

Fund Briefing for Luxembourg, Belgium and the Netherlands

Recent developments in the investment management practice

March 2009



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1. Amendments to the Luxembourg SICAR regime

Introduction

On 15 October 2008, the Luxembourg Parliament adopted the law modernising the regime applicable to investment companies in risk capital ("*société d'investissement en capital à risque*" or "SICAR") by increasing legal and regulatory structuring flexibility and investor protection. This modernisation further confirms the ability to use the Luxembourg limited partnership ("*société en commandite simple*" or "SCS") for risk capital structuring purposes. The main modifications are the following.

Main changes

Clarification of the "well-informed investor" status

SICARs can only raise capital from "well-informed investors". The definition of "well-informed investor" underwent a mere technical revision following the repeal of Directive 93/22/EC which was replaced by Directive 2004/39/EC, as well as of the adoption of Directive 2006/48/EC. The revision clarifies the list and types of financial intermediaries which may certify the "well-informed investor" status of investors committing less than EUR 125,000 to a SICAR.

In addition, the scope of application of the exemption from the "well-informed investor" certification is broadened to include the "managers" (*dirigeants*) and other persons who are involved in the management of the SICAR, including the management of the assets of the SICAR (i.e., the personnel of an appointed investment manager or investment adviser). The wording of the SICAR law ("SICAR Law") proved to be too narrow by failing to consider the fact that managers are often also investing into the vehicle they are managing in order to align their interests with those of the other investors. Usually they do so in much smaller amounts, thus often requiring a "well-informed investor" certification. The amendment is a much welcomed clarification and extension, not only clearing the core or senior management team from the relevant certification but also more junior management professionals which are often permitted to invest at a much smaller scale.

Compartmentalisation

Compartmentalisation is a common feature for specialised investment funds ("*fonds d'investissement spécialisés*" or "SIF"). At the time when the original SICAR legislation was drafted, it was generally felt that the compartmentalisation feature was neither needed nor required for the types of risk capital transactions contemplated at that time. With the industry having clearly voiced its interest, the introduction of compartments represents a significant innovation for the SICAR regime.

The revised SICAR Law now offers the possibility to create a SICAR with multiple compartments. Different compartments allow initiators and managers to combine different investment policies within the same legal entity. Compartments furthermore permit a "vintage" year approach whereby investors may participate in different

investment tranches over time. The compartmentalisation furthermore facilitates the introduction of certain “excused investor” provisions, allowing the creation of segregated compartments in respect of assets in which certain investors may not participate.

The constitutive documents of the SICAR must expressly allow the creation of compartments and need to cater for the applicable operational rules. The prospectus must thus describe the specific investment policy of each compartment. The securities of a multi-compartment SICAR may hence be of a different value with or without indication of a par value.

Unless otherwise provided for in the constitutive documents of the SICAR, the rights of investors and of creditors relating to a specific compartment, or claims which have arisen in connection with the creation, operation or liquidation of that compartment, shall be limited to the assets of that compartment. Consequently, the assets of that compartment are exclusively available to satisfy the rights of investors in relation to that same compartment and the rights of creditors whose claims have arisen in connection with the creation, the operation or the liquidation of that compartment.

Again, unless the constitutive documents provide otherwise, for the purpose of the relations between investors, each compartment will be deemed to be a separate entity. Each compartment may thus be separately liquidated. When the last compartment has been liquidated, though, the SICAR itself will be deemed to have been liquidated.

Capitalisation

The minimum capitalisation of a SICAR may now be reached through a combination of share capital and issue premiums. This feature introduces additional capital structuring flexibility, e.g., when a very low nominal value per share is needed for the balancing of investors’ interests, while at the same time ensuring that the minimum capitalisation is reached.

Limited partnership

The SICAR Law devotes further attention to the Luxembourg limited partnership under the SICAR regime. The limited partnership (“*société en commandite simple*” or “SCS”) had already been identified as the risk capital vehicle of choice at the time of the enactment of the SICAR Law. However, its success remained far below expectations with only a few initiators opting for the SCS. Though the lack of success was in part caused by the novelty of the SICAR regime itself, certain perceived uncertainties in the applicability of the legal provisions governing the limited partnership law under the SICAR Law sealed its fate.

The revised SICAR Law now allows the SCS organised as a SICAR to adopt a variable capital. In addition, the revised SICAR Law now confirms the availability of particular financing techniques typically used in the context of the Anglo-Saxon partnership practice, i.e., capitalisation of the limited partnership with a minimum capital amount and, for the remainder, with non-interest bearing loan commitments from investors' pro rata to the equity participation of each limited partner. This ensures a maximum flexibility for the financing of the limited partnership as well as for the reimbursements to the limited partners.

Fair value concept

The concept of "*probable realisation value estimated in good faith*" has been replaced by a simple reference to "*fair value*". This amendment aligns the SICAR Law's terminology with the one used by the European Commission for the harmonisation of accounting principles through the 4th Directive. A further reference to the valuation methodologies such as, *inter alia*, the EVCA, the BVCA or AFIC has been accepted since the inception of the SICAR regime.

Mandatory depository's duties

The specific monitoring duties imposed on the depository bank by the SICAR Law have on numerous occasions proven to be inappropriate in risk capital matters. While the depository bank's overall role and mission remain unchanged, the SICAR Law no longer imposes certain specific duties on the depository bank.

Publication of the net asset value calculation

Publishing the net asset value has often proven to be burdensome, expensive and irrelevant for cash-based private equity transactions. Consequently, the semi-annual NAV information duty imposed by the SICAR Law has been repealed.

Conclusion

The modernisation of the SICAR Law should be considered an important fine-tuning exercise rather than a general overhaul. The revisions have direct practical implications improving the "user-friendliness" of the regime without tainting any of its core characteristics. It comes at a critical junction as the regime is exiting its testing phase to play a core role in international risk capital structuring.

The clarifications given in relation to the Luxembourg limited partnership (SCS) are most welcome in the international (private fund) structuring community. They send a clear message on the use of this legal form, which compares favourably to its Anglo-Saxon counterparts. The availability of the limited partnership form will further be appreciated by the internal investor community, while its combination with the other traditional strengths of Luxembourg gives it the breadth and depth for long-lasting success.

2. Luxembourg Hedge Funds with Side Pockets

Introduction

Fund managers often want to be able to take advantage of attractive opportunities which fall within the objectives of their funds to the benefit of their investors, even if the particularities of such investments do not fully align with the terms of the fund. As a consequence, many hedge funds have begun broadening their investments by investing portions of their portfolios in largely illiquid assets, previously considered the domain of private equity funds. These hybrid funds combine the liquidity and flexibility of a typical hedge fund (usually including the right for investors to redeem and a compensation structure based on the net asset value) with the illiquidity and certain more rigid characteristics more typical of private equity funds (including the absence of a redemption right and a deferred compensation mechanism).

The valuation, accounting, distribution and liquidity constraints which apply to these types of investments do not fit within the traditional hedge fund structure and mechanics, which require a special solution to accommodate the duality inherent to these funds. The creation of side pockets provides a tailor-made solution to the issues pertinent to hybrid funds.

Side pockets are becoming an increasingly popular tool, also for Luxembourg investment funds.

