The voice of corporate governance in Luxembourg

Directors FAQ - Luxembourg funds and management structures

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The voice of corporate governance
in Luxembourg

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FOREWORD

It is with great pleasure that I can present this, the fourth edition, of our Frequently Asked Questions (or FAQ) document for directors of Luxembourg regulated funds. This document represents a comprehensive and best efforts guide to the key aspects of governance as it relates to Luxembourg funds and has been widely viewed as an invaluable tool for directors of all levels of experience.

This edition has been updated specifically to accommodate the changes to the governance regime introduced by CSSF circular 18/698. The brand of the Luxembourg fund industry remains extremely robust but is dependent on maintaining the highest level of diligence and oversight over the funds themselves and the role of Boards and the respective conducting officers in this regard is crucial.

Maintaining a consistent and high quality governance framework is in the interests of everyone and it is with this in mind that we believe the continued efforts to educate and support fund directors is critical to the role ILA has to play - and this FAQ document is an important tool which fund directors can use in exercising their roles and responsibilities in this regard.

I hope that you find this document useful

Mike Delano
Chair of the ILA Investment Funds Committee

GENERAL PRINCIPLES

This document is intended as a general overview of common questions for Directors of regulated investment funds and their management structures in Luxembourg. It gives an indication of the general framework of relevant company and investment funds laws and regulations, as well as market practice as at the date of drafting. Different types of vehicles have varying legal and regulatory requirements, not all of which can be covered here. The information provided is not intended as a substitute for legal or tax advice.

With the diversity of structures and operating models available in Luxembourg, it is impossible to provide a complete overview of the different types of entities performing collective management in Luxembourg. Focus is therefore given to investment fund managers ("IFM") entities operating as management companies under Chapter 15 of the 2010 Investment Fund Law (commonly referred to as "UCITS ManCo") and entities authorised under the 2013 AIFM Law to act as alternative investment fund managers ("AIFM"). Such UCITS ManCos and AIFMs will be generally referred to as "IFMs" in this document, in line with the recent CSSF terminology, unless specifically indicated to the contrary. Interally managed AIFMs or self-managed UCITS-SICAVs will not be addressed in this publication due to their increasingly limited use.

Whilst reasonable care has been taken in compiling these answers to the Frequently Asked Questions (FAQ), ILA does not accept any responsibility and does not guarantee in any way that they will be appropriate for a particular structure, circumstance or vehicle. Readers should take their own professional advice in order to clarify which rules and practices apply to their individual circumstances.

Although many answers are generic to all regulatory and legal types of vehicle, we have mainly focused on Funds and IFMs organised in a corporate form as an SA (e.g. a SICAV) with a board of directors (and no supervisory board) and Funds having appointed an external IFM - as this is the most common configuration. If organised as an FCP, it is the Board of the IFM which has similar obligations to those set out below. For Funds organised as partnerships, where the operational management is assumed by the partnerships' general partner, we have assumed that such general partners take the most commonly used form of S.à r.l.

Although this document reflects general consensus of discussions with various specialists in the funds sphere, there exists a wide range of market practice due to the large number of legal and regulatory vehicles, different types of asset classes as well as diverse origins of the Initiators.

This document does not address specific questions regarding Conducting Officers (dirigeants) of IFMs (whether UCITS ManCos or AIFMs) due to the specificities of this function. The reader's attention is drawn to publications made by other professional bodies on that topic. However, several references to Conducting Officers are made in this document to illustrate the links between the members of the Board of Directors and the Conducting Officers when appropriate. It should however not be regarded as containing a full description of the duties and responsibilities of Conducting Officers.

GLOSSARY OF TERMS

When used in this brochure and unless otherwise defined herein, the following defined terms shall have the meaning set out hereafter.

1915 Companies Law	The Law of 10 August 1915 concerning commercial companies (as amended). This is the primary legislation governing commercial companies.
2004 SICAR Law	The Law of 15 June 2004 on the investment company in risk capital (as amended).
2007 SIF Law	The Law of 13 February 2007 on Specialised Investment Funds (SIFs) (as amended).
2010 Investment Fund Law	The Law of 17 December 2010 on Undertakings for Collective Investments (UCIs) (as amended). This law is divided into Part I - UCITS Funds and Part II - non-UCITS Funds. These are followed by Part III - Foreign UCIs, Part IV - Management Companies and Part V - General Provisions.
2013 AIFM Law	The Luxembourg law of 12 July 2013 and transposing the European Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) (as amended). The AIFMD aims to create a comprehensive regulatory and supervisory framework for the management of Alternative Investment Funds (across the European Economic Area). The 2013 AIFM Law needs to be read in conjunction with the Level 2 Regulations as well as ESMA guidelines on key concepts of the AIFMD (ESMA/2013/611).
2016 RAIF Law	The Law of 23 July 2016 on Reserved Alternative Investment Funds (RAIFs)
2018 MiFID Law	The Law of 30 May 2018 on markets in financial instruments implementing the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments. Reference in this document to this Law may also be mde by way of a reference to MiFID II.
AIF or Alternative Investment Fund	Any collective investment undertaking which is not a UCITS and which: raises capital from a number of investors; and invests capital in accordance with a defined investment policy ; and don't qualify as UCITS Funds which are neither UCITS nor AIFs are referred to in this document as "Non-AIFs"
AIFM	Any legal person whose regular business is managing one or more AIFs and which is authorised by the CSSF to perform such services pursuant to Chapter 2 of the 2013 AIFM Law. In this document, UCITS ManCos and AIFMs are collectively referred to as "IFM", unless indicated to the contrary.

AIFMD	The Directive 2011/61/UE of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.
ALFI Code of Conduct	The ALFI Code of Conduct provides Fund boards with a framework of high-level principles and best practice recommendations for the governance of Luxembourg Funds. The latest version of the ALFI Code of Conduct dates back to August 2013. ILA and ALFI have published a series of publications providing guidance on the application of the ALFI Code of Conduct to Board of Directors. A substantial part of Luxembourg based Funds and IFMs are believed to have adopted the ALFI Code.
Articles	The "statuts" or Articles of Incorporation of a company.
Board or Board of Directors	The management body of a Luxembourg Company – i.e. the management body of a Fund, a GP or an IFM In this document we use the term Board to refer generally to a grouping of Directors (as defined below).
Conducting Officer	An IFM (whether a ManCo or an AIFM) must have at least 2 Conducting Officers (who need not be Directors). The Conducting Officers should normally be resident in Luxembourg or the Greater Region, although Circular 18/698 contains some derogations. Under the direction of, and reporting to, the Board of Directors they will perform management, oversight and governance duties for the IFM. For example, they have a particular responsibility to monitor all portfolio manangement and risk management processes as well as to monitor activities delegated by the IFM to service providers. In this document, reference to Senior Management (a term used in various EU financial services texts, including AIFMD, CRD IV and MiFID II) applies equally to Conducting Officers.
CSSF	The "Commission de Surveillance du Secteur Financier" is the supervisory body of the Luxembourg financial sector.
CSSF Regulation 10-4	CSSF Regulation No.10-4 transposing Directive 2010/43/EU as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company in the context of UCITS. These rules and requirements are seen as a «MiFID-isation» of Funds introduced through the UCITS Directive and related regulations.
CSSF Circular 18/698	CSSF Circular 16/698 (superseding CSSF Circular 12/546) sets detailed provisions on requirements to be implemented within AIFMs, UCITS ManCos, internally managed AIFMs and Self-Managed UCITS-SICAVs.
CSSF Circular 13/556 or the "AML Circular"	CSSF Circular 13/556 implements Regulation 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing.

Director	The members of the Board or management body of a Luxembourg Company/Fund. SA - administrateur S.à r.l. – gérant SCA, SCSp or SCS – have no proper management body – management is done through the associé commandité (or GP). The GP is in most cases another company, set up as a SA or S.à r.l. – operating conditions applicable to SA or S.à r.l. described herein, apply mutatis mutandis to the GP.
ESMA	The European Securities and Markets Authority, ESMA is an independent EU Authority that contributes to safeguarding the stability of the EU's financial system by ensuring the integrity, transparency, efficiency and orderly functioning of securities markets, as well as enhancing investor protection. For example, ESMA Improves co-ordination among securities regulators, acts as an advisory group to the EU Commission in particular in its preparation of draft implementing measures of EU framework directives in the field of securities and to ensure more consistent and timely day-to-day implementation of community legislation in the EU Member States.
FCP	"Fonds commun de placement" - an unincorporated co-ownership of assets managed by a management company. This is a contractual vehicle with no legal personality.
Fund	A Luxembourg investment fund. See "UCI". Unless indicated to the contrary in this document, Fund refers to all investment vehicles described therein.
GDPR	The General Data Protection Regulation (EU) 2016/679
Governing Body	The body with ultimate decision making authority in an AIFM, comprising the supervisory and the managerial functions, or only the managerial function if the two functions are separated. The Governing Body is generally the Board of Directors of an AIFM. The dual system, where the supervisory and the managerial functions are separated, is not described herein. Senior Management (as defined below) may comprise some or all of the members of the Governing Body (and the Governing Body may be comprised of senior managers).
GP	General Partner - the entity managing an SCA, SCS or SCSp.
IFM	The common reference used by CSSF Circular 18/698 for ManCos and AIFMs.
Initiator	The entity which is responsible of the establishment of a Fund and which determines its features and usually draws the ultimate economic benefit from the Fund. In this document, the term Initiator encompasses other terms used in the market to describe the same concept, such as "Sponsor" or "Promoter".

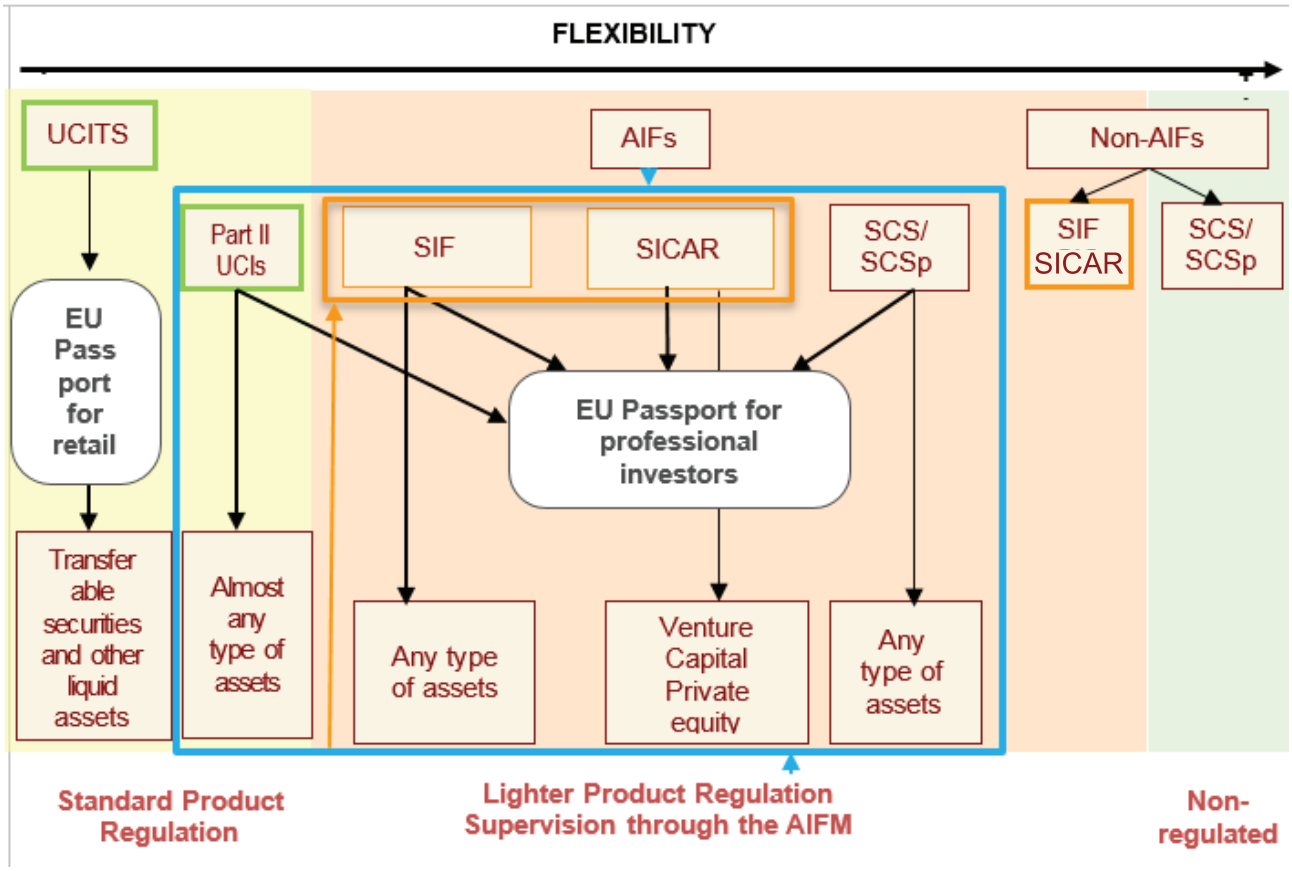
LP	Limited Partnerships akin to Anglo-Saxon limited partnership regimes created pursuant to the terms of a contractual limited partnership agreement ("LPA"). These are most commonly used for private equity and other alternative investment strategies, with a GP, having unlimited responsibility, controlling the structure and other limited partners investing into the structure. See SCS and SCSp.
Level 2 Regulations	Following the publication of the main EU Directives, the EU publishes further details in "Level 2" or "Implementing" Regulations. For example, in relation to AIFMD, there have so far been three sets of Level 2 regulations: Commission Delegated Regulation (EU) No 231/2013 on exemptions, general operating conditions, depositaries, leverage, transparency and supervision Commission Implementing Regulation (EU) No 447/2013 on opt-in AIFMs; Commission Implementing Regulation (EU) No 448/2013 on the procedure for establishing the member state of reference for non-EU fund managers.
Luxembourg Stock Exchange	The Luxembourg Stock Exchange (**LuxSE**) approves prospectuses, which are outside the scope of the Prospectus Directive (e.g. for MTF listings). The official EU regulated market (**Bourse de Luxembourg**) or the alternative **Euro MTF Market** offer different possibilities to issuers. The Euro MTF is more commonly used for Funds, and there are less stringent reporting and disclosure requirements.
ManCo or Management Company	A UCITS Management Company is a company whose main business is collective portfolio management of UCITS. A UCITS Management Company is a company authorised to engage in the management of UCITS and other collective investment schemes in the form of either unit trusts, common contractual funds or investment companies or any combination thereof. In this document, UCITS ManCos and AIFMs are collectively referred to as "IFM", unless indicated to the contrary.
MiFID II	European Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments
Non-AIFs	Investment Entities which are neither UCITS nor AIFs due to their being "out of scope" of the AIFMD. Exclusions include entities such as holding companies, Securitisation Vehicles, family offices, insurance contracts, etc.
Part 2 Funds	Part 2 Funds are those subject to Part II of the 2010 Investment Fund Law.
Prospectus Directive	European Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.

