

The new era of alternative investments

In 2013, a new era will begin on the alternative investment market with the implementation of the AIFMD¹ in all EU-Member States legal frameworks. In anticipation of the forthcoming changes and in order to adapt the most successful investment vehicle's legal and regulatory environment to its future objectives, a draft law amending the current law on specialized investment fund (the "SIF") was submitted to the Luxembourg parliament on 12 August 2011. We summarize below the most interesting points of the draft law.

When flexibility rhymed with uncertainty

At the time of its enactment in 2007, one of the most striking innovations of the SIF law was the possibility, under conditions, to launch a SIF before obtaining the CSSF's formal approval.

However this option generated uncertainties on the legal status of the SIF during the transitory period between the start of its activity and the obtaining of the CSSF's approval. Furthermore, the announced CSSF commitment to revert to the applicant SIF within 10 working days as from the receipt of the application file eroded the interest in granting the possibility to launch a SIF *ex ante*.

Furthermore, in practice most of the service providers usually recommended to obtain the CSSF's green light before launching any SIF.

Therefore, it was decided to request from all SIFs to obtain henceforth the CSSF approval before starting any activities.

Such amendment is welcome by the industry to the extent that it takes out any doubts about the status of the SIF.

Delegation: written in the rock

The stricter rules in terms of delegation of functions have now a legal ground. Indeed, as practitioners know, the CSSF seemingly aimed at achieving this purpose already.

These conditions are similar to those already provided in

2002 with the entry into force of UCITS III, (the delegate will have to give proof of its experience and honorability, the delegation may not prevent the effectiveness of supervision over the SIF, etc.).

It is worth mentioning that the management of the investment can only be delegated to individuals or legal persons being subject to prudential supervision (with some minor exceptions).

As mentioned previously, it will not have a large impact as those conditions are already required by the CSSF on a regulatory basis.

Risk management/conflicts of interest: internal level playing field provisions

The SIFs will be required to implement risk management systems with the view to detect, measure, manage and monitor appropriately the risk associated to the investment positions and the contribution to the general risk profile of the portfolio.

Furthermore, the SIFs will be required to implement appropriate measures to mitigate any conflicts of interest. Both new requirements are in line with the UCITS rules and the AIFMD.

WII: A stamped label

SIFs will have to implement measures to ensure that the securities they issue are held by well-informed investors.

Currently, any SIF is required to ensure that its investors qualify in accordance with the SIF Law. However, no specific requirements were legally imposed yet.

Dust removal

Seen as of little use, costly or even old-fashioned, the requirement to translate the notarial deeds written in English into French or German is now being relinquished.

Inspired by the UCITS IV legislation, the draft law encompasses several measures that will ease the organization of the annual general meeting. It aims to dust-off the previous requirement which was deriving from the Luxembourg corporate requisites and was poorly adapted to the size of specific SIFs.

SIFs do no longer need to send the annual report, the management report and the auditor report along with the convening notice to the shareholders. However the convening notice must indicate the place where these documents will be made available to the shareholders or where they can be obtained by them.

The last measure for easing the process is the creation of a record date (*date d'enregistrement*) as for the EU listed companies. According to this record, the quorum (and the shareholder's voting and participation rights) will be set based on the number of issued shares as of the 5th day prior to the general meeting.

The previous requirement derived from the Luxembourg corporate requisites and was not adapted to the size of certain SIFs.

New investment tool: the cross investment

Another attractive provision is the new opportunity for an umbrella SIF to invest into other sub-funds of the same entity.

As for the UCITS, an investment in another sub-fund is subject to specific conditions: the suspension of the voting rights during the cross holding period, the prohibition of double cross investment (the invested sub-fund cannot invest back into the investing sub-fund) and, as long as the securities are held by the SIF, the non recognition of their value for the calculation of the minimum threshold of net assets.

The difference to UCITS is that (i) no limiting threshold (20% or 25%) is required (ii) management, subscription and redemption fees may be charged and (iii) the target sub-fund may invest its monies in the other sub-funds of the same SIF (with the exception however in the investing sub-fund).

Contribution in kind

Contribution in kind to a SIF will be subject to an external and independent auditor's report (*réviseur d'entreprises agréé*).

Timing

The amendments to the law will enter into force in the first month following its publication in the official gazette.

However, the draft law foresees some grandfathering provisions in regard to risk management, conflicts of interest (30 June 2012) and delegation (30 June 2013).

With these changes, the draft law assimilates the past experiences of the CSSF, aligns the SIF provisions to the UCITS IV and prepares the landing of the AIFMD.

1. Directive 2011/61/eu of the European Parliament and of the council of 8 June 2011 on alternative investment fund managers and amending directives 2003/41/ec and 2009/65/ec and regulations (ec) no 1060/2009 and (eu) no 1095/2010.

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UPCOMING EVENTS

VANDENBULKE will be present at:

22-23 november

Alfi European Alternative Investment Funds Conference



24 november

Private Equity Exchange & Awards Summit



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