Use of side pockets

Particular Benefits

There may be several reasons to create a special class of shares/units with a view to isolating investments which are illiquid by nature, which may become illiquid or may become hard to value.

Liquidity - the creation of side pockets ensures that, by isolating the illiquid or undervalued asset, the fund can honour its redemption commitments in the normal course of business whilst retaining an investment which is difficult to value or which temporarily loses its value. This avoids the scenario in which the fund may be forced to sell at a discounted price, or the calculation of the net asset value (and the subscription and redemption of shares) has to be suspended, or where a gate limitation has to be invoked.

Valuation - side pockets ensure a more accurate valuation of the fund by excluding the illiquid positions from valuation at a realisable value at each valuation date (which would lead to distortion). Among other things, this protects investors subscribing and redeeming from buying or selling at an inaccurate value.

Generally, the creation of side pockets allows the fund manager to take advantage of investment opportunities falling within the objects of the fund even if the nature/ features of the investment (liquidity terms, etc.) do not fully align with the mechanics of the fund. Side pockets furthermore avoid the “last man standing” scenario in which a fund without side pockets and which holds a variety of liquid and illiquid assets inevitably liquidates its liquid assets first in order to pay redemption proceeds to redeeming investors, thus leaving the remaining investors with the illiquid assets (and the potential risks attached to such investments).

When to create side pockets

Side pockets should be created upon the formation of a fund if it is anticipated that they may be required. They may also be added to existing funds at a later stage during a restructuring or once a liquidity or value event has taken place. The former scenario is, however, preferable and it is prudent to carefully consider this option when setting up a new fund.

How do side pockets function

Side pockets are, in essence, a means that allows the fund to isolate an asset from the rest of the assets of the fund and to treat the asset, and investors who have an interest in it differently to the normal way.

Generally, a proportion of existing shares corresponding to the value of the investments comprising the side pocket will, once triggered, be exchanged against new shares in the side pocket (on a *pro rata* basis of each investor's interest in the fund). The side pocket shares can generally not be redeemed upon request from investors. Once side pocketed, the assets are treated separately from the rest of the fund portfolio, with each side pocket having its own provisions with respect to the redemption of shares (usually not redeemable at the option of the investor), valuation of the assets (usually at cost), compensation payable to the fund manager and the trigger event(s) for the side pocket to revert to the “normal” terms of the fund.

Conclusion

The acceptance by the *Commission de Surveillance du Secteur Financier* (“CSSF”) of the usage of side pockets and their benefit to investors is a significant development for the funds industry in Luxembourg.

After some initial scepticism, side pockets are being gradually more accepted by investors, mainly due to the benefits afforded by their prudent use in the best interest of investors. Side pockets are increasingly becoming a standard feature of hedge funds with fairly broad investment objectives and hedge funds investing in assets with particular liquidity or valuation risk. Side pockets should be considered when setting up new open-ended or semi open-ended funds or restructuring existing funds of a similar nature.

3. Islamic funds and the Benelux: a perfect match

Introduction

The Islamic fund industry has been experiencing significant growth over the last couple of years. It is roughly estimated that at least 300 Islamic funds have been set up to date. The demand for Islamic finance is said to be growing with double digits for the years to come. The current financial crisis is also expected to fuel the demand for Islamic finance as a sustainable and more ethical alternative form of financing.

In the wake of the current difficult financial climate, Islamic investors seem to prefer a stable investment climate and greater diversification of their investments. Following this trend, Islamic funds are increasingly structured as onshore (regulated) funds instead of offshore (unregulated) funds. Both Luxembourg and the Netherlands provide a flexible legal, regulatory and tax framework that suits the changing investor requirements.

Combining both Islamic finance and investment management expertise, Loyens & Loeff is and has been successfully involved in the setting up and launching of several Islamic funds. Based on that experience, we expect a growing demand for Islamic funds, since a significant and growing proportion of international investors actively seek Islamic fund investments over conventional funds.

Below we have included a very brief summary of some of the basic factors to take into account when setting up an Islamic fund.

Basic Islamic principles

Islamic funds can invest in a wide range of assets such as real estate assets (note that the leverage allowed in respect of such real estate assets is limited, see further below), equity interests, *Ijara* (lease), commodity, *Murabaha* (cost plus sale) or a combination of assets, as long as they comply with Islamic finance principles.

The key prohibitions that should be taking into account when structuring an Islamic fund are as follows:

- (a) *Riba* is the Arabic word for “excess” and is commonly explained as a ban on paying interest and other fixed guaranteed returns on money. An excess amount for the exchange of commodities which cannot be considered as a return for a specific risk is also considered as *riba*.
- (b) *Gharar* is the Arabic word for “deceit”. In practice this means that no significant element of avoidable uncertainty may be included in any transaction. The sale of property which one does not own is for example not allowed, but a private equity investment in a company is allowed.

- (c) *Maysir* refers to the ban on speculation and gambling. As a consequence, many conventional derivatives and options, or even insurance, may fall foul of this prohibition.

In addition to the above general prohibitions, the following specific principles must also be taken into account:

- (a) The return on investment must be linked to actual profits of such investment (asset-based, not asset-backed). However, the return can under certain circumstances be capped by reference to a pre-agreed and well-defined benchmark.
- (b) The investment must satisfy a so-called 'industry' or 'sin' screen. This means that the underlying business activity must be *halal*, i.e. may not be connected with the manufacture or sale of products such as alcohol, weapons, insurance, adult entertainment, gambling or conventional banking.
- (c) The investment must satisfy a 'financial' screen, in that they must satisfy certain financial covenants. The main financial covenants are: (i) debt to market capitalisation ratio (usually 33% to 50%), (ii) interest income to total revenues (usually 5% to 15% limit) and (iii) accounts receivable to total assets (usually less than 45%).
- (d) Investors in an Islamic fund must be treated equally. However, a fund can be divided into classes and/or sub-funds, provided that the investors in each sub-fund are treated equally.

Potential investments which do not satisfy the above criteria must be avoided. If existing investments do not satisfy the above criteria but are in the portfolio of an Islamic fund, one solution is the 'purification' process, as accepted by most Islamic scholars. In such 'purification process', profits that originate from non-compliant investments should be donated to charity.

Due to the *Sharia'a* restrictions, Islamic funds generally achieve less diversification than conventional funds. However, the Islamic finance industry is actively working on expanding suitable Islamic investments to be offered to investors as an alternative to conventional funds.

Generally, Islamic funds appoint a so-called *Sharia'a* board consisting of three or more *Sharia'a* scholars, in order to ensure *Sharia'a* compliance and monitor and approve the fund's investments on an ongoing basis. The *Sharia'a* board can be installed at different levels in a corporate or common fund structure. An external *Sharia'a* board can also be used where necessary. It is estimated that around 50% of the existing Islamic funds have an external *Sharia'a* board.

