

## Table of content:

Overview of European Public Funds.....	2
欧洲公募基金概览 .....	31

## Overview of European Public Funds

### Section 1 – Legal & Regulatory Requirements

- **Introduction and General Description**

UCITS stands for Undertakings for Collective Investment in Transferable Securities. UCITS invest in transferable securities as well as in other eligible asset classes as further detailed below. They are subject to strict diversification requirements. UCITS are open-ended funds and are primarily targeted at retail investors. They benefit from a European distribution passport and can be managed on a cross-border basis.

- **Applicable Legislation**

Part I of the law of 17 December 2010 [click [here](#) to access the text of the law] concerning undertakings for collective investment, as amended.

- **European Directive**

The law of 17 December 2010 (hereinafter the “2010 Law”) has transposed Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended [click [here](#)].

- **Upcoming Changes in Laws and Regulations**

N/A.

- **Eligible Assets**

- (i) Transferable securities traded on a regulated market;
- (ii) Money market instruments (“MMIs”);
- (iii) Units of other UCITS and eligible investment funds;
- (iv) Deposits with credit institutions with less than 12 months maturity;
- (v) Financial derivative instruments (“FDIs”);
- (vi) Ancillary cash.

UCITS may not borrow. Short selling of securities is not permitted. UCITS may not acquire precious metals or certificates representing precious metals.

- **Eligible Investment Markets**

The European Commission publishes a list of regulated markets in the European Union, which are considered as eligible investment markets for a UCITS.

For non-European markets, the qualification of a given market as regulated market within the meaning of the 2010 Law is the responsibility of the UCITS. The CSSF may however provide some guidance from time to time which should rather be considered as a “no objection” opinion.

- **Risk Diversification Requirements**

UCITS are subject to very strict risk diversification requirements. Please note that the summary below is a high level overview only. The detailed list of diversification requirements and investment restrictions is provided in Chapter 5 of the 2010 Law, articles 40 to 52 for [click [here](#)].

Concentration rules

- a) No more than 10% of net assets in transferable securities and MMIs issued by the same body [article 43 (1)]; in certain cases, a higher limit may be applied (index tracking funds) [article 44 (1)].
- b) The total value of transferable securities and MMIs held by a UCITS in the issuing body in each of which it invests more than 5% of its assets shall not exceed 40% of net assets [article 43 (2)].
- c) No more than 20% of net assets in deposits with the same body [article 43 (1)].
- d) Risk exposure to a single counterparty in an OTC FDI transaction may not exceed 10% of net assets when the counterparty is a credit institution or 5% of net assets in other cases [article 43 (1)].
- e) A UCITS shall not combine, where this would lead to an investment of more than 20% of net assets in a single body, any of the following [article 43 (2)]:
  - Transferable securities or MMIs issued by that body;
  - Deposits made with that body;
  - Exposure arising from transactions in OTC FDIs with that body.
- f) No more than 20% of net assets in a single target UCITS or other investment funds (for the purpose of this limit, each sub-fund of a target umbrella fund is considered a separate issuer).
- g) No more than 30% of net assets in aggregate in other investment funds (excluding UCITS).

Rules regarding significant influence over an issuer

- a) A UCITS may not acquire any shares carrying voting rights which would enable it to exercise significant influence over the management of an issuing body [article 48 (1)].
- b) A UCITS may acquire no more than [article 48 (2)]:
  - 10% of the non-voting shares of the same issuer;
  - 10% of the debt securities of the same issuer;
  - 25% of the units of the same UCITS or other investment fund;
  - 10% of the MMIs issued by the same issuer.

- **Investor Protection – Overview**

Investor protection is at the core of UCITS legislation. The depositary and the management company must act solely in the interest of unitholders/ shareholders of the fund.

- **Different Types of Fund Entities and Legal Form**

In Luxembourg, UCITS can be structured either:

- (i) In contractual form as a common fund (“Fonds Commun de Placement” or FCP). A common fund is defined as an undivided collection of assets made up and managed according to the principle of risk spreading on behalf of unitholders who are liable only up to the amount contributed by them. An FCP does not have a legal personality and must be managed by a management company.
- (ii) In corporate form as an investment company:
  - Either with variable capital (“Société d’Investissement à Capital Variable” or SICAV) ;
  - Or with fixed capital (“Société d’Investissement à Capital Variable” or SICAF)<sup>1</sup>.

For the purpose of this paper, we will focus on the SICAV which is the most frequently used form. A SICAV will adopt the form of a public limited company (“Société Anonyme” or SA).

As its name indicates, a SICAV is a company whose capital may constantly vary. Its capital is at all times equal to the net asset value.

The Société Anonyme with a one-tier management structure is managed by its board of directors whose appointment and termination of appointment is controlled by the shareholders in general meeting. It must have at least three directors. No nationality or residence requirement apply.

The board of directors has the power to carry out all acts necessary for the achievement of the corporate objective.

It is also possible for a Société Anonyme to adopt a two-tier management structure operating with a supervisory board and a management board.

Click [here](#) for more information on this legal form.

Both the SICAV and SICAF are structured as corporate entities and have a legal personality separate from the shareholders and are therefore treated as opaque for fiscal purposes.

- **Umbrella Funds and Segregated Sub-funds**

UCITS may be established as umbrella funds with multiple sub-funds, each with different features (generally a different investment policy).

Even though the fund as a whole constitutes a single entity, each sub-fund corresponds to a distinct part of the assets and liabilities of the UCITS.

The right of investors and of creditors concerning a sub-fund are limited to the assets of that sub-fund, unless a clause included in the management regulations (FCP) or instruments of incorporation (SICAV/ SICAF) provides otherwise.

For the purpose of the relations between investors, each sub-fund is deemed to be a separate entity, unless provided otherwise in the management regulations or constitutive documents.

- **Master-feeder Structures**

Master-feeder structures are permitted under UCITS regulations but are subject to specific requirements. The feeder UCITS must invest at least 85% of its assets into a single master UCITS.

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<sup>1</sup> By contrast, a SICAF is defined as a company that is not a SICAV. A SICAF has a fixed capital. It is not very often used so for the purpose of this paper, it has not been considered further.

The remaining 15% of its assets may be invested in ancillary liquid assets and in financial derivative instruments which may be used for hedging purposes only.

- **Eligible Investors**

Directive 2009/65/EC of the European Parliament and of the Council of 13 July defines UCITS as undertakings for collective investment in transferable securities that promote the sale of their units to the public in the European Union. By creating a single legal framework for UCITS, the Directive facilitates the removal of the restrictions on the free movement of units of UCITS in the European Union.

As such and by definition, UCITS are widely-held funds that are typically marketed in a large number of countries.

All types of investors are eligible to invest in a UCITS: Retail investors, institutional investors, pension funds, insurance companies.

Once a UCITS is approved by the Luxembourg Supervisory Authority (the Commission de Surveillance du Secteur Financier), it can avail itself of the European passport to market its units/shares in other EU Member States. Marketing in other EU Member States is however subject to notification in each of the countries of distribution.

In addition, UCITS may be distributed in non-EU Member States subject to local regulatory and distribution requirements.

In aggregate, UCITS are currently placed in some 70 different countries (List provided as Appendix 1, Status as of 31 December 2016).

- **Open-ended vs. Closed-end**

UCITS are by definition open-ended funds.

- **Listing on Stock Exchange**

Admission to listing on the Luxembourg Stock Exchange is optional.

- **Exchange Traded Funds**

A UCITS ETF is a UCITS at least one unit or share class of which is traded throughout the day on at least one regulated market or Multilateral Trading Facility with at least one market maker which takes action to ensure that the stock exchange value of its units or shares does not significantly vary from its net asset value and where applicable its Indicative Net Asset Value.

## Section 2 – Different Actors, combining to create a Multi-layered Approach to Investor Protection

The diagram below illustrates the various actors involved in the governance, supervision and oversight of a UCITS fund. Their combined activities create a multi-layered approach to protecting the assets and investments of investors, whether retail or institutional.

Subsequent sections cover in more detail the requirements to become, and the responsibilities of, a depositary Bank, and a Management Company, and a section covering in more detail the role of the Luxembourg Regulator in supervising the various actors. This section focuses on specifically what each of all the actors does to ensure the protection of the investor.



- **Board of Directors**

The Board of Directors of a Fund is selected by the initial shareholders, which typically means the initiator; the fund manager or fund management company which has organised the establishment of the fund.

The primary roles of the Board are;

- Strategic direction of the Fund (foresight),
- Control & governance of the Fund's affairs (oversight),
- Appointment of significant actors, including: Management Company, Depositary, Auditor and Legal Advisors,
- The Board will oversee the activities of the Management Company, whose purpose is to manage the day to day running of the Fund.

**Like any other company, the Board is ultimately responsible to, and protects the interests of, its shareholders, which in the case of a UCITS are the investors. Investor protection is at the heart of every action and decision of the Board therefore.**

Each appointment requires the approval of the CSSF, who will verify Directors are of sufficient good repute, and have sufficient experience relative to the Fund and its objectives and profile. The CSSF will assess the diversity and skills and experience on the Board, again relative to the nature and complexity of the Fund. The CSSF will also verify that each Director is able to devote sufficient time for each mandate they accept – there is no prescriptive limit to the number of Directorships, but the CSSF scrutiny is particularly focused on this aspect.

The typical fund board in Luxembourg requires a minimum of three Directors. Larger Funds typically have larger Boards, with 5 to 7 being the normal quorum. There is no requirement for the Directors to reside in Luxembourg.

- **Depositary**

The Depositary qualifications, duties and liabilities are covered in detail in Section 4. In summary, from an investor protection perspective, the Depositary:

- Ensures the assets of the Fund are safe from loss,
- Has a duty to act solely in the interests of investors,
- Is independent of the Management Company and is appointed directly by the Fund Board,
- Has oversight duties across the entire fund lifecycle.

Its specific duties include;

- Verifying the suitability of the Management Company the Board wishes to appoint,
- Oversight of the Net Asset Value calculation,
- Oversight of investor trade activity ensuring timely settlement of transactions,
- Selection and oversight of sub-custodians,
- Ensuring asset segregation at the sub-custodian,
- Verifying the existence of assets included in the net asset value,
- Monitoring of cash flows of the Fund,
- Monitoring the compliance of the Fund with its investment mandate.

The Depositary is liable for any loss of asset held in the custody network and is obliged to arrange immediate restitution in the event of a loss of asset. A loss of an asset held outside the custody network also remains the liability of the Depositary if the depositary is found to be negligent in its oversight of such arrangements.

- **Management Company**

The vast majority of Luxembourg UCITS are now governed under a Management Company model, with a few still remaining as self-managed funds.

The Management Company is appointed by the Fund Board, and its mandate is to carry out the day to day running of the Fund.

It provides the local regulatory substance of the Fund in the form of authorisation, capital, qualified staff, systems and controls.

Specific duties include :

- Appointment and oversight of portfolio managers. In the majority of cases, this is delegated to portfolio managers best suited to managing the particular strategy of the Fund.
- Central administration, including the maintaining of the books and records of the fund used to calculate the net asset value, and the maintenance of the register of investors with the associated management of investor account management and trading activity. In many cases, the Management Company will appoint third party administrators to perform these tasks and will oversee them as delegates of the Management Company, retaining responsibility for their actions and potentially their losses.
- Oversight of the distribution activity of the Fund.
- Risk management procedures and controls which ensure the fund operates within its prescribed risk parameters and investment mandate.

A Management Company may be wholly owned by the initiator of the Fund or the Fund may appoint a specialist third party Management Company to perform the duties.

Again, the primary duty of care is to the Fund Board, which in turn has a primary duty of care towards the investors.

- **Auditor**

The auditor of the fund is appointed by the Fund board. Their primary role is to express an opinion on the financial statements produced under the responsibility of the Fund Board, and such opinion will provide assurance to investors that the financial statements are free from material misstatement.

There is substantial prescription in the content and format of financial statements and the annual report, and in the underlying accounting standards upon which such reports are based.

