

Bill 6318 amending the Law of 13 February 2007 on Specialised Investment Funds

Introduction

Bill N° 6318, which proposes amendments to the law of 13 February 2007 on specialised investment funds (SIF Law), was adopted by the Luxembourg Government Council on 1 July 2011 and laid before the Luxembourg Parliament on 12 August 2011.

The objective of the Bill is to enhance the legal framework for specialised investment funds (SIFs) by

- implementing some requirements of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (the AIFM Directive), in particular as regards risk management, conflicts of interest and the delegation of functions to third parties, without however comprehensively implementing the requirements of the AIFM Directive;
- amending the supervisory framework for SIFs taking into account the experience of the *Commission de Surveillance du Secteur Financier* (CSSF) in supervising SIFs, e.g. by requiring SIFs to obtain approval prior to carrying out their activities and also by requiring the CSSF's approval not only for directors, but also for investment managers of SIFs; and
- making available to SIFs some of the advantages introduced by the law of 17 December 2010 on undertakings for collective investment (UCI Law) for UCITS and other funds falling under the UCI Law, such as the possibility of cross sub-fund investments.

This briefing provides a short overview of the main amendments to the SIF Law proposed by the Bill.

Amendments regarding the authorisation and supervision of SIFs

Prior approval of the SIF

The Bill proposes to require SIFs to obtain the CSSF's approval prior to the commencement of their activities,¹ thereby abrogating the possibility to request the CSSF's approval within one month after the launch of the SIF.

Approval of directors and investment managers

The Bill further puts forward an express requirement to obtain the CSSF's approval for the appointment and replacement of directors of the SIF and introduces a new requirement to obtain the CSSF's approval for the appointment and replacement of investment managers.²

Key Issues

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Amendments regarding the authorisation and supervision of SIFs

More flexibility for SICAV-SIFs and other corporate SIFs

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Transitional provisions and entry into force

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¹ Art. 5 of the Bill

² Art. 5 of the Bill

Notification of changes

The Bill also includes an express obligation to notify the CSSF of any material changes to the information on which its approval of the SIF, its directors and investment managers was based.³

Risk management

SIFs shall be required to implement appropriate risk management systems in order to identify, measure, manage and monitor appropriately the risks associated with the positions and their contribution to the overall risk profile of the portfolio.⁴ This obligation may be further specified by a regulation of the CSSF.

Conflicts of interest

SIFs shall be structured and organised in such a way as to minimise the risk that conflicts of interest between the SIF and, as the case may be, any person contributing to the activities of the SIF or any person related directly or indirectly with the SIF, may damage the interests of investors.⁵ This obligation may also be further specified by a regulation of the CSSF.

Delegation

The Bill proposes to introduce conditions applicable to the delegation to third parties by SIFs or their management companies of some of their tasks.⁶ The proposed conditions resemble the conditions applicable to delegations by UCITS under the UCI Law⁷ (with the exception that the portfolio management may with the CSSF's prior approval also be delegated to undertakings, which do not fulfil the requirement of being authorised or registered for the purpose of asset management and subject to supervision, or the requirement that the cooperation between their supervisory authorities and the CSSF must be ensured).

Supervisory powers of the CSSF

A new article shall be introduced into the SIF Law aligning the supervisory powers of the CSSF in supervising SIFs to the supervisory powers conferred on the CSSF by the UCI Law.⁸

More flexibility for SICAV-SIFs and other corporate SIFs

The Bill continues to subject SICAVs and other corporate SIFs to the general provisions applicable to commercial companies under the law of 10 August 1915 on commercial companies (Commercial Companies Law) insofar as the SIF Law does not derogate therefrom. However, the Bill puts forward some relief as follows:⁹

Translation of corporate documents

The requirement that articles of incorporation drawn up in English must be translated into an official language shall be abolished. This also applies to other corporate documents requiring notarisation, such as minutes of the extraordinary general meeting of shareholders or a merger project concerning a SICAV.

Convening general meetings of shareholders

It is also proposed to abolish the requirement to send to registered shareholders, together with the convening notice, copies of the annual accounts, the auditor's report, the management report and, if applicable, the comments of the supervisory board. The convening notice shall however indicate where and how these documents shall be available and that they may be sent to shareholders on request.