Some nominated contracts used for Islamic funds

Islamic funds can be structured using one or more of nominated contract forms. The most commonly used contracts for the establishment of an equity fund are for example:

Mudarabah. The most common structure used for Islamic equity funds is using the nominated contract known as *Mudarabah*. A *Mudarabah* contract can be compared to a limited partnership. Investors (the *Rabb-al-Mal*) provide capital and an asset manager (the *Mudarib*) manages the assets in exchange for a (capped) share in the profits (management and performance fees can also be agreed to). Losses should be borne by the *Rabb-al-Mal* only, except if caused by negligence or violation of terms of the contract by the *Mudarib*. The *Mudarib* goes unrewarded for his efforts in case of a loss. Comparable to a limited partner, the *Rabb-al-Mal* has no control over the management of the fund.

Musharaka. Islamic equity funds can also be set up using *Musharaka*. *Musharaka* is similar to a joint venture or general partnership. Partners are free to determine how profits are allocated but losses are allocated *pro rata* to their contributions. Management of a *Musharaka* can be carried out by one or more investors or outside parties.

It is important to note that interpretations differ regarding many of the relevant *Sharia*'a principles between different *Sharia*'a boards and different region. Although several organisations seek to unify Islamic finance, each transaction may have its own specific issues. Before structuring an Islamic fund structure, it is therefore essential to understand the requirements of the targeted investor audience thoroughly.

Islamic funds and the Benelux

Both Luxembourg and the Netherlands are highly suitable jurisdictions for setting up any type of Islamic fund. Their legal, regulatory and tax frameworks provide the necessary flexibility for implementing the Islamic requirements set out above. In addition, the tax authorities can provide certainty in advance in the form of an advance tax ruling. Depending on the location of the investments of the fund, the targeted investor audience (institutional / retail, specific countries) and the required regulatory framework, the most efficient structure should be determined on a case-by-case basis. A combination of Dutch and Luxembourg fund entities and/or special purpose vehicles may under certain circumstances also be considered.

In both the Netherlands and Luxembourg, a replication, totally or partially, of Islamic indices such as the Dow Jones Islamic Indices or the FTSE Global Islamic Index can be accommodated. Parallel fund structures and co-investment strategies can also be accommodated. In both countries *Sukuk* are recognised as tradable securities and can for example be listed. A Dutch *stichting* may be used as a trust issuing *Sukuk*. In the Netherlands the Dutch Central Bank has recently issued a policy paper on the regulatory treatment of Islamic finance transactions, concluding that, with some minor amendments, if any, Islamic finance should fit within the current Dutch regulatory framework.

Loyens & Loeff has a dedicated Islamic Finance Group and can advise on the most suitable tax and legal framework for a wide range of Islamic funds. Please refer to <http://www.loyensloeff.com/en-US/Practice/Pages/Islamicfinance.aspx> for further information on our Islamic finance practice.

4. The Belgian Institutional Fund regime

Introduction

The Royal Decree of 7 December 2007 (the Royal Decree) regulates the status of open-ended Institutional Undertakings for Collective Investment in Financial Instruments and Liquid Assets (Institutional Funds) that can be structured as tax transparent fund vehicles (*FCP*) or as non-tax transparent fund vehicles (*SICAV*). This Royal Decree entered into force on 18 December 2007. It aims to promote Belgium as an attractive jurisdiction for institutional investors, and in particular for pension funds, in an international context.

Main conditions

Under the Royal Decree, the institutional fund must:

- exclusively invest in (a broad range of) financial instruments and liquid assets (cash);
- exclusively raise its financing among (a broad range of) institutional or professional investors (as defined in the UCI Law) acting for their own account;
- be open-ended; and
- only issue registered financial instruments (and such instruments must remain registered instruments).

Notwithstanding its collective character, an institutional fund may also be incorporated by one single investor.

An institutional fund (and each of its compartments, if any) must be registered with the Ministry of Finance before launching its activities and it must remain registered with the Ministry thereafter. The role of the Ministry is limited to registering the institutional fund, which does not imply any regulatory supervision. No supervision is exercised by the Belgian financial regulator (the Commission for Banking, Finance and Insurance) either. Under certain circumstances, the institutional fund may be barred from the register.

The assets of the institutional fund must be kept by a custodian with sufficient experience, taking into consideration the nature of the institutional fund. The custodian has certain duties as set out in the Royal Decree. Only certain regulated entities established in Belgium can be appointed as custodian.

The institutional fund structured as a non-tax transparent fund vehicle may be a self-managed entity or managed by a Belgian or foreign entity licensed as an investment management company or entitled to offer discretionary investment management services in Belgium; the designation of a management company is compulsory for institutional funds structured as tax transparent fund vehicles.

The institutional fund must appoint an auditor licensed by the Commission for Banking, Finance and Insurance. If there are several compartments, separate accounting records must be kept for each compartment.

The management rules (in case of a tax transparent fund vehicle) or the articles of association (in case of a non-tax transparent fund vehicle) must specify the investment policy of the institutional fund and mention the type of financial instruments (among the list of financial instruments as defined in MiFID and certain related financial instruments) and liquid assets the institutional fund may invest in. If compartments are created, a specific investment policy applies for each compartment.

Taxation

The section below only highlights the main tax features of an institutional fund structured as a non-tax transparent fund vehicle. Generally speaking, a “look-through” approach applies to institutional funds structured as tax transparent fund vehicles.

An Institutional SICAV is subject to the ordinary Belgian corporate income tax regime at the rate of 33.99%, but *de facto* all investment proceeds of an Institutional SICAV are excluded from the corporate tax base. Considering its formal subjection to corporate income tax, an Institutional SICAV should in principle be eligible for treaty protection and for the benefits of the EU Parent-Subsidiary Directive.

An Institutional SICAV is also subject to the subscription tax, at a reduced rate of 0.01%, calculated on the net amounts invested in Belgium.

No capital duty tax is due on contributions to the Institutional SICAV. Management fees charged to the Institutional SICAV are exempt from VAT.

Dividends distributed by an Institutional SICAV are subject to 25% withholding tax; on this issue, the tax regime of the Institutional SICAV has not yet been fully aligned with the tax regime of other Belgian investment companies (i.e., reduction to 0 or 15% withholding tax). However, besides the zero rate provided by certain tax treaties, the Institutional SICAV benefits from the following domestic exemptions:

- dividends paid to foreign entities, which (i) are not conducting a business or a lucrative activity and (ii) are totally tax exempt in their country of residence, benefit from a withholding tax exemption, provided that these entities are not contractually obliged to redistribute these dividends; this withholding tax exemption is mainly aimed at attracting foreign pension funds and charitable trusts investing in Belgium; and
- acquisition surpluses (in case of redemption of shares) and liquidation surpluses paid by such Institutional SICAV are not subject to withholding tax, as they do not qualify as income under Belgian domestic tax law.

5. Update on the Dutch VBI regime

Introduction

The 2007 introduction of the VBI regime improved the Dutch landscape for tax-efficient investment fund structures. Since its introduction, the VBI regime has been used for the implementation of hedge funds, feeder funds and fund-of-funds. In addition, the VBI regime appealed to the attention of European HNWI and family offices.

As set out in more detail in the Annex, the VBI regime offers an efficient investment fund regime providing full exemption from Dutch corporate tax and dividend withholding tax, provided certain requirements are met. Key conditions are – inter alia – that the VBI functions as collective investment institution, limits its investments to financial instruments (with some exceptions, see Annex), that it restricts its activities to the making of passive investments, and that it provides for a (semi) open-ended character.