- **Regulator (Supervisory Authority)**

In Luxembourg, the Supervisory Authority is the Commission de Surveillance du Secteur Financier ("CSSF"). It operates under the authority of the Minister of Finance.

It performs its duties of supervision for the purposes of ensuring the safety and soundness of the financial sector, solely in the public interest.



Specifically with respect to UCITS supervision, the CSSF will:

- Authorise the establishment of the Fund after careful scrutiny of its constitutional documents and its application dossier,
- Approve the appointment of the Board of Directors,
- Authorise and supervise the activities of Management Companies,
- Authorise and supervise the activities of Depositary banks,
- Authorise and supervise the activities of the Auditor,
- Prescribe a comprehensive suite of reports from the various actors, which it ensures are received on a timely basis, and scrutinises such reports for signs of control weakness or risk.

The CSSF has a wide range of sanctions at its disposal it can use to effect supervision or punish offenders, which range from fines and penalties of institutions through to removal of licences and personal fines and imprisonment

- **Summary**

Luxembourg UCITS are supervised and governed by a multi-layer group of authorised professionals, each of whom have prescribed responsibilities, obligations and liabilities, with an over-arching objective of protecting investors in those UCITS.

This provides assurance to investors, especially important in a Fund domiciled in one country but distributed to investors in over seventy countries around the world, protecting investors who may be based thousands of miles from the domicile of the fund. Every investor is treated the same, with the same inherent and explicit protection against loss of asset resulting from fraud, negligence or default of any of the actors in the chain.

### **Section 3 – Management Company – Role, Requirements, License, Minimum Capital**

- **Role**

The role of the management company is to carry out the collective portfolio management for a UCITS.

Functions included in the activity of collective portfolio management of UCITS include (i) investment management, (ii) administration and (iii) distribution<sup>2</sup>. Each of these functions can be performed by the UCITS management company or the self-managed investment company or be delegated.

- **Management Company**

#### Applicable Regulation

The main rules applicable to management companies of undertakings for collective investment in transferable securities (“UCITS management company(ies)”) are:

- Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of law, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, as amended (“UCITS Directive”);
- Law of 17 December 2010 on undertakings for collective investment, as amended;
- CSSF Regulation 10-04; and
- CSSF Circular 12/546.

#### Minimum Capital

The initial capital of a UCITS management company is EUR 125,000.

When the value of the portfolios managed by the UCITS management company exceeds EUR 250,000,000, it shall be required to provide additional own funds equal to 0.02% of the amount by which the value of the portfolios of the UCITS management company exceeds EUR 250,000,000. The required total of the initial capital and the additional amount shall not, however, exceed EUR 10,000,000.

#### Legal Form

A UCITS management company can be incorporated as a public limited company, a private limited company, a cooperative company, a cooperative company set up as a public limited company or a corporate partnership limited by shares.

#### Summary of Applicable Rules

According to the UCITS Directive, a UCITS management company is a company, the regular business of which is the management of UCITS in the form of common funds or of investment companies (collective portfolio management of UCITS).

- A common fund (FCP) always needs to be managed by a management company. An FCP is managed by a management company pursuant to a mandate contained in the management regulations appointing that management company and approved by the CSSF.
- A UCITS in the form of an investment company must either designate a UCITS management company or act as a self-managed investment company.

A UCITS management company is subject to substance requirements set out in the UCITS Directive and implemented in Luxembourg laws and regulations:

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<sup>2</sup> The European legislation uses the term “Marketing” which means in fact distribution.

- The persons who effectively conduct the business (designated as the “conducting officers”) of a UCITS management company must be of sufficiently good repute and be sufficiently experienced in relation to the type of UCITS managed by the management company.
- UCITS management companies are also required, among other things, to have adequate internal control mechanisms (Art. 109 (1) a) of the 2010 Law).
- The CSSF Circular 12/546 provides details on the requirements applicable under the UCITS Directive to UCITS management companies. This Circular contains requirements regarding inter alia own funds, internal governance, operating staff, complaints handling, permanent compliance and internal audit, electronic data processing and accounting procedures, permanent risk management function, personal transactions, conflicts of interests, rules of conduct, voting rights policy, remuneration policy and external audit.

Similar requirements shall apply to self-managed investment companies.

- **Delegation of Investment Management by Management Company**

The investment management function involves managing the investment, the disinvestment and reinvestment of the assets of the UCITS, or of one or more of its sub-funds. A key element of this function is generally decision making in relation to the portfolio of assets of the UCITS.

The investment manager must manage the portfolio of a UCITS in accordance with the investment diversification criteria periodically laid down by the management company (in case of a UCITS of the contractual type) and the board of directors of the investment company (in case of a UCITS of the corporate type).

Where a UCITS, or its management company, appoints investment managers, the CSSF needs to be provided with a detailed description of their activities, management expertise, supervision and licences as well as copies of their latest accounts, unless these managers are already known to them.

The management company may delegate the investment management function to a third party for the purpose of a more efficient conduct of their business. The mandate for investment management must be given only to undertakings which are authorised or registered for the purpose of asset management and subject to prudential supervision. Is the mandate given to a third country undertaking, cooperation between the CSSF and the supervisory authority of that country must be ensured by way of a MoU.

The administration comprises in particular a sound administrative and accounting organisation which ensures, amongst others, the adequate execution of operations, the correct and complete recording of operations, the production of sound and rapidly available management information, the monitoring of delegated activities, the management of conflicts of interest and the respect of applicable rules of conduct. The administration must be established in the EU - that means that a Luxembourg UCITS may be administered by a Luxembourg or EU management company. Marketing activities relate to the distribution of the shares or units of the UCITS in another Member State of the European Union or a third country.

- **Management Company Passport**

Where a Management Company authorised under Chapter 15 of the 2010 Law proposes, without establishing a branch, only to market the units of the UCITS it manages as provided for in Annex II of the 2010 Law in a Member State other than the UCITS home Member State, without proposing to pursue any other activities or services, such marketing shall be subject only to the requirements of Chapter 6 of the 2010 Law.

A Management Company authorised by the competent authorities of another Member State under Directive 2009/65/EC, may pursue in Luxembourg the activity for which it has been authorised, either by the establishment of a branch or under the freedom to provide services. The 2010 Law lays down the procedures and conditions for carrying on in Luxembourg such activity.

A Management Company authorised under Chapter 15 of the 2010 Law may pursue the activities for which it has been authorised within the territory of another Member State either by the establishment of a branch or under the freedom to provide services. The 2010 Law lays down the procedures and conditions for carrying on such activities in other Members States.

- **Risk Management**

The management company must, amongst others, establish and maintain a permanent risk management function. The permanent risk management function must be hierarchically and functionally independent from operating units. The function is responsible for (a) implementing the risk management policy and procedures, (b) ensuring compliance with the UCITS' risk limitation system, and notably the legal limits concerning global exposure and counterparty risk, (c) advising the board of directors as regards the definition of the risk profile of each managed UCITS, (d) providing of regular reports to the board of directors and management, and (e) reviewing and reinforcing, where appropriate the tools and procedures for the valuation of OTC traded derivative instruments.

- **Use of Financial Derivative Instruments**

Under certain conditions UCITS may use financial derivative instruments ("FDIs") – either for investment or hedging purposes (to reduce the risk of the portfolio). Eligible FDIs include, but are not limited to, future, options, swaps (interest rate swaps, currency swaps, total return swaps, credit default swaps), forwards, and contract for difference. For FDIs to be eligible, the underlying assets of the FDI must be a core eligible asset. The UCITS fund's prospectus should contain detailed information on FDIs in the prospectus and indicate in which categories of assets the fund in question is authorized to invest. The prospectus should state prominently whether the derivatives transactions are for the purpose of hedging, or to meet investment goals, and how the use of derivatives may affect the fund's risk profile.

- **Leverage**

A UCITS may use leverage to increase its exposure through the use of financial derivative instruments. Leverage may be used at the discretion of the investment manager in accordance with the investment objective and policy. It must be monitored on a regular basis by the risk management function of the management company. The level of leverage shall be defined as the sum of absolute value of the notional amount of all financial derivative instruments used by the sub-fund, as well as any exposure generated by reinvestment of cash collateral in relation to efficient portfolio management techniques. The above methodology based on the "sum of notional" is mandatory.

## **Section 4 – Depositary - Role, Requirements, License, Minimum Capital**

- **Role**

The role of the depositary is to safekeep the assets of a UCITS and to perform control/oversight and cash monitoring functions.

The depositary of a UCITS is subject to a strict liability regime and to an obligation of restitution as further described below.

- **Depositary**

### Applicable Regulation

The depositary of a UCITS must be a credit institution within the meaning of the law of 15 April 1993 on the financial sector (hereinafter the “1993 Law”). It is also subject to the 2010 Law. These institutions can only accept to be appointed as the depositary of a UCITS if they possess in addition to their authorisation as credit institution, a specific authorisation to act as depositary of a UCITS established in Luxembourg. The authorisation is granted by the CSSF.

### Minimum Capital

Minimum capital of EUR 8,700,000 compliant with Regulation 575/2013 and application of the capital adequacy ratios defined in the Capital Requirements Regulation and Capital Requirements Directive IV.

### Legal form

The depositary can be established under the form of a public-law institution, a public limited company, a corporate partnership limited by shares or a cooperative company.

### Summary of applicable rules

It must either have its registered office in Luxembourg or be established there if its registered office is in another Member State of the EU. The eligibility and approval criteria for the appointment of a credit institution as depositary of a UCITS are set out in the Commission Delegated Regulation 2016/438 and CSSF Circular 16/644 (as defined and summarised below).

The depositary has to act in the interests of the holders of shares or units in the relevant fund and therefore may be directly liable vis-à-vis such share- or unitholders.

The 2010 Law imposes depositary functions on the depositary of UCITS (i), who is, in addition, in charge of control functions (ii).

### Depositary functions under the 2010 Law

Under the 2010 Law, the depositary carries out oversight, cash monitoring and safekeeping duties.

### Control / oversight functions

The 2010 Law provides for certain specific control duties of the depositary of a UCITS. The depositary of UCITS must:

- ensure that the sale, issue, repurchase, redemption and cancellation of shares or units are carried out in accordance with the law and the constitutive documents;
- ensure that the value of the shares or units of the UCITS is calculated in accordance with the law and the constitutive documents;
- carry out instructions of the UCITS or the management company acting on behalf of the UCITS, unless they are in conflict with the law or the constitutive documents;
- ensure that in transactions involving the assets of the UCITS any consideration is remitted to it within usual time limits; and
- ensure that the income of the UCITS is applied in accordance with the law or its constitutive documents.

Although the depositary may delegate the material execution of such duties, it remains responsible for ensuring the correct execution thereof.

The appointment and replacement of the depositary requires the prior approval of the CSSF.

#### *(a) Cash monitoring functions*

As regards cash monitoring, the 2010 Law requires that the depositary ensures that the cash flows of the UCITS are properly monitored and, in particular, that all payments made by, or on behalf of, unitholders or shareholders upon the subscription of units or shares have been received and that all cash of the UCITS has been booked in cash accounts.

#### *(b) Safekeeping functions*

The assets of the UCITS shall be entrusted to the depositary for safekeeping as follows:

- a) for financial instruments that may be held in custody, the depositary shall:
  - (i) hold in custody all financial instruments that may be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;
  - (ii) ensure that all financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts, in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the management company acting on behalf of the fund, so that they can be clearly identified as belonging to the fund in accordance with the applicable law at all times;

b) for the other assets, the depositary shall:

- (i) verify the ownership by the fund of these assets by assessing whether the fund holds the ownership based on information or documents provided by the UCITS /the management company acting on behalf of the UCITS and, where available, on external evidence;
- (ii) maintain a record of those assets for which it is satisfied that the UCITS holds the ownership and keep that record up to date.

The depositary shall provide the management company/ UCITS, on a regular basis, with a comprehensive inventory of all the assets of the UCITS. The assets of the UCITS held in custody by the depositary shall not be reused by the depositary, or by any third party to which the custody function has been delegated, for their own account. Reuse comprises any transaction of assets held in custody including, but not limited to, transferring, pledging, selling and lending.