Public Interest Entity or PIE	Public Interest Entity is a concept introduced via various audit directives which provide specific requirements regarding statutory audit of public-interest entities as well as a requirement for a PIE's Board to constitute an audit committee. Broadly, any Fund which has a stock exchange listing on a regulated market will be considered a PIE – regardless of its size (see full definition in the Law of 18 December 2009 on the audit profession (consolidated version 11/2010 – article 1(19)). Non-listed entities may be PIE by virtue of their size, nature of business or number of employees.
RAIF	*Fonds d'investissement alternatif réservé* (Reserved Alternative Investment Fund) is a type of unregulated collective investment vehicle aimed at well-informed investors. A RAIF must be managed by an authorised AIFM.
RCSL or Registrar of Companies	*"Régistre de Commerce et des Sociétés Luxembourg"* is the registrar of companies which keeps the register of commerce and companies.
RESA	*"Recueil électronique des sociétés et associations"* is the electronic official gazette where items such as new laws, Articles, changes to company details and management are published (www.lbr.lu).
SA	*Société Anonyme* (public limited liability company). The *conseil d'administration* is the board of directors of an SA
S.à r.l.	*Société à responsabilité limitée* (private limited liability company). A S.à r.l is managed by one or more managers (*gérants*).
SCA	*Société en commandite par actions* (partnership limited by shares). A SCA is managed by one or more unlimited members or general partners *(associés commandités*).
SCS	*Société en commandite simple* (limited partnership – tax transparent). An entity having a legal personality. An SCS is managed by one or more unlimited members or general partners *(associés commandités*).
SCSp	*Société en Commandite Spéciale* (special limited partnership or SCSp – tax transparent), an entity itself having no legal personality, and similar to an Anglo-Saxon limited partnership. An SCSp is managed by one or more unlimited members or general partners *(associés commandités*).
Securitisation Vehicles or SVs	Luxembourg - Luxembourg securitisation vehicles are companies governed by the 1915 Companies Law which have also submitted to the application of the law of 22 March 2004 on securitisation (the "**Securitisation Law"**).
Securitisation Vehicles (EU) or SVs (EU)	Securitisation Vehicles which qualify as financial vehicle corporations engaged in securitisation transactions must comply with EU reporting obligations as set out in ECB Regulation (EC) Nr 24/2009 BCL Circular 2009/224 of the Luxembourg Central Bank on statistical data collection for securitisation vehicles – in particular self-notifying its existence and reporting certain data on a quarterly basis. Securitisation Vehicles falling within the EU definition are non-AIFs by virtue of also falling within a SV exemption from the AIFMD.

Self-Managed Fund	A Fund with legal personality that has not opted to appoint an external IFM. Internally managed AIFMs are also covered in this definition.
Senior Management	The AIFMD Level 2 Regulations specify the tasks and responsibilities of the '***governing body***' and of the '***senior management***'. '***Senior Management***' means the persons who effectively conduct the business of an AIFM, and, as the case may be, the executive member or members of the governing body.
SICAF	*Société d'investissement à capital fixe* (investment company with fixed capital).
SICAR	"*Société d'investissement en capital à risque*" (investment company in risk capital) is a lightly regulated Luxembourg company that invests in private equity or venture capital.
SICAV	*"Société d'investissement à capital variable"* (investment company with variable capital) is an open-ended collective investment fund.
SIF	"*Fonds d'investissement spécialisé"* (Specialised Investment Fund) is a regulated collective investment vehicle aimed at well-informed investors.
SOPARFI	"*Société de participations financières*" (Financial holding company).
SPVs	Special Purpose Vehicles
Super ManCo	A management company which is authorised under both the 2010 Investment Funds Law and the the 2013 AIFM Law to manage both UCITS and AIF. In this document, UCITS ManCos and AIFMs are collectively referred to as "IFM", unless indicated to the contrary.
UCI	Undertaking for collective investment.
	"Undertakings for Collective Investment in Transferable Securities" are Funds subject to the European Union directive 2009/65/EC (as amended) that aims to allow collective investment schemes to operate freely throughout the EU on the basis of a single authorisation from one member state. Luxembourg UCITS compliant Funds are those subject to Part I of the 2010 Investment Fund Law.
UCITS Directive	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, as amended.
X LSE Principles	The X Principles of Corporate Governance of the Luxembourg Stock Exchange. The latest version of the X Principles is dated December 2017.

LUXEMBOURG INVESTMENT FUND STRUCTURES

4.1. What are the different types of Luxembourg Funds?



Luxembourg has three main types of regulated funds:

1. **UCITS Funds:** the more heavily regulated public mutual funds, authorized for sale to the general public on a passported basis across the European Union,

2. **AIFs:** non-UCITS Funds, which may be offered by their AIFM to professional investors on a passported basis across the European Union.

   AIFs include vehicles such as:

   - **Part 2 Funds** are highly regulated fund vehicles that may be sold to the general public in Luxembourg. Eligible asset classes are wider than for UCITS Funds and investment restrictions more flexible.
   - **SIFs,** a highly flexible vehicle used for almost any asset class, subject to CSSF supervision, with a requirement that no single asset represents more than 30% of the portfolio. SIFs are reserved to well-informed investors in the sense of the 2007 SIF Law.
   - **RAIFs**, a highly flexible vehicle used for almost any asset class, subject to indirect CSSF regulation via their AIFM, with a requirement that investment risks are spread (in practice, generally no single asset should represent more than 30% of the portfolio). RAIFs are reserved

to well-informed investors in the sense of the 2016 RAIF Law.

- **SICARs** are vehicles exclusively created for risk capital investment (such as venture capital and private equity).
- **Partnerships** such as the special limited partnership (SCSp) or the limited partnership (SCS).
- **Other vehicles** which meet the criteria to qualify as AIF under the AIFMD and raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors
- **Non-AIF Funds**: certain Funds and fund-like vehicles may fall outside the scope of both the UCITS and AIF regimes. This may occur, for example, due to being below the AIF thresholds or due to a specific exemption such that for Securitisation Vehicles.
- Most of the items below would apply also to Non-AIF Funds
    1. **Securitisation vehicles** are also used for certain Fund structures.
    2. Vehicles such as SIF which are supervised Funds, may be non-AIFs, if the qualification criteria set out in the AIFMD are not met.

There are many types of companies, partnerships and other entities in Luxembourg.

The main types of legal forms for commercial companies are the SA, S.à r.l., SCA, SCS and the SCSp.

You can refer to ILAs' guide "AIFs and AIFMs - A practical guide for Directors" on ILA website for examples of fund structures.

4.2. Externally managed vs. self managed Funds

With the exception of contractual Funds, such as FCP (which must appoint a ManCo), both UCITS and AIF may either be self-managed or may appoint an external IFM.

Where, for example, a group's current IFM does not have all of the requisite expertise to act as IFM for a particular product, they may opt for a 3rd Party IFM which has the necessary expertise and provides substance in line with the requirements of the UCITS Directive or the AIFMD. This may even occur in the case of contractual Funds where a ManCo and an IFM may end up being involved.

Self-Managed Funds have become rare and currently their number is constantly decreasing - appointment of an external IFM is the most common form.

BOARD COMPOSITION AND ORGANISATION

5.1. Are there specific qualifications required to be a Director of a Fund or an IFM?

There are no specific qualifications for directors of Luxembourg companies.

Certain persons may be excluded e.g. if banned following a previous bankruptcy or if the CSSF has sanctioned him/her by banning him/her for a period of time.

CSSF pre-approval: Prior to appointment, the CSSF must pre-approve proposed directors of regulated IFM/Funds. The CSSF will look at each director's curriculum vitae, his/her approval request and proof of absence of a criminal record and will also require the applicant to fill out a «Declaration of honour» and to provide a full list of current mandates and other professional activities.

Integrity and professional experience

The CSSF will assess each Director's appropriateness for performing the required duties. Relevant laws and regulations state that Directors must:

- be of **sufficiently good repute and have sufficient experience and competences,** and
- must **act with honesty, integrity and independence of mind.**

Whilst there is no legal requirement for a Director to have any particular type of prior experience or education, the Board and the CSSF will assess required skills on a case-by-case basis in terms of the entity involved and in particular **the mix of competencies of that particular Board as a whole.** The CSSF particularly looks to ensure that each Board contains some Directors with knowledge/expertise in the relevant types of assets.

Director induction and on-going Director education have become commonplace, and in the case of the AIFMD is a requirement. ILA recommends that all Directors undertake continuing education each year - and this is also an expectation of the CSSF.

Sufficient time for each mandate

Internationaly, there has been increasing scrutiny of the number of mandates each individual Director holds. For Funds, it has been particularly difficult to set a maximum due to the enormous variances in complexity and time required by different entities, however the principle of dedicating sufficient time to each and every mandate is key:

- **CSSF Circular 18/698** expressly states that each member of the Board of Directors of any Fund or IFM **must dedicate the required time and attention to his tasks.** Therefore, (s)he must limit the number of other professional engagements to the extent as necessary for the proper performance of these tasks. The CSSF has set conditions and principles for exercising multiple mandates. The CSSF also requires existing mandates to be listed as part of a Director's approval process for each new mandate and requests a confirmation of time expected to be devoted to the mandate, and monitors closely any Director's time availability once he/she holds several mandates.
- **The AIFMD** requires each member of the **governing body to commit sufficient time to perform their functions in the AIFM**, and must therefore limit the number of other professional engagements and mandates accordingly.

The **ALFI Code of Conduct** recommends that Board members **devote sufficient time to their role** (Principle II, Rec. 6) and periodically review Board performance.

- CSSF Circular 18/698 sets conditions for exercising multiple mandates and each board member of an IFM shall ensure that the following limits are complied with:

  1. the number of hours dedicated to his professional commitments may not exceed 1920 hours per year, and
  2. the number of mandates in regulated entities and in operational companies may not exceed 20 mandates.

  The Circular allows for mandates grouping in certain circumstances such as Funds having the same initiator, IFMs belonging to the same group, or mandates exercised within special purpose vehicles held by the Fund and within the Fund itself.

  When one of the above thresholds is exceeded, as part of a "comply or explain" exercise, the Director will need to provide the CSSF with additional information on how he can still meet his responsibilities.

- Although circular doesn't explicitly apply to Funds, CSSF has confirmed they apply the same principle to Funds. .

Residence of Directors

With the special exception of intra-group financing companies, there is no general legal requirement for Luxembourg companies to have any Luxembourg domiciled Director.

Luxembourg residence may sometimes be desirable for other reasons (e.g. local representation, expertise, fiscal and regulatory substance). For IFMs, both Conducting Officers normally must work and be based in or near Luxembourg. IFM staff are usually also expected to work from Luxembourg. Exceptions may be made by the CSSF on a case-by-case basis.

IFM Directors vs. Fund Board Directors

The CSSF will look at the control and supervision throughout the entire structure. CSSF Circular 18/698 sets out certain incompatibilities and recommends that the Boards ofa Fund and itsIFM not be predominantly composed of the same persons.

5.2. How many Directors are required?

Pursuant to the 1915 Companies Law, unless a higher number is set out in the Articles, **a minimum of 3 Directors is required** for an SA (including SICAVs), at least one Manager for an S.à r.l. and at least one unlimited member (associé commandité) for an SCA. The CSSF, however, will require at least 3 Managers/Directors.

The total number of Directors on Fund and IFM Boards varies widely, as does the composition of those Boards. For example:

- A larger Fund will **typically have between 5 and 7 Directors.**
- **Fund Boards have traditionally tended to contain a higher number of independent Directors**
- **IFM Boards** traditonally tended to be dominated by internal management of the IFM and the Initiator group, although addition of Independent Directors is increasingly common, and is favoured by the CSSF.
- Both the 2010 Investment Funds Law, the 2013 AIFM Law and local legislation require that the **governing body possess adequate collective knowledge, skills and experience to understand ... [its] activities, in particular the main risks involved in those activities.**

A prime consideration is that the **Board be balanced in terms of experience and expertise.**

The ALFI Code of Conduct states the *"composition of the Board should be balanced and diverse so it can make well-informed decisions. Members of the Board should therefore have appropriate experience, with complementary knowledge and skills, relative to the size, complexity and activities of the fund"* (Principle II, Rec.1)

AIFM Senior Management / Conducting Officers

All IFMs and Self-Managed Funds require a minimum of two Senior Managers who are responsible for day-to day management of the IFM/Fund comprising direction and management, execution and control.

The Senior Managers will themselves be supported by the senior persons of the various administrative and control functions within the IFM. In addition, the often quoted "three lines of defence" – full-time Risk Management / Compliance / Internal Audit functions – will provide additional assurance and support.

ESMA sets out in some detail examples of what *"senior management functions"* within an AIFM would include. Please also refer to ILA's AIFM guide for more details.

The UCITS Directive and CSSF Circular 18/698 impose similar requirements on UCITS ManCo Conducting Officers in terms of monitoring and ensuring compliance with the requirements of the 2010 Investment Funds Law and the Fund's mandate.

5.3. Do we need non-executive or independent Directors?

The question of Director independence has long been at the heart of corporate governance policies as the presence of independent non-executive directors is widely considered as a mean of protecting the interests of shareholders and other stakeholders.

There is no legal requirement to appoint non-executive or independent directors, however an increasing number of Funds are appointing non-executive and/or independent directors as a majority of a board's members.

By ensuring there are Directors on each Board who are free from material *conflicts of interest*, it is intended that it be easier to ensure appropriate scrutiny and challenge of management recommendations and proposals and, when appropriate, for these Directors to make objective decisions which may be in conflict with the interests of management.

The ALFI Code of Conduct recommends consideration be given to the inclusion in the Board of one or more members that are independent (Principle II, Recommendation 2).

One driver behind the appointment of non-executive and/or independent Directors stems from the inherent conflicts of interest which may result from employees of the investment manager or other service providers. A Director **must always act in the best interests of the Company/Fund of which he is a Director.**

As a result, in order to be well placed to actively manage any potential conflicts of interest, the ALFI Code of Conduct recommends:

- *"The Board is expected to act fairly and independently irrespective of any Board member's affiliation" (Principle III, Rec. 2), and*
- *"The Board should at all times put the interests of the investors first" (Principle III, Rec. 1).*

The key independence concept is the presence on Fund Boards of persons who have **"independence of mind"**, and therefore the Board must assess whether a Director has any relationships which may

impair his/her independence of mind Board composition should be reviewed to ensure all Directors are aware of such potential conflicts, and where necessary an appropriate number of non-executive and independent Directors are on the Board in order that such inherent conflicts may be re-balanced.

Who is "non-executive" or "independent"?

The definition of independence differs from Code to Code, for example:

- **Luxembourg Stock Exchange ("LuxSE")**: (listed companies) - the Ten Principles of Corporate Governance of the LuxSE recommends the appointment of non-executive and at least 2 independent directors
    1. *Non-executive:* reference is made to the EU criteria as set out in Appendix D to the X LSE Principles,
    2. *Independent:* Rec. 3.5 sets out prerequisites such as having no business relations with the company, no relation with senior management, and no controlling shareholder which may affect his/her independence of judgement. In addition, reference is made to the EU criteria for independence as set out in Appendix D to the X LSE Principles,
- **ALFI**: Consideration should be given to the inclusion in the Board of one or more members that are, in the opinion of the Board, independent
    1. *Independent*: no definition – Board to evaluate
    2. *Please refer to the Alfi Code of Conduct and related guidance on Board Member independence.*
- **AIMA (Hedge Funds)**: Best practice to have a majority of independent offshore Directors and to avoid appointing Directors who represent the advisers or service providers to the Fund
    1. *Independent*: no definition – refers to stock exchange definitions
- **Irish Code** (published by the Central Bank of Ireland): recommends a majority of the Board be "non-executive" and at least one Director "independent".
    1. *Non-executive:* a Director who is "not directly involved in the day to day discretionary investment management" of the Fund (CIS).
    2. *Independent:* not an employee, partner, significant shareholder or Director of a firm providing services to the Fund (e.g. custodian, administrator, auditor, legal advisor, consultant etc.); not providing services personally to the Fund/ManCo and receiving professional fees (other than Directorship fees from the Fund or ManCo).
- **Other**: In the book "Investment Fund Governance", author Jan-Jaap Hazenberg uses the term "semi-independent" to refer to non-executives i.e. those not employed by the Initiator, but who have nonetheless an economic link to the Initiator (e.g. former employees, service providers, etc.). Although their loyalty to the Initiator may be stronger than loyalty to Investors, they are not in a hierarchical relationship with management of the Initiator.

Independence of the bodies of the IFM in relation to the depositary:

As required by the CSSF Circular 18/698, every IFM must have solid governance arrangements Its shareholder(s) must take into account the principles of independence when composing the governing body/management body of the IFM.

The principle of independence of the IFM from the depositary prevents a director of the IFM from being employed by the depositary of a UCI which the IFM manages.

5.4. What is the role of the Chairman of the Board?

The 1915 Companies Law states *"The Board of Directors... may elect a chairman from among their members..."* (article 444-3).