New guidance

Capitalising on the experiences gained over the last year, the Dutch government has issued additional guidance on the application of the VBI regime in the form of a Decree of March 10, 2008, and an informal letter of October 2008. The most important elements are:

- With respect to the shareholder's requirement where the VBI is used as an investment vehicle for HNWI, the tax authorities have set a maximum 90% shareholding per investor. This requirement purports to avoid structures where the shares in the VBI are ultimately held by one dominant shareholder.
- Existing entities wishing to opt for the VBI-regime for the 'passive investment' part of their total assets are allowed to split off these assets into a separate VBI entity in a tax-neutral manner.

6. Update on the Dutch FBI regime

Introduction

Since its introduction in 1969, the FBI regime has been widely used as a listed and non-listed investment fund vehicle for investments in securities and real property (in the latter case, the FBI is being referred to as the 'Dutch REIT'). Although initially used as a public investment fund due to its shareholder restrictions, recent legislative relaxations to these restrictions have made the FBI an attractive investment fund vehicle for the private investment fund market as well. In addition, these legislative relaxations have allowed foreign investment funds to benefit from the FBI's tax regime for their Dutch (real estate) assets.

As set out in more detail in the Annex, the FBI regime offers a REIT-like investment fund regime combining a special 0% income tax rate with a compulsory annual distribution obligation, provided certain requirements are met. Key requirements are - inter alia - an eligible investor test, leverage limitations and an activity limit.

Amendments to FBI regime

Further to consultations with the Dutch listed REITs industry (which was advised by Loyens & Loeff), the Dutch government has amended the FBI regime as per January 1, 2009 as follows:

- The 60% leverage ratio for investments in real estate now also applies to investments representing shares in a group company whose assets comprise at least 90% of real estate (and associated rights). This amendment capitalises on the trend in the real estate sector where properties are owned more and more indirectly through a layer of property companies.
- The permitted activities of a FBI have been extended to include the granting of bank guarantees to real estate group companies.
- Intra-group financing arrangements made to property subsidiaries now fall outside the FBI's leverage restriction (normally 20% of book value, with 60% for real estate): consequently, the FBI will be able to attract external financing in order to provide back-to-back financing arrangements to group entities without deteriorating its financing limits.

7. Luxembourg: clarification of the relationship between depositaries and prime brokers of SIFs

Introduction

The depository of a specialised investment fund (“*fonds d’investissement spécialisés*” or “SIF”) is vested with a general monitoring duty regarding the assets of the SIF. It must know at all times how the assets of the SIF are invested and where and how the assets are available. SIFs using derivatives or implementing alternative investment strategies will often, in compliance with market practices, use the services of a prime broker to, *inter alia*, safeguard the SIF’s assets, implement clearing transactions, be involved/provide debt financing, enter into securities lending transactions, etc.. Therefore, the CSSF circular No 08/72 issued on 5 September 2008 provides guidelines and clarifications in respect of the relationship and the interaction between SIFs, their depositaries and their prime brokers.

Guidelines

Approval of the prime broker

The depository will be involved in the process of selecting the prime broker. The depository will verify that the prime broker chosen by the SIF is i) a financial institution subject to the control of a supervisory authority of a country with a supervisory regime recognised to be equivalent to that provided by EU legislation and ii) a recognised financial institution specialised in prime brokerage operations.

Organisation of the relationship between the depository and the prime broker

In order to fulfil its supervisory duty, the depository must have full knowledge at any time of the composition and the value of the SIF’s portfolio. In order to have access to relevant information, the depository must have a right to information and a right of intervention regarding the assets entrusted to the prime broker. The depository is, however, not obliged to know with which correspondents of the prime broker the assets of the SIF are held.

The right to information and the right of intervention may be exercised on the basis of appropriate instructions provided by the SIF to the prime broker or on the basis of an agreement between the depository and the prime broker or from appropriate instructions given by the SIF to the prime broker in the prime brokerage agreement. The right of information will allow the depository to receive, at any time, information from the prime broker on the composition and the value of the SIF’s portfolio. The right of intervention will be exercised when the depository considers that it cannot properly fulfil its supervisory duty.

Additional duties of the depositary

For a SIF structured in the form of a co-ownership of assets (the “*fonds commun de placement*” or FCP) the depositary has to specifically deal with the receipt of dividends, interest and securities which have come to maturity, the exercise of option rights and, generally, any other transaction relating to the day-to-day administration of securities and liquid assets belonging to the SIF.

Where the assets of the SIF have been entrusted to a prime broker, the prime broker may be invested with the physical execution of such administrative transaction. As a consequence, in such cases, the depositary may contractually delegate to the prime broker the material execution of operations concerning day-to-day administration.

Information to the investors

The sales documents of a SIF using a prime broker must contain an adequate description of the implication of the prime broker and the risks associated therewith, including counterparty risks.

Conclusion

The growing number of specialised hedge funds launched in Luxembourg required that the relationship between depositaries and prime brokers be clarified. This circular achieves the clarification required by the market participants for the structuring and operational aspects of hedge funds in Luxembourg.

8. UCITS IV

The UCITS I and III regimes have contributed to the development of the European investment fund industry and have developed into a global brand.

In 2006 the European Commission issued a White Paper on improvement measures to the UCITS Directive. This paper eventually led to the introduction on 16 July 2008 of a legislative proposal containing a set of amendments to improve certain shortcomings of the current UCITS Directive.

The proposal contains the following key elements:

- *Regulatory framework for cross-border mergers*

The EU Commission wishes to set a clear process and specify common terms and conditions regarding pan European mergers. Its proposal encompasses the opportunity of three different merger techniques (i.e., by absorption, by amalgamation and by creation of a new UCITS).

- *Introduction of master-feeder structures*

The EU Commission wishes to introduce master-feeder UCITS structures.

- *Enhancement of the notification procedure for the EU passport*

The EU Commission wishes to remove the current administrative barriers, delays and uncertainties to cross border distribution by a simple notification letter (including key elements as *inter alia* subscription, redemption, paying agent). The shares/units would become distributable three days after the sending of the notification letter by the home country regulatory authority.

- *Replacement of simplified prospectus by “key investor information”*

The EU Commission proposes to replace the simplified prospectus by the issuance of a new document denominated “Key Investor Information”. The “KID” will focus on the fees and the subscription – redemption process and will exclude the legal information currently contained in the simplified prospectus.

- *Coordination between national supervisory authorities; improvement of the regulator-to-regulator communication*

The improvement of the cooperation processes between national supervisors is one of the priorities of the EU Commission.

- *Management Company Passport*

The Economic and Monetary Affairs Committee at the European Parliament (ECON) adopted, on 2 December 2008, the report on the revision of the UCITS Directive legislation including the management company passport.

The proposal has been approved by the European Parliament on 13 January 2009. The directive still needs to be approved by the EU Council. Member States will need to enact national legislation to apply the main changes by 1st July 2011.