³ Art. 5 of the Bill

⁴ Art. 6 of the Bill

⁵ Art. 6 of the Bill

⁶ Art. 7 of the Bill

⁷ Art. 110 (1) of the UCI Law

⁸ Art. 8 of the Bill; see Art. 147 of the UCI Law

⁹ Art. 3 of the Bill

Quorum and voting rights in general meetings

Given potentially frequent subscriptions and redemptions of shares of a SICAV or other corporate funds, and, as a result, the frequent changes of the register of shareholders, the Bill proposes that a convening notice for a general meeting of shareholders may provide that the quorum shall be assessed on the basis of the shares issued and in circulation 5 days prior to the date of the general meeting. The same shall apply to the rights of shareholders to participate and vote in general meetings.

Amendments regarding umbrella funds

Authorisation and withdrawal of authorisation

The Bill provides expressly for the authorisation of sub-funds and clarifies that the withdrawal of a sub-fund's authorisation does not entail the withdrawal of the umbrella fund from the CSSF list of authorized SIFs.¹⁰

Liquidation

In line with this provision the Bill also proposes to allow the *tribunal d'arrondissement*, on request of the public prosecutor acting on its own initiative or on request of the CSSF, to decide on the dissolution and liquidation of a sub-fund of a SIF.¹¹

The Bill further sets out a clarification that a sub-fund must not allow subscriptions after occurrence of the facts giving rise to its liquidation, except where necessary for the purposes of the liquidation.¹²

Cross sub-fund investments

The Bill proposes to introduce a provision into the SIF Law to allow for cross sub-fund investments similarly to the UCI Law.¹³ Under this provision the sub-fund of a SIF may, subject to the conditions provided for in the offering document, subscribe, acquire and/or hold securities to be issued or issued by one or more sub-funds of the same SIF without the SIF, when constituted in corporate form, being subject to the requirements of the Commercial Companies Law with respect to the subscription, the acquisition and/or the holding by a company of its own shares. The conditions for such cross sub-fund investments, which shall be slightly lighter than those set forth by the UCI Law, are put forward as follows:

- the target sub-fund does not, in turn, invest in the sub-fund invested in this target sub-fund;
- voting rights, if any, attaching to the relevant securities are suspended for as long as they are held by the sub-fund concerned and without prejudice to the appropriate processing in the accounts and the periodic reports; and
- in any event, for as long as these securities are held by the SIF, their value will not be taken into consideration for the calculation of the net assets of the SIF for the purposes of verifying the minimum threshold of the net assets imposed by the SIF Law.

Other proposed amendments

Well-informed investors

The Bill further puts forward an express requirement for SIFs to establish appropriate procedures ensuring that only well-informed investors subscribe to the SIF.¹⁴

Changes to offering documents

The Bill includes a new provision to expressly require the CSSF's prior approval for material amendments of a SIF's offering document.¹⁵

¹⁰ Art. 15 of the Bill

¹¹ Art. 9 of the Bill

¹² Art. 14 of the Bill

¹³ Art. 16 of the Bill

¹⁴ Art. 2 of the Bill

¹⁵ Art. 12 of the Bill

Contributions in kind

It is also proposed to codify the CSSF's administrative practice to require an auditor's report in accordance with the requirements of the Commercial Companies Law¹⁶ for subscriptions in kind to SIFs, including also to SIFs in the form of common funds.¹⁷

Definition of SIFs

The Bill proposes to amend the definition of SIFs in Art. 1 of the SIF Law by defining "management" as activity comprising at least the service of portfolio management.¹⁸ This amendment aims at expressly excluding from the scope of the definition of SIFs passive investment vehicles whose activity is limited to the holding of participations, in particular family wealth management companies (*sociétés de gestion de patrimoine familial*) governed by the law of 11 May 2007 in relation to the creation of family wealth management companies. This amendment should however not affect private equity SIFs or real estate SIFs.

Entry into force and transitional provisions

The amended law shall come into force on the first day of the month following its publication in the Luxembourg official journal, the *Mémorial*. The Bill sets forth the following transitional provisions in relation to SIFs existing at the time of the entry into force of the amended law:

- procedures ensuring that its investors are well-informed investors shall be implemented by **30 June 2012**;
- the required risk management systems and arrangements to avoid conflicts of interest shall be put in place by **30 June 2012**;
- conformity with the conditions applicable to delegations shall be achieved by **30 June 2013**.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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¹⁶ Art. 26-1 of the Commercial Companies Law

¹⁷ Art. 11 of the Bill

¹⁸ Art. 1 of the Bill