The assets of the UCITS held in custody by the depositary are allowed to be reused only where:

- a) the reuse of the assets is executed for the account of the UCITS;
- b) the depositary is carrying out the instructions of the UCITS or of the management company on behalf of the UCITS;
- c) the reuse is for the benefit of the UCITS and in the interest of the unitholders or shareholders; and
- d) the transaction is covered by high-quality and liquid collateral received by the UCITS under a title transfer arrangement.

The market value of the collateral shall, at all times, amount to at least the market value of the reused assets plus a premium.

In case of insolvency of the depositary and/or of any third party located in Luxembourg to which custody of the assets of the UCITS has been delegated, the assets held in custody are unavailable for distribution among, or realisation for the benefit of, creditors of such a depositary and/or such a third party.

*(c) Day-to-day administration of the assets held in custody*

The depositary must fulfil all operations concerning the day-to-day administration of the assets of a UCITS in its custody, in particular, collect dividends, interest and securities due, exercise rights deriving from securities and, in general, carry out any other operations concerning the day-to-day administration of securities and liquid assets which belong to the UCITS. To the extent that the operations referred to above relate to assets which are not held in custody by the depositary itself, the latter may, on a contractual basis confer the performance thereof to delegates with whom the assets are effectively deposited.

- **Strict Liability Regime and Obligation of Restitution**

The depositary is liable to the UCITS and to the unitholders/shareholders of the UCITS for the loss by the depositary or a third party to whom the custody of financial instruments held in custody has been delegated. In the case of a loss of a financial instrument held in custody, the depositary must return a financial instrument of an identical type or the corresponding amount to the UCITS or the management company acting for the UCITS. The depositary is not liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. The depositary is also liable to the UCITS and to the unitholders/shareholders of the UCITS for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to the 2010 Law.

The liability of the depositary is not affected by any delegation and may not be excluded or limited by agreement.

- **Sub-custodians**

The depositary may delegate custody functions to sub-custodians if (i) the tasks are not delegated with the intention of avoiding the requirements laid down in the 2010 Law (ii) the depositary can demonstrate that there is an objective reason for the delegation, and (iii) the depositary has exercised all due skill, care and diligence in the selection and the appointment of the sub-custodian, and continues to exercise all due skill, care and diligence in the periodic review and ongoing monitoring of the sub-custodian. In order to be eligible, the sub-custodian must (1) have structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the UCITS which have been entrusted to it; (2) be subject to effective prudential regulation and supervision and an external periodic audit, (3) segregate the assets of the clients of the depositary from its own assets and from the assets of the depositary, (4) take all necessary steps to ensure that in the event of insolvency the assets of the UCITS held by the sub-custodian are unavailable for distribution among creditors, and (5) comply with some general requirements regarding the flow of information and independency as well as the safekeeping and reuse of assets.



## **Section 5 – Central Administration, Transfer and Registrar Agency - Role, Requirements, License, Minimum Capital**

### **• Requirements**

#### Summary of applicable rules

Administration is one of the three main functions included in the activity of collective portfolio management of UCITS.

The UCITS itself or, as the case may be its management company, is not obliged to perform the tasks connected to the central administration, transfer and registrar agency. It may entrust to a regulated third party the exercise of the duties set out above. Typically, the management company will appoint a third party to perform these tasks.

The term "central administration" and its interpretation have been defined by the Luxembourg regulator in Circular IML 91/75. Pursuant to the latter, the duties of a central administration agent are the following:

- the keeping of the accounts and other accounting documents;
- the issues or redemptions of shares or units of the scheme;
- the keeping of the register of participants in the fund;
- the co-operation in the establishment of the prospectus, financial reports and other documents to be distributed to investors;
- the correspondence, the dispatch of financial reports and all other documents to shareholders or unitholders;
- the calculation of the net asset value.

A Luxembourg UCITS or, as the case may be its management company, may organise the division of tasks connected to the duties of central administration and transfer and registrar agency amongst various providers of services. It must, in this case, itself be in a position to co-ordinate and supervise the execution of such tasks unless it entrusts this mission to a duly qualified agent.

The UCITS, or the providers of services which may be appointed therefor, must have the necessary infrastructure (i.e. sufficient human and technical means) in order to accomplish the above central administration duties. The above provisions however do not exclude the appointment of financial institutions or professional bodies abroad as paying agents or as agents for the distribution and redemption of shares or units, nor the occasional assistance of experts, advisers or other specialised persons providing services from abroad.

#### Applicable Regulation

A central administrator, transfer and registrar agent shall be authorised as a specialised professional of the financial sector pursuant to the 1993 Law.

#### Minimum Capital

Minimum capital of EUR 125,000.

#### Legal form

A central administration, transfer agency and registrar agent can take of the form of any form of commercial company.

## **Section 6 – Distribution - Passporting**

### **▪ Distributor**

The UCITS management company may appoint distributors located in a third country(ies) as its delegate(s) with a view of distributing the UCITS fund.

### **▪ Marketing and Distribution of a UCITS in Europe and in the world**

The UCITS marketing passport allows a UCITS which has been authorised in an EU Member State (the “UCITS home Member State”) to market its units within other EU Member States (the “UCITS host Member States”), after having submitted a notification letter to the competent authorities of its home Member State (Article 93(1) of the UCITS Directive). To that end, UCITS host Member States shall ensure that UCITS are able to market their units within their territories upon notification, and shall not impose any additional requirements or administrative procedures on UCITS in respect of the field governed by the UCITS Directive (Article 91 (1) and (2) of the UCITS Directive).

A Luxembourg UCITS needs to submit to the CSSF a notification file that contains:

- A notification letter including main information regarding the UCITS;
- The last version of the CSSF attestation, the constitutive documents of the UCITS, the prospectus, the KIIDs, the latest audited annual report and any subsequent semi-annual report, the marketing arrangements (if any) and confirmation of payment (if required).

When a Luxembourg UCITS is distributed outside the European Union, rules of the relevant jurisdiction where the shares of the UCITS are marketed will apply. However, since UCITS has become a worldwide recognised investment fund brand offering a high level of protection to investors, its registration in third countries outside of Europe often benefits from a more flexible and smoother process.

### **• Fight against Money Laundering and Terrorist Financing (AML/ CTF)**

UCITS and their Management Companies are subject to Luxembourg laws and regulations on AML/ CTF, which transposed the applicable European Directives.

As a key principle, it is the responsibility of the UCITS and its Management Company to develop and maintain a distribution network which complies with Luxembourg laws and regulations on AML/ CTF.

An effective risk-based approach allows the UCITS and its Management Company to exercise reasonable judgment with respect to distributors and investors in the fund. A risk-based approach will build on a risk assessment taking account (i) the types of investors subscribing the UCITS (ii) the types of relationships (iii) the types of transactions (iv) the distribution channels and (v) country or geographic-specific risks.

- **Fund Passport**

Funds set up as UCITS in compliance with the UCITS Directive may seek registration in other EU Member States and EEA member countries through a facilitated registration procedure in those countries. The simplified notification procedure is a process by which the initial notification of a UCITS' intention to market its shares in another EU Member State, and later filings in relation to the creation of new compartments, are undertaken by the CSSF ("regulator-to-regulator filing").

The local authorities in such countries will ensure that the marketing rules in their countries are complied with, but cannot, pursuant to the UCITS Directive, require any amendments to the scheme's structure or documentation as approved by the CSSF.

## **Section 7 - Accounting and Valuation**

### **• Classes of Shares**

The issue and the redemption of units / shares only matters for those vehicles with a variable capital, the most popular one being the so-called “SICAV”.

For those UCITS that are incorporated in the form of a fixed capital company (“SICAF”), any issue or redemption of shares are subject to the rules of the law of 10 August 1915 on commercial companies (hereinafter the “1915 Law”), these will not be further developed here.

Units/shares of a UCITS shall be issued at a price defined by dividing the NAV of the investment vehicle by the number of units/shares outstanding; this price may be increased by expenses and commissions. The units/shares of a UCITS shall be redeemed at a price defined by dividing the NAV of the investment vehicle by the number of units/shares outstanding; the price may be decreased by expenses and commissions.

One or more classes of units or shares that match various characteristics may be created in a stand-alone vehicle or in each compartment of an umbrella vehicle. The classes of units or shares may for example have the following distinguishing features:

- distribution policy (distribution or capitalisation shares/units);
- currency (different currencies for the shares/units may be accommodated, e.g. USD, EUR, JPY, etc.);
- investors targeted (either retail, professional or institutional investors, investors of a different nationality, etc.);
- structure of fees (different fee structures may be accommodated, e.g. in relation to the subscription fee, redemption fee, conversion fee, distribution fee, management fee, etc.);
- currency hedging (hedged classes or not);
- minimum subscription and holding requirements.

### **• Frequency of Net Asset Value (NAV) Calculation**

The constitutive documents of the investment vehicle shall determine the frequency of the calculation of the issue and redemption price.

For a UCITS, the NAV is computed at sufficiently close and fixed intervals, but at least twice a month. The CSSF may, however, permit a UCITS to reduce this frequency to once a month, on condition that such a derogation does not prejudice the interests of unit/shareholders.

Repayments to investors following a reduction of capital shall not be subject to any restriction other than the respect of the required minimum capital.

### **• Suspension of NAV Calculation**

The constitutive documents of the vehicle shall specify the conditions in which issues and redemptions may be suspended, without prejudice to legal causes. In the event of suspension of issues or redemptions, the investment vehicle must without delay inform the CSSF and, if it markets its units/shares in other Member States of the European Union, the respective competent authorities. Where the interest of the investors so requires, redemptions may be suspended by the CSSF if the provisions of laws, regulations or the constitutive documents concerning the activity and operation of the vehicle are not observed.

The issue and redemption of the units/shares shall be prohibited:

- when there is no management company (in case the investment vehicle is not self-managed) or depositary;
- when the management company (in case the investment vehicle is not self-managed) or the depositary is put into liquidation, declared bankrupt, seeks a composition with creditors, a suspension of payment or a court controlled management or is the subject of similar proceedings.

- **Valuation Principles**

For investors to have confidence in a UCITS fund, they must be able to trust the valuations it uses for individual assets and for the NAV. Investors buy shares or units in a UCITS without knowing the exact price, which is only established after the deal has been placed.

Unless otherwise provided for in the articles of incorporation or the management regulations of the fund, the valuation of the assets (purchased or sold) is based, in the case of officially listed securities, on the last known stock exchange quotation, unless this quotation is not representative.

As a rule, the latest official market closing prices must be used to value publicly-traded securities, otherwise a 'fair market value' must be provided. This is designed to offer protection against late trading, market timing and other practices that can affect the value of a fund.

For securities and for securities which are not listed this way, but for which the latest quotation is not representative, the valuation will be based on the probable realisation value, estimated with care and in good faith. There are also prescribed rules for valuing certain assets such as short-term commercial debt and OTC derivative instruments (short for over the counter) that are not listed or traded on public exchanges. The management company of a UCITS fund must put in place valuation procedures for derivatives that are appropriate to their level of complexity, and details of the process must be disclosed to investors. The manager may appoint an outside firm to carry out such valuations. If it does so in-house, the process must be independent of the portfolio management to avoid conflicts of interest

- **Distribution**

Distributions (interim or final) of dividends can be made irrespective of the realised results within the period to the extent the minimum share capital is maintained.

- **Publication of NAV**

The investment company and the management company, for each of the funds it manages, must publish an annual report for each financial year and a semi-annual report covering the first 6 months of the financial year. The annual and semi-annual reports must be published within the following time limits, with effect from the end of the period to which they relate:

- 4 months in case of the annual report
- 2 months in case of the semi-annual report

- **Audit**

Audited Financial Statements need to be published 4 months after the closing of the financial year of the fund.

The Board of Directors of the UCITS is responsible for the preparation and fair presentation of these financial statement in accordance with Luxembourg legal and regulatory requirements relating to the preparation of the financial statements, such financial statements are meant to be free from material misstatement whether due to fraud or error.