9. Other developments

Luxembourg

New tax measures

As per 1 January 2009, the Luxembourg government has further improved the Luxembourg tax framework:

- The exemption from withholding tax on dividends has been extended to dividends distributed to a corporate shareholder who is i) considered a tax resident in a country with which Luxembourg has concluded a tax treaty for the avoidance of double taxation, ii) is subject to a tax comparable to the Luxembourg corporate income tax regime and iii) owns (or commits itself to own) a shareholding of at least 10%, or having an acquisition cost price of €1.2M, for at least 12 months. Based on the parliamentary documents, the exemption should also be granted to certain foreign pension funds.
- The abolishment of the 0.5% capital duty applicable to companies and the € 1250 fixed capital duty applicable to investment funds. This includes that the five year claw-back period for shares contributed pursuant to a transaction that was exempt from capital duty under the share merger exemption no longer applies. A fixed registration duty (i.e. € 75) has been introduced for incorporation of Luxembourg entities, amendment of the bylaws of Luxembourg entities and transfers of seat to Luxembourg.
- Reduction of the corporate income tax rate by 1% (i.e. from 22% to 21%). As a consequence, the aggregate corporate tax rate for companies resident in the city of Luxembourg has decreased to 28.59% as of 2009. The aim is to further reduce the aggregate corporate tax rate in several stages from 28.59% to 25.5%.

Belgium

Holding shares in fund through a nominee

The Commission for Banking, Finance and Insurance published a Circular letter regarding the holding of securities of Belgian and foreign collective investment undertakings (CIU) distributed in Belgium (CBFA Circular ICB 4/2007) through a nominee.

Although not widespread practice, the holding of securities through a nominee is acceptable under Belgian law, subject to a few exceptions. A nominee acts in their own name but for the account of underlying investors. It is the nominee who is registered as shareholder in the CIU's shareholders register. Accordingly, any shareholder information is sent to the nominee and not necessarily to the underlying investors, who may be unknown to the CIU.

Unless securities in a CIU can only be held through a nominee as a matter of the applicable regulatory regime, an investor must be given the option to hold their securities in the CIU directly, instead of through a nominee. The legal documentation (prospectus and abbreviated prospectus or Belgian addendum) must specify the modalities of exercising such option. In addition to providing information concerning the rights and obligations of the parties and the impact on the shareholders' voting rights, the legal documentation must describe the effect of a possible insolvency of the nominee.

The Circular letter discusses three (non exclusive) options of nominee structures in this regard, i.e. the nominee as a trust or as a special purpose vehicle and the regime of the Belgian Co-ordinated Royal Decree Nr. 62 of 10 November 1967 relating to the custody of fungible financial instruments and the settlement of transactions in those instruments. The latter option seems to be the most commonly applied and is indeed the appropriate structure under Belgian law.

If the Belgian Co-ordinated Royal Decree Nr. 62 applies, all securities held by a nominee on behalf of the investors will be treated as co-owned by such investors. This co-ownership includes a right of recovery in kind of the same number of securities of the same type and series, enforceable against third parties in case of bankruptcy, judicial composition or other situation of conflicting claims between the creditors of the nominee. Accordingly, it offers the required protection for the investors in the event of insolvency of the nominee.

Subsidiaries of property funds

The position of Belgian property funds (*SICAFI/Vastgoedbevak*) should be reinforced in 2009 thanks to the legislative initiative allowing subsidiaries of such property funds to opt for the status of institutional fund in real estate, characterised by the absence of compulsory listing, a reduced regulatory control and an absence of taxation of the investment proceeds. Even if Belgian tax law has already been adapted, a Royal Decree regarding the regulatory aspects is still pending. The institutional funds in real estate are therefore not yet operational. The exact scope of application of this new institutional fund is not yet known; in our opinion, it should be available to subsidiaries of Belgian property funds but also to subsidiaries of similar EU property funds in order to comply with EU principles.

Netherlands

Law on carried interest taxation

As per January 1, 2009, a new tax regime has entered into force for the taxation of fund managers with respect to his/her shares, receivables or rights with similar economic characteristics, the so-called '*lucrative interests*'. It is important to note that this new tax regime is not restricted to Dutch fund managers, potentially affecting foreign fund managers as well.

Based on the new legislation, there will be a *lucrative interest* if the taxpayer has acquired shares, receivables or rights with similar economic characteristics, and the income on these instruments is intended to form a remuneration for services (to be) rendered by the taxpayer or certain of his relatives, in the Netherlands. Also a debt obligation may constitute a *lucrative interest* if the debt obligation can be (partly) waived by the creditor, and this waiver intends to form a remuneration for services rendered by the taxpayer or certain of his relatives.

Shares constitute a *lucrative interest* if (a) there are various classes of shares and (i) the shares held by the taxpayer rank junior to other classes of shares, while (ii) the class of shares held by the taxpayer constitute less than 10% of the paid-up share capital; or (b) if the taxpayer owns preference shares with a preferred dividend of at least 15% per annum. The new legislation does not include shares issued to employees if no specific conditions are attached to such shares.

Receivables constitute a *lucrative interest* if the yield depends on 15% or more of management or shareholder targets such as profit, turnover, EBIT(DA), cost reduction, realisation of an exit, etc.

Other rights with similar economic characteristics constitute a *lucrative interest*, inter alia if they are comparable to the above-mentioned shares or receivables and comprise of similar economic characteristics.

The income derived from *lucrative interests* will in principle be taxed as ordinary income derived from business activities, employment and miscellaneous activities against the progressive income tax rates up to 52%. Taxpayers have the option to elect for taxation against a flat rate of 25% provided that the *lucrative interest* is structured such that it is held through a company in which the taxpayer holds a substantial ($\geq 5\%$) interest and at least 95% of the income from the *lucrative interest* is distributed by this company to the taxpayer in the year of realisation.

As indicated, the new regime also applies to foreign taxpayers if their *lucrative interest* intends to form remuneration for services rendered in the Netherlands, albeit foreign taxpayers resident in tax treaty states should normally be protected against this Dutch domestic tax liability. This may be different if the Netherlands have a (limited)

right to tax under the applicable tax treaty, for instance in the case of dividends or interest paid by a Dutch entity, or if the fund manager resides on the board of a Dutch fund entity. Please note that it is not possible to apply the so-called 30% ruling (a tax facility for foreign employees assigned to the Netherlands) to the income derived from a *lucrative interest*.

The new regime is applicable as of 1 January 2009, also with respect to existing *lucrative interests*: for domestic fund managers, no step-up has become available for any built-in value of an existing *lucrative interest*: this will be fully taxed upon realisation after January 1, 2009. Non-resident fund managers holding a *lucrative interest* and moving to the Netherlands should generally be able to get a step-up to the market value of their *lucrative interest* at the date of arrival in the Netherlands. This only applies in situations where the fund manager has not yet been a non-resident taxpayer in relation to his interest prior to immigration.

The Netherlands Financial Markets Authority (AFM) postpones rescission prohibition on short selling

From 16 to 23 February 2009, the Netherlands Authority for the Financial Markets (AFM) conducted consultations concerning its intention to change its measures with respect to short selling. These measures prohibit the creation or increase of both covered and uncovered (naked) short positions in Dutch financials such as Aegon, ING Groep, Fortis and SNS Reaal.

The AFM is extending its temporary measures until 1 June 2009 at the latest as a precautionary measure. In the current extreme market circumstances, the AFM does not consider the immediate rescission of its prohibition on short selling advisable. The AFM will, however, proceed with the rescission prior to 1 June if market circumstances allow.

