

# International Comparative Legal Guides



## Public Investment Funds **2021**

A practical cross-border insight into public investment funds

**Fourth Edition**

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# Luxembourg



Dr. Marcel Bartnik



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## 1 Registration

**1.1 Are funds that are offered to the public required to be registered under the securities laws of your jurisdiction? If so, what are the factors and criteria that determine whether a fund is required to be registered?**

There are two types of investment funds available in Luxembourg that can be offered to the public, such term being understood as any type of investor including, in particular, retail investors. The first category are the so-called undertakings for collective investment in transferable securities (“UCITS”), which were established based on directives of the European Union since the 1980s. They can be offered to retail investors, in particular in any EEA country. UCITS have to comply with the first part of the Luxembourg law dated 17 December 2010 on undertakings for collective investment (“2010 Law”).

The other category are investment funds that are established based on the second part of the 2010 Law, and that cannot rely on EU rules in order to be distributed to retail investors within the EEA. These so-called part II – funds have become a niche product and are mainly used for setting up hedge funds and other fund products in asset classes or with strategies that do not comply with the UCITS rules. Part II – funds are automatically considered alternative investment funds by the 2010 Law and will therefore not be covered further in the present chapter.

Both categories of fund products can only be established after having received the approval of the Luxembourg financial regulator, the *Commission de Surveillance du Secteur Financier* (“CSSF”). Such approval results in the relevant fund being entered onto an official list for UCITS, which is kept by the CSSF and can be consulted on the regulator’s website.

The 2010 Law defines UCITS, and therefore the entity requiring approval and registration by the CSSF, as an undertaking (i) the sole object of which is collective investment in transferable securities and/or in other liquid financial assets, (ii) of capital raised from the public, (iii) which operates based on the principle of risk-spreading, and (iv) the units of which are, at the request of investors, repurchased out of this undertaking’s assets.

It is worth mentioning in this context that UCITS can be set up in two main forms, either as a corporate entity that is required to be a public limited company (*société anonyme*), or as a so-called common fund (*fonds commun de placement* or “FCP”). The corporate form is almost always equipped with variable capital and is therefore often referred to as a SICAV (*société d’investissement à capital variable*), while the FCP does not have a legal personality and must therefore always appoint a Luxembourg-based

management company that acts for it. For SICAVs, such appointment is optional; however, the choice of a so-called self-managed SICAV without an appointed management company is a clear exception today: it is much more efficient to have all organisational and substance requirements covered by a management company for a number of UCITS, than to have each SICAV do so by itself.

**1.2 What does the fund registration process involve, e.g., what documents are required to be filed?**

An application for approval must be made to the CSSF in writing, and for new UCITS (as opposed to amendments to an existing UCITS), it is required to use the regulator’s electronic platform “eDesk” to do so. It is also worth mentioning that for each approval process, fees have to be paid to the CSSF. Its amount is set out in a Grand Ducal regulation of 21 December 2017, which was last amended in December 2020 and consists of a one-off fee and an additional annual fee.

The main documents that have to be filed with the CSSF for approval in draft form are the following:

- articles of incorporation (in case of a SICAV) or management regulations (in case of an FCP);
- prospectus;
- agreements with the main service providers (depository, central administration, management company in case of a SICAV);
- engagement letter of an independent auditor;
- documentation on the proposed members of the board of directors (in case of a SICAV);
- various CSSF questionnaires (relating to the proposed investment policy, KYC information, etc.); and
- business plan and structure chart.

**1.3 What are the consequences for failing to register a fund that is required to be registered in your jurisdiction?**

There are a number of criminal sanctions resulting from the 2010 Law that apply to breaches of such law by the relevant UCITS’ directors or third parties. For accepting monies and investing them through an investment fund without it being entered onto the relevant list by the CSSF, fines between EUR 500–50,000, or a penalty of imprisonment of three months to two years can be imposed.

Pretending to act based on the 2010 Law although no authorisation has been obtained for such activity, is punishable by fines of EUR 500–25,000.