The “Réviseur d’entreprise Agréé” or approved statutory auditor (Regulated by the CSSF) will express an opinion on the above accounts. This opinion will result from an audit process conducted in accordance with International Standards on Auditing as adopted by the CSSF.

- **Audited Financial Statements (Financial Reports)**

The disclosure requirements specific to the annual reports of Luxembourg UCITS investment funds are defined by the 2010 Law as amended and the relevant CSSF circulars.

Presentation

- The annual accounts shall be drawn up in accordance with the provisions of the law applicable to commercial companies, except when otherwise stated in the 2010 Law.
- The annual accounts shall give a true and fair view of the company’s assets, liabilities, financial position and results.
- Where a provision of the 2010 Law requires a quantitative or qualitative assessment, it must be performed by the management of the company in accordance with the true and fair view principle.

Luxembourg GAAP

Unless there is an exceptional derogation, disclosed and explained in the notes to the accounts, the valuation of items shown in the annual accounts shall be made in accordance with the following general principles derived by the 1915 Law:

- The company is presumed to be carrying on its business as a going concern (going concern principle).
- The valuation methods may not be modified from one financial year to another (principle of consistency of method principle).
- The components of asset and liability items must be valued separately (principle of segregated valuation of asset and liability items).
- The balance sheet at the beginning of each financial year must correspond to the closing of balance sheet of the preceding year (principle of intangibility of the opening balances).

Required content of the annual report

(i) The annual report must include the following elements:

- A balance sheet or a statement of assets and liabilities.
- A detailed income and expenditure account for the financial year.
- A report on the activities of the past financial year and the other information provided for in Schedule B of the 2010 Law (mainly portfolio with specific features and other information on NAV).
- And finally, any significant information which will enable investors to make an informed judgement on the development of the activities and the results of the fund.

## Section 8 – Supervisory Authority

- **Introduction**

The Luxembourg Supervisory Authority is the “Commission de Surveillance du Secteur Financier” (Commission for the Supervision of the Financial Sector or “CSSF”).

The CSSF, established by the law of 23 December 1998, with effect on 1 January 1999, is a public institution with legal personality and financial autonomy. It operates under the authority of the Minister of Finance.

The CSSF performs its duties of prudential supervision and supervision of the markets for the purposes of ensuring the safety and soundness of the financial sector, solely in the public interest.

The CSSF is generally responsible for the supervision of the entire financial sector in Luxembourg, with the exception of the insurance sector.

As regards UCITS and management companies, the CSSF is the competent authority for granting the authorisation to carry out the requested activity and for the permanent supervision of the requested activity.

As at June 2017, the CSSF employs 713 staff. The nine departments in charge of the sector of investment funds and management companies employ over 200 persons.

- **Approval and Prudential Supervision in the context of UCITS and their Management Companies**

For the purpose of this paper, we have focussed on the CSSF’s approval and prudential supervision of UCITS, their Management Companies and Depositaries.

### Approval of UCITS and their Management Companies

The CSSF is the competent authority for the authorisation and the supervision of UCITS and management companies that are established under Luxembourg law as further detailed in Section 2.

The CSSF has developed a number of templates that applicants must fill in as well as check-lists of required documentation.

Once a UCITS is approved, the CSSF stamps the prospectus (in hard copy) and enters the fund on its list. The list is publicly available on the CSSF’s website.

Similarly, all entities which are approved, and supervised by, the CSSF are entered in a register of CSSF supervised entities accessible on the CSSF’s website.

### Ongoing Supervision by CSSF and Reporting Requirements

In order to carry out its mission of ongoing supervision of UCITS, the CSSF will typically rely on the following:

- (i) Monthly reporting;
- (ii) Semi-annual and annual reports;
- (iii) Long-form reports;
- (iv) Audit findings (management letters issued by independent auditors);
- (v) Off-site and on-site inspections.

The CSSF will carry out its ongoing supervision of Management Companies and Depositaries through all means at its disposition: Regular reportings, review of financial statements, audit findings, off-site and on-site inspections.

- **Entities Subject to CSSF Approval and Prudential Supervision**

The CSSF is generally in charge of the approval and prudential supervision of the following categories of entities of the financial sector:

- Banks/ Credit Institutions (which may act as Depositaries of UCITS);
- UCITS and other categories of Regulated Investment Funds;
- Management Companies of UCITS;
- Alternative Investment Fund Managers;
- Professionals of the Financial Sector;
- Pension Funds;
- Investment Companies in Risk Capital;
- Authorised Securitisation Undertakings;
- Securities Markets and their operators;
- Multilateral Trading Facilities;
- Payment Institutions;
- Electronic Money Institutions;
- Auditors.

- **Organisation, Independence and Governance of Supervisory Authority**

The CSSF's Board of Directors is composed of seven members appointed on the proposal of the Government for a period of five years. The powers conferred upon the Board of Directors notably include the annual adoption of the CSSF's budget and the approval of the financial statements and of the management report of the CSSF's Executive Board, which are submitted to the Board of Directors before being presented to the Government for approval. It also sets the general policy as well as the annual and long-term investment programmes which are submitted to it by the Executive Board before being submitted for approval to the Minister of Finance. The meetings and deliberations of the Board of Directors take place according to its internal rules.

The Board of Directors is not competent to intervene in the CSSF's prudential supervisory matters.

The senior executive authority of the CSSF is the Executive Board, composed of a Director General and of two to four Directors, appointed on the proposal of the Government in Council for a period of five years. The Executive Board works out the measures and takes the decisions it deems useful and necessary for the fulfilment of the CSSF's mission and its organisation.



### Control Regarding the Fight against Money Laundering and Terrorist Financing

The CSSF is in charge of ensuring compliance with the professional obligations regarding the fight against money laundering and terrorist financing by all the persons subject to its supervision.

### Sanctions

The CSSF has a whole range of significant measures to act against persons subject to its supervision that would violate the applicable regulations relating to the financial sector or that would not comply with the professional obligations imposed on them, including by imposing administrative fines and sanctions.

### Drawing-up of Regulations

The CSSF has the power to make regulations within the limits of its competences and missions, in accordance with Article 9(2) of the law of 23 December 1998.

The legislative framework applicable to the financial sector is complemented by circulars issued by the CSSF and Frequently Asked Questions.

### Interaction with International Bodies

The CSSF cooperates with the three European supervisory authorities (among which the European Securities Markets Authority has prime responsibility for the asset management sector), other supervisory authorities and resolution authorities at the European and international level.

## **Section 9 – Available Documents for Investors**

- **Prospectus**

The investment company and the management company must, for each of the UCITS it manages, publish a prospectus. The prospectus must include the information necessary for investors to be able to make an informed judgement of the investment proposed to them, and, in particular, of the risks attached thereto. The prospectus shall include, independent of the instruments invested in, a clear and easily understandable description of the fund's risk profile and shall at least contain specific information as set out in the 2010 Law.

- **KIID**

Investment companies and management companies must, for each of the UCITS they manage (or their sub-fund(s) - and share classes as the case may be), draw up a short document containing key information for UCITS investors (KIID). The KIID is restricted to two A4 pages and must include appropriate information about the essential elements of the UCITS concerned, such elements include (i) identification of the UCITS and the reference that the CSSF is the competent authority for the supervision of the UCITS, (ii) a short description of its investment objectives and investment policy, (iii) past performance presentation or, where relevant, performance scenarios, (iv) costs and associated charges, and (v) risk/reward profile of the investment, including appropriate guidance and warnings in relation to the risks associated with investments in the relevant UCITS. The KIID must be drafted using plain language, i.e. avoiding jargon and giving complex information in a clear way. The KIID is to be provided free of charge and it must be translated in the languages of the countries in which the UCITS (or their sub-funds) are registered for distribution.

- **Factsheets and Other Marketing Material**

All marketing communications to investors must be clearly identifiable as such. They must be written in a fair, clear and not misleading way. In particular, any marketing communication comprising an invitation to purchase units of UCITS that contain specific information about UCITS shall make no statement that contradicts or diminishes the significance of the information contained in the prospectus and the KIID.

- **Publication of NAV prices**

The UCITS is obliged to publish the issue, sale and repurchase price of their units each time they issue, sell and repurchase their units, and at least twice a month. Under certain conditions, the CSSF may permit a UCITS to reduce this frequency to once a month.

- **Financial Report**

The management company must for each fund it manages, publish (i) an audited annual report for each financial year within four months after the closing of the financial year, and (ii) a half-yearly or semi-annual report covering the first six months of the financial year within two months as of the end of the half-year.

- **Translation**

The prospectus, annual report, KIID and other marketing material must be issued in one of the following languages: French, German, English or Luxembourgish. Where a Luxembourg UCITS markets its units or shares in another Member State of the European Union, it must provide to investors within the territory of that Member State these documents in the official language, or one of the official languages of the UCITS host Member State or into a language approved by the competent authorities of the host Member State.

- **Availability in Electronic Form**

The prospectus, and the latest published annual and semi-annual reports shall be provided to investors on request and free of charge. The prospectus and the KIID may be provided in a durable medium or by means of a website. In addition, an up to date version of the KIID shall moreover be published on the website of the investment company or the management company.

## **Section 10 – Tax Considerations**

Luxembourg investment funds are essentially tax-exempt vehicles, with the exception of a registration tax and an annual subscription tax.

### **Section 10.1 Taxation of Fund**

- **Corporate Income Tax**

Tax exempt.

- **Municipal Business Tax**

Tax exempt.

- **Wealth Tax**

Tax exempt.

- **Subscription Tax**

UCITS are subject to an annual subscription tax of 0.05% calculated on net assets.

Subject to a UCITS complying with the conditions set out in the 2010 Law, a reduced rate of 0.01% applies for money market funds, cash funds and for sub-funds or share classes which are reserved to institutional investors.

The 2010 Law further provides for an exemption of the annual subscription tax for money-market funds whose securities are reserved for institutional investors, micro-credit funds, share classes which are reserved to pension funds and for index-tracker ETFs, again subject to the particular requirements set out in the law.

- **Capital Duty (Corporate Entities)**

Fixed registration duty of EUR 75.

- **Other Taxes**

N/A.

### **Section 10.2 Taxation of Income Received by Fund**

- **Eligibility to Double Tax Treaties**

From a Luxembourg viewpoint, a common fund (FCP) is in principle considered as a tax transparent vehicle given its legal features.

As such, it is deemed in most cases to be fiscally transparent for the purpose of the application of double tax treaties. Common funds themselves are thus not treaty eligible unless otherwise specifically agreed between Luxembourg and its treaty partner countries. Investors in an FCP fund may however seek treaty benefits between their own countries of residence and the countries of investment.

UCITS in the form of investment companies (SICAVs) being recognized as fiscally opaque entities, with legal personality, and beneficial ownership of their investments, may be eligible to benefit from double tax treaties entered into by Luxembourg (currently 80 double tax treaties signed by Luxembourg).

- **Withholding Tax on Dividends, Interest, Capital Gains received**

Depending on the countries of investments, UCITS are typically subject to withholding tax on dividends and interest received.

Where a double tax treaty applies, UCITS may benefit from a reduced rate of withholding tax, either at source or by way of refund. They are also usually protected from taxes levied by the country where investments are made on gains made on disposal of investments.

- **Tax Credits**

Where a double tax treaty applies, UCITS may benefit from a reduced rate at source or by way of refund, but the portion of withholding tax that is not refunded does not give investors in the UCITS or the UCITS itself, any tax credit.

### **Section 10.3 Taxation of Income Paid by Fund**

- **Dividends Paid by Fund**

Dividends paid to resident and non-resident investors are not subject to any withholding tax in Luxembourg.

Investors (both individuals and corporate) resident in Luxembourg must declare income from UCITS (both SICAVs or FCPs) in their annual tax returns, and will be subject to taxation at the prevailing standard rate.

Non-residents (both individuals and corporate) are not subject to any other taxes in Luxembourg on dividends or distributions made by a UCITS.