The role of a Chairman of the Board is not simply to chair an individual meeting, although this remains an important aspect of the role for delivering successful Board meetings. **The Chairman is responsible for leadership of the Board** and should:

- ensure effective composition and operation of the Board and its committees.
- chair Board and Shareholder meetings. In relation to Board meetings this includes setting the agenda, style and tone of Board discussions, ensuring the Board focuses on key tasks and also ensuring proper information to the Board.
- take responsibility for the Board's composition – including initiating change and planning succession where necessary.
- oversee the processes for induction and development of directors.
- support and advise senior management and CEO in the development of strategy.

There is a growing international trend towards the appointment of a strong chair being a key aspect of good governance practices. Requirements vary however, and continue to evolve. For example in the various Codes of Conduct, references to the Chairman of the Board remain limited:

- **ALFI** – a Board Chair "should demonstrate leadership during as well as outside of meetings. The Chairperson's duties should include setting the Agenda, managing the meeting, steering the discussions and ensuring that effective and fair conclusions are reached" (Principle II, Rec. 2)
- **Irish Code** – a permanent non-executive Chairman must be appointed to the Board of the Fund or ManCo. A deputy chair should be appointed as required.
- **AIMA** – refers to a standing Fund Chairman
- **LuxSE** - The X LSE also set out aspects relating to the role of the Chair.

Note also the 1915 Companies Law states a default position in respect of a casting vote for the Chairman in cases where the Articles fail to address this issue:

Art 444-2 – *"Unless otherwise provided for by the Articles ... the chairman of each corporate body shall have a casting vote in the event of a tie"*

5.5. What is the role of the Board Secretary or any other similar appointee?

The Governance Officer, Board secretary, Company secretary: although not an official legal concept in Luxembourg, a company secretary may be appointed, and is often done so.

A company secretary acts as the main point of contact for the Board, takes minutes of meetings, and ensures the Board is well run and coordinated.

If no official secretary to the Board is nominated, then this role is generally taken by an employee of the Initiator, the domiciliation agent or the central administration agent, with a minute taker appointed ad hoc for each meeting. In practice it is important to have a support person who assists with the administration of the Board and **supports the Chair in his/her duties, including ensuring the quality of the Board minutes, and who is able to understand the meeting sufficiently in order to take quality minutes of the meeting.**

Where outsourced, the role tends to be more functional (limited to agendas, minutes, etc.) and to lack the logistical approach of the dedicated Governance Officer.

5.6. Does the Fund/IFM need a Compliance function to support the Board?

Each IFM/ must have a **permanent compliance function**, which must be organized in accordance with the provisions of CSSF Circular 04/155. The compliance function must be able to operate independently and in compliance with the concept of "separation of roles and responsibilities" in order to identify any risk of non-compliance of the IFM with the requirements imposed by the law and regulations.

An IFM, whose authorisation is limited to collective management, may delegate the compliance function to a third party subject to having successfully make a prior adequately justified derogation request to the CSSF.

Who may act as Compliance Officer? It is a requirement that one of the Senior Managers/Conducting Officers is designated responsible for oversight of the compliance function, and also for related items such as the handling, centralisation and follow-up of complaints. The role of **Compliance Officer** cannot be exercised by a member of the Board of Directors of the IFM.

The CSSF will evaluate derogation requests from Self-Managed Funds given the nature, size and complexity of the Fund. Where such a derogation has been granted, the Fund should receive a compliance report from the Chief Compliance Officer of its Initiator.

5.7. How are complaints handled?

IFM and Self-Managed Funds must appoint a person responsible for **complaints** and also establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints received from investors.

Each complaint and the measures taken for its resolution need to be recorded in a register, and a complaints report must be communicated annually to the CSSF by the Complaints Officer appointed by the Board. Investors should receive information on complaints procedures e.g. via the fund website and/or in the prospectus.

5.8. Does the Fund/IFM need an internal Audit function?

IFM and Self-Managed Funds must have an **internal audit function** which must be organized in accordance with the provisions of IML Circular 98/143.

The internal audit function must be able to operate independently and in compliance with the concept of "separation of roles and responsibilities" in order to identify any risk of non-compliance of the management company with the requirements imposed by the law and regulations.

Who may act as Internal Auditor? In accordance with item 5.4.9 a) of IML Circular 98/143, the internal audit function may be delegated to an external expert specialised in internal audit. Circular 18/698 also permits delegation to an internal auditor of the group to which the IFM belongs.

A Senior Manager/Conducting Officer must be designated as responsible for the oversight of the internal audit function.

The role of internal auditor cannot be exercised by a member of the Board of Directors of the IFM/ Fund. Compliance and internal audit functions cannot be undertaken concurrently by the same physical person. Similarly, where the compliance and internal audit functions have been delegated/ outsourced, the monitoring of these functions cannot be carried out by the same individual. The CSSF will assess derogation requests from Self-Managed Funds in the light of the nature, size and complexity of that Fund.

5.9. Does the Fund/IFM need a Risk Management Function?

IFMs and Self-Managed Funds must establish and maintain a **permanent (or full-time) risk management function.**

The risk management function must be **hierarchically and functionally independent** from the IFM/Fund's daily operations functions.

The CSSF may allow derogations from this requirement where such derogation is appropriate and proportionate in view of the nature, scale and complexity of the IFM/Self-Managed Fund's activities and the type of Funds managed/involved.

Every IFM and Self-Managed Fund must appoint a person who will be responsible for the risk management function and who possesses the necessary qualifications, knowledge and expertise in this area. This person must perform his mandate under the direct responsibility of the conducting officer who is responsible for the oversight of, or directly in charge of, the risk management function.

In addition to this designated **"Risk Officer"**, the permanent risk management function must also **report regularly** to the Board and at least once per year to the Regulator. Risk Manager reports are expected to include not only information on market risk, but also on counterparty, operational, liquidity and other important risks.

Who may act as Risk Officer? The Senior Manager/Conducting Officer responsible for, or directly in charge of, the risk management function may not, at the same time, be the conducting officer responsible for investment management (even if this function is delegated to a third party). The risk management function may not be combined with the internal audit function. By contrast, it is permissible to combine the compliance function with the risk management function. The risk management function cannot be exercised by a member of the Board of Directors of the IFM/Fund.

5.10. Are there Board diversity requirements (e.g. age, sex, ethnicity, education...)?

There are currently no diversity requirements in Luxembourg fund or company laws, however Boards should have **a balanced composition in terms of expertise,** and this can be required by the Regulator. Each Board should also regularly question whether its current mix remains appropriate, based on the complexity and needs of the Fund/IFM in question.

It is increasingly seen as part of good governance and succession planning that a skills matrix be considered, in particular as part fot the periodic Board evaluations. Such matrices should ideally include both hard and soft skills and behavioural traits.

Requirements to consider appropriate Board composition may, however, stem from other sources:

Codes of Conduct

- The **ALFI Code of Conduct** recommends the composition of the Board be balanced and diverse so it can make well-informed decisions (Principle II, Rec. 1).
- the **X Principles of Corporate Governance of the Luxembourg Stock Exchange** recommend, for example, an appropriate representation of both genders and account to be taken of the specific features of the company and its activities, and particularly the various business lines of the company and their geographic diversity.

EU

- There is currently much discussion at EU level regarding Board diversity and more particularly the representation of both sexes. Certain draft texts, including MiFID II, contain requirements in this respect.

5.11. Must one be a shareholder to become a Director?

Unless the Articles state otherwise, there is no legal obligation for a Director to hold shares in the Company/Fund of which he is a Director, and also no prohibition.

Where Directors hold shares in the Fund, it is best corporate governance practice to disclose those holdings annually in the annual report and accounts. Directors who hold shares will also need to ensure compliance with market abuse and insider trading rules.

5.12. How are Directors appointed and removed?

The appointment and removal of IFM/Fund Directors are governed primarily by the provisions of **Luxembourg company law**, with additional requirements from the CSSF such as pre-approval of Director candidates.

Appointment:

- The shareholders in general meeting appoint the Directors
- If allowed by the Articles, if there is a vacancy on the Board between general meetings, a replacement Director may be co-opted by the remaining Directors. The shareholders must approve this appointment at the next general meeting

(in both cases, for all regulated vehicles all appointments are subject to CSSF pre-approval of each Director candidate(s))

Removal:

- Resignation (from the stated date of resignation)
- Non re-election upon expiration of the term of the mandate
- Removal by vote of shareholders in general meeting
- Dissolution of the Fund and appointment of a liquidator
- Death or incapacity

Publication:

- Any changes to the Board must also be notified to the RCSL within one month, who will publish these in the RESA.

5.13. Accepting a mandate – due diligence

ILA guidance

Please refer to the **ILA Guidance Note** "Getting on Board" which contains certain questions to be considered prior to accepting a Director Mandate. Various sample checklists are available on-line.

Due Diligence by the candidate Director

Appointment as a director is not only about companies selecting candidates, it equally applies to candidates selecting their mandates. Whether in-house or external, each Director must carefully demonstrate an independence of thought and mind-set. Each Director must function as a Director of this Board – and not of any other function or employer he may have.

Initial due diligence on the IFM, and on the Fund and its Initiators

Directors are encouraged to conduct due diligence to ensure they are familiar and comfortable with the structures and affiliates with whom they will be associated. The objective of due diligence is to understand the proposed role of the potential director and his/her expected contribution to the

company and the Board, as well as to satisfy the candidate that the "tone at the top" of the company and the corporate governance framework are appropriate and applied as should be expected. It is recommended always to carry out a certain amount of due diligence in a strictly objective manner, irrespective of, for example the apparent prestige attached to the appointment, prior knowledge of the company or personal acquaintance with some of the other Directors or management of the company.

In certain cases the CSSF may encourage independent directors to conduct due diligence such as travelling to meet the relevant Initiators, and ILA recommends that all Directors have met both the key persons at the Initiator as well as the Chairman of the Fund Board.

It is a matter of judgment as to how detailed the due diligence by the candidate needs to be, but the key matters should be given consideration in all circumstances, including the prospectus, past annual reports and most recent semi-annual report.

5.14. How is the directorship formalised?

It is shareholders who appoint Directors – a successful shareholder vote at a shareholder meeting is sufficient to formalise the Directorship (exception – if co-opted by the existing Directors following a resignation). No further formalities are required, although there is an obligation to publish the appointment within one month.

Letters highlighting important terms of a Director appointment are, however, becoming standard, and are useful for clarifying certain issues relating to duties, remuneration, insurance, term of appointment and certain rights after termination of the appointment. See also Section 5.15 below regarding support/comfort from the Initiator group.

Appointment letters are often issued by the Initiator, however as Directors are appointed by the shareholders (and not the Initiator) these may not be legally enforceable unless the Fund also provides a letter.

Often such a letter will also give the right to inspect documents at the registered office after termination of the appointment. This is especially important should a Director leave due to a conflict with other directors or if there is litigation against the Fund and/or Director(s).

Such a letter can be critical to your understanding of your liabilities, rights and duties, as well as setting expectations on both sides. Bear in mind, however these letters are designed to draw attention to legal obligations, and also to comfort directors by providing additional promises to the directors – they are n**ot intended to create new or additional obligations on the director to those set out in the laws**. As a result the letter should be kept short and should be limited in scope (as a Director's responsibilities stem from the laws in place – and should not stem from such a letter). The letter should not start to look like an employment contract – if it is longer than 2 or so pages you should ask why.

Please also refer to the **ILA Guidance Note** "Getting on Board" and **Guidance Note on** appointment letters.

5.15. Support from Initiator or from major shareholder

In reality few Funds have extensive own resources and most rely heavily on the appointed IFM and also on the Initiator group for both management personnel and other support. As a a result, a letter of support from the Initiator or major shareholder (signed by the Initiator or major shareholder) can also be a valuable resource – especially where a Fund has little or no own resources for Directors to call upon.

Potential clauses for a support letter may include some of the following:

- Support / resources to be made available
  e.g. undertaking to make available to means and resources required to comply with legal and regulatory obligations and properly fulfil roles as a Director / Senior Manager /Conducting Officer
- Insurance – undertaking to organise and pay the D&O insurance (if group policy) and keep it renewed and appropriate, failing which Initiator undertakes to indemnify Directors directly
- Indemnity from the Initiator

THE ROLE OF AN IFM OR FUND DIRECTOR

6.1. What are the responsibilities of the Board?

The 1915 Companies Law deals with issues related to the responsibility of the Directors in carrying out the mandate granted to them and states that *"Directors shall be liable to the company in accordance with general law for the execution of the mandate given to them and for any misconduct in the management of the company's affairs"* . *English translation of Luxembourg company law by Philippe Hoss (Elvinger Hoss Prussen)*

Although the 1915 Companies Law does not expressly address issues on who should be appointed as a Director, competences, skills required or time to be committed, Directors' duties and responsibilities shall be based on the general rules set out in the Civil Code regulating execution of an agency mandate ("mandat"). To this end, Article 1137 of the Civil Code makes reference to the concept of the "bon père de famille" who should be attentive and take reasonable care in carrying out his/her duties. The concept of reasonable care is to be considered in the light of the Directors' professional qualification and experience.

In general, the Board of Directors retains responsibility for the execution of its mandate, but it may delegate various activities in particular to the Conducting Officers of an IFM. Case law has established that where such delegation is made, the Board of Directors fulfills its responsibilities by issuing clear formal instructions to the Conducting Officers of the IFM, ensuring adequate resources are available and monitoring the delegated activity. In that context it is worth mentioning that where the Board has established or appointed a management committee or a managing executive officer, the liability of these persons are substantially the same as those of the Board.

Directors or members of the management committee or a managing executive officer are ultimately responsible for both their actions and their omissions. Liability could arise from breaches of any type of law or regulation.

Board of a Self-Managed Fund

The Board of a Self-Managed Fund is responsible by law for managing, administering and supervising the Fund

Board of an AIF/UCITS Fund who has appointed an external IFM

Where a Fund Board appoints an IFM:

- the Fund Board remains responsible for overall product strategy, relations with investors, the regulator and the auditors and for ensuring its IFM performs its functions with due care and diligence. The Fund Board remains responsible for the appointment and supervision of the depositary.
- the IFM, acting through its Board and/or Conducting Officers, is responsible for the performance of the IFM's duties either internally or to appoint and perform the oversight of all service providers, apart from the depositary. The IFM will also be and for the day-to-day management and oversight of the Fund's affairs.
- If the IFM is a UCITS ManCo, the IFM's duties comprise the portfolio management, the central administration and the distribution of the Fund. If the IFM is an AIFM that has only been appointed to provide portfolio and risk management to the AIF, the Board of the AIF remains responsible for the appointment and supervision of the central administration agent and the distributor(s).

6.2. What is the role of a Fund Director?

Pursuant to Luxembourg company law, a Board is generally entitled to do all things deemed necessary to achieve the corporate objects except for those actions that have been expressly reserved by the 1915 Companies Law or the Articles for decision by the shareholders *(1915 Companies Law, Art.441-5, al.1).*

Accordingly, although a Fund Board is formally charged by statute with all aspects of the operation of the Fund (i.e. administration and management of the business of the Fund) and collectively represents the Fund towards third parties, in practice, the role of a Fund Board changes depending on whether the Fund is self-managed or has appointed an IFM:

Board of a Self-Managed Fund

The Board of a Self-Managed Fund is responsible by law for managing, administering and supervising the Fund.

Even in Self-Managed Funds, many functions (such as the management and administration functions) will often have been delegated and the Fund Board must ensure adequate supervision of the delegates.

Board of an AIF/UCITS Fund which has appointed an external IFM

Where a Fund appoints an IFM, the Fund Board's role transforms into a supervisory role with the **Fund Board overseeing** the performance by the IFM of the duties for which the IFM has been appointed (rather than managing it directly). Yet the Fund Board remains responsible for overall product strategy, relations with investors, the regulator and the auditors and for ensuring the IFM performs the functions for which it has been appointed with due care and diligence.

The Fund remains responsible at all times for the appointment and supervision of the depositary.