#### 1.4 Are there local residency or other local qualification requirements that a fund must meet in order to register in your jurisdiction? Or are foreign funds permitted to register in your jurisdiction?

UCITS are considered established in Luxembourg if they are approved by the CSSF. FCPs need to appoint a Luxembourg-based management company and are therefore automatically established in Luxembourg as a result.

For those UCITS established as corporate entities and that have not appointed a management company, the appointment of two conducting officers is mandatory. As a matter of principle, these need to be permanent residents of Luxembourg or at least travel to Luxembourg on a regular basis. However, even SICAVs that have appointed a management company need to appoint a board of directors. Even if there are no specific rules that require any of them to be resident or working in Luxembourg, it is nevertheless recommended for the majority to be local for tax substance reasons.

Such UCITS that are not established in Luxembourg but rather in another Member State of the EEA can market their shares in Luxembourg, subject to a notification procedure with the CSSF and the appointment of a local bank as paying agent. Open-ended foreign investment funds that are not UCITS can be distributed to retail investors in Luxembourg under the conditions of the CSSF Regulation 20-10 of 21 December 2020, which sets out further details of the required approval procedure in such case.

## 2 Regulatory Framework

#### 2.1 What are the main regulatory restrictions and requirements that a public fund must comply with in the following areas, if any? Are there other main areas of regulation that are imposed on public funds?

##### i. Governance

In case the UCITS is set up as a SICAV and therefore a company, there should be at least three directors, all of whom with the required experience for such position. In addition, the Luxembourg regulator also verifies that they can allocate the necessary amount of time to such role, and that they are of good repute.

Other governance matters are typically covered by the management company that is appointed by the UCITS. For self-managed SICAVs that have not appointed a management company, please refer to question 1.4.

##### ii. Selection of investment adviser, and review and approval of investment advisory agreement

In terms of terminology, it should be noted that in Luxembourg the entity that takes the portfolio management decision is typically referred to as a portfolio manager or investment manager, while the term investment advisor (frequently used in the US) is reserved for an entity that exclusively provides investment advice and does not have any decision taking power.

UCITS or their management companies can delegate the portfolio management function to third parties under the following conditions:

- the delegate is authorised for providing such services and is supervised by a public authority; and
- for entities outside of the EEA, a cooperation with the supervisory authority in such country and the CSSF needs to exist (memorandums of understanding exist with all major jurisdictions), and the regime of supervision needs to be considered equivalent to the Luxembourg regime.

A draft of the agreement with the delegate portfolio manager needs to be filed with the CSSF during the approval process.

##### iii. Capital structure

The capital of UCITS must reach an amount of EUR 1.25 million (or the equivalent thereof if another currency is chosen) within a period of six months after having obtained the approval from the CSSF.

For UCITS set up in the form of a SICAV, a minimum capital of EUR 30,000 needs to be proven to the notary at the time of its incorporation. For self-managed SICAVs, such threshold is set at EUR 300,000.

##### iv. Limits on portfolio investments

As UCITS are aimed at retail investors, there are a number of provisions in the 2010 Law that have the objective of limiting the risk such investors are exposed to. These can be divided into three categories: limits to the eligibility of assets; risk diversification rules; and prohibition of certain techniques.

Firstly, and as their name indicates, UCITS are limited to investments into transferable securities or financial derivative instruments that have such securities as their underlying. They can also invest into bank deposits, money market instruments or other investment funds with similar investor protection rules. The majority of these securities must be dealt in on a regulated stock market, even if an investment into OTC derivatives is also admissible under certain conditions. Consequently, UCITS cannot invest into asset classes such as real estate, private equity or commodities, and are also precluded from acquiring precious metals.

Secondly, the portfolio of UCITS must be diversified. In principle, that means that no more than 10% of a UCITS' net assets can be invested into securities from a single issuer (for target funds this percentage is 20%). In addition, a maximum of 40% of a UCITS' net assets may consist of investments with more than 5% exposure to a single issuer. There are a number of additional rules and exemptions, in particular for investments into securities from public issuers.