- **Capital Gains on Redemptions**

Capital gains on redemption proceeds paid to resident and non-resident investors are not subject to any withholding tax in Luxembourg.

Non-residents (individuals and corporate) are not subject to any other taxes in Luxembourg on gains on disposal of units/shares, either via redemption or transfer to a third party. Non-resident investors are taxed in accordance with applicable rules in their respective countries of residence.

## Section 10.4 Automatic Exchange of Information

- **FATCA**

UCITS funds qualify as foreign financial institutions. They are generally reporting financial institutions save in the situation where they may avail themselves of the specific exempt statuses provided for under in the IGA model 1 signed with the US.

- **Common Reporting Standard (Mandatory Automatic Exchange of Information in the Field of Taxation)**

UCITS funds qualify as reporting financial institutions within the meaning of the Luxembourg Law of 18 December 2015 transposing the Council Directive 2014/107/EU of 9 December 2014 ("DAC 2") amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [click [here](#)]. The law came into force on 1 January 2016 [click [here](#)].

## 欧洲公募基金概览

### 第 1 节 - 法律与监管要求

- **简介和概述**

UCITS 系指“可转让证券集合投资计划”。UCITS 投资于可转让证券以及如下详细所列的其他合格资产类别。UCITS 须满足严格的风险分散要求。UCITS 属于开放式基金，主要针对零售投资者。它们受益于欧洲分销通行证，可以跨境管理。

- **适用法律**

经修订的有关集合投资计划的 2010 年 12 月 17 日法律的第一部分 [[点击此处](#)获取该法律文本]。

- **欧洲指令**

2010 年 12 月 17 日法律（下称“《2010 年法律》”）替代了 2009 年 7 月 13 日欧洲议会和欧盟理事会有关可转让证券集合投资计划（UCITS）的法律、法规和行政管理规定的协调的指令 2009/65/EC（修订） [[点击此处](#)]。

- **法律和法规即将进行的变更**

无。

- **合格资产**

- (vii) 在受监管市场上交易的可转让证券；
- (viii) 货币市场工具（“MMI”）；
- (ix) 其他 UCITS 和合格投资基金的单位；
- (x) 信贷机构 12 个月内到期的存款；
- (xi) 金融衍生工具（“FDI”）；
- (xii) 辅助现金。

UCITS 不得借款、不得卖空证券。UCITS 不得购买贵金属或代表贵金属的证书。

- **合格投资市场**

欧盟委员会公布了在欧盟被视为 UCITS 的合格投资市场的受监管市场清单。

对于非欧盟市场，由 UCITS 负责评估特定市场是否满足《2010 年法律》定义的受监管市场的资格条件。然而卢森堡金融监管委员会（CSSF）可以不时地提供一些指导，更确切地说应该被视为“无异议”的意见。

- **风险分散要求**

UCITS 须满足非常严格的风险分散要求。请注意，以下摘要仅为高风险概要。关于分散要求和投资限制的详细列表，请参见《2010 年法律》第 5 章，第 40 到 52 条[[点击此处](#)]。

集中度规则

- h) 在相同机构发行的可转让证券和货币市场工具上的净资产不超过 10% [第 43 (1) 条]；在某些情况下，可以应用更高的限额（指数跟踪基金）[第 44 (1) 条]。
- i) UCITS 在发行机构中持有的、投资超过 5% 净资产的各可转移证券和货币市场工具的总价值不应超过 40% 的净资产[第 43 (2) 条]。
- j) 在相同机构存款中的净资产不超过 20% [第 43 (1) 条]。
- k) 当交易方为信贷机构时，在场外交易市场（OTC）金融衍生工具交易中，对单一交易方的风险敞口不得超过 10% 的净资产；在其他情况下，不超过 5% [第 43 (1) 条]。
- l) UCITS 于单一机构投资下列各项的总值合计不得超过其净资产的 20% [第 43 (2) 条]:
  - 该机构发行的可转让证券或货币市场工具；
  - 存入该机构的存款；
  - 从与该机构的场外交易市场金融衍生工具交易中产生的敞口。
- m) 在单一目标 UCITS 或其他投资基金上的净资产不超过 20%（对于该限额，目标伞型基金的每个子基金视为单独的发行人）。
- n) 在其他投资基金（不包括 UCITS）上的合计净资产不超过 30%。

有关对发行人有重大影响的规则

- c) UCITS 不得收购使其能够对发行机构的管理实施重大影响的有表决权股票[第 48 (1) 条]。
- d) UCITS 不得收购超过[第 48 (2) 条]:
  - 10% 的相同发行人的无表决权股票；
  - 10% 的相同发行人的债务证券；
  - 25% 的相同 UCITS 或其他投资基金的单位；
  - 10% 的相同发行人发行的货币市场工具。

- **投资者保护——概述**

投资者保护是 UCITS 立法的核心。保管（存托）人和管理公司必须完全为了基金的单位持有人/股东的利益行事。



- **基金实体的不同类型和法律形式**

在卢森堡，UCITS 可以采用以下任何一种形式构成：

(iii) 作为共同基金的合同形式（“共同投资基金”或 FCP）。共同基金定义为按照风险分摊原则代表单位持有人组成和管理的完整资产集合，其中单位持有人仅对他们认缴的金额负责。FCP 没有法人资格，必须由管理公司进行管理。

(iv) 作为投资公司的公司形式：

- 使用可变资本（“可变资本投资公司”或 SICAV）；
- 或使用固定资本（“固定资本投资公司”或 SICAF）<sup>3</sup>。

对于本文件，我们将集中于最常用的形式 SICAV。SICAV 将采用公开有限公司的形式（“股份有限公司”或 Société Anonyme，即 SA）。

正如其名字所指明的那样，SICAV 是资本可能一直在变化的公司。其资本始终等于资产净值。

具有单层管理结构的股份有限公司由其董事会进行管理，董事的任免由股东大会控制。它必须至少有三名董事。没有国籍或住所要求。

董事会有权执行达到公司目标所必需的所有行动。

股份有限公司还可以采用监事会和管理委员会的双层管理结构。

点击[此处](#)获取有关这种法律形式的更多信息。

SICAV 和 SICAF 都是公司实体，拥有独立于股东的法人资格，因此出于财政目的，它们被视为不透明。

- **伞型基金和分离式子基金**

UCITS 可以建立为有多个子基金的伞型基金，每个子基金有不同的特点（通常为不同的投资政策）。

虽然基金总体上构成单一实体，但是每个子基金对应于 UCITS 资产和负债的不同部分。

投资者和债权人有关子基金的权利限于子基金的资产，除非管理规定（FCP）或成立文书（SICAV/SICAF）有不同规定。

对于投资者之间的关系，每个子基金被视为单独实体，除非管理规定或成立文件另有规定。

- **主从结构**

UCITS 规定下允许主从结构，但是要满足具体的要求。联接 UCITS 必须有至少 85% 的资产投资到单一主 UCITS 中。剩下的 15% 资产可以投资于辅助流动资产和仅可用于对冲目的的金融衍生工具。

- **合格投资者**

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<sup>3</sup> 相反，SICAF 被定义为非 SICAV 的公司。SICAF 有固定资本。由于它不是很常用，因此对于本文件，不做进一步考虑。

7月13日欧洲议会和欧盟理事会的指令 2009/65/EC 将 UCITS 定义为在欧盟向公众推销它们的单位的可转让证券集合投资计划。通过为 UCITS 创建单一的法律框架，指令促进了对 UCITS 单位在欧盟自由流通的限制的消除。

因此按照定义，UCITS 是被广泛持有的基金，一般在许多国家销售。

所有类型的投资者都是 UCITS 的合格投资者：零售投资者、机构投资者、养老基金、保险公司。

一旦 UCITS 获得卢森堡监管机构（卢森堡金融监管委员会）批准后，它就可以利用欧洲护照在其他欧盟成员国销售其单位/股份。然而，在其他欧盟成员国的销售要在每个销售的国家发出告示。

另外，UCITS 可以根据地方监管和分销要求在非欧盟成员国中分销。

总体而言，UCITS 目前在大约 70 个不同国家（附录 1 提供清单，状态截至 2016 年 12 月 31 日）发行募集。

- **开放式基金和封闭式基金**

按照定义，UCITS 是开放式基金。

- **在证券交易所上市**

可以选择在卢森堡证券交易所上市。

- **交易型开放式指数基金（ETF）**

UCITS ETF 是至少有一个单位或股份类别全天在至少一个受监管市场或多边交易设施（Multilateral Trading Facility）、通过至少一名做市商交易的 UCITS；做市商采取措施确保其单位或股份的证券交易所价值与其资产净值及其指示性资产净值（若适用）不会有明显差异。

## 第 2 节 - 不同参与主体，共同打造多层次的投资者保护方式

下图说明了 UCITS 基金的治理、监管和监督中涉及各个参与主体。他们的联合活动形成了保护投资者的资产和投资的多层次方式，不管是零售还是机构。

后面的章节更加详细地介绍了成为存托银行和管理公司的要求以及存托银行和管理公司的责任，其中一个章节详细介绍了 CSSF 在监管各参与主体中发挥的作用。本节专门介绍各参与主体为保证投资者保护而发挥的作用。



### Investor Protection 投资者保护

Board of Directors 董事会

Ultimate responsibility 负有最终责任

Depository 保管人

Management Company 管理公司

Safekeeping of Assets 保管资产

Investment/Risk management 投资/风险管理

Oversight of NAV calculation 监督 NAV 计算

Oversight Duties 监督职责

Transaction settlement 交易结算

Compliance with Prospectus 遵守招股说明书

Auditor 审计人

Regulator 监管人 – CSSF

Audit of Annual Accounts 审计年度报表

Authorization 授权

Reporting to CSSF 向 CSSF 报告

Ongoing supervision 持续监管

Sanction regime 制裁制度

- **董事会**

基金的董事会由初始股东选出，初始股东通常是指发起人；组织基金成立的基金管理人或基金管理公司。

董事会的主要作用是：

- 基金的战略指挥（远见），
- 基金事务的控制和治理（监督），
- 重要参与主体的任命，包括：管理公司、保管人、审计人和法律顾问，
- 董事会将监督管理公司的活动，管理公司的目的是管理基金的日常运作。

像其他公司一样，董事会最终对其股东负责，并且保护其股东的利益，在 UCITS 的情况下股东就是投资者。因此，投资者保护是董事会每个行动和决策的核心。

每项任命都需要获得 CSSF 的批准，CSSF 会将核实董事是否声誉良好、是否具有针对基金及其目标和主要情况的充分经验。CSSF 将评估风险分散性及董事会的技能和经验，也涉及基金的性质和复杂性。CSSF 还将核实各董事是否能够为他们接受的每项职权投入足够的时间——董事席位的数量没有硬性限制，但是 CSSF 审查会特别集中于这个方面。

卢森堡的基金董事会一般要求至少有三名董事。较大的基金通常有较大的董事会，5 到 7 人是正常的法定人数。对于董事是否居住在卢森堡没有要求。

- **保管人**

保管人（Depositary，即存托人）的资格、职责和责任在第 4 节中详细介绍。总的来说，从投资者保护的角度，保管人：

- 确保基金资产不遭受损失，
- 有义务完全为了投资者的利益而行事，
- 独立于管理公司，直接由基金董事会任命，
- 在整个基金生命周期具有监督职责。

具体职责包括：

- 核实董事会希望任命的管理公司的适合性，
- 监督资产净值（NAV）的计算，
- 监督投资者交易活动，确保交易及时结算，
- 选择和监督分托管人，
- 确保分托管人的资产隔离，
- 核实资产净值中包含的资产是否存在，
- 监控基金的现金流动，
- 监控基金遵守投资限制