On 21 January 2009 the EU Commission has announced a forthcoming EU directive called 'Directive on legal certainty of securities holdings' addressing the liability of depositaries in the chain of custody arrangements for investment funds. The proposal is said to be prompted by the Madoff affaire which proved that in practice it is difficult to establish in whose name the securities are held and where the securities are held in custody. The proposed directive should give investors more protection as to their invested moneys in investment funds.

Annex

Comparison of six fund regimes: Luxembourg SIF and SICAR regime, Dutch FBI and VBI regime, Belgian PRICAF Privée and Institutional SICAV regime

Matter	Luxembourg SIF	Luxembourg SICAR	Dutch FBI
Legal form	<p>1. Various corporate entities either with or without SICAV status: <i>Société Anonyme</i> (SA), <i>Société en commandite par actions</i> (SCA), <i>Société à responsabilité limitée</i> (Sarl) or <i>Société coopérative</i> (SCSA).</p> <p>2. FCP-SIF: <i>Fonds commun de Placement</i>.</p> <p>3. SCS-SIF: <i>Société en commandite simple</i> (limited partnership).</p>	<p>1. Corporate: <i>Société Anonyme</i> (SA), <i>Société en commandite par actions</i> (SCA), <i>Société à responsabilité limitée</i> (Sarl) or <i>Société coopérative</i> (SCSA).</p> <p>2. <i>Société en Commandite Simple</i> (SCS) (partnership model).</p>	<p>1. Corporate: <i>Naamloze Vennootschap</i> (NV) or <i>Besloten Vennootschap</i> (BV).</p> <p>2. <i>Fonds voor gemene rekening</i> (FGR).</p> <p>3. A comparable foreign entity established under the laws of an EU Member State or certain other jurisdictions.</p>
Corporate profile	<p>Separate legal personality. Limited liability</p> <p>FCP-SIF: Co-ownership of assets established under Luxembourg law, managed by a Luxembourg management company. No separate legal personality. Investor liability limited to contribution and capital commitment.</p> <p>SCS-SIF: Limited partnership managed by its managing general partner. Limited liability for investors.</p>	<p>Corporate SICAR: separate legal personality. Investor liability limited.</p> <p>SCS-SICAR: partnership between a general partner as manager, and investors as limited partners. Limited liability for investors.</p>	<p>Separate legal personality if NV or BV. Investor liability limited.</p> <p>FGR: Co-ownership of assets established under Dutch law. No separate legal personality. Investor liability limited to contribution and capital commitment.</p>
Investors' requirements	<p>Either institutional/ professional investors or 'well-informed' investors (investing at least EUR 125,000 or benefiting from a certification).</p>	<p>Either institutional/professional investors or 'well-informed' investors (investing at least EUR 125,000 or benefiting from a certification).</p>	<p>Various conditions apply to the composition of the FBI's shareholders in terms of maximum interest that a single investor is allowed to hold.</p>
Tax treatment	<p>Not subject to tax, except for annual subscription tax of 0.01% on net asset value of SICAV-SIF (save for certain exceptions). An exemption from subscription tax applies if the SIF acts as a pooling vehicle for pension funds. In addition, a one-off fixed capital duty of EUR 75.</p> <p>SCS-SIF and FCP-SIF are tax transparent for income tax and dividend withholding tax purposes.</p>	<p>Corporate: Subject to corporate income tax, but the return derived from securities is exempt. A SICAR is not subject to net wealth tax. No annual subscription tax. A one-off fixed capital duty of EUR 75.</p> <p>SCS-SICAR: tax transparent for income tax and dividend withholding tax purposes.</p>	<p>Corporate income tax at a rate of 0%. Capital gains may be added to a tax free reinvestment reserve. No capital duty. Gearing limitations, an activity test and certain other restrictions apply.</p> <p>Profits must be distributed within eight months after the fiscal year-end, except for capital gains profits added to the reinvestment reserve. All classes of shares must share equally in the profits.</p>
Tax Treaty protection	<p>SICAV-SIF can make use of roughly half of the bilateral tax treaties concluded by Luxembourg. Most important ones are Germany, Spain, People's Republic of China, Portugal, Austria, Turkey, Singapore and Korea.</p> <p>FCP-SIF and SCS-SIF are tax-transparent: no tax treaty protection.</p>	<p>Corporate SICAR can, in general, make use of all Luxembourg's bilateral tax treaties.</p> <p>SCS-SICAR is tax-transparent: no tax treaty protection.</p>	<p>As the FBI is subject to corporate income tax (although at a rate of 0%), it can, in general, make use of bilateral tax treaties.</p>
Withholding tax	<p>SICAV-SIF: No withholding tax.</p> <p>FCP-SIF and SCS-SIF: no withholding tax as a result of its tax-transparency.</p>	<p>Corporate SICAR: No withholding tax.</p> <p>SCS-SICAR: no withholding tax as a result of its tax-transparency.</p>	<p>An FBI is required to withhold and remit 15% Dutch dividend withholding tax on distributions made to its shareholders unless a treaty or domestic law provides for a reduction or repayment. An FBI is granted a rebate on its remittance obligation for Dutch and (in part) foreign withholding tax incurred by the FBI. Distributions sourced from the reinvestment reserve are free from dividend withholding tax.</p>
Regulatory provisions	<p>Subject to authorisation and on-going supervision by the CSSF. Application must be filed within one month after set-up. Appointment of a Luxembourg custodian bank entrusted with the safeguarding of the fund's assets and the daily administration thereof.</p>	<p>Subject to prior authorisation and on-going supervision by CSSF. Appointment of Luxembourg custodian bank entrusted with the safeguarding of the SICAR's assets.</p>	<p>Regulatory supervision is not a condition to benefit from the FBI regime (tax regime). However, depending on the investors' base, the manager or the FBI may be subject to a licence requirement and on-going supervision by the AFM. In practice, an exemption often applies (e.g. for funds with an institutional investors' base). If, however, the FBI is subject to regulatory supervision, or specifically exempted from such regulatory supervision, the FBI enjoys more relaxed shareholder conditions. If the FBI qualifies as a UCITS, a European passport is available.</p>
Risk diversification; minimum net assets and other typical requirements	<p>Principle of risk spreading applies. No quantitative, qualitative, geographical or other type of investment restrictions. 30% safe harbour rule.</p> <p>Net assets may not be less than EUR 1,250,000 (to be reached within twelve months).</p>	<p>No risk diversification rules apply.</p> <p>Net assets of a SICAR may not be less than EUR 1,000,000 (to be reached within twelve months).</p>	<p>No risk diversification rules.</p> <p>The FBI is only permitted to be engaged in 'passive investment activities' (with limited possibility to be engaged in real estate development).</p>