Thirdly, no UCITS may borrow for investment purposes, except for up to 10% of its net assets on a temporary basis. Also, UCITS are not allowed to use short sales of securities, or grant loans.

##### v. Conflicts of interest

Both the management company of UCITS or a self-managed SICAV that has not appointed a management company need to have procedures in place to avoid conflicts of interest. Such conflicts could occur between the management company and its clients, between two of its clients, between one of its clients and UCITS or between two UCITS. The CSSF needs to be provided with a written conflicts of interest policy during the approval process of the management company or the self-managed SICAV.

In addition, any potential risks that may result from conflicts of interest at the level of the UCITS itself need to be disclosed to investors in the prospectus of the UCITS.

##### vi. Reporting and recordkeeping

Every UCITS must make an audited annual report with financial information available to its investors within four months of the end of the relevant financial year. In addition, unaudited semi-annual reports must be made available to investors within two months of the relevant reporting period.

UCITS must also provide reports to the CSSF: the aforementioned annual report needs to be submitted to the regulator, in addition to a so-called long form report that is established by the auditor and contains further operational information about the UCITS. Furthermore, statistical data must be provided to the CSSF on a monthly basis.

Recordkeeping duties of UCITS are typically assumed by the management company appointed by the UCITS, or by another service provider appointed by it, usually referred to as its central administrator. Self-managed SICAVs typically also appoint a service provider for such task.

#### vii. Other

Any UCITS can be established as a so-called “umbrella” structure with several sub-funds. These can be understood as segregated portfolios of assets with their own investment policy and strategy, all under one single legal structure (FCP or SICAV) with the same legal form and service providers. The considerable popularity of such structures results from the economies of scale possible through the multiplication of assets under management and reduced administrative costs. Also, the addition of a new sub-fund (or the modification of the terms of an existing sub-fund) limits the scope of the approval process necessary with the CSSF to such sub-fund and its terms only, thereby substantially accelerating the time to market. Pursuant to the 2010 Law, each sub-fund within an umbrella structure is segregated from the others, and its assets only available to the investors and creditors of such sub-fund.

UCITS also need to issue a short document containing key investor information, which contains a summary of the main aspects of such UCITS and needs to be made available to investors prior to their investment. Such document also needs to be provided to the CSSF during the approval process.

It should also be mentioned that UCITS cannot be of the closed-ended type, but have to offer their investors the possibility to request the redemption of their shares or units.

Finally, in order to comply with Luxembourg anti-money laundering requirements, each UCITS (or its management company in case of an FCP) needs to designate two different persons responsible for the compliance of the relevant UCITS with its obligations in that context.

#### 2.2 Are investment advisers that advise public funds required to be registered and/or regulated in your jurisdiction? If so, what does the registration process involve?

Please refer to our answer to question 2.1 (ii).

#### 2.3 In addition to the requirements above, are there additional regulatory restrictions and requirements imposed on investment advisers that advise public funds?

Pursuant to the administrative practice of the CSSF, the majority of the members of the board of directors of the management company (or delegate portfolio manager) must not be identical with the members of the board of directors of a UCITS (in form of a SICAV) or its management company (in case of an FCP).

#### 2.4 Are there any requirements or restrictions in your jurisdiction for public funds investing in digital currencies?

In principle, UCITS can invest into cash in any currency, if it is held on deposit with a credit institution. This seems difficult to conceive for digital currencies, which at least for the time being are not considered real currencies but rather as speculative investments. Also, due to the high risk involved in such assets, it appears difficult to argue that they are eligible as an investment for UCITS.

The CSSF has also confirmed this view by issuing a warning in April 2018, stating explicitly that UCITS are not allowed to invest directly or indirectly into virtual currencies.