保管人对于托管网络内资产的损失负有责任，并且在资产损失情况下有义务安排立即赔偿。如果保管人被发现疏于监督此类安排，则在托管网络外的资产损失也应由保管人负责。

- **管理公司**

绝大多数卢森堡 UCITS 现在都采取管理公司模式进行管理，只有少数仍然为自我管理基金。

管理公司由基金董事会任命，其职权是开展基金的日常运作。

管理公司以授权、资本、合格工作人员、系统和控制的形式，提供基金的地方监管内容。

具体职责包括：

- 任命和监督投资组合经理。在大多数情况下，这项职责委托给最适合管理基金特别战略的投资组合经理。
- 集中管理，包括用于计算资产净值的基金账簿和记录的保存、投资者名册的保管，连同管理投资者账户管理和交易活动的相关。在很多情况下，管理公司将任命第三方管理人来执行这些任务，并监督作为管理公司代表的他们，为他们的行动及可能的损失负责。
- 监督基金的分销活动。
- 管理和控制风险，确保基金在其规定的风险参数和投资职权内运作。

管理公司可以由基金发起人全资所有，或者基金可以任命专业第三方管理公司来履行这些职责。

再次说明，管理公司对基金董事会负有主要谨慎责任，而基金董事会对投资者负有主要谨慎责任。

#### • 审计人

基金审计人由基金董事会任命。其主要作用是对基金董事会负责编制的财务报表发表意见，这些意见将向投资者保证财务报表不存在重大虚报。

对财务报表和年度报告的内容和格式、以及这些报告依据的基本会计准则有实质性规定。

#### • 监管人（监管机构）

在卢森堡，监管机构是卢森堡金融监管委员会（“CSSF”）。该委员会在卢森堡财政大臣的领导下运作。

CSSF 履行其监管职责，旨在确保金融业的安全和稳定，完全符合公众利益。

在对 UCITS 的监管方面，CSSF 具体将：

- 在仔细审查基金的成立文件及其申请档案之后，核准基金的成立，
- 审批董事会的任命，
- 核准与监督管理公司的活动，
- 核准与监督存托银行的活动，
- 核准与监督审计人的活动，
- 规定各参与主体需提交的一整套报告，确保及时收到报告，审查报告，寻找存在监控弱点或风险的迹象。

CSSF 有各种制裁手段可以用于实施监管或惩罚违规者，从对机构处以罚金和罚款，到吊销执照和对个人处以罚金和监禁。

## • 总结

卢森堡 UCITS 由一系列多层次的授权专业人士/机构进行监督和管理，各自都有规定的职责、义务和责任，总体目标旨在保护 UCITS 投资者。

这为投资者提供了保证，对于在一个国家注册、却在全世界超过 70 个国家分销的基金来说尤其重要，保护了可能离基金注册地千里以外的投资者。每个投资者都得到相同的待遇，获得相同的固有明确保护，防止由于运营链上任何参与主体的欺诈、疏忽或违约而导致的资产损失。

### 第 3 节 - 管理公司 - 作用、要求、许可、最低资本

#### • 作用

管理公司的作用是开展 UCITS 的集合投资组合管理。

UCITS 的集合投资组合管理活动中包括的职能有：(i) 投资管理、(ii) 行政管理，和 (iii) 分销<sup>4</sup>。每项职能都可以由 UCITS 管理公司或者自我管理的投资公司执行，或者委托执行。

#### • 管理公司

##### 适用法规

适用于可转让证券集合投资计划管理公司（“UCITS 管理公司”）的主要规则有：

- 2009 年 7 月 13 日欧洲议会和欧盟理事会有关可转让证券集合投资计划（UCITS）的法律、法规和行政管理规定的协调的《指令 2009/65/EC》（修订）（“UCITS 指令”）；
- 经修订的有关集合投资计划的 2010 年 12 月 17 日法律；
- CSSF 法规 10-04；
- CSSF 通知 12/546。

##### 最低资本

UCITS 管理公司的初始资本为 12.5 万欧元。

当 UCITS 管理公司所管理的投资组合价值超过 2.5 亿欧元时，UCITS 管理公司需要提供等于其投资组合价值超过 2.5 亿欧元的金额的 0.02% 的附加自有资金。然而，初始资本和附加金额的要求总数不应超过 1000 万欧元。

##### 法律形式

UCITS 管理公司可以组建为公众有限公司、私人有限公司、合作公司、建立为公众有限公司的合作公司、或者股份合伙有限公司。

##### 适用规则摘要

根据 UCITS 指令，UCITS 管理公司是指正常业务为管理采用共同投资基金或投资公司（UCITS 的集合投资组合管理）形式的 UCITS 的公司。

- 共同投资基金（FCP）始终需要由管理公司来管理。FCP 由管理公司依照任命该管理公司的管理法规中包含的、并经 CSSF 审批的授权进行管理。
- 采用投资公司形式的 UCITS 必须指定一家 UCITS 管理公司，或者作为自我管理的投资公司运作。

UCITS 管理公司要满足 UCITS 指令中所列的以及卢森堡法律和法规所执行的实质性要求：

- 有效执行 UCITS 管理公司的业务的人（指定为“执行管理人员”）必须具备充分良好的声誉，而且在管理公司所管理的 UCITS 类型方面必须具有充分的经验。

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<sup>4</sup> 欧洲立法使用 “Marketing”（营销）一词，实际上是指分销。

- 其中，UCITS管理公司还要具备充分的内控机制（《2010年法律》第109(1)a条）。
- CSSF通知12/546提供UCITS指令下适用于UCITS管理公司的要求的详情。其中，该通知包含有关自有资金、内部治理、经营人员、投诉处理、永久合规性和内部审计、电子数据处理和会计程序、永久风险管理功能、个人交易、利益冲突、行为规则、表决权政策、报酬政策和外部审计的要求。

类似的要求适用于自我管理的投资公司。

- **管理公司的投资管理委托**

投资管理职能包括管理 UCITS 或者一个或多个其子基金资产的投资、投资撤回和再投资。该职能的关键要素通常是有关 UCITS 资产的投资组合的决策。

投资管理人必须按照管理公司（在合同类型的 UCITS 的情况下）和投资公司的董事会（在公司类型的 UCITS 的情况下）定期制定的分散投资标准来管理 UCITS 投资组合。

如果 UCITS 或其管理公司指定投资管理人，需要向 CSSF 提供投资管理人的活动、管理技术、监督和许可的详细说明以及他们最新账户的副本，除非这些管理人已经为 CSSF 所知。

管理公司可以将投资管理职能委托给第三方以便更加有效地开展他们的业务。投资管理只能委托给为了投资管理目的而授权或注册、并且受到审慎监管的企业。如果委托给第三国企业，必须通过谅解备忘录的方式确保 CSSF 和该国监管机构之间的合作。

行政管理特别包括完善的行政管理和会计机构，其中该机构确保充分的运营执行、正确而完整的运营记录、完善且快速可用的管理信息的产生、委托活动的监控、利益冲突的管理以及适用的行为规则的考虑。行政管理必须立足于欧盟——即卢森堡 UCITS 可以由卢森堡或欧盟管理公司进行管理。销售活动涉及 UCITS 的股份或单位在欧盟其他成员国或第三国的销售。

- **基金通行证**

如果按照《2010 年法律》第 15 章授权的管理公司提出，在不建立分支机构条件下，按照《2010 年法律》附件 II 中的规定在 UCITS 本成员国之外的成员国销售其管理的 UCITS 单位，而不进行任何其他活动或服务，该销售只需要满足《2010 年法律》第 6 章的要求。

由其他成员国的主管当局按照指令 2009/65/EC 授权的管理公司，可以在卢森堡进行其获得授权的活动，不管是通过建立分支机构还是自由提供服务。《2010 年法律》为在卢森堡开展这样的活动制定了程序和条件。

按照《2010 年法律》第 15 章授权的管理公司，可以在其他成员国领土内进行其获得授权的活动，不管是通过建立分支机构还是自由提供服务。《2010 年法律》为在其他成员国开展这样的活动制定了程序和条件。

- **风险管理**

除其他外，管理公司必须建立和维持永久的风险管理职能。永久风险管理职能必须在层级上和职能上独立于运作单位。该职能负责：（a）执行风险管理政策和程序，（b）确保符合 UCITS 的风险限制系统，特别是有关全球敞口和交易方风险的法律限制，（c）告知董事会每个管理的 UCITS 的



风险概况，（d）向董事会和管理层提供定义报告，（e）视情况审核及加强用于场外交易的衍生工具估值的工具和程序。

- **金融衍生工具的使用**

在某些情况下，UCITS 可以使用金融衍生工具（“FDI”）——不管是用于投资还是对冲目的（以降低投资组合的风险）。合格的金融衍生工具包括但不限于：期货、期权、互换（利率互换、货币互换、总收益互换、信用违约互换）、远期和差价合约。金融衍生工具要合格，其基本资产必须是核心的合格资产。UCITS 基金的招募说明书应当包含有关其中金融衍生工具的详细信息，并指出该基金可以投资于哪些类别的资产。招募说明书应当清楚说明衍生工具交易是否支持对冲，或者是否达到投资目标，以及衍生工具的使用是如何影响基金的风险概况。

- **杠杆**

UCITS 可以通过使用金融衍生工具，用杠杆来提高其风险敞口。杠杆可以由投资管理人按照投资目标和政策决定是否使用。杠杆必须由管理公司的风险管理职能定期监控。杠杆的水平应当被定义为子基金使用的所有金融衍生工具的名义金额绝对值，以及现金抵押通过有效的投资组合管理方法进行再投资所产生的风险敞口。上述基于“名义金额”的方法是强制性的。

## 第 4 节 – 保管人 - 作用、要求、许可、最低资本

- 作用

保管人（Depositary，即存托人）的作用是保管 UCITS 的资产，履行控制/监督和现金监控的职能。

UCITS 保管人须遵守严格的责任制度和赔偿义务，具体见下文。

- 保管人

### 适用法规

UCITS 保管人必须是符合关于金融行业的 1993 年 4 月 15 日法律（以下称为“《1993 年法律》”）定义的信贷机构。它还须遵守《2010 年法律》。如果这些机构除了其信贷机构的授权外，还拥有担任卢森堡设立 UCITS 的保管人的特定授权，那么它们只能被任命为 UCITS 保管人。由 CSSF 授权。

### 最低资本

最低资本 870 万欧元，符合《法规 575/2013》，适用《资本要求法规》和《资本要求指令 IV》中规定的资本充足率。

### 法律形式

保管人的设立形式可以是公法机构、公众有限公司、股份合伙有限公司或合作公司。

### 适用规则摘要

保管人必须在卢森堡有注册办公地址，或者如果其注册办公地址位于其他欧盟成员国，必须在该国设立。信贷机构的任命资格和审批条件如《委员会授权法规 2016/438》和《CSSF 通知 16/644》（如下文定义和概述）中所述。

保管人必须以相关基金的股份或单位持有人的利益行事，因此对该等股东或单位持有人负有直接责任。

《2010 年法律》对另外负责监控职能的 UCITS 保管人赋予保管职能。

### 《2010 年法律》下的保管职能

根据《2010 年法律》，保管人履行监督、现金监控和保管职责。

## 控制 / 监督职能

《2010 年法律》规定了 UCITS 保管人的某些特定监控职责。UCITS 保管人必须：

- 确保股份或单位的销售、发行、回购、赎回和撤销按照法律和组成文件执行；
- 确保UCITS股份或单位的价值按照法律和组成文件计算；
- 执行UCITS的或代表UCITS行事的管理公司的指令，除非该等指令与法律或组成文件冲突；
- 确保在涉及UCITS资产的交易中，任何报酬在正常期限内汇款到账；以及
- 确保UCITS的收入按照法律或其组成文件予以应用。

尽管保管人可以授权委托他人实际履行此类职责，但它仍须负责确保此类职责予以正确履行。

保管人的任命和更换须获得 CSSF 事先批准。

### **(d) 现金监控职能**

关于现金监控，《2010年法律》要求保管人须确保UCITS的现金流得到妥善监控，特别是，认购单位或股份时由或代表单位持有人或股东作出的所有付款已收取，UCITS的所有现金已在现金账户中登记。

