

Amendments of the Luxembourg Law on Specialised Investment Funds

Introduction

On 6 March 2012 the Luxembourg Parliament adopted a new law (Bill 6318) amending the Luxembourg law of 13 February 2007 on specialised investment funds (SIFs). The full legislative process is expected to be completed shortly.

The amendments:

- anticipate some of the requirements to be introduced by Directive 2011/61/EU on Alternative Investment Funds (AIFM Directive), in particular as regards risk management, conflicts of interests and the delegation of functions to third parties, but do not yet comprehensively implement these or other requirements of the AIFM Directive;
- strengthen the supervisory framework for SIFs, e.g. by requiring SIFs to obtain approval prior to carrying out their activities;
- make available to SIFs some of the innovations introduced by the law of 17 December 2010 on undertakings for collective investment (UCI Law), such as the relief for some corporate SIFs from some of the requirements of the law of 10 August 1915 on commercial companies (Commercial Companies Law) or the possibility of cross sub-fund investments for umbrella SIFs.

This briefing provides a short overview of the main changes to the legal regime of SIFs introduced into the law of 13 February 2007 on SIFs as amended by the new law emerged from Bill 6318 (SIF Law).

Key issues

- Introduction
- Amendments regarding the authorisation and supervision of SIFs
- More flexibility for SICAV-SIFs and other corporate SIFs
- Amendments regarding umbrella SIFs
- Other proposed amendments
- What you need to do and by when

If you would like to know more about the subjects covered in this publication or our services, please contact:

[Mrs Joëlle Hauser](#) +352 48 50 50 203

[Mrs Caroline Migeot](#) +352 48 50 50258

[Mr Alfred Sawires](#) +352 48 50 50 276

[Mr Paul van den Abeele](#) +352 48 50 50 478

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance, 2-4 Place de Paris, B.P. 1147, L-1011 Luxembourg, Grand-Duché de Luxembourg
www.cliffordchance.com

Amendments regarding the authorisation and supervision of SIFs

Prior approval of the SIF

The SIF Law now requires SIFs to obtain the approval of the Luxembourg supervisory authority of the financial sector (CSSF) prior to the commencement of their activities.

Approval of directors and investment managers

The SIF Law now further sets forth an express requirement to obtain the CSSF's approval for the appointment and replacement of directors (*dirigeants*) of the SIF and introduces a new requirement to obtain CSSF's approval for the appointment and replacement of investment managers.

Notification of changes

The SIF Law now also includes an explicit obligation to notify spontaneously in writing the CSSF of any material changes to the information on which its approval of the SIF, its directors and investment managers was based.

Risk management

SIFs are 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. This obligation will be further specified by a regulation of the CSSF.

Conflicts of interests

SIFs are also required to be structured and organised in such a way as to minimise the risk that conflicts of interests 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. This obligation will also be further specified by a regulation of the CSSF.

Delegation to third parties

SIFs that delegate one or more of their functions to third parties will have to comply with the following conditions:

- a) the CSSF must be informed in an appropriate manner;
- b) the mandate may not prevent the effectiveness of the supervision over the SIF; in particular, it must not prevent the SIF from acting or from being managed in the best interests of the investors;
- c) when the delegation concerns the management of investment portfolios, the mandate may be given only to legal or natural persons which are authorised or registered for the purpose of the management of investment portfolios and which are subject to prudential supervision; when this mandate is given to a legal or natural person of a third-country subject to prudential supervision, cooperation between the CSSF and the supervisory authority of that country must be ensured;
- d) when the conditions of point c) are not met, the delegation can only become effective if the CSSF has approved the choice of the legal or natural person to which functions shall be delegated; in this latter case, these persons must be of sufficiently good repute and be sufficiently experienced in relation to the type of SIF concerned;
- e) the directors of the SIF must be able to demonstrate that the legal or natural person to which functions will be delegated is qualified and capable to exercise the functions in question and sufficient diligence has been applied for its selection;

- f) measures exist enabling the directors of the SIF to monitor effectively and at any time the delegated activity;
- g) the mandate must not prevent the directors of the SIF from giving at any time instructions to the legal or natural person to which functions are delegated or from withdrawing the mandate with immediate effect in order to protect the interest of investors;
- h) no mandate with regard to the core function of investment management shall be given to the depositary;
- i) the offering document of the SIF shall list the delegated functions.