#### 2.5 Are there additional requirements in your jurisdiction for exchange-traded funds?

Luxembourg is the second largest ETF domicile in Europe. There are no specific rules for UCITS that are also traded on regulated markets. Any types of ETFs can be established in Luxembourg, be it passively or actively managed, or with a physical or synthetic replication of indices. Typically, an ETF can be listed within two days on the Luxembourg Stock Exchange. Any such UCITS can use its prospectus under the 2010 Law for such public listing and does not need to establish a further document as normally required by the rules relating to listing on a Luxembourg regulated market.

Furthermore, Luxembourg ETFs are exempt from the annual subscription tax on their net assets.

### 3 Marketing of Public Funds

#### 3.1 What regulatory frameworks apply to the marketing of public funds?

The main framework on how UCITS can be distributed in Luxembourg or in other EEA states is set out in the 2010 Law. UCITS established in Luxembourg can market their shares or units as soon as they are approved by the CSSF. For the distribution of foreign investment funds in Luxembourg, please refer to question 1.4.

Luxembourg is the largest distribution hub for UCITS in Europe. Consequently, most of its UCITS are distributed in the EEA and can do so by way of a simple notification procedure between the CSSF and the supervisory authority of the relevant host Member State. Such possibility is often referred to as a “passport” for UCITS.

The above, however, only applies to the distribution of UCITS by its management company, with such task being defined as one of the main tasks of management companies in the 2010 Law. In light of the fact that the vast majority of Luxembourg UCITS are distributed outside of Luxembourg, such a marketing and distribution task is frequently performed by one or several distributors that are appointed by the management company.

If such distributor is located in Luxembourg, the rules of the Luxembourg law on the financial sector dated 5 April 1993 (“1993 Law”) apply. Such law implements the European Directive known as “MiFID II” into Luxembourg law and, in its chapter dedicated to financial service providers, sets out the requirements for distributors of investment funds (in addition to a number of regulation and administrative circulars).

UCITS or their management companies are exempt from these rules. They can only delegate the marketing of their UCITS to entities that are licensed for such activity, and they remain responsible for the supervision of any such delegate.

#### 3.2 Is licensure with a regulatory authority required of persons (whether entities or natural persons) engaged in marketing activities? If so: (i) are there commonly available exceptions that may be relied on?; and (ii) describe the level of substantive regulation applied to licensed persons.

If a management company markets the shares of its UCITS

itself, it needs to have mentioned and described such activity, including the infrastructure dedicated to such task, during its approval process with the CSSF.

In case of a delegation of the distribution to a third-party distributor in Luxembourg, the requirements of the 1993 Law apply (see above question 3.1). In Luxembourg, such activity can only be performed by a legal person as opposed to individuals. A delegation to a distributor outside of Luxembourg needs to follow the rules laid out under question 3.1 hereabove, in addition to compliance with any local laws in such jurisdiction.

### 3.3 What are the main regulatory restrictions and requirements in the following areas, if any, that must be complied with by entities that are involved in marketing public funds?

#### i. Distribution fees or other charges

The framework of MiFID II mentioned under question 3.1 requires any distributor within the EEA that is appointed by the relevant UCITS management company, to disclose any costs and charges related to the financial instruments that they distribute to potential investors, both before any subscription of the shares and on a regular basis. This also includes information that is not required to be disclosed pursuant to the 2010 Law, such as transaction costs.

Such charges also need to be (i) disclosed in the annual report that UCITS must make available to its investors, and (ii) described in the UCITS' prospectus.

#### ii. Advertising

Any information including marketing information that is made available by a distributor to potential investors must be fair, clear and must not be misleading. Marketing communication must also be clearly identifiable as such.

#### iii. Investor suitability

Pursuant to the 2010 Law, there are no restrictions in terms of investor categories that may invest into UCITS. Consequently, retail investors, but also institutional and professional investors, may invest into UCITS, subject to any additional restrictions that are set out in the documentation of the relevant UCITS, such as minimum investment amounts. It is also possible to establish classes within UCITS that are reserved for certain types of investors, such as institutional investors or group entities of the initiator.

Any distributor appointed by a management company that is subject to the rules of MiFID II must perform suitability tests on potential investors in relation to their knowledge and experience in the field of investments that the relevant UCITS is making. That includes, in particular, such investor's potential to absorb losses, his/her time horizon for an investment or his/her tolerance for risks.