The **ALFI Code sets out major oversight functions,** including

- Approving the Fund's strategy and ensuring that the Fund consistently follows its stated investment objectives;
- Reviewing Fund expenses and their impact on Fund returns and ensuring that the expenses charged to the fund are reasonable, fair and appropriate;
- Effective oversight of delegated functions including the appointment of delegated parties and review of their activities and performance;

Examples of items the Fund Board would be involved in stem from a combination of the 1915 Companies Law and also the specific Funds Laws applicable to that entity, including:

- Appointing and supervising an IFM depending on the regulatory status of the Fund
- Appointing any service providers who are not appointed by the IFM (such as the Depositary, the Paying Agent, Fund legal counsel, Fund auditor)
- Signing agreements binding the Fund
- Approving material transactions (particularly in the case of Private Equity and Real Estate Funds)
- Deciding on and approving important matters of policy, for example:
  - accounting and valuation principles to be applied by the Fund
  - changes to the Prospectus/Offering Document
  - sub-fund launches, liquidations, mergers
  - entering new markets
  - targeting new categories of investor

- Reviewing Fund performance and expenses
- Reviewing reports received from the IFM and from other delegated functions
- Supervising that stated investment policies are adhered to
- Ensuring compliance of the Fund with the provisions of the GDPR
- Ensuring compliance with AML/CFT rules
- Holding regular Board meetings - plus ad hoc Board meetings where required
- Approving the annual report of the Fund and submitting it to the shareholders
- Convening the general meeting of shareholders
- Proposing and declaring dividends
- Signing Audit Letters e.g. Engagement Letter and Representation Letter

The implementation of the obligations under the GDPR regarding the processing of Personal Data is complex due to the fact that Funds often delegate duties to various service providers. The Directors must ensure that the Fund puts in place the proper contractual agreements with its key service providers (e.g. the IFM and/or register and transfer agent) regarding the processing of Personal Data of investors in the Fund. The Directors should ensure that they receive reporting from such service providers on the duties performed and when there has been a Personal Data breach, the Board should have a process in place that allows for timely reporting to the competent data protection authorities. Additional information on the application of the GDPR on Funds can be found in the ALFI Q&A on GDPR.

Directors must **manage the Fund applying the standard of care and diligence of a reasonable person in that position**. The 2010 Investment Fund Law, the 2013 AIFM Law and the CSSF Circular 18/698, for example, set out further requirements such as due care and diligence, as well as the need for appropriate resources and procedures.

Directors should ensure they **regularly receive detailed reporting** from the IFM, agents, advisers and service providers of the Fund to enable proper consideration of all decisions. They should also **request further information** when required.

6.3. What is the role of a Director of an IFM?

The IFM is always a company, and therefore its Board is also generally entitled to do all things deemed necessary to achieve the corporate object of that company except for those actions that have been expressly reserved by the 1915 Companies Law or the Articles for decision by the shareholders (1915 Companies Law, Art.441-5, al.1).

In addition to the rights and obligations of the 1915 Companies Law, the Board of an IFM will also have obligations to carry out those items as required by its CSSF authorisation, the CSSF Circular 18/698 and other relevant laws and regulations applicable to it.

Accordingly, **the IFM Board is charged with all aspects of the business of the IFM**, but the IFM Board is in principle not in charge of the "management" of the IFM, as this role is widely performed by the Senior Management / Conducting Officers of the IFM. The IFM Board collectively represents the IFM towards third parties. Their governing bodies (Board and Senior Managers/Conducting Officers) have on-going responsibilities for monitoring compliance of the IFM with the relevant regulatory obligations. **The Board of an IFM is usually more concerned with overseeing the activities of the IFM platform and its activities, thus ensuring compliance with the IFM's regulatory obligations.**

Examples of items the Board on an IFM would be involved in include:

- Setting the business strategy of the IFM, including ensuring sufficient support and resources for the implementation of the strategy
- Deciding on important matters of policy and internal control mechanisms to be applied by the IFM, such as adopting and approving its internal policies and procedures
- Appointing and overseeing its own internal functions and its service providers
- Ensuring compliance with the provisions of the GDPR
- Ensuring compliance with AML/CFT rules
- Holding regular meetings plus ad hoc meetings where required
- Approving the Annual Report of the IFM
- Convening the general meeting of shareholders of the IFM
- Proposing and declaring dividends of the IFM to its shareholders
- Signing Audit Letters e.g. Engagement Letter and Representation Letter of the IFM
- Signing other material agreements of the IFM
- Approving material transactions of the IFM
- Appointing, overseeing delegates and service providers of the Funds it manages, such as:
  - Portfolio Management
  - Risk Management
  - Central Administrator / Transfer Agent
  - Distribution
  - Valuation
  - Depositary
- If the Fund/AIF does not have a corporate form:
  - Risk spreading rules of the Fund/AIF
  - Determination of asset allocation criteria for the investments made by the Fund/AIF

The role and responsibilities of the IFM under the GDPR should be understood by the IFM Board and the Board maust ensure that the IFM has proper agreements in place with its service providers and delegates and that adequate monitoring and reporting procedures exist. Additional information on the application of the GDPR on IFMs can be found in the ALFI Q&A on GDPR.

Directors must **direct the IFM applying the standard of care and diligence of a reasonable person in that position.**

IFM Directors should ensure they **regularly receive detailed reporting** from not only agents, advisers and service providers, but also internally from employees and in particular the Senior Managers / Conducting Officers. They should also **request further information** when required.

See also Section 5 below regarding the role of the IFM Board under CSSF Circular 18/698.

6.4. What is the role of the Board of an IFM in relation to a Fund?

IFMs are regulated companies whose regular business is collective portfolio management and risk management of one or more UCITS funds or AIF. They may perform additional duties.

A **"SuperManCo"** refers to an IFM which is authorized to manage both UCITS Funds and AIF and is therefore licensed both as a UCITS ManCo and as an AIFM.

Both the Board of Directors of the IFM and the Senior Managers /Conducting Officers of the IFM

play a key role in meeting these regulatory governance requirements. Day to day management and administration duties whether of the IFM or of the Funds it manages are not usually carried out by the Directors of the IFM, but rather by the Senior Managers / Conducting Officers and other employees. These governing bodies have on-going responsibilities for monitoring compliance of the IFM/Fund with the relevant regulatory obligations.

The exact governance arrangements will vary from entity to entity, and there are also slight differences between the UCITS Directive and the AIFMD, however the role of a UCITS ManCo and an AIFM are broadly similar – hence the possibility also to create so-called "Super ManCos" which act as both a UCITS ManCo and an AIFM and are subject to both the Chapter 15 of the 2010 Investment Fund Law and to article 5 of the 2013 AIFM Law.

6.5. What are the specific roles of the Board of an IFM or a Self-Managed Fund under the Circular 18/698?

CSSF Circular 18/698, among others, strengthens various aspects of the internal organisation and control mechanisms of each IFM. In particular, Circular 18/698 contains several provisions setting out the specific roles and functions the Board of an IFM should assume. The list below should be considered as the minimum level of involvement of a Board, knowing that depending on the business of the IFM and the nature of the investments performed by the Funds/AIFs it manages, the Board of the IFM may assume additional roles (references below refer to the relevant sections of the CSSF Circular 18/698):

- (93): the Board has the ultimate responsibility to ensure that the Conducting Officers perform the following function:
  1. put in place the strategies and general principles on central administration and internal governance of the IFM foreseen by the Circular 18/698 by adopting precise written policies and procedures;
  2. put in place adequate internal controls mechanisms (permanent risk management function, compliance and internal audit);
  3. ensure that the IFM has the technical infrastructure and human resources necessary for its activities.

  To ensure compliance with this obligation, the Board should receive regular reports from the Conducting Officers on the items and updates on any material changes in the IFM's set-up.
- (102) the Board shall receive regular, complete and written reports from the Conducting Officers on the activities of the IFM and the Funds/AIFs it manages.
- (160) the Board determines, based on a proposal made by the Conducting Officers, the key functions of the IFM to be maintained in the context of the IFM's business continuity plan.
- (164) the Board appoints and revokes the persons responsible for internal control functions of the IFM (permanent risk management, compliance and internal audit) and ensures that the CSSF is adequately informed.
- (165) the permanent risk management, compliance and internal audit functions are ultimately responsible to the Board and must be in a position to contact the members of the Board directly if they deem necessary.
- (167) the Board may ask for additional information from the permanent risk management, compliance and internal audit functions.
- (191+192+211) the Board receives regular and ad hoc written reports by the person responsible for the risk management function of the IFM.
- (229+232) the Board ultimately approves the compliance charter of the IFM and any updates thereof.

- (256+257) the Board receives annual and ad hoc written reports by the person responsible for the compliance function of the IFM and approves the annual compliance report.
- (264+267) the Board ultimately approves the internal audit charter of the IFM and any updates thereof.
- (288) the Board makes recommendations to and ultimately approves the internal audit plan.
- (298) the Board receives the annual report of the person responsible for the internal audit function and approves such report.
- (317) the Board receives the annual report of the MLRO and approves such report.
- (348) the Board should receive regular reports on the permanent risk management, compliance and internal audit functions.

Best practice is to put all of these into one «Procedures Manual». Certain of these functions may (or even must) be delegated to specialist providers on condition of appropriate safeguards (as set out in more detail in Section 8 delegations and due diligence).

6.6. What sort of internal controls, policies and procedures should a Board have?

IFMs and Self-Managed Funds

Internal board policies and guidelines are compulsory for IFMs and Self-Managed Funds

Regulation CSSF 10-4 (for ManCos) and Regulation 231/2013 (for AIFMs), as well as CSSF Circular 18/698 (for all IFMs) detail minimum policies and guidelines as well as other prerequisites in terms of organisational requirements, conflicts of interest, conduct of business, risk management and agreements with depositaries that may vary in detail depending on the regulatory status of the entity. In general, IFMs must have policies and procedures in place, covering areas including (but not limited to):

- remuneration,
- conflicts of interest,
- compliance,
- internal audit,
- risk management (including operational risk),
- due diligence and ongoing monitoring,
- best execution,
- personal dealing,
- business continuity.

Also bear in mind that it is the responsibility of the Board of a UCITS to provide adequate answers to the Management Letter set out by the Fund's auditors. See also *CSSF Circular 02/81* on the "Long-form Report" (N.B. this only applies to UCITS).

More detail on the functioning of the Board is given in the next Section below.

Other Fund or fund-like vehicles

A Procedures Manual should be considered as best practice for all Funds, and ideally, the Board should be provided at least annually with a review covering material controls, including financial, operational and compliance controls as well as risk management.

General Considerations applicable to Boards

Even where they may not required by regulation, it is still recommended to implement internal policies and guidelines as only very minimum guidelines are set out in the Articles and/or the 1915 Companies Law (e.g. quorum, participating by telephone etc.). This is especially important for those legal forms where there is limited regulatory guidance.

The Board should maintain **a sound system of internal control and compliance** designed to safeguard investor's interests and the Fund/AIF's assets. **The Board should develop over time its own set of internal functioning procedures and guidelines.**

The Board should ensure the establishment of effective systems and controls for compliance with applicable requirements and standards under relevant laws and regulations. Best practice is to compile all of these into a «**Procedures Manual**». As a matter of practice, Funds often begin by taking and adapting the policies and procedures of the Initiator and/or of the IFM.

It is recommended that **all Funds and IFMs adopt a corporate governance code** such as the «**ALFI Code of Conduct for Investment Funds**».

To improve transparency and demonstrate commitment to high standards of corporate governance, Boards of Funds and IFMs should periodically assess compliance with the principles and recommendations contained in the ALFI Code of Conduct and confirm adherence to the Code in their annual financial statements. Such confirmation helps demonstrate to investors a Board's explicit commitment to good corporate governance.

The ALFI Code of Conduct can be considered as an internal tool for the Board to establish an internal framework of policies, controls and procedures reflecting best industry practices. To that effect, it is recommended that a Board uses an assessment grid to demonstrate compliance. If the Board resolves to disregard one or more principles or recommandations, a written explanation should be given

A particular area of attention – and a recommendation of the ALFI Code – is that Boards should arrive at decisions taking into consideration, where appropriate, any broader impact of such decisions on market integrity and on the wider community (e.g., legal requirements with regard to AML/CFT, FATCA and any lists of prohibitions e.g., investments in cluster munitions etc.)

To complement the legally required policies, guidance may also be sought from other relevant sources, such as professional guidelines in other countries. Good places to start include:

- Local directors' institutes e.g. the Luxembourg Institute of Directors (ILA)
- Fund industry bodies such as The Association of Luxembourg Investment Funds (ALFI) and the European Fund and Asset Management Association (EFAMA)
- Specialist industry bodies, such as the Luxembourg Private Equity Association (LPEA), European Venture Capital Association (EVCA), the European Association for Investors in Non-listed Real Estate Vehicles (INREV) or Alternative Investment Management Association (AIMA)
- Standards boards such as the Accounting Standards Board, Standards Board for Alternative Investment (SBAI) and the UK Financial Reporting Council
- A more detailed list of useful links is given in Sections 7. and 14. below.

6.7. Our Group already has Board policy and corporate governance guidelines for funds outside of Luxembourg. Can the Board simply apply these?

As long as they do not conflict with Luxembourg laws and regulations a Director/Board may make use of other guidelines.

The Board should still develop specific Board guidelines for Luxembourg entities to help avoid inadvertent breaches of Luxembourg laws or regulations, and to ensure that all Luxembourg requirements are being complied with.

Any specific legal or regulatory requirements must be addressed at the level of the Luxembourg entity.

FUNCTIONING OF THE BOARD

7.1 Are there rules on how the Board should function?

The Articles usually set out the basic rules regarding meetings of the Board (convening, voting majorities etc.).

More detailed internal rules regarding the Board's functioning and deliberations are recommended.

7.2 When or how often does a Board meeting need to be held?

The Board should **meet as often as is necessary to properly manage the business of the IFM/Fund** and exercise its powers in order to discharge its responsibilities effectively. As a result, the frequency of Board meetings will differ in accordance with the specific needs of the entity, its current business needs and conditions and the asset class(es) concerned.

- Full Board meetings take place several times a year.
  - Good market practice is for a Fund to hold at least 3 regular meetings in person in Luxembourg per year, plus ad hoc board meetings where required.
  - An IFM Board must meet at least 4 times a year as per Circular 18/698.
- Financial Reports and Accounts (half yearly, yearly) should always be discussed Board level.
- Sub-committees are possible to deliberate on specific ad hoc issues.

Different asset types will drive different business decision-making needs

- **IFM Board – & Self-Managed Funds** – An IFM or Self-Managed Fund will usually have formal minuted meetings of its Senior Managers/Conducting Officers at least monthly, with physical Board Meetings quarterly.
- **Funds with Illiquid assets** - Funds investing in illiquid assets such as Private Equity and Real Estate Funds tend to hold full Board Meetings less frequently, however tend to hold ad hoc Board meetings more frequently, linked to the deal flow of significant transactions.
- **Fund with liquid assets** – Funds investing in liquid assets (where investment decisions are carried out by delegates within the strict confines of a Board-approved investment strategy) tend to meet in person in Luxembourg at least 3 times a year.

7.3 Are there requirements to publish Director attendance at Board meetings?

No such requirement currently exists.

Luxembourg Funds may be subject to such requirements by virtue of relevant stock exchange listing rules or Codes adopted by the Fund. Where required, it is usually included in the annual report or accounts.

7.4 How is a Board meeting called?

This is usually set out in the Articles. The Board should ensure the convening notice always contains **a formal agenda** of all matters the Board will review, discuss and approve with **sufficient supporting documentation** made available in advance.

The ALFI Code of Conduct states that a Board Chair "should demonstrate leadership during as well as outside of meetings. The Chairperson's duties should include setting the Agenda…." (Principle II, Rec. 2)

In principle, setting an appropriate agenda and building an appropriate Board pack will involve significant liaison with key contacts at the central administration and also at the Investment Manager. The Board should be supported by one or more persons in the role of Governance Officer or Company Secretary for these purposes.