Supervisory and investigative powers of the CSSF

A new provision is introduced into the SIF Law aligning the supervisory powers of the CSSF in relation to SIFs to the supervisory and investigative powers conferred to the CSSF by the UCI Law.

More flexibility for SICAV-SIFs and other corporate SIFs

The SIF Law continues to subject SICAVs and other corporate SIFs to the general provisions applicable to commercial companies under the Commercial Companies Law insofar as the SIF Law does not derogate therefrom. However, as under the UCI Law, the SIF Law now provides for some reliefs as follows:

Translation of corporate documents

The requirement that the articles of incorporation of SICAVs and other corporate SIFs (and any amendments thereto) drawn up in English must be translated into an official language is abolished. This also applies to other corporate documents requiring notarisation, such as the minutes of the extraordinary general meeting of shareholders or the merger project concerning a SICAV or another corporate SIF.

Convening general meetings of shareholders

The requirement to send to the registered shareholders of SICAVs and other corporate SIFs (which have adopted the form of a public limited company, of a corporate partnership limited by shares or of a cooperative in the form of a public limited company), together with the convening notice to the annual general meeting, copies of the annual accounts, the approved statutory auditor's report, the management report and, if applicable, the comments of the supervisory board is also abolished. The convening notice shall however indicate where and how these documents shall be available and that they may be sent to shareholders on request.

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 SIF Law now provides that a convening notice for a general meeting of shareholders of SICAVs and other corporate SIFs (which have adopted the form of a public limited company, of a corporate partnership limited by shares or of a cooperative in the form of a public limited company) may stipulate that the quorum shall be assessed on the basis of the shares issued and outstanding on the fifth day prior to the date of the general meeting at midnight Luxembourg time (referred to as "record date"). The rights of shareholders to attend a general meeting and to exercise the voting right attaching to their shares are determined in accordance with the shares held by each shareholder at the record date.

Amendments regarding umbrella SIFs

Authorisation and withdrawal of authorisation

The SIF Law now 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 SIF from the CSSF's official list of authorised SIFs.

Liquidation

In line with the preceding provision, the SIF Law also allows 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.

The SIF Law 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 liquidation.

Cross sub-fund investments

A new provision is introduced into the SIF Law allowing for cross sub-fund investments similarly to the UCI Law. 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 are set forth 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 SIF Law now requires SIFs to establish appropriate procedures ensuring that only well-informed investors subscribe to the SIF, it being understood that the conditions pertaining to the status of well-informed investors as set forth in the SIF Law continue not to be applicable to the directors and other persons who intervene in the management of the SIF.

Changes to offering document

The SIF Law includes a new provision explicitly requiring the CSSF's prior approval for material amendments of a SIF's offering document.

Contributions in kind

The SIF Law now codifies the CSSF's administrative practice to require a report of the approved statutory auditor in accordance with the requirements of the Commercial Companies Law for contributions in kind to SIFs, including also to SIFs in the form of common funds.

Definition of SIFs

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

What you need to do and by when

The amendments made to the SIF Law (as described above) will come into force on the first day of the month following the publication of the new law emerged from Bill 6318 in the Luxembourg official journal, the *Mémorial*.

However, the following transitional provisions apply to SIFs existing at the time of the entry into force of the new 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 of functions shall be achieved by **30 June 2013**.

Clifford Chance can provide you with an integrated service and dedicated team who will be happy to answer your questions, to structure specialised investment funds, draft their documentation in accordance with the Luxembourg fund legislation and advise on their tax regime.

Please note that an English translation of the amended SIF Law may be obtained upon request.

This publication 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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Clifford Chance, 2-4 Place de Paris, B.P. 1147, L-1011 Luxembourg, Grand-Duché de Luxembourg
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