Dutch VBI-regime	Belgian PRICAF Privée	Belgian Institutional SICAV
<i>Naamloze Vennootschap</i> (NV) or <i>Fonds voor gemene rekening</i> (FGR) or a comparable foreign entity established under the laws of an EU Member State or certain other jurisdictions.	Corporate: <i>Naamloze Vennootschap</i> (NV) / <i>Société Anonyme</i> (SA), <i>Commanditaire Vennootschap op Aandelen</i> (Comm. VA) / <i>Société en Commandite par Actions</i> (SVA), <i>Gewone Commanditaire Vennootschap</i> (Comm. V) / <i>Société en Commandite Simple</i> (SCS).	Corporate: <i>Naamloze Vennootschap</i> (NV) / <i>Société Anonyme</i> (SA), <i>Commanditaire Vennootschap op Aandelen</i> (Comm. VA) / <i>Société en Commandite par Actions</i> (SVA). FCP: <i>Gemeenschappelijk beleggingsfonds / Fonds commun de placement</i> .
Separate legal personality. Investor liability limited.	Separate legal personality. Investor liability limited, except for the Comm. VA and Comm. V where at least one participant (the general partner) is jointly and severally liable for all obligations of the company.	Corporate: Separate legal personality. Investor liability limited, except for the Comm. VA where at least one participant (the general partner) is jointly and severally liable for all obligations of the company. FCP: No separate legal personality.
VBI must function as an investment institution for collective investments.	No requirements as to the capacity of the investor (investing at least EUR 50,000). Pricaf Privée must have at least six (unrelated) investors. Pricaf Privée can have less than six shareholders if at least one shareholder has a special status such as a Belgian or foreign undertaking for collective investments (UCI) or a Belgian or foreign pension fund.	Institutional or professional investors (defined broadly). Institutional SICAV can be incorporated by one single investor.
No liability to Dutch corporate income tax. No capital duty. No other levy.	Corporate taxpayer without tax base (except for certain items of income, generally not relevant for funds), meaning effectively tax exempt. No capital duty. No other levy.	Corporate: Corporate taxpayer without tax base (except for certain items of income, generally not relevant for funds), meaning effectively tax exempt. No capital duty. Annual subscription tax of 0.01% FCP: Tax transparent for income tax and dividend withholding tax purposes.
The VBI is exempt from corporate income tax, and, therefore, not entitled to tax treaty protection.	Entitled to tax treaty protection (from a Belgian perspective; unknown whether source countries grant treaty protection)	Corporate: Entitled to tax treaty protection (from a Belgian perspective; unknown whether source countries grant treaty protection). FCP: No tax treaty protection.
No withholding tax.	No withholding tax, except: - re-distribution of Belgian source dividends to non-residents (15% withholding tax); and - dividends distributed to Belgian investors (15% withholding tax). No withholding tax on acquisition surpluses (redemption of shares) and liquidation surpluses.	Corporate: 25% withholding tax, except for dividends distributed to foreign pension funds and charitable trusts; no withholding tax on acquisition surpluses (redemption of shares) and liquidation surpluses. FCP: No withholding tax as a result of its tax transparency.
Regulatory supervision is not a condition to benefit from the VBI regime. However, depending on the investors' base, the manager or the VBI may be subject to a license requirement and on-going supervision by the AFM. In practice, an exemption should generally apply (e.g. for funds with an HNWI or institutional investors' base). If the VBI qualifies as a UCITS, a European passport is available.	No supervision by the Commission for Banking, Finance and Insurance (CBFI). "Indirect" supervision by the statutory auditor (external auditor).	No supervision by the Commission for Banking, Finance and Insurance (CBFI). "Indirect" supervision by the statutory auditor (external auditor).
VBI should apply risk diversification. Requirement should be easily met in practice. Investments restricted to categories of securities / financial instruments listed in regulatory law. This may include bank deposits, as well as foreign real estate if structured through a (tax-transparent) entity. VBI may not be used for direct investments in Dutch real estate. There is a limit on the permitted scope of assets to financial instruments. (semi-) Open-ended character is compulsory. No obligatory distribution policy.	Risk diversification principle applies, but without specific risk diversification criteria, thus easily met in practice. Investments restricted to financial instruments listed in regulatory law and temporary or additional investments listed in regulatory law; mainly financial instruments issued by non-listed companies. Maximum term of a Pricaf Privée is 12 years.	Risk diversification principle applies, but without specific risk diversification criteria, thus easily met in practice. Investments restricted to financial instruments and liquid assets.

Comparison of five entities that frequently serve as fund or feeder entity: Dutch CV, BV and Coop, the Luxembourg “Soparfi” and the Belgian “Holding”

Matter	Dutch CV	Dutch BV
<i>Legal form</i>	<i>Commanditaire Vennootschap (CV)</i>	<i>Besloten Vennootschap (BV)</i>
<i>Corporate profile</i>	Limited partnership with no separate legal personality (a bill is pending that makes it possible to elect for legal personality). Investor liability limited to contribution and capital commitment.	Separate legal personality. Investor liability limited.
<i>Transferability</i>	For tax reasons, transparency can be achieved only if LPA provides for unanimous consent from all the partners for a transfer of limited partnership interests or the admission of new limited partners. A deemed consent may apply for investors not responding within a four weeks period following notification.	No specific requirements.
<i>Investors' requirements</i>	No requirements.	No requirements.
<i>Tax treatment</i>	Not subject to corporate income tax, withholding tax, capital duty, net wealth tax or annual subscription tax. Limited partners may be subject to corporate income tax (permanent establishment); in such a situation the participation exemption (see under Dutch BV) may apply and effectively eliminate tax liabilities.	Normally subject to 25.5% corporate income tax. Exemption applies to dividend and capital gains income realised from $\geq 5\%$ shareholdings in active companies and real estate companies (“participation exemption”).
<i>Tax Treaty protection</i>	CV is tax-transparent. Hence, in principle, no tax treaty protection.	BV can, in general, make use of Dutch bilateral tax treaties.
<i>Taxation of distributions</i>	No withholding tax or other tax liabilities as a result of CV's tax-transparency.	Subject to 15% withholding tax. Under circumstances corporate income tax is imposed on foreign shareholders. Reduction or elimination of these tax liabilities may apply on the basis of EC Parent-Subsidiary Directive, or tax treaties.
<i>Flexibility</i>	Flexibility in partnership agreement: lock-up, open/closed ended, redemption and distribution, etc. However, transferability rules must be taken into account to ensure tax transparency.	Flexibility in setup.
<i>Regulatory provisions</i>	If set up as an institutional fund not subject to prior authorisation or on-going supervision. No reporting obligations and no external audit required.	Depending on the investors' base, the manager or the BV may be subject to a license requirement and ongoing supervision by the AFM. In practice, an exemption should generally apply (e.g. for funds with an institutional investors' base).
<i>Risk diversification</i>	None.	None.

