn when the CSSF observes that the management company or AIFM in question comes within one of the situations listed in the 2010 Act,[129] AIFMD,[130] or the 1993 Act,[131] as the case may be. Under the 2010 Act the CSSF may grant management companies a limited period to comply with the applicable laws and regulations or to cease their activity.[132]

Management companies and AIFMs established in foreign countries

1.139 Management companies of coordinated UCITS or of coordinated AIFs approved as such in foreign countries may, by virtue of their European passport, establish themselves in Luxembourg or provide the services set out in Directive 2009/65 and AIFMD in Luxembourg without having to seek additional authorization from the CSSF.[133] The notification procedure by which the authorities in the home State inform the CSSF, as set out in Directive 2009/65 and in AIFMD, is the only formality to be observed.[134] The CSSF has limited powers in this respect. It can only refuse authorization for a Luxembourg UCITS to designate a foreign management company if the relevant management company does not comply with the rules regarding the establishment and running of the UCITS, has not been authorized to manage this type of UCITS, or has not transmitted the written agreement with the depositary or information regarding any proposed delegation of its administrative or management functions.[135] The powers of the CSSF are even more limited with regard to a foreign coordinated AIFM wishing to manage a Luxembourg AIF. It is only with respect to matters not governed by AIFMD that it may impose additional requirements on the manager.[136]

1.140 The CSSF authorizes foreign management companies other than coordinated management companies and AIFMs when they want to manage a UCI in Luxembourg other than a coordinated UCITS[137] or a SIF.[138] In principle, the CSSF requires such companies to be subject to prudential control in their country of origin, allowing it to trust in supervision it has every reason to consider effective.

[129] Arts 102(5) and 125(5), 2010 Act.
[130] Art 11, AIFMD.
[131] Art 23, 1993 Act.
[132] eg this power can be exercised by the CSSF when a management company no longer complies with the legal requirements with respect to share capital (Art 107, 2010 Act).
[133] See 6.355. See also the regime organized by AIFMD in relation to AIFMs established in third countries described in 6.523 *et seq*.
[134] Arts 17 and 18, Directive 2009/65; Arts 33 and 41, AIFMD.
[135] Art 20(3), Directive 2009/65.
[136] Arts 33(5) and 41(5), AIFMD.
[137] Such authorization is subject to the rules applicable to conducting persons. See Art 129(5), 2010 Act.
[138] Art 42(3), Act of 13 February 2007.