### **(e) 保管职能**

UCITS的资产应如下委托给保管人进行保管：

#### **c) 对于可能受托的金融工具，保管人应当：**

- (iii) 保管所有可能在金融工具账户（在保管人账簿中开立）中登记的金融工具，以及所有实物交付给保管人的金融工具；
- (iv) 确保所有可能在金融工具账户（在保管人账簿中开立）中登记的金融工具，按照《指令2006/73/EC》第16条所述的原则，在保管人账簿中以独立账户进行登记，以代表基金行事的管理公司的名义开立，这样它们就可以清楚地确定为按照适用法律始终属于基金；

d) 对于其他资产，保管人应当：

(iii) 通过基于UCITS/代表UCITS行事的管理公司提供的信息或文件以及外部证据（如有）评估基金是否拥有所有权，来核实基金对该等资产的所有权；

(iv) 对其已确知UCITS拥有所有权的该等资产保存记录，并不断更新该记录。

保管人应当定期向管理公司/UCITS提供关于所有UCITS资产的全面清单。保管人或任何被授予保管职能的第三方不得为自身利益而再利用保管人保管的UCITS资产。再利用包含任何托管资产交易，包括但不限于转让、质押、出售和出租。

仅在以下情况下允许再利用保管人保管的UCITS资产：

e) 为UCITS运用资产

f) 保管人执行UCITS或代表UCITS的管理公司的指令；

g) 以UCITS为受益人，且为了单位持有人或股东的利益；以及

h) 交易由UCITS在所有权转让安排下受到高质量和流动性抵押品的保障。

抵押品的市场价值应当始终至少相当于再利用资产加上溢价的市场价值。

如果保管人和/或任何被委托保管UCITS资产的位于卢森堡的第三方资不抵债，保管资产不可在该保管人和/或该第三方的债权人之中进行分配，或为该等债权人利益而变现。

**(f) 保管资产的日常管理**

保管人必须完成关于保管 UCITS 资产的日常管理的所有运作，特别是收取到期股息、利息和证券，行使证券衍生出的权利，以及一般而言，负责任何其他关于属于 UCITS 的证券和流动资产的日常管理的运作。如果上述运作涉及非保管人本身保管的资产，那么保管人可以订立合同委托他人有效保管该资产。

- **严格的责任制度和赔偿义务**

对于因保管人或被委托保管金融工具的第三方造成的损失，保管人应对 UCITS 以及 UCITS 的单位持有人/股东负责。如果受托金融工具发生损失，那么保管人必须向 UCITS 或代表 UCITS 行事的管理公司返还相同类型的金融工具或相应金额。若保管人可以证明损失的起因是超出其合理控制的、尽一切合理努力仍不可避免的外部事件，保管人无须承担责任。对于所有其他因保管人无意或故意未依照《2010 年法律》适当履行其义务而对 UCITS 以及 UCITS 的单位持有人/股东造成的损失，保管人也应承担赔偿责任。

保管人的责任不受任何授权的影响，不得因约定而被排除或限制。

- **分保管人**

保管人可以将保管职能委托给分保管人，条件是：(i) 并非为了避免《2010 年法律》规定的要求而委托任务，(ii) 保管人可以证明有委托的客观理由，(iii) 保管人在选择和任命分保管人时，运用一切应尽的技能、谨慎和勤勉，并在定期检查和持续监督分保管人时继续运用一切应尽的技能、谨慎和勤勉。为了符合条件，分保管人必须：(1) 具备与受托 UCITS 资产的性质和复杂性相称的结构和专业知识；(2) 接受有效审慎监管以及定期外部审计；(3) 将保管人的客户资产与其自身资产和保管人资产隔离开来；(4) 采取一切必要措施确保如果发生无力偿还，分保管人持有的 UCITS 资产不可在债权人之中进行分配；以及 (5) 遵守有关信息流和独立性以及资产保管和再利用的一般要求。

## 第 5 节 – 中央管理、转让和注册机构 – 作用、要求、许可、最低资本

### • 要求

#### 适用规则摘要

管理是UCITS集合投资组合管理活动中的三大职能之一。

UCITS本身或其管理公司（视情况而定），不必执行与中央管理、转让和注册机构有关的任务。它可以委托受监管的第三方行使上述职责。通常，管理公司将任命第三方履行此类任务。

“中央管理”一词及其解释由CSSF在《通知IML 91/75》中定义。根据该通函，中央管理机构的职责如下：

- 保存账户和其他会计凭证；
- 发行或赎回计划中的股份或单位；
- 保存基金参与者登记册；
- 配合制定招股说明书、财务报告和其他要分发给投资者的文件；
- 答复、发送财务报告和所有其他文件给股东或单位持有人；
- 计算资产净值。

卢森堡 UCITS 或其管理公司（视情况而定）可能组织各种服务提供商，分配与中央管理、转让和注册机构的职责相关的任务。在这种情况下，其本身必须协调和监督此类任务的执行情况，除非将该任务委托给具有正式资质的代理人。

为完成上述中央管理职责，UCITS或其为此任命的服务提供商必须具有必要的基础设施（即足够的人力和技术手段）。但是，上述规定并不排除任命国外金融机构或专业机构作为付款代理人或发行和赎回股份或单位的代理人，也不排除专家、顾问或其他从国外提供服务的专业人士的偶尔协助。

#### 适用规定

根据《1993 年法律》，中央管理机构、转账和登记代理机构应被授权为金融部门的专业机构。

#### 最低资本

最低资本为 12.5 万欧元。

#### 法律形式

中央管理、转让代理人和注册代理人可以采取任何形式的商业公司的形式。

## 第 6 节 – 分销 – 跨境销售通行规则

### ▪ 分销商

UCITS 管理公司可以指定位于第三国的分销商代为分销 UCITS 基金。

### ▪ UCITS 在欧洲和全世界的营销和分销

UCITS 营销护照允许在一个欧盟成员国（“UCITS 母国”）获得授权的 UCITS，在向母国主管当局提交通知函之后，在其他欧盟成员国（“UCITS 所在国”）发售其单位（《UCITS 指令》第 93(1) 条）。为此，UCITS 所在国应确保 UCITS 可经发送通知在其领土内发售其单位，并在《UCITS 指令》管辖的方面对 UCITS 施加任何额外要求或管理程序（《UCITS 指令》第 91(1) 和 (2) 条）。

卢森堡 UCITS 需要向 CSSF 提交包含以下内容的通知文件：

- 含有关于 UCITS 的主要信息的通知函；
- 最新版本的 CSSF 认证、UCITS 的章程文件、招股说明书、KIID（关键投资者信息披露文件）、最新的经审计的年度报告和随后的半年报告，营销安排（如有）和付款确认单（如要求）

当卢森堡 UCITS 在欧盟之外分销时，适用 UCITS 股份营销地点所在辖区的法规。但是，由于 UCITS 已经成为向投资者提供高水平保护的全球认可的投资基金品牌，所以在欧洲之外的第三国注册往往受益于更加灵活而顺畅的流程。

### • 打击洗钱和恐怖主义融资 (AML/ CTF)

UCITS 及其管理公司须遵守卢森堡的 AML/ CTF 法律法规，该等法律法规可替换适用的欧盟指令。

作为一项重要原则，UCITS 及其管理公司有责任制定和维护符合卢森堡 AML/CTF 法律法规的分销网络。

有效的基于风险的方法可让 UCITS 及其管理公司对基金中的分销商和投资者进行合理判断。基于风险的方法将建立在风险评估的基础之上，并考虑到：(i) 认购 UCITS 的投资者类型，(ii) 关系类型，(iii) 交易类型，(iv) 分销渠道以及 (v) 国家或地区特定风险。

- **基金通行证**

根据《UCITS指令》设立的UCITS基金，可通过欧盟成员国和 EEA成员国的便捷注册程序，在这些国家注册。简化通知程序是指，CSSF先将UCITS计划在另一个欧盟成员国发售股份的意图进行通知，然后对创建新分区进行备案（“监管机构对监管机构备案”）的过程。

这些国家的地方当局将确保本国的营销规则得到遵守，但根据《UCITS指令》，不可对CSSF批准的计划的结构或文件进行任何修改。



## 第 7 节 - 会计和评估

### • 股份类别

单位/股份的发行和赎回仅对具有可变资本的投资工具十分重要，最受欢迎的是“SICAV”（可变资本投资公司）。

对于以固定资本公司（“SICAF”）形式成立的 UCITS，任何发行或赎回股份均须遵守《1915 年 8 月 10 日商业公司法》（以下简称“《1915 年法律》”）的规定，此处不再赘述。

UCITS 的单位/股份的发行价格应按照投资工具的 NAV 除以发行单位/股份的数量确定；该价格可能需要加上费用和佣金。UCITS 的单位/股份的赎回价格应按照投资工具的 NAV 除以发行单位/股份的数量确定；该价格可能需要减去费用和佣金。

独立式工具或伞式工具的每个分区中可能产生符合各种特征的一类或多类单位或股份。单位或股份的类别可能具有以下区别性特征：

- 分配政策（分销或资本化股份/单位）；
- 货币（可提供不同的股份/单位货币，如美元、欧元、日元等）；
- 以投资者为目标（散户、专业或机构投资者、不同国籍的投资者等）；
- 费用结构（可提供不同的费用结构，如与认购费、赎回费、转换费、分销费、管理费等有关）；
- 货币对冲（对冲类份额/股份或非对冲类份额/股份）；
- 最低认购和持有要求。

### • 资产净值 (NAV) 计算频率

投资工具的组成文件应确定计算发行和赎回价格的频率。

对于 UCITS，NAV 应以充分接近和固定的时间间隔计算，但每月至少两次。但是，CSSF 可能允许 UCITS 将此频率降低到每月一次，前提条件是这种减少不会损害单位/股份持有人的利益。

除须达到要求的最低资本外，减资后的投资者回报不受任何限制。

### • 暂停 NAV 计算

基金的设立文件应规定暂停发行和赎回的条件（在不违背法律条款的情况下）。在暂停发行或赎回的情况下，基金必须毫无延误地通知 CSSF，如还在其他欧盟成员国发售单位/股份，还应通知各主管部门。出于投资者的利益需要，如果未遵守关于投资工具的活动和运营的法律、法规或组成文件的规定，CSSF 可以暂停赎回。

在以下情况下，应禁止发行和赎回单位/股份：

- 无管理公司（如果基金非自我管理）或保管人时；
- 当管理公司（如果基金非自我管理）或保管人进入清算、宣告破产、寻求与债权人和解、暂停付款或法院控制管理，或成为类似程序的对象。

- **评估原则**

投资者如要对UCITS基金充满信心，则必须信赖其个人资产和NAV所用的估值方法。投资者购买UCITS的股份或单位时并不知道确切价格，因为价格在交易完成后方能确定。

除非公司章程或基金管理条例另有规定，否则正式上市证券的资产（购买或出售）评估根据最近公布的证券交易所报价进行，除非该报价不具代表性。

一般而言，评估公开交易的证券时必须采用最新的官方市场收盘价，否则必须提供“公允市值”。其目的是防止逾时交易、市场择时和其他可能影响基金价值的做法。

对于非以这种方式上市但是最新报价对其不具代表性的证券，将根据谨慎且诚意预测的可能实现价值进行评估。另外还规定了关于某些资产的评估，如未在公开交易所上市或交易的短期商业债务和OTC（场外）衍生工具。UCITS基金的管理公司必须对复杂程度合适的衍生工具制定评估程序，并且必须向投资者披露流程细节。经理人可委托外部公司进行此类评估。如果内部评估，则评估过程必须独立于投资组合管理层，以避免利益冲突。

- **分配**

只要维持最低股本，无论期限内实现的业绩如何，均可分配股息（临时或最终）。

- **公布 NAV**

投资公司和管理公司针对其管理的每支基金，必须公布每个财务年度的年度报告以及该财务年度前6个月的半年度报告。年度和半年度报告必须在以下期限内公布，自相关期限结束时生效：

- 年度报告在 4 个月内
- 半年度报告为 2 个月内

- **审计**

经审计的财务报表需在基金的财务年度结束 4 个月后公布。

UCITS 董事会负责根据卢森堡的财务报表编制方面的法律法规要求，编制和公允列报上述财务报表，该等财务报表不得有任何重大错报，无论是由于欺诈还是错误。

“Réviseur d'entreprise Agréé”或经批准的法定审计机构（由 CSSF 监管）将对上述报表发表意见。该意见将经过按照 CSSF 采用的国际审计准则进行的审计过程而得出。