Please refer to ILA's Factsheet on Board Agendas and Meetings.

7.5 What information can a Fund Director expect to receive?

The Board should be supplied in a timely manner with information in a form and of a quality appropriate to enable it to discharge its duties. Each Director is entitled to receive copies of all information and documents transmitted to the Board.

Directors should normally review all Fund documents. However, the Board may have delegated certain functions, and for example only request a list of related agreements with one or more sample full agreements attached for review.

Luxembourg has strict confidentiality laws, particularly in the financial sector, but also set out in the 1915 Companies Law. Directors must take care to ensure that no information received is divulged to third parties or used for any other purposes. Care must be taken with professional confidentiality. For example, if there is a copy of the shareholders register to view at a Board meeting, its contents should not be detailed in the Board minutes.

Of particular note, these confidentiality rules also preclude Board materials from being shared with the group or shareholder related to any of the Directors (even if the Director has been nominated by that shareholder or group).

Examples of documents likely to be supplied to a Board, which the Directors should have the opportunity to comment on, include:

Set up of a Fund:	Key reports and updates supplied periodically to a Board:
• Articles • prospectus • summary of communications from the regulator • management company agreement • management agreements • domiciliation agreement • administrative agreement(s) • accounting policies, including valuation policies and procedures • transfer agent agreement • custody agreement • distribution agreement(s) • agreements and arrangements relating to specific sub-funds (where the Fund is party to such agreements/arrangements) • auditor engagement letter • any other material agreement(s) (where the Fund is a party to such agreements) • internal procedures and policies • valuation agreements and procedures	• Risk management report • Investment manager report • Investment restriction breaches report • Compliance report • Investment manager report • Conducting officer report / ManCo/AIFM Report • Investor complaint report • Central administration report • Summary of regulatory correspondence • AML/KYC report • Distribution report • Conflicts of interest • Custody report • Regulatory and legal updates • Tax update • New product approval • External audit findings report • Annual financial statements (and semi-annual, where applicable) • Updates to key documents

Please also refer to the 9th Fund Governance Survey conducted by PwC & ILA in 2018 for additional details on the types of reporting provided to Boards as well as the typical frequency of reporting.

It may be necessary to require access to agreements within individual suppliers and sub-suppliers where legally possible and feasible.

On-going supervision by the Board

- On-going supervision – regular Board meetings
  - The exact details will of course depend on the structure of the fund and who is in charge of it.
- On-going supervision – between Board meetings
  - It is unrealistic to expect all decisions to be made only at quarterly meetings, thus Boards need to consider how decisions will be made between Board meetings.
  - Options include ad hoc telephone meetings, circular resolutions or delegation to sub-committees and/or service providers.

It is important to remember, however, that whilst a Board may delegate certain activities and decisions, it cannot delegate responsibility for those decisions. Decisions taken should be reported to the Board in writing at the next regular meeting so that they can be ratified.

7.6 If a Director wants more information – can he/she demand it?

If a Director does not feel that information provided by the relevant parties (such as management) is enough, he/she should make further enquiries and requests from delegates, service providers and the appropriate internal persons. Such requests shall, however, be made as a Board, rather than from individual directors.

It is generally accepted that the Board, in the execution of its duties, may take independent legal advice at the Fund's expense.

7.7 Can a Director still access information after termination of his/her appointment?

Usually, no.

It is recommended to deal with this in an appointment letter – see Section 5.14 above.

Pay particular attention in such letters to not agreeing to destroy/return all documentation, but only to return original documentation and physical assets.

7.8 Do meetings need to be held in Luxembourg?

Not pursuant to Luxembourg law. Often there are reasons making it desirable to hold the majority of Board meetings in Luxembourg, for example, proximity to service providers and fiscal and regulatory substance. For these reasons the **majority of Board meetings tend to be held in Luxembourg.**

7.9 Can a Director participate by proxy, telephone or videoconference?

Usually the Articles expressly allow these, however you should check the Articles of the Fund in question.

Proxies – the Articles usually also set out that a Director may represent one or more of his/her fellow Directors at a Board meeting. A proxy (or Power of Attorney) for a Board meeting cannot be granted to a non-director. Proxies must also be specific to the Agenda in question.

Telephone Attendance – such meetings tend not to be as effective as physical meetings and are best for dealing with urgent ad hoc items. Additionally, they may give rise to foreign tax domicile issues for the Fund, and therefore should not be used as a substitute for physical meetings in Luxembourg. Conference calls should generally be initiated from the Board meeting in Luxembourg and not from abroad

7.10 Can a Director bring an adviser to meetings?

A Board meeting is a private affair - a Director may only invite a third party (such as service providers or advisers) to attend a Board meeting (i) for information and advisory purposes, and (ii) if all the Directors present at that meeting agree to this. The third party cannot vote and may only comment if invited to do so.

7.11 What is the quorum for meetings and voting?

In the absence of a special rule or a higher number set out in the Articles the usual rules are:

- **Quorum** – at least half of the Directors must be present or represented.
- **Votes** – a decision is passed if a majority of those Directors present or represented vote in favour.
- **Chairman's Casting vote** – unless there is a provision to the contrary in the Articles, where

there are equal votes the Board Chair (if there is one) gets a casting vote.

Circular resolutions – unanimous (all Directors must sign). Circular resolutions cannot systematically replace face-to-face meetings which allow discussions.

7.12 Must there be a Chairman of the meeting?

Usually the permanent Chairman of the Board will also preside at Board meetings (see Section 5.4 regarding the role of the Chairman).

If the Chairman of the Board is absent, the Articles will usually allow another Director to be appointed as Chair of a particular meeting by a majority of directors present or represented.

The ALFI Code of Conduct in Principle II, Rec. 2 states

"The Chairperson's duties should include setting the Agenda, managing the meeting, steering the discussions and ensuring that effective and fair conclusions are reached"

7.13 How should conflicts of interest be tracked and recorded?

Declarations of any conflicts of interest should be added as a standard Agenda item for all Board Meetings to ensure they are considered and declared near the beginning of each meeting.

All IFM/Funds must also **adopt conflicts policies and procedures** and keep a **register of conflicts.** These policies and procedures should be referred to and adhered with.

The 1915 Companies Law states that Directors cannot vote on decisions where they have an *"opposing interest"* to that of the Fund unless these are in the ordinary course of business. Generally, a Director will still be able to vote on decisions taken in the ordinary course of business and under normal conditions. The Articles of the Fund should be checked in relation to the type of decision to be made. In cases where there is a *material opposing interest*, the Director in question normally must:

1. inform the Board,
2. ensure the conflict is mentioned in the minutes,
3. be excluded from voting, and
4. inform the next meeting of shareholders of the nature of the conflict before any other business is voted.

What is a conflict of interest?

The issue is often to determine what is a conflict? Business dictionaries refer generally to a situation where a person may be in conflict between his/her self-interest and professional interest, or where a person's loyalty or responsibility to one party may affect his/her ability to discharge correctly responsibilities towards another party. In reality it is difficult to judge as one person may act on the perceived link of loyalty, whereas another may be able to resist such influence and can maintain their independence of mind-set.

Given that Fund Boards are frequently composed of representatives of the Initiator and of service providers to the Fund, it is thought by some as inappropriate to apply this concept to functional conflicts of interest (i.e. day-to-day matters). Practice is however for Directors being in a conflicting situation to abstain from participating in the relevant discussion and decision, and as a result it may in some circumstances be essential to have Directors who are not connected to the Initiator who are still able to vote.

The same may be true of conflicts between the IFM and the Fund – which is the reason why the CSSF usually requires a majority of the Fund Directors to be different from the IFM Directors.

Reducing situations of conflict of interest

In practice, the easiest way for a Board to be able to deal with such uncertainty is to appoint directors who are independent of the Initiator and of the various service providers. Research suggests simply having independent directors on a Board acts as a deterrent on the Initiator. However, not all persons who technically qualify as independent directors will necessarily also have the character required to stand up to their peers.The question to whom a Director owes his/her duty to may not always be obvious (company? shareholders? Investors? other stakeholders?). Better information for independent Directors, coupled with increased diversity of viewpoints and backgrounds of those directors may help ensure that as a group they are better positioned for challenging inherent conflicts withthe Initiator and the Service Providers.

7.14 Are there limitations on what the Board can decide?

The Board is generally entitled to do all things deemed necessary to achieve the corporate objects, except for those actions that have been expressly reserved by law or the Articles for decision by the shareholders. The Articles may contain restrictions.

7.15 Should the Board keep Minutes?

Yes - **Board meetings should always be evidenced by Minutes**. Minutes are an important record of the decisions taken.

- **significant legal status** – Minutes can and are often used in litigation and disclosed in court, to regulators and to auditors. They serve as evidence of genuine discussion and decision-making, and as prima facie evidence that Directors are doing their job. They are a record of the decisions taken.
- **reviewed & commented on before signing** – After a meeting the Minutes should be circulated for review by all the Directors, commented on, and then for the final Minutes to be signed by such persons as mentioned in the Articles.
- **detail** – It is good practice for each separate item/decision to be dealt with in separate points. It is also good practice to set out a table of action points to be followed up at the beginning of the next meeting (e.g. action, when arisen, due by, who is responsible).
- **corporate secretary** - a Board may appoint a corporate secretary or equivalent to take minutes (see Section 5.5 above)

For further details, please refer to ILA's Factsheet on Board Minutes.

7.16 Must there be performance evaluations of the Board?

There is no legal requirement for performance evaluations of the Board. Board self-evaluations have evolved to become best international corporate governance practice, and both the ALFI Code of Conduct and the 10 Principles of the Luxembourg Stock Exchange include recommendations for regular Board Self-Evaluations.

ALFI Code of Conduct states in Principle II, Rec. 7: *"The Board should conduct a periodic review of its performance and activities".*

At a minimum, the Board should self-evaluate annually its compliance with applicable Codes and other requirements, and in this context Board self-evaluations may be desirable (or even required by the applicable Code).

Please refer to the ILA Board Self-Evaluation Toolkit, which also contains a sample questionnaire.

7.17 What are the signatory powers of the Board and of Directors generally?

The Board of a SA is a collegial body, the general principle being that individual members have no powers to bind the Fund or IFM – the powers lie collectively with the Board as a whole acting at duly convened meetings of the Board.

However the **Articles usually set out the signature and representation powers** of each Director as well as whether such powers are sole or joint.

The Board should pay attention to its own **delegations of powers** and keep track of persons to whom it has delegated representation powers (e.g. Self-Managed Fund to the Conducting Officers and to service providers).

7.18 What reporting or communication obligations exist for Fund Directors?

In addition to the entity-level reporting required, Fund Directors also have individual responsibilities. It is impossible to list all possibilities, however some examples of reporting or communication obligations may include:

- Fund Directors must report to the shareholders at least annually, plus ad hoc reporting following a significant event (e.g. NAV suspension, response to press speculations, significant losses)
- The Fund prospectus often sets out various reporting obligations
- If listed, stock exchange rules and continuing obligations may apply
- Fund Directors and the Fund may be called upon to respond to questions from regulators on behalf of the Fund
- Any queries or complaints from investors must be dealt with promptly. CSSF Circular 11/508 introduced a requirement to designate a person to take responsibility for the handling, centralisation and follow-up of complaints procedures and policies.
- There are various reporting obligations in the 1915 Companies Law regarding items which must be filed with the Registrar of Companies and published in the RESA.
- There are reporting obligations towards the CSSF such as filing with the CSSF annual and semi-annual accounts, audit long-form reports, annual Risk Management Policy updates, annual complaints officer report, etc.-

Directors should also check their Board's guidelines or policies and ideally incorporate any reporting obligations into those guidelines.

7.19 What reporting or communication obligations exist for IFM Directors?

UCITS Reporting requirements

CSSF Circulars 11/512 and 18/698 enumerate certain direct reporting requirements to the CSSF by the named contact persons (Risk Management, Internal Audit, Complaints, etc.) which the Boards should actively manage to ensure they receive regular reports on these matters and are aware in advance of the contents of such reports.

Stock Exchange listings will trigger further reporting requirements.

AIFM reporting requirements

Boards of IFM must comply with extensive reporting requirements in respect of each AIF they manage. Often these requirements must be considered in conjunction with service providers (e.g. depositaries and valuers).

- AIFMD Article 23 provides a detailed list of matters to be disclosed to investors, including but not limited to, a description of the investment strategy and objectives of the AIF.
- The Level 2 Regulations set out further disclosure and reporting requirements, as well as the relevant frequencies.

Initial investor information

The UCITS Directive and AIFMD detail initial disclosures required to be disclosed to investors prior to investment - mostly via the Prospectus.

On-going disclosure requirements

The IFM must periodically disclose additional items – for example details regarding leverage, special arrangements and current risk profiles.

Reporting to Regulators

Both the UCITS Directive and AIFMD require detailed on-going reporting to regulators. The IFM will also have to respond to any additional regulatory requests issued from time to time.

7.20 What are Board committees? If the committee makes a recommendation, does this mean the rest of the Board does not need to consider the matter further?

Board committees are simply sub-sets of the Board – certain tasks may be delegated for efficiency reasons. Their purpose and functioning are usually contained in formal terms of reference defined by Board decision, although these could also be in the Articles.

Except for private equity and real estate investment and valuation committees, standing Board committees are not general market practice for Funds. In some cases they are required by a stock exchange or supervisory authority or by a Group's internal guidelines.

The most common Board committees include:

- Appointment & Remuneration Committee,
- Audit Committee,
- Risk Committee
- Pricing/Valuation Committee
- Investment Committee
- Other technical committees

There may also be ad hoc committees to deal with a specific circumstance, transaction or issue.

Note, however, that even if a Board Committee has made a recommendation to the Board regarding a particular matter, **each Director must properly consider each proposal before voting** on the matter as the ultimate responsibility remains with the Board.

DELEGATION, AND DUE DILIGENCE ON DELEGATES AND SERVICE PROVIDERS

8.1 Can a Fund or IFM Board delegate its functions?

What can an IFM or a Fund delegate?

Article 441-10 of the 1915 Companies Law allows the Board to **delegate day-to-day management** of a Company to one or more directors or managers or to delegate specific tasks. Material business decisions may not be delegated.

Article 441-11 of the 1915 Companies Law allows the Board, insofar as provided by the Articles, to delegate its management powers to a management committee or a managing executive officer (directeur general). This delegation may not extend to the general strategy and policy setting of the company or to any matters that are specifically reserved to the Board by the 1915 Companies Law. As a result, the Board is mainly entrusted with the supervision of the management committee or the managing executive officer.

Specialist tasks may sometimes be delegated to specialist providers (whether intra-group or outsourced), although this is subject to limits and to prior CSSF approval. Delegation should never lead to a situation where the IFM becomes merely a letter box entity without any substance. For AIFMs, in particular, only one of the core functions of risk management and portfolio management may be outsourced.

The ALFI Code of Conduct for Luxembourg Investment Funds makes reference to delegation and due diligence on delegates under:

i) Principle 1 - *The Board should ensure that high standards of corporate governance are applied at all times.*

Recommendation 5: **The Board should provide independent review and oversight, including effective oversight of delegated functions.**

ii) Principle 4 - *The Board should act with due care and diligence in the performance of its duties.*

Recommendation 4: **The Board is responsible for the appointment of delegated parties and should oversee their activities and performance.**

8.2 What responsibility remains with the Fund or IFM Board in the case of delegation?

It is important to note that under the 1915 Companies Law **ultimate responsibility always remains with the Board.**

Even though Boards of Funds /AIFs in practice often delegate certain functions to third party service providers, in general this does not alter the situation regarding a Board's ultimate responsibility. Boards must act as a prudent person in the same circumstances, and this includes performing due diligence on its service providers before their appointment and also on-going monitoring during the relationship, such as through regular review of reports, questions, site visits, etc.

Initial due diligence and supervision by the Fund Boards is required

Prior to appointing a delegate, a Fund Board should undertake a due diligence on the potential delegate by requesting relevant information and confirmation about the regulatory status of the delegate, existence of adequate policies and procedures regarding the projected delegation, controls report (such as ISAE 3402), etc.