Dutch Coop	Luxembourg "Soparfi"	Belgian "Holding"
<i>Coöperatie U.A. (Coop)</i>	<i>Société à responsabilité limitée (Sarl)</i> <i>Société anonyme (SA)</i>	<i>Société anonyme (SA) / Naamloze vennootschap (NV)</i> <i>Société privée à responsabilité limitée (SPRL) / Besloten vennootschap met beperkte aansprakelijkheid (BVBA)</i> <i>Société en commandite par actions (SCA) / Commanditaire vennootschap per aandelen (Comm. VA)</i> <i>Société en commandite simple (SCS) / Gewone commanditaire vennootschap (Comm. V)</i>
Special form of a Dutch association with separate legal personality, which is governed by certain specific rules and the general rules applicable to Dutch associations (<i>verenigingen</i>). Investor liability limited to contribution and capital commitment.	Separate legal personality. Investor liability limited.	Separate legal personality. Investor liability limited, except for the Comm. VA and Comm. V where at least one participant (the general partner) is jointly and severally liable for all obligations of the company.
For tax reasons (see below), a transfer of interests or the admission of new members generally requires the unanimous consent from all partners.	For Sarl the transfer of shares to third parties requires approval of shareholders representing at least 75% of the share capital. For the SA, the share transfer is free.	No specific requirement. Regarding the SCS / Comm.V., for foreign tax reasons, transparency can be achieved only if AoA provides for unanimous consent from all the partners for a transfer of limited partnership interests or the admission of new limited partners.
At least 2 members required at incorporation.	No requirements.	At least 2 members required at incorporation for SA/NV, SCA/Comm. VA and SCS/Comm. V.
Normally subject to 25.5% corporate income tax. Exemption applies to dividend and capital gains income realised from ≥ 5% shareholdings in active companies and real estate companies ("participation exemption").	Normally subject to 28.59% aggregate corporate income tax. Exemption generally applies if dividend and capital gains income is realised from a shareholding (i) which is held – or will be held – for at least 12 months, (ii) in which Sarl/SA is either invested for ≥ 10%, or has an acquisition price of ≥ €1.2M (dividend income) respectively ≥ €6M (capital gains), and (iii) in case of non-EU shareholdings, a subject to tax requirement is met.	Normally subject to 33.99% aggregate corporate income tax. 95% exemption generally applies if dividend income is realized from a shareholding (i) which is held – or will be held – for at least 12 months, (ii) in which the holding is either invested for ≥ 10%, or has an acquisition price of ≥ €1.2M (iii), which has the nature of financial fixed assets and (iv) provided a subject-to-tax requirement is met (generally met for EU shareholdings); 100% exemption generally applies to capital gains on shares provided that the subject-to-tax requirement is met.
Coop can, in general, make use of Dutch bilateral tax treaties.	Sarl/SA can, in general, make use of Luxembourg's bilateral tax treaties.	The entities can, in general, make use of the Belgian bilateral tax treaties.
No withholding tax. Under circumstances corporate income tax is imposed on foreign shareholders. Reduction or elimination of this tax liability may apply on the basis of tax treaties.	Subject to 15% withholding tax. An exemption may apply in the case of distributions to entities resident in treaty states or on the basis of the EC Parent-Subsidiary Directive. Furthermore, reductions may apply pursuant to tax treaties. Alternatively, hybrid financial instruments may be employed to capitalise the Sarl/SA.	Subject to 15/25% withholding tax; the following exemptions however apply: - dividends paid to foreign pension funds and charitable trusts; and - dividends paid to parents companies established in treaty states (extension of the P/S Directive to treaty states). Furthermore, exemptions or reductions may apply pursuant to tax treaties.
Flexibility in setup.	Flexibility in set-up.	Flexibility in set-up.
Depending on the investors' base, the manager or the Coop may be subject to a licence requirement and ongoing supervision by the AFM. In practice an exemption often applies (e.g. for Coops with an institutional investors' base).	In principle not subject to regulation.	In principle not subject to regulation.
None.	None.	None.

Loyens & Loeff Fund Team

Our Investment Management practice is the largest to offer a full range of investment management services in the Benelux. Our practice is multidisciplinary and closely integrated with other related practice areas, such as Private Equity (focusing specifically on private equity transactions such as leveraged buyouts and venture capital transactions), Tax, Real Estate and Banking & Finance.

Fund formation

Fund formation constitutes a large part of a comprehensive range of investment management services. For the past 20 years, we have assisted sponsors of and investors in private equity funds pursuing all major investment strategies in a variety of markets, including buyout, venture capital, real estate, mezzanine, infrastructure, healthcare, energy, as well as fund of funds. Structuring such funds requires not only expertise in corporate, tax and securities law, but also a significant amount of industry knowledge. Our expertise is continually reinforced by our database of current market terms assembled through our fund formation work and through review of funds on behalf of institutional investors. In addition, we regularly assist in the formation, registration and maintenance of UCITS in the Netherlands and Luxembourg and the listing and delisting of public funds.

Our fund formation services include:

- Structuring and negotiating of the fund documentation with investors, from a tax and corporate perspective
- Structuring of carried interest, organisation of employee investment entities and structuring of other incentive arrangements
- Providing advice on complex investment management-related VAT issues
- Assisting with the registration and maintenance of UCITS in the Netherlands or Luxembourg
- Providing regulatory, corporate and tax advice to public investment entities and mutual funds (including UCITS), hedge funds, and proprietary funds sponsored by insurance companies, banks and other institutional investors
- Rendering capital markets-related work in relation to listings and delistings (through public offers or otherwise) of investment funds.

Assistance with fund investments

We regularly act on behalf of several large institutional investors in respect of their investments in private equity, real estate, hedge and other funds, in a tax as well as corporate and regulatory capacity.

Asset pooling and asset management arrangements

We are regularly involved in asset pooling and asset management arrangements, including fiduciary management arrangements for institutional investors and pension funds and institutional asset managers. Our services include corporate, regulatory and tax assistance.

Our specialists

Our specialists are based in our Amsterdam and Luxembourg offices, closely working together with team members in Brussels for Belgian investment management services. Team members posted to our foreign offices are increasingly involved in the team's investment management work. We are heavily involved with associations such as the Dutch Venture Capital Association (NVP), the European Venture Capital Association (EVCA), the European Association for Investors in Non-listed Real Estate Vehicles (INREV) and the European Public Real Estate Association (EPRA). Our Fund Team maintains close relationships with leading law firms and tax advisers in Europe, the United States and the Far East.

Clients

Clients include a variety of funds and fund managers: European captive and independent private equity funds (buy-out and venture capital), mutual funds, quoted REITs with a European property portfolio, cross border private equity real estate funds, US investment banks managing European opportunity funds and investment managers setting up fund-of-funds. We advise large institutional investors for the formation of their funds, or who act as lead investors for funds set up by others.

Please visit our website www.loyensloeff.com for a current overview of the practitioners of the Loyens & Loeff Fund Team, their publications and seminars.

Loyens & Loeff

Loyens & Loeff is an independent full-service law firm specialised in providing legal and tax advice to enterprises, financial organisations and governments. The intensive cooperation between attorneys, tax lawyers and civil law notaries places Loyens & Loeff in a unique position in its home market, the Benelux regions. Internationally, Loyens & Loeff is a reputable adviser on tax law, corporate law, financial and capital markets, cross-border financing, private equity, real estate, the energy sector, European law, regulatory law, VAT and employment law. When providing international advice, Loyens & Loeff maintains close relationships with leading law firms and tax advisers in Europe, the United States and the Far East. Worldwide, Loyens & Loeff has more than 1,500 employees, including over 800 tax and legal experts in seven of the Benelux offices and ten branches in the major international financial centres.

Awards

- 'First tier' in Tax, Environment & Planning and Real Estate (Legal 500 EMEA 2008)
- 'First tier' in tax advice (2007 editions Chambers and World Tax)
- Only Benelux law firm in the American Lawyer Global 100 (2007)
- M&A Deal of the Year 2008 Award (IFLR)



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