- **经审计的财务报表（财务报告）**

卢森堡 UCITS 投资基金年度报告的具体披露要求，由经修订的《2010 年法律》和相关 CSSF 通知定义。

列报

- 年度报表应按照适用于商业公司的法律规定制订，《2010 年法律》另有规定的除外。
- 年度报表应真实公允地反映公司的资产、负债、财务状况和业绩。
- 如果《2010 年法律》的某项规定要求进行定量或定性评估，则必须由公司管理层按照真实、公平的原则进行。

卢森堡 GAAP（一般公认会计准则）

除非报表注释中有关于特殊减损的披露和解释，否则年度报表所示项目的评估应按照《1915 年法律》规定的以下一般原则进行：

- 假定公司持续经营（持续经营原则）。
- 每个财务年度的评估方法不得改变（方法一致性原则）。
- 资产和负债项目的组成部分必须单独评估（资产和负债项目单独评估原则）。
- 每个财务年度年初的资产负债表，必须与前一年度资产负债表的结算（承上结余原则）相符。

年度报告须包含的内容

(ii) 年度报告必须包含以下要素：

- 资产负债表。
- 该财务年度的详细收支账目。
- 有关上一财务年度活动的报告，以及《2010 年法律》附表 B 规定的其他信息（主要是具有特定功能的投资组合和 NAV 方面的其他信息）。
- 任何能使投资者对基金的活动发展和业绩做出明智判断的重要信息。

## 第 8 节 – 监管机构

### • 简介

卢森堡监管机构是“Commission de Surveillance du Secteur Financier”（卢森堡金融监管委员会或 CSSF）。

CSSF 系根据《1998 年 12 月 23 日法律》成立，于 1999 年 1 月 1 日生效，是一个具有法人资格和财政自主权的公共机构，在财政大臣的领导下运作。

CSSF 履行审慎监管和监管市场的职责，旨在确保金融业的安全和稳定，完全符合公众利益。

CSSF 通常负责监管卢森堡的整个金融行业，保险业除外。

对于 UCITS 和管理公司，CSSF 是授权执行要求的活动，并长期监督要求的活动的主管机关。

截至 2017 年 6 月，CSSF 共有 713 名员工。负责投资基金和管理公司的九个部门有员工 200 余人。

### • UCITS 及其管理公司中的审批和审慎监管

在本文中，我们重点关注 CSSF 对 UCITS 及其管理公司和保管人的审批和审慎监管。

#### UCITS 及其管理公司的审批

CSSF 是对根据卢森堡法律成立的 UCITS 和管理公司进行审批和监督的主管部门，详见第 2 节。

CSSF 编制了一些申请人必须填写的模板以及必需文件的检查清单。

一旦 UCITS 获得批准，CSSF 将对招股说明书盖章（在打印件上），并将基金列入其清单。该清单公布在 CSSF 的网站上。

同样，由 CSSF 批准和监督的所有实体都将被列入 CSSF 监督实体名录，该名录可在 CSSF 的网站上获取。

### CSSF 的持续监督和报告要求

为了执行持续监督 UCITS 的使命，CSSF 通常依赖于以下内容：

- (vi) 月度报告；
- (vii) 半年和年度报告；
- (viii) 详细报告；
- (ix) 审计结果（独立审计机构出具的管理建议书）；
- (x) 场外和现场检查。

CSSF 将通过一切手段对管理公司和保管人进行持续监督：定期报告、审核财务报表、审计结果、场外检查和现场检查。

### • 受 CSSF 审批和审慎监管的实体

CSSF 通常负责对金融行业的以下类别的实体进行审批和审慎监管：

- 银行/信用机构（可担任 UCITS 的保管人）；
- UCITS 和其他类别的规范投资基金；
- UCITS 的管理公司；
- 另类投资基金经理人；
- 金融行业专业人士；
- 养老基金；
- 风险资本投资公司；
- 经授权的证券化企业；
- 证券市场及其市场参与者；
- 多边贸易设施；
- 支付机构；
- 电子货币机构；
- 审计机构。

### • 监管机构的组织、独立性和治理

CSSF 董事会由七位成员组成，成员由政府提名，任期为五年。赋予董事会的职权主要包括每年通过 CSSF 预算、审批财务报表和 CSSF 执行委员会的管理报告，该等报表须先提交董事会，然后提请政府审批。董事会还设定总方针以及执行委员会向其提交的年度和长期投资计划，然后提请财务部审批。董事会的会议和审议按照其内部规定进行。

#### 董事会无权介入 CSSF 的审慎监管事宜

CSSF 的高级行政机构是执行委员会，由总干事和两至四名董事组成，董事由政府委员会提名，任期为五年。执行委员会制定措施，并采取其认为有用和必要的决定，以实现 CSSF 的使命及其组织的需要。

#### 关于打击洗钱和恐怖主义融资的管控措施

CSSF 负责确保所有受其监管的人员履行打击洗钱和恐怖主义融资活动的专业义务。

### 制裁

CSSF 具有一系列重要措施，对其监管下的可能违反金融业的相关规定、或不遵守其规定的专业义务的人员采取行动，包括进行行政处罚和制裁。

### 法规制定

根据《1998 年 12 月 23 日法律》第 9(2)条，CSSF 有权在其权限范围内制定法规。

CSSF 发布的通知和《常见问答》是对金融业相关立法框架的补充。

### 与国际机构进行互动

CSSF 与欧洲三大监管机构（其中欧洲证券及市场管理局对资产管理行业负主要责任）、欧洲和国际上的其他监管机构和决议机构进行合作。

## 第 9 节 – 投资者可用文件

- **招股说明书**

投资公司和管理公司必须就其管理的每个 UCITS 发布招股说明书。招股说明书必须包含使投资者能够对其投资计划做出明智判断（特别是所附风险）的必要信息。招股说明书应独立于所投资的工具，对基金风险状况进行清晰易懂的描述，并应至少包含《2010 年法律》规定的特定信息。

- **KIID**

投资公司和管理公司必须就其管理的每个 UCITS（或其子基金和股份类别，视情况而定）编制一份包含 UCITS 投资者关键信息（KIID）的简短文件。KIID 不得超过两页 A4 纸，并且必须包含相关 UCITS 的基本要素的适当信息，该等元素包括：(i) UCITS 的身份，以及 CSSF 是监督 UCITS 的主管部门的说明，(ii) 对其投资目标和投资政策的简要描述，(iii) 过往业绩展示或业绩前景（如相关），(iv) 成本和相关费用，以及 (v) 投资的风险/回报概况，包括关于 UCITS 投资相关风险的适当指导和警告。KIID 必须用语简洁，即避免使用术语，并以清晰方式说明复杂信息。KIID 必须免费提供并翻译成 UCITS（或其子资金）注册分销的国家的语言。

- **情况报告和其他营销材料**

提供给投资者的所有营销材料必须明确可辨。营销材料必须用语恰当，清晰无误。特别是任何包含 UCITS 单位购买邀请的营销材料，其中含有关于 UCITS 的具体信息，不得做出任何与招股说明书和 KIID 所含信息意义相互矛盾或削弱其意义的声明。

- **公布 NAV 价格**

UCITS 每次发行、出售和赎回其单位时均有义务进行公布，每月至少两次。在某些情况下，CSSF 可能允许 UCITS 将该频率减少到每月一次。

- **财务报告**

管理公司必须就其管理的每支基金，(i) 在每个财务年度结束后四个月内公布该财务年度的经审计的年度报告，并 (ii) 在每个半年结束后两个月内，公布该财务年度前半年的半年度报告。

- **翻译**

招股说明书、年度报告、**KIID** 和其他营销材料必须以下列语言之一公布：法语、德语、英语或卢森堡语。如果卢森堡 **UCITS** 在另一欧盟成员国发售其单位或股份，则其必须以官方语言、或 **UCITS** 母国的官方语言之一、或所在国主管部门批准的语言，向该成员国领土内的投资者提供上述文件。

**提供电子表格**

招股说明书和最新公布的年度和半年度报告，应按要求且免费提供给投资者。招股说明书和 **KIID** 可在耐用媒介中或通过网站提供。此外，还应在还应在投资公司或管理公司的网站上公布最新版本的 **KIID**。



## 第 10 节 – 税务考量

除注册税和年度认购税外，卢森堡的投资基金基本上是免税投资工具。

### 第 10.1 节 基金的税费

- **企业所得税**

免税。

- **市政营业税**

免税。

- **财富税**

免税。

- **认购税**

UCITS 每年须缴纳占净资产 0.05% 的认购税。

符合《2010 年法律》规定条件的 UCITS，其货币市场基金、现金基金，以及为机构投资者预留的子基金或股份类，其税率可降低 0.01%。

《2010 年法律》还规定，对于为机构投资者预留证券的货币市场基金、小额信贷基金、为养老基金和指数追踪 ETF 基金保留的股份类型，其年度认购税豁免还须符合该法规定的特殊要求。

- **资本税（法人实体）**

75 欧元的固定注册税。

- **其他税费**

无。

### 第 10.2 节 基金收到的所得税

- **有资格受益于避免双重征税协定**

从卢森堡的角度来看，共同投资基金（FCP）因其法律特征，原则上被视为税务透明的投资工具。

因此，在大多数情况下，为了适用避免双重征税协定，共同投资基金被视为财务透明。所以，除非卢森堡与缔约国另有特别约定，否则 FCP 本身没有资格受益于避免双重征税协定。但是，FCP 投资者可寻求自己居住国和投资目的地国之间的税收协定优惠待遇。

采用投资公司 (SICAV) 形式、被认为财务不透明实体、具有法人资格、对其投资拥有实益所有权的 UCITS，可能有资格获益于卢森堡签署的避免双重征税协定（目前卢森堡签署了 80 项避免双重征税协定）。

- **所得股息、利息、资金收益的预扣税**

UCITS 通常须就其所得股息和利息缴纳预扣税，~~一~~视投资国家而定。

如果适用避免双重征税协定，UCITS 可通过原始收入减税或退税的方式享受预扣税减免。UCITS 通常还免受投资目的地国对处置投资所得收益的征税。

- **税收抵免**

如果适用避免双重征税协定，UCITS 可通过原始收入减税或退税的方式享受预扣税减免，但未退还的预扣税部分不会给予 UCITS 的投资者或 UCITS 本身任何税收抵免。

### **第 10.3 节 基金支付的所得税**

- **基金支付的股息**

支付给居民和非居民投资者的股息在卢森堡无需缴纳任何预扣税。

卢森堡的居住投资者（个人和企业）必须在年度报税表中申报来自 UCITS（SICAV 或 FCP）的收入，并按现行标准税率缴税。

非居民投资者（个人和公司）在卢森堡无需对 UCITS 支付的股息或分配缴纳任何其他税款。

- **赎回资本收益**

向居民和非居民投资者支付的赎回资本所得收益在卢森堡无需缴纳任何预扣税。

非居民投资者（个人和公司）在卢森堡无需就其通过赎回或转让给第三方的方式处置单位/股份所得的收益缴纳任何其他税款。非居民投资者按照各自居住国家的适用规定征税。

## 第 10.4 节 自动信息交换

- **FATCA（海外账户纳税法案）**

UCITS 基金具有外国金融机构的资格。它们一般为报告金融机构，除非它们可以利用与美国签署的 IGA 范例 1 中规定的特定豁免资格。

- **通用报告标准（CRS，强制性税务信息自动交换）**

UCITS 基金符合卢森堡《2015 年 12 月 18 日法律》意义上的报告金融机构，该法替代 2014 年 12 月 9 日的《理事会指令 2014/107/EU》（“DAC 2”），并修订关于强制自动交换税收信息的《指令 2011/16/EU》[点击[这里](#)]。该法于 2016 年 1 月 1 日生效 [点击[这里](#)]。