Each Fund Board **should exercise ongoing supervision of delegated responsibilities e.g. by requiring regular upward reporting to the Board to controlthat delegated tasks are managed in accordance with applicable law and regulations, in accordance with the relevant contracts, while ensuringthe best interests of the investors.**

Such ongoing supervision will be based on regular reports to be provided by the delegate, physical meetings with decision makers of the delegate (attendance as guests at meetings of the Board), on-site inspections made by the Conducting Officer or Senior Management of the IFM, or if no IFM was appointed, by the Fund Board itself.

Monitoring of the Initial due diligence and supervision by the IFM Boards

Initial due diligence and ongoing monitoring are required pursuant to various legal and regulatory texts.

As a general rule, the practical performance of the initial due diligence and ongoing monitoring of a delegate is generally performed by the Conducting Officers or Senior Management of the IFM in line with the IFM's delegation policy and procedures established in accordance with the provisions of CSSF Circular 18/698.

The IFM Board has a more indirect role in the supervision of the IFM's delegates, as it should supervise the activities of the Conducting Officers by receiving regular reports on the performance of due diligence reviews and ongoing monitoring, as well as the outcome of any such monitoring performed on a delegate.

8.3 How does one delegate or outsource? Must it be in writing? And what conditions must be met?

Take care when delegating - The general rule is that delegation is permitted provided there are adequate safeguards in place – i.e., appropriate due diligence on, and effective monitoring of, the delegate.

In accordance with CSSF Circular 18/698 – section 6.2.3, every use of an external service provider must be preceded by written due diligence by the IFM on the provider. It is important to note that "external" is used in the wider sense and includes for example related group companies.

This due diligence must be available for inspection at the request of the CSSF.

Two types of delegation should be distinguished:

- **Internal delegation** – Distinct responsibilities may be attributed to different persons within the entity, however restrictions on a delegation do not bind third parties even if they have been published. See also comments under section 8.1. above.

  A Board should ideally have **delegation guidelines**, including an internal rule that all delegations be in writing:

  - Date and duration of the delegation
  - Circumstances of the delegation (e.g. Why? Approved at board meeting dated xx, etc.)

- What has been delegated to whom? It is best practice to set out in detail the **powers, roles & responsibilities of each delegate** – what areas, what limits, must they act as a committee or can each act alone?
- **reporting obligations** – set out what reporting is expected in return, including what reporting is expected from delegates at Board meetings, in between meetings and following any significant event
- any other relevant details regarding the delegation

- **Third party arrangements – outsourcing by the IFM/Fund** – In addition to the above, all outsourcing arrangements must be set out in a **written contract**. Such agreement must clearly set out, among others:

  - roles and responsibilities of the delegates, including their reporting obligations (including obligations to disclose and seek approval of all sub-delegations)
  - access protocols to enable due diligence exercises
  - detailed operating procedures and/or service level agreements

The content and provisions of such delegation agreement depend on the type of activity that is delegated and the regulatory status of the delegating entity.

CSSF Circular 18/698 – section 6.2.3.3, requires that where an IFM partly or wholly delegates one or several functions, it must verify that the delegates have taken suitable measures to comply with the regulatory requirements in the area of organisation, conflicts of interest and rules of conduct set out in EU CSSF Regulation 10-4 for UCITS ManCos and, for AIFMs, in the Delegated Regulation 231/2013.

The IFM thus has an obligation to verify the existence of arrangements for internal governance regarding its delegates and to ensure that these arrangements are being complied with effectively. Generally, an IFM may be authorised to delegate to third parties for the purposes of more efficient conduct of its activities, the power to carry out, on behalf of the IFM, one or more functions. The monitoring of activities delegated to a third party cannot, however, itself be delegated under any circumstances.

Regarding the activities that an IFM may, in principle, delegate (within the limits set out in the 2013 AIFM Law or the 2010 Investment Fund Law, as the case may be, and CSSF Circular 18/698), these include, inter alia, the following:

1. portfolio management
2. risk management
3. complaints handling
4. compliance function
5. internal audit function
6. systems management
7. valuation function (for AIFMs)

CSSF Circular 18/698 provides that the IFM must provide the CSSF with a list of all delegates of the IFM on an annual basis.

Any delegation of such significance that the IFM would be transformed into a **letter-box entity** shall be considered as **contravening the conditions which the IFM is required to meet to obtain and maintain its authorisation.** For AIFMs, the core functions of risk management and asset portfolio management may not both be outsourced.

The fact that an IFM has delegated some functions to third parties does not affect the IFM's liability.

Further considerations:

- The IFM and the delegate must establish, implement and maintain a business continuity plan.
- Access to the data documenting the activities performed by the delegate must be provided to the IFM's Conducting Officers.
- Detailed controls reporting must be provided by the delegate to the IFM, as appropriate, in the areas of subject to delegatation, such as fund accounting (e.g., NAV calculations, valuations etc.), register and transfer agency, portfolio management (investment restrictions, best execution etc.), marketing and distribution (new countries of registration, commission payments etc.) and investment and operational risk management.
- The IFM can take into account when implementing its control arrangements transversal or specific competences existing within the group to which it belongs.
- The delegation agreement must not prevent the senior management of the IFM from giving additional instructions to the delegate from time to time or from withdrawing the delegate's mandate at any time and with immediate effect when the interests of investors so warrant.

CSSF Circular 18/698 contains specific requirements for the delegation of the portfolio management function.

8.4 What is the split of responsibilities between the Fund Board and the IFM Board (in terms of delegation)?

Certain matters are reserved to the Board of the Fund:

Statutory responsibilities

- e.g. oversight of the IFM's activities and responsibilities including oversight of delegated functions by the IFM;
- delegation of authority to carry out day-to-day management etc.

Material contracts

- e.g. appointment of parties contracting directly with the Fund and any amendments to the terms of the agreement with such parties etc.

Product Management

- e.g. approval to distribute sub-funds in a new jurisdiction / country etc.
- approval of new sub-funds

Other Matters

- e.g. annual review of the key operating controls of the IFM.
- approval of the annual and semi-annual (if applicable) reports and accounts.

Certain matters are delegated to the IFM:

All delegated matters must be carried out in accordance with any legal and regulatory obligations of the IFM, as well as requirements, limits or conditions set out in the Articles, Prospectus or Board resolution.

For example:

- operational aspects related to the launch of a sub-fund or share class already approved by the Board of the Fund and the CSSF;
- approval and signature of all documentation required for sub-fund investments to be made in a new market;
- the completion, signature and submission of any necessary tax documentation;
- waiver of investment minimums, redemption charges etc.;
- for AIFMs: perform the steps necessary for marketing an AIF in a host Member State;
- ensuring that distributors' marketing materials are accurate and not misleading and comply with regulations.

8.5 What can an IFM delegate or outsource?

In the funds industry tasks often tend to be delegated to specialist providers (whether in-house or outsourced) to increase operational efficiency, obtain access to specialist service providers at the best cost and in the interest of investors.

UCITS ManCos: CSSF Circular 18/698 and Regulation 10-4

CSSF Circular 18/698 and Regulation 10-4 set out in details certain prerequisites in terms of organisational requirements, conflicts of interest, conduct of business, risk management and agreements with depositaries.

Delegation of tasks by a UCITS ManCo is permitted on condition of appropriate safeguards such as appropriate due diligence on, and effective monitoring of, the delegate.

Delegation by a UCITS ManCo should however not take the extent to make the UCITS ManCo a letter-box entity.

AIFMs: CSSF Circular 18/698 and Delegated Regulation 231/2013

In relation to AIFMs, delegation is permitted along similar lines as for UCITS ManCos, although the AIFMD has introduced additional rules on independence, conflicts of interest (e.g. valuation function of the AIFM to be functionally independent of portfolio management)

Furthermore, the concept of letter-box entity has been defined in great detail in the Delegated Regulation 231/2013 and as a result regulatory practice only allows the AIFM to delegate one of its core functions and requires that it must perform the other function internally.

8.6 Who may a Fund or IFM delegate to?

Delegation may be done inside the organisation or to a third party provider. Entities receiving delegation of specific duties must be properly authorised and organised to perform the duties delegated to them. Many activities that are being delegated also require a proper regulatory license and supervision in the home jurisdiction of the delegate.

Prior to making any delegation, due diligence should be carried out – please refer to Section 8.2. above.

For IFMs and Funds/AIFs subject to CSSF supervision, delegation is subject to a CSSF **pre-approval.**

The CSSF will check that all legal and regulatory requirements are complied with and only once CSSF approval has been granted, the delegation may become effective.

Entities to which delegation of duties is done, include, for example:

- IFM
- central administration agent
- investment manager(s)
- risk manager(s)
- principal distributor
- depositary bank
- independent valuation agent (for AIFMs)

Attention should be paid to the concept of letter-box entity, as well as certain incompatibility rules resulting from the UCITS Directive and the AIFMD.

8.7 What due diligence and supervision of service providers is required by IFMs?

CSSF Circular 18/698 (which is expected in future to apply similarly to both UCITS and AIFs) provides for due diligence requirements in general terms - allowing Boards of IFMs/Fund the possibility to exercise their professional judgement in fulfilling these requirements.

It is important that following **initial due diligence** Boards ensure that the Conducting Officers have put in place procedures to assess third party service providers and the continued appropriateness of their framework of governance and controls. Areas which might be considered include inter alia access to books and records, client confidentiality, business continuity issues, termination procedures etc.

The Boards should also ensure that **periodic due diligence** regarding outsourced tasks is undertaken by the Conducting Officers, such as thorough regular review of reports, questions, site visits etc.. This requirement may sometimes extend beyond the Fund's/IFM's direct service providers to sub- delegates (e.g., sub-investment managers or prime brokers or sub-custodians who may hold assets, sub-distributors, who may sell products etc.). Although there may be issues in gaining access to sub-delegates both initially and on an on-going basis for monitoring, a certain amount of effort should be expended for assurance that indirect service providers can be relied upon.

The IFM should, for example, ensure that sub-delegates are subject to appropriate due diligence and ongoing monitoring by the IFM's direct delegate. The IFM should include proper performance by the delegate of these tasks in its due diligence process on the delegate. Where possible,the agreements with the IFM's delegates should contain provisions allowing the IFM access to sub-delegates.

Sub-delegations are subject to prior CSSF approval.

For AIFMs, the Delegated Regulation 231/2013 provides in particular that the AIFM must give its approval to any sub-delegation.

Supervision by the Board of the IFM/Fund is required

The IFM/Fund who has made the delegation must retain oversight over delegated duties e.g., via regular upward reporting to the Board and ensuring that delegated tasks are managed in accordance with applicable law and regulations and agreements.

Due diligence must remain a value-added process. It must never become a box-ticking exercise. Due diligence is not a static process – it is an on-going process.

The monitoring and control of delegated functions is a task which must be assumed by the IFM/Fund.

DIRECTOR TIME AVAILABILITY AND REMUNERATION

9.1 Required time and attention of each Director

Whilst the various Fund laws set out requirements in terms of good repute and appropriate experience of fund directors, these do not contain any specific time commitment requirements.

Regulated IFMs/UCIs

- **CSSF Circular 18/698** states that each member of the Board of Directors of any IFM or Self-Managed Fund must *"dedicate the required time and attention to his/her duties"* and that he/she must *"limit the number of other professional commitments, to the extent necessary to be able to perform their duties properly"* for the proper performance of these tasks.
- The Circular also states that the director must have *"sufficient expertise and professional experience gained through having already performed similar activities to a high level of responsibility and autonomy"*.
- All Directors of regulated Funds/ IFM must be pre-approved by the CSSF. Such approval involves the Fund/ IFM submitting a file to the CSSF containing amongst others a "Declaration of Honour" and a full list of current Director mandates (see also Section 5.1 above).
- The CSSF may also require an express confirmation that the Fund Director will commit the required time and attention to the mandate.

ALFI Code of Conduct (2nd edition - 2013)

Most Luxembourg investment funds have adopted the ALFI Code of Conduct. Certain Principles and Recommendations in the Code require directors to evaluate their commitment to a mandate. The following Principles, for example, require a degree of reflection on the commitment to a mandate:

I. *The Board should ensure that high standards of corporate governance are applied at all times*

II. *The Board should …. ensure that it is collectively competent to fulfil its responsibilities*

Recommendation 6. **The members of the Board are expected to understand the activities of the fund and devote sufficient time to their role.**

Recommendation 7. **The Board should conduct a periodic review of its performance and activities.**

IV. *The Board should act with due care and diligence in the performance of its duties*

Recommendation 1. **Board members should regularly attend and participate actively at Board Meetings.**

X. *The Board should ensure the remuneration of Board members is reasonable and fair and adequately disclosed.*

Recommendation 2. **The remuneration of Board members should reflect the responsibilities of the Board, the experience of the Board as a whole and be fair and appropriate given the size, complexity and investment objectives of the fund.**

LuxSE – X Principles

The X Principles of the Luxembourg Stock Exchange contain some hard limits on numbers of mandates as well as the following general provision - but rarely apply to Funds (who tend to adopt the ALFI Code).

Recommendation 5.9. *"Every Director shall undertake to dedicate the time and attention required to his duties, and to limit the number of his other professional commitments (especially offices held at other companies) to the extent required for him to be able to fulfil his duties properly. The number of offices held shall be a function of the nature, size, and complexity of the company's business."*

CRD IV & MIFID II

Article (91) (3) of CRD IV (which is applicable to financial institutions such as banks), states that *"the number of directorships which may be held by a member of the management body at the same time shall take into account individual circumstances and the nature, scale and complexity of the institution's activity"*, and goes on to set certain caps.

Article 9 of the MIFID II (which will be applicable to investment firms) contains similar provisions. .

Please also refer to the **ILA Guidance Note** "Accepting Director Mandates" which advocates a c**ommon sense self-assessment approach** to evaluating how many mandates are appropriate for any particular Director. In addition to the complexity and expected time commitment surrounding an individual mandate, resources and support available to a Director, as well as an individual Director's ambitions regarding work vs. other life projects are all items suggested to be taken into account, as should the additional liability exposure of acting as a Director.

9.2 Who decides on the level of Director Fees?

There is a wide range in remuneration levels, depending on the type of mandate. In practice often the Initiator recommends the level of remuneration, and the shareholders vote to approve it at the next general meeting. Directors should also be entitled to reclaim reasonable expenses.

- The ALFI Code of Conduct requires **remuneration of Board members to be reasonable and fair as well as adequately disclosed** (Principle X), and further recommends
    - where appropriate a remuneration policy be put in place and be adequately disclosed (Rec. 1),
    - that the Board remuneration reflect the responsibilities of the Board, its experience as a whole, and be fair and proportionate given the size, complexity and investment objectives of the fund (Rec. 2)
    - Director remuneration be published at in the annual accounts either individually or collectively (Principle X, Rec. 3.)

There has been increased scrutiny on time commitment required from Directors both by the regulators and investor groups – as well as an evolving viewpoint on what the appropriate time commitment may be. Additionaly there had been a steady increase in duties and liabilities whilst at the same time Directors should limit their numbers of mandates. As a result, we see a trend of Director fees increasing. Director pay should also be in line with any adopted remuneration policies.

9.3 Must there be remuneration policies?

Remuneration of Directors to be reasonable, fair, and adequately disclosed

As noted above, Principle X of the ALFI Code of Conduct requires remuneration of Board members to be reasonable and fair as well as adequately disclosed.

Remuneration Policies are often required for the IFM and their delegates, but less often for the AIF.

CSSF Circular 18/698

In order to promote the sound and prudent management of risks, each IFM must put in place a remuneration policy in accordance with articles 111bis and 111ter of the 2010 Investment Fund Law and Article 12 of the 2013 AIFM Law.

CSSF Circular 10/437 regarding remuneration in the financial sector requires remuneration policies compatible with good governance and which do not lead to excessive risk. This Circular aims to implement EU recommendations from April 2009. All IFMs must have a remuneration policy in place, however the Circular does not apply to most Fund Boards as it only applies if there is a variable remuneration package.