#### iv. Custody of investor funds or securities

Independently of their form as a SICAV or FCP, any Luxembourg UCITS must appoint a Luxembourg credit institution as depositary of its assets. It (i) holds any financial instruments in custody, (ii) verifies for other assets the ownership of the UCITS, (iii) and maintains appropriate records of such assets, which includes the provision of regular reporting of an inventory of the assets. The depositary is responsible for any loss of financial instruments and performs a number of supervisory tasks in the interest of the UCITS' investors.

The investors' monies that are pooled in UCITS are segregated from its depositary's own assets and can only be reused

by the depositary under strict conditions, such as the provision of high-quality collateral. As a consequence, in case of insolvency of the depositary, the assets of the UCITS that are held in custody are not available to be distributed among the depositary's creditors.

### 3.4 Are there restrictions on to whom public funds may be marketed or sold?

No restrictions exist from a Luxembourg perspective. However, it should be noted that in case of a distribution of UCITS into another jurisdiction, further local regulations can apply.

### 3.5 Are there other main areas of regulation that are imposed with respect to the marketing of public funds?

In particular, consumer protection legislation must be observed in case of marketing of UCITS to retail investors. Among others, the following laws need to be considered in such case:

- the Luxembourg consumer code concerning, for example, the marketing of financial services by way of distance marketing;
- the Luxembourg law relating to door-to-door selling and solicitation of orders; and
- the Luxembourg law against unfair competition and misleading advertising.

## 4 Tax Treatment

### 4.1 What are the types of entities that can be public funds in your jurisdiction?

The tax treatment of UCITS does not distinguish between the various legal forms that are available. As a consequence, both SICAV and FCP structures fall under the rules set out in the following paragraphs.

### 4.2 What is the tax treatment of each such entity (both entity-level tax and taxation of investors in respect of allocations of income or distributions, as the case may be)?

Pursuant to the provisions of the 2010 Law, Luxembourg UCITS are exempt from taxes such as income tax. They are only subject to the annual subscription tax (*taxe d'abonnement*), the rate of which is, in principle, 0.05% *p.a.* of the aggregate net asset value of the relevant UCITS, as calculated on the last day of each quarter.

For the following UCITS (or their sub-funds), the subscription tax is lowered to 0.01% *p.a.*:

- UCITS whose sole objective is the collective investment in money market instruments and the placing of deposits with credit institutions;
- UCITS whose sole objective is the collective investment in deposits with credit institutions; and
- UCITS or classes thereof that are reserved for one or more institutional investors.

In addition, there are several categories of UCITS that are entirely exempt from the subscription tax:

- the value of the assets represented by units held in other UCIs that have already been subject to the subscription tax;
- UCITS (i) whose securities are reserved for institutional investors, (ii) that only invest in money market instruments and the placing of deposits with credit institutions,

(iii) whose weighted residual portfolio maturity does not exceed 90 days, and (iv) that have obtained the highest possible rating from a recognised rating agency;

- UCITS whose securities are reserved for pension funds or retirement institutions (one or more employers) or to companies investing their funds to provide retirement benefits;
- UCITS that mainly invest into microfinance institutions; and
- UCITS that are listed on a stock exchange and replicate one or more indices.

Investors of Luxembourg UCITS are not subject to any taxes such as capital gains tax, income tax or withholding tax in Luxembourg, unless they have their domicile or permanent residence or establishment in Luxembourg.

UCITS set up in a corporate form (SICAV) can potentially benefit from the large network of double taxation treaties that Luxembourg has concluded. UCITS set up in the form of an FCP, however, cannot benefit from such treaties as they are generally considered tax-transparent.

**4.3 If a public fund, or a type of entity that may be a public fund, qualifies for a special tax regime, what are the requirements necessary to permit the entity to qualify for this special tax regime?**

There is no special tax regime for UCITS, beyond that already described under question 4.2.



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