AIFMD

Each AIFM must have remuneration policies and practices in accordance with a detailed list of principles set out in Annex II to the AIFMD, and applicable to certain prescribed categories of staff. These principles must:

- promote sound and effective risk management; and
- do not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage.

AIFMD remuneration provisions apply to all AIFM that fall within its scope. Entities to whom portfolio management or risk management have been delegated must apply similar policies. ESMA's "Guidelines on Sound Remuneration Polices under the AIFMD" provides further guidance. The policies and procedures must be reviewed at least annually, and each AIFM must produce an annual report for each EU AIF it manages which must be provided to regulators, and also to investors on request.

9.4 Will Director remuneration be published?

There are no general legal or regulatory requirements to list or publish remuneration amounts.

However, this may be required for other reasons:

- the ALFI Code of Conduct recommends Director remuneration be published at in the annual accounts either individually or collectively (Principle X, Rec. 3);
- listing rules often require disclosure of Board compensation;
- Variable remuneration must be disclosed to the CSSF as a result of CSSF Circular 10/437, as discussed below;
- the AIFMD requires more transparency and disclosure of management and other salaries;
- certain corporate governance statements in the financial statements in certain countries require that data be published regarding the number of Board Meetings held during the year, and the attendance record of the Directors at those meetings.

Also, given that shareholders are asked to vote on Director pay it should be available to shareholders for evaluating that vote.

9.5 Who pays the Fund Director fees

Practice varies regarding who pays the fees of the various Fund directors.

Fees are normally paid by the Fund. They may, however, be paid by the Initiator of the Fund. Payment by the Initiator can, however, give rise to certain conflict of interest issues.

9.6 What taxes are payable in Luxembourg on Director's fees?

If paid by the Fund, Director's fees (known as tantièmes) will be subject to a **special withholding tax of 20%, which must be paid to the tax office within 8 days of the fee being paid.** Directors must ensure the company files and pays of these withholdings. Depending on the Director's personal circumstances it may be possible to set this off against other Luxembourg or foreign income. In any event, a tax adviser should be consulted.

In principle, Luxembourg Director fees are also subject to VAT, albeit with exemptions for those Funds where the management services exemptions apply. ALFI and ILA have published detailed guidance on this subject.

If paid by the Initiator, the Director's fees may be assimilated to consulting fees and be subject to VAT. If invoiced via a private company, they may also be subject to corporate income tax. Consult a tax adviser.

Director fees are usually not tax deductible by the entity paying them.

LIABILITY

10.1 What is the practical exposure stemming from a Director's management duties and responsibilities?

Directors are ultimately responsible both for their actions and their omissions. Liability could arise from breaches of any type of law or regulation – e.g. company law, tax law, AML/KYC law, accounting rules, CSSF circulars, insolvency regulations, employment law, civil responsibility, criminal law, environmental regulations, health and safety, planning regulations etc.

Until recently, few directors had been brought to court in Luxembourg as most cases have settled following negotiations. As a result there is little case law in this area, and it is important to consult a lawyer to receive tailored legal advice. Early and proactive consultation with the CSSF, auditors and other advisers is also advisable.

In the past, focus has been more on mismanagement issues. Regulatory fines have become common for late and incomplete reporting. There is currently also a heavy focus on outsourcing/delegation and AML/KYC.

CSSF fines and bans –

- If found liable for mismanagement of an IFM/Fund, a Director may also be barred from acting as a Director in the future. The CSSF may request him/her to resign and may refuse to permit him/her to be on other Boards in the future. In principle, Directors are not personally liable for the obligations of the Fund.
- The CSSF also has the power to ban or remove a Director if unsatisfied for other reasons, for example after a CSSF welcome visit or inspection.
- The CSSF publishes names of Directors and professionals of the Financial Sector who infringe certain rules – such as late accounts filings under the Transparency Directive.

Other jurisdictions – There could also be implications in other jurisdictions, e.g. if the Fund is registered for sale in Germany and has not filed tax declarations on behalf of its shareholders. Various specific offences, including those pursuant to Luxembourg civil and company law, are set out in Section 10.2 below.

10.2 As a director, what types of liability are there?

Principles applicable to the liability of Directors generally do not distinguish whether the Director sits on the Board of a Fund/AIF or of an IFM. Therefore, unless indicated to the contrary, the term "entity" refers to all corporate vehicles notwithstanding their legal or regulatoy status.

There are three main types of liability:

1. Civil liability
2. Criminal liability
3. Regulatory liability

1) Civil liability

The general duties and responsibilities of Directors are governed by the Luxembourg Civil Code and the 1915 Companies Law. Directors face two main types of civil liability – **contractual liability towards the Fund and liability in tort towards the Fund and third parties**. Many, but not all, offences are judged in relation to reasonableness.

Generally, individual shareholders generally cannot bring suits against the Fund (unless, for example, there is a specific action affecting only a given shareholder). It is usually the shareholders as a group acting in general meeting who have the right to bring such actions.

In order to establish a civil liability in tort, the three following elements will be assessed:

1. Error
2. Damage
3. Causal relationship between the error and the damage

Some of the main liabilities include:

- **Individual liability to the Fund for mismanagement** (art.441-9, al.1 of the 1915 Companies Law). The liability can result from an action or an inaction (omission) by the Director.

  This action can only be brought against the Director by the shareholders of the entity, following a decision at a shareholders' meeting.

  To assess the liability, the judge will assess how another normally prudent and diligent Director in the same position would have acted. Any Director found liable would have to indemnify the Fund for foreseeable damages (except in cases of fraud). **Appropriate risk management should be set up to ensure regular review of risks.**

  Examples could include:

  - Negligence in due diligence on delegates;
  - Breach of investment policy/restrictions;
  - Insufficient or inexisting procedures;
  - inaccuracies in the fund prospectus (wrong, missing data or not updated);
  - errors in the accounts or incorrect valuations.

- **Joint liability to the Fund or third parties for breaches of the 1915 Companies Law or the Articles.** (art.441-9, al.2 of the 1915 Companies Law). Liability is only incurred as a result of wrongdoing, whether through action or inaction (omission).

  This action can be brought by an individual shareholder, the entity acting through its other Directors or a third party. In order to act, it is important that the claimant has suffered an individual damage.

  The Directors have a joint and several liability. Their liability is of contractual nature when the action is brought against them by the entity and is limited to foreseeable damages (except in cases of fraud). When the action is brought by a third party or a shareholder, it is of non-contractual (tortious) nature (and subject to the provisions of article 1382 of the Luxembourg Civil Code) and it covers also unforeseeable damages.

Examples could include:

- acting in breach of the entity's corporate object;
- Failure to convene an annual meeting of shareholders;
- Failure to submit the annual accounts within the legal timeframe.

Article 1400-6 of he 1915 Companies Law provides that all actions against the directors prescribe after five years as from the time of such action, or if they were fraudulently concealed, from the discovery thereof.

Tortious liability (individual liability of that director) – based on article 1382 and 1383 of the Luxembourg Civil Code -this principle of "responsabilité aquilienne" applies generally if a person commits a fault (whether by act or omission) that causes a loss to the entity or a third party who has dealt with the Fund. The party bringing the action must prove the wrongdoing of the Director(s) has caused them specific and personal damage.

2) Criminal liability

Certain breaches of the 1915 Companies Law may also incur criminal liability for Directors (Art. 1500-1 to 1500-12 of the 1915 Companies Law). Most often these are limited to fraudulent acts on the part of the Directors, but not always.

Examples include:

- not filing accounts within the statutory deadline
- not convening a shareholders meeting after requisition by 10% of shareholders
- for fraudulent reasons, not publishing the accounts or making misrepresentations in accounts
- issuing shares without receiving payment for them
- improper use of corporate assets
- Criminal penalties under the 2010 Investment Fund Law (selection):
- use of the designation UCITS or UCI without prior CSSF authorisation
- not determining issue and redemption prices at the specified intervals
- violating sales documentation regarding valuation principles and time limits for payments of issued/redeemed shares
- distributing shares without prior CSSF approval
- failing to call an EGM when assets fall below legal minimum
- Criminal penalties under the 2013 AIFM Law
- Carrying out or attempting to carry out the activity of AIFM without a CSSF authorisation
- Use a designation or description giving the impression that they relate to the activities subject to the 2013 AIFM Law if the CSSF has not granted an authorisation
- Violation of the AML/CFT rules in the 2004 AML Law
- Insolvency liabilities
- Tax/VAT laws
- etc....

3) Regulatory liability

Both the 2013 AIFM Law and the 2010 Investment Fund Law have introduced an extensive set of administrative sanctions that can be pronounced by the CSSF both against the Fund/AIF or IFM and the Directors of the Fund/AIF or of the IFM.

The CSSF can pronounce the following types of sanctions based on the gravity of the offense:

- a warning,
- a reprimand,
- a fine of between EUR 250 and EUR 250,000,
- and in several cases one or several of the following measures:

  (a) a temporary or definitive prohibition on carrying out operations or activities, as well as any other restrictions on the activity of the person or entity,

  (b) a temporary or definitive prohibition on acting as directors, managers or conducting persons, whether de jure or de facto, of persons or entities subject to the supervision of the CSSF.

It should be noted that the CSSF may also decide to publish the imposition of any such sanctions and that a Director applying for a function within any CSSF regulated entity will have to indicate such sanction in the CSSF Declaration of Honour.

Sanctionable acts constitute for example:

- Failure to comply with the obligations to have procedures in place;
- Failure to comply with the obligation to appoint a depositary;
- Failure to comply with the duty to publish accounts and balance sheets;
- Hampering with CSSF supervision, inspection and enquiry powers;
- Failure to comly with delegation rules.

Because of divergent legal entities and structures of Funds, as well as those using IFM, there may be differing liabilities applicable. Directors should always seek independent legal advice.

10.3 Practical steps to limit liability

Absent the case of fraud, the assessment of a Director's liability is mostly subjective and depends on the opinion taken by a judge. The decisions taken by the Director will be assessed in the context in which the decision was taken and not with hindsight.

It is therefore advisable for a Board to take appropriate steps to document the reasons and justifications that have led to important decisions taken by the Board so that Directors can demonstrate that they have acted in good faith at the time a resolution was taken and that adverse consequences of their decision were not foreseeable.

Typical elements to demonstrate such good governance will incude:

- Meeting at appropriate intervals.
- Document all important decisions (ensure there is evidence that issues have been properly considered).
- Consider also whether the discussions and the basis for the decision require documenting or not - although Minutes are usually records of decisions taken there can be situations where it will be important to also summarize the discussion or a dissenting vote.
- Carefully review and comment on all Minutes.

- Think about how each document may look when read out later in a court.
- Review prospectuses – ensure nothing is misleading. Consider providing more information in prospectuses (e.g. gates, swing pricing, side pockets, etc...).
- Ensure there are enough human resources to ensure on-going assessment of portfolio (e.g. liquidity and eligibility of assets).
- Understand and document what the service providers think their roles and responsibilities are, ensure there are no gaps and know who is doing what and who is responsible for what. You may wish to consider appointing a company secretary to assist with this task.
- In case of doubt, do not hesitate to ask further questions and explanations until you have the relevant comfort.

In relation to the individual liability for mismanagement, it should be noted that the responsibility of the Directors against the entity disappears for acts that have been ratified by the shareholders at the annual general meeting. However, all other actions against the Board remain open.

10.4 What if a Director voted against a decision – could he still be held responsible?

In principle, yes. Ultimately this is for the court to decide.

Where, for example, there has been a breach of the 1915 Companies Law or of the Articles, a Director can avoid liability only if there is no fault on their part and they denounce the actions to the first meeting of shareholders that follows their becoming aware of the infraction(s).

Directors should ensure the Minutes of the meeting expressly set out their objections to important matters (or if sufficiently serious, Directors should even consider resigning or «whistle blowing» to a regulator). Independent legal advice should be obtained.

10.5 Does the designated person of a corporate entity that is Director have a different liability?

A representative of a corporate entity has the same rights, duties and liabilities as if appointed a Director directly in his/her own name. The entity represented will, however, be jointly liable with the Director. Although extremely rare in Funds, note that corporate entities can also be held criminally liable.

Representing a corporate entity may lead to certain conflicts of interest. See also Section 5.3 above.

INDEMNITIES AND INSURANCE

11.1 In some countries, Directors get a "hold harmless" agreement, can Directors of a Luxembourg Fund/AIF or IFM ask for the same?

Indemnity will usually be mentioned in the Fund/AIF's and/or the IFM's constitutive documents and also in any Prospectus which may be issued, and Directors should check this is the case. Where a letter setting out terms of appointment is in place, the letter will usually also contain an indemnity from the Fund/AIF and/or the IFM (and ideally also from the Initiator/major shareholder). Indemnities cannot cover gross negligence, criminal liabilities or fraud. See also Sections 5.14 and 5.15 above.

In cases of extreme difficulties, the Fund/AIF and/or the IFM may also be bankrupt so an indemnity may be of limited value. It is therefore important that there is always also adequate insurance coverage in place, and ideally also, whenever possible, an indemnity from the Initiator/major shareholder.

11.2 What is the "annual discharge"?

Each year the shareholders in general meeting may, by special vote, grant *"discharge"* to the Directors. This discharge has the effect of liberating the Directors from contractual liability towards the Fund/AIF and/or the IFM (but not towards third parties) for the financial period for which the accounts are being approved (i.e. the previous year).

However, this is conditional on the accounts containing no omission or false information regarding the real situation of the Fund/AIF and/or the IFM. In certain cases (e.g. reporting on alleged breaches of law or the Articles), these facts must be expressly set out in the notice convening the shareholders meeting.

11.3 Auditors' Letters of Representation and engagement letters with other service providers

Auditor's Letter of Representation

Before signing the Audit, **the auditors will seek a Letter of Representation from the Fund's Directors.** The exact contents will vary depending on the nature of the Fund/AIF and/or the IFM, however it will typically cover items such as (i) an acknowledgement of responsibilities, including in respect of internal controls and for assessing fraud risk, (ii) that all appropriate books and records have been made available, (iii) that all material transactions have been properly recorded, (iv) that investments and other financial instruments have been valued in accordance with prospectus criteria, (v) that all related party transactions and all contingent liabilities have been disclosed to the auditors.

It is important for the Directors to review carefully not only the accounts, but also the contents and context of each representation requested by the auditor.

Fund/IFM Directors increasingly request **«representation comfort letters» from the Fund/AIF's depositary and other key service providers** (where applicable) as to the delegated areas covered. The Fund/AIF's investment manager and administrator should review the accounts and be asked to provide Directors with details of any significant matter arising from that financial period and respond to any queries the Directors may have. This needs to be built into the timetable for accounts approval to ensure Directors receive the necessary comfort and have sufficient time to carry out their reviews effectively.

Letters of engagement with auditors and other service providers

Always read proposed letters of engagement carefully. Question the provisions (what is said to be standard often is not...).

For example, certain specific limitations of liabilities may not be in the best interests of the investors for the Directors to accept.

Additional information on this topic can be found on ILA's website in a publication titled – Management's Representation in the Context of an Investment Fund Annual Audit.

11.4 What professional directors and officers indemnity insurance (D&O coverage) is available against all these liabilities?

A confirmation that appropriate insurance is in place is also required in the CSSF Declaration of Honour.

Whilst the AIFMD also requires that the AIFM has a professional indemnity insurance in place, note this is not the same as a Director D&O coverage.

Be aware of the difference between the IFM/Fund's indemnity insurance and the Director's individual D&O insurance (which are usually mutually exclusive).

It is advisable to obtain policies combining both professional indemnity and D&O policies to ensure there is no gap in the coverage.

Various providers offering such individual D&O insurance are listed on ILA's website.

Even where there is no legal requirement for D&O coverage, it is best practice for a company to cover its Directors and key officers against legal action.

It is in the entity's best interests to have adequate and well-constructed D&O coverage for Directors, as otherwise Directors may call on the entity for indemnification where the insurance coverage does not apply. ILA is of the opinion that no Director should **ever accept a Director mandate unless also insured** by the entity and/or related group. Even if a Director has dutifully carried out his/her responsibilities, legal suits can take years before the courts. In order that each Director be entitled to properly defend his/herself, adequate insurance coverage is required before and during such proceedings. In case of large losses, such as the Madoff Fraud, everyone remotely linked to any structure has been sued – including regulators, auditors, Feeder Fund directors and a long list of others.

A Luxembourg-based policy is preferable due to consistency in forum and definitions. It must cover Luxembourg and all countries where the Fund is distributed.

- Each Director should receive a copy of the policy and receive annual conformations that it is up-to-date and renewed. It is also standard to receive an additional one page summary of the policy from the insurer.
- Policies should be negotiated by professionals - policies are highly technical and are also extremely varied in terms of amount, terms, and exclusions, for example by using an insurance broker specialised in D&O insurance, who understands the risk profile of the Fund/AIF and/or the IFM, and who will undertake a process of due diligence regarding the Fund/AIF and/or the IFM. Following this the broker should highlight the differences between the various D&O products on offer.
- Policy review is not only about insurance premium paid – details vary widely, e.g. Directors need to review and consider the impact of each exclusion. For example:
  - When considering the amount, remember this is an aggregate amount for all the Fund

Directors each year, so in the case of disagreement between them and each appointing its own lawyers, this amount may erode quickly.

- The policy may need to cover not only the cost of protracted and complicated litigation and/or investigations brought by investors and/or regulators, but also cover potential damages and punitive awards.
- often excluded are:
  - US claims and litigation made in the US or the enforcement of US decisions in other territories, US ERISA claims and/or claims under the US securities Act of 1933 or US Securities Exchange Act of 1974
  - fraud
  - claims related to money laundering (actual or alleged), claims relating to market fluctuations and investment performance, claims by major shareholders, market abuse, punitive damages exclusions, regulator claims exclusions
  - bankruptcy/insolvency are often excluded, yet you are most likely to need the coverage following an insolvency event

- It may be advisable, when negotiating or changing a policy to engage a specialist insurance lawyer to review and comment on scope and exclusions.
- Important issues to consider include in relation to Group coverage:
  - although there may be higher overall coverage levels, often these are for all actions worldwide and per annum. If for example, there has been a significant claim elsewhere in the Group, that year's Director coverage may already have been used up – meaning there is no insurance left for that year (it is applied on a first come, first served basis).
  - If the Initiator does something to prejudice the coverage (e.g. not pay the premium, commit a breach or a fraud), there will be no coverage and local Directors will not necessarily be aware of this.
  - in the case of a dispute, claims through an insurer in a foreign jurisdiction rather than in the Fund's home jurisdiction may not be convenient.
  - there may be conflicts if, for example, the Fund Directors need to claim against the investment manager who has taken out (and has control of) the policy.
- Fund level coverage will be easier to monitor & control, although it may be more costly than simply adding the entity to the Group's existing D&O policy. Additionally, if a Director leaves an entity on bad terms he may have difficulty getting access to the group policies.
- Price varies enormously, depending on parties involved, experience, Fund structure etc. Often larger Groups have better negotiating power and are perceived by the insurers as being a lower risk.
- Consider tail insurance on termination of a Fund.
- Best practice is to also have additional personal D&O insurance in case the Group/Fund insurance is not sufficient. Directors normally need to arrange this themselves, although it may be billable to the Fund.

11.5 How much D&O is required?

General insurance coverage levels

The level of any coverage will usually depend on the size and complexity of the Fund, however in Luxembourg it tends to be between 5 million € and 25 million € for a single stand-alone structure. Levels will be significantly higher for group coverage and for more complex vehicles.

The insurance will often only cover the defence costs, not any fines or penalties which may ultimately be levied. One should be aware of whether damages which may be awarded are covered by the policy or not.

AIFMD

The AIFMD requires AIFMs to hold a minimum level of initial capital, plus additional own funds or professional indemnity insurance to cover potential professional liability risks resulting from activities AIFMs may carry out pursuant to the Directive.

Supplementary regulations deals with the definition of professional liability risks and the requirements in respect of additional own funds and professional indemnity insurance (articles 12, 13, 14 & 15 of the Commission Delegated Regulation supplementing Directive 2011/61/EU).

Own funds - If opting to use the own funds, own funds must at least equal 0.01% of the value of the portfolios of AIFs managed (with regulatory consent, it is possible to reduce this to 0.008%).

Insurance - If opting to use insurance, the insurance coverage for an individual claim must equal at least 0.7% of the portfolio value of all AIFs managed, and the insurance coverage for annual aggregate claims must equal at least 0.9% of the value of the portfolios of AIFs managed.

LISTED FUNDS

12.1 The Fund is listed. What difference does it make?

Listing of a Fund may be required by certain types of institutional investors.

Funds listed on the Euro MTF in Luxembourg must comply with the rules of that market and also to rules generally applicable to publicly traded products – such as prohibitions on insider trading, market manipulation, etc. . Listed Funds tend to adopt the ALFI Code of Conduct instead of the X Principles.

Certain additional requirements resulting from a Listing:

- Broadly, entities whose securities are listed will be caught by the definition of "Public Interest Entity" (rules set out in the Law of 18 December 2009 on the audit profession, as amended following the EU Audit Reform regulation entered into force on 16 June 2014).
- Public Interest Entity (PIE) status can lead to extra requirements, such as the need to have an audit committee and auditor rotation as described below. Even though audit committees are not required for listed funds, the AC role and responsibilities remain at Board level.
- Depending on certain factors (including the minimum denomination of each unit) certain non-UCITS collective investment vehicles and products may also be caught by the requirements of the Transparency Directive.

Where an entity is listed on the Official List of the Luxembourg Stock Exchange or on a foreign exchange, the relevant Stock Exchange's regulations and requirements need to be complied with. Additional requirements may include, for example, an obligation to appoint one or more non-executive Directors, to create Board Committees such as audit, compensation and remuneration committees, shareholders' disclosure obligations such as disclosing remuneration packages and Director share holdings and generally to comply with the relevant Listing Rules.

12.2 Audit Committee

Composition:

- AC as a whole shall have competence relevant to the sector in which the PIE is operating
- At least one AC member is knowledgeable in audit or accounting
- A majority of AC members need to be independent from the audited PIE (N/A in case the BoD is taking over AC duties)
- The president is an independent member

AC is required to monitor:

- the financial reporting process and submit recommendations to ensure its integrity
- the audit process
- the selection and the independence of the auditor and the provision of the non-audit services (NAS)

12.3 Audits and Auditors of PIE

Mandatory auditor rotation

- Transition arrangements for rotation of auditor are in place depending of when the first audit started
- General rule: maximum engagement period: 10 years
- Option taken by Luxembourg: On a tender, possibility to extend the engagement period by a max of 10 years bringing the total engagement to a maximum period of 20 years

Selection process

- AC responsible for the selection procedure (AC to demonstrate to the competent authority that the selection procedure was conducted in a fair manner)
- **Entity** - Tendering and (at the end of the process) preparation of report on auditor evaluation
- **AC** - Validation of report and recommendation (justified and contains at least two choices)
- **Board** - Proposal to the AGM based on the recommendation
- **Shareholders** - AGM decides on the appointment of auditor

Approval of permissible NAS by the audit committee

- Asses and document any threat to independence
- Approval from the audit committee of a PIE for the provision of any non-audit services (NAS) which are not on the prohibited list to the PIE itself

Fee-cap on permissible NAS

- NAS $\leftarrow$ 70% of the average of the statutory audit fees over the past 3 years - Applicable in 2020

Auditor's report

- Risks assessments and findings
- Explain to what extent the statutory audit was considered capable of detecting irregularities, including fraud
- Confirm that the audit opinion is consistent with the additional report to the AC
- Declare that prohibited NAS were not provided and that the auditor remained independent

DIRECTOR INDUCTION, TRAINING AND CONTINUING PROFESSIONAL DEVELOPMENT (« CPD »)

13.1 Where can a Director find resources to keep abreast of industry best practice and guidance ?

Director Induction

Director induction and on-going Director education have become commonplace. It is best practice to ensure that each new Director who joins the Board receives a tailored induction programme to introduce him/her to the key persons, documentation and policies.

Where there is a Company Secretary, often he/she will usually be charged with coordinating the Induction together with the Chair, otherwise an existing Director may play this role.

Certain Codes and regulations require a formal Director Induction and training programme to be in place:

- **AIFMD** - requirement for induction and training of members of the AIFM governing body
- ILA recommends that all Directors undertake continuing education each year and this is an expectation of the CSSF.
- **The X Principles of Corporate Governance of the Luxembourg Stock Exchange (4th Ed, 2017)**
    - **Recommendation 3.6.** *The company shall ensure that new directors receive induction training on the way the company operates, enabling them to contribute in the best possible manner to the work of the Board. The company shall allocate adequate resources to the induction and ongoing training of its Directors.*
        - *Guideline 1* - The company shall provide its new Directors with corporate governance training, which will be provided either internally or by specialist external institutions.
        - *Guideline 2* - For Directors called upon to join a Board committee, this induction training programme shall cover the description of the committee's remit, and the skills required to fulfil its assignment.
        - *Guideline 3* - For new members of the Audit Committee, this training programme shall include an overview of the company's organisation of internal control and of its risk management systems. In particular, they shall receive comprehensive information on the company's accounting, financial and operational features. This programme shall also involve contact with the Statutory Auditor and with the internal auditor. The Board shall specifically ensure that the Directors are able to acquire the necessary skills to manage the various risks that are considered to require specific monitoring.

Continuing Professional Development

Continuing Professional Development ("**CPD**") is something recommended for all Directors, regardless of how experienced they may be in any particular field.

In many sectors and industries, there may also be annual CPD requirements. ILA Certified Directors are required to commit to annual CPD in order to maintain their Certified status.

- **The ALFI Code of Conduct** sets out various obligations on Directors in terms of initial and on-going knowledge. For example:
  - ALFI Code Principle 2 – *"The Board should…. use best efforts to ensure it is collectively competent to fulfil its responsibilities."*
  - ALFI Code Principle 2, Rec. 4 – *"The Board should ensure it keeps abreast of relevant laws and regulations and that it remains vigilant about evolving risks and market developments."*
  - **Board Evaluations are becoming common practice and often assist in highlighting gaps in individual or collective Board knowledge….**
    - ALFI Code Principle 2, Rec. 1 _*"The Board should conduct a periodic review of its performance and activities"*
    - ALFI Code Principle 2, Rec. 1 _*"Members of the Board should have … complementary knowledge and skills, relative to the size, complexity and activities of the Fund".*
- **The X Principles of Corporate Governance of the Luxembourg Stock Exchange** (4th Ed 2017)
  - Recommendation 3.7.- *Directors shall update their skills and improve their knowledge of the company with a view to fulfilling their role both on the Board and, where applicable, on Board committees. Directors must acquire an excellent understanding of the company's business activities, and of the group's structure, where applicable.*
    - *Guideline* - The Chairman of the Board shall ensure that the necessary resources are available for improving and updating the knowledge and skills of the Directors.
- Whilst most education and development requirements will tend to be generic, certain regulations impose a positive on-going education obligation in a specific area, such as in the area of Anti-Money Laundering compliance updates.

Changes in function, such as joining a Board Committee or becoming Chair may require new skill-sets, whilst following a Board Evaluation exercise, certain skillsets may have been identified as missing in a particular Board room collective. Items may include many different areas, such as:

- technical skills (such as skills related to risk management, investment management, etc..)
- regulatory environment know-how (such regulatory changes and updates)
- other skills (such as negotiation skills, strategy, ethics, chairing skills, financial analysis, etc..)

CPD Providers

ILA offers numerous CPD opportunities focused on Directors of all types of Luxembourg entities:

- Events - Regular events focused on issues relevant to Directors
- Training courses - basic and advanced training courses in both technical and soft skills for Directors, with more details available in ILA's CPD guide.
- A Director Certification Programme - Those Directors who have sufficient experience and have followed the structured programmes required to receive the ILA Director Certification as required to undertake annual CPD and to maintain CPD records.

Other industry associations which offer updates and training in Luxembourg in the Funds sphere (albeit not necessarily focused on Directors) include:

- ALFI (regular conferences, plus training programmes)
- LPEA (Private Equity)
- Luxembourg House of Training (financial sector training programmes)
- ALRiM (Risk Management)
- ALCO (Compliance)
- Other services providers often run courses and events for clients in topical subjects (law firms, audit firms, trust companies, etc.). Some also have regular on-line training possibilities.
- Cybersecurity: C3 – regular training / breakfast sessions and Room #42 for cyber attack simulation

INDUSTRY RESOURCES AND GUIDANCE

14.1 Website Links

Luxembourg regulators and governmental bodies

- Commission de Surveillance du Secteur Financier (CSSF) – www.cssf.lu
- Luxembourg Stock Exchange – www.bourse.lu
- Luxembourg Business Registers – www.lbr.lu
- Chamber of Commerce - www.cc.lu
- Luxembourg for Finance - http://www.luxembourgforfinance.com/en
- Luxembourg House of Financial Technology, the LHOFT - www.lhoft.com

Useful publications can be found on the sites of various local law firms, accounting firms, trust companies etc. For example:

- Other publications: Useful summaries of the different Luxembourg structures is set out in the Luxembourg For Finance website - http://www.luxembourgforfinance.com/en/products-services/investment-vehicles

14.2 Industry Guidance

ILA – Luxembourg Institute of Directors

- ILA Guidance Notes / Publications - http://www.ila.lu/
- ILA Events
- Book *"Investment Fund Governance"* by Jan-Jaap Hazenberg (his PhD thesis) is also available for purchase form the ILA Secretariat.

ALFI – Association of the Luxembourg Funds Industry

- ALFI guidelines and recommendations - http://www.alfi.lu/legal-technical/alfi-guidelines-and-recommendations

  -ALFI Code of Conduct (2nd Edition, 2013)

  -ALFI guidelines on
  - treatment of subscription & redemption orders
  - risk management
  - side pockets
  - swing pricing
  - AML
  - etc....

  -ALFI statements and position papers - http://www.alfi.lu/publications-statements/alfi-statements
- ALFI Brochures - http://www.alfi.lu/brochures
- ALFI Podcasts - http://www.alfi.lu/publications-statements/express--alfi-podcast

Industry associations

- ALFI - The Luxembourg Association of Investment Funds (ALFI) – www.alfi.lu
- LPEA – Luxembourg Private Equity Association – www.lpea.lu
- EFAMA - The European Fund and Asset Management Association - www.efama.org
  - EFAMA – Code for External Governance Principles for the Exercise of Ownership Rights in Investee Companies (or so-called "Stewardship" rights and obligations)
- AIMA – Alternative Investment Management Association (Hedge Funds) – www.aima.org
- EVCA – European Private Equity and Venture Capital Association - www.evca.eu
- IIFA – International Investment Funds Association - www.iifa.ca
- INREV - European Association for Investors in Non-listed Real Estate Vehicles –www.inrev.org
- Overseas trade associations
- Overseas regulators

Director and other corporate governance institutes

- The Luxembourg Institute of Directors (ILA) – www.ila.lu
- European Institute of Directors – www.ecoda.org (and each of the national institutes)
- European Corporate Governance Institute - www.ecgi.org
- International Corporate Governance Network - https://www.icgn.org
- INSEAD Corporate Governance Initiative - https://www.insead.edu/executive-education/corporate-governance/international-directors-programme

PRINCIPAL LEGAL AND REGULATORY TEXTS

15.1 Main sources of regulatory guidance and rules

CSSF - www.cssf.lu =→ « Laws, regulations, circulars and other texts »

Certain key CSSF Documentation relevant to Directors include:

- CSSF Director's Declaration of Honour (under http://www.cssf.lu/documentation/formulaires/ =→ then choose vehicle type)
- CSSF Table listing the professional activities and the mandates performed (under http://www.cssf.lu/documentation/formulaires/ =→ then choose vehicle type)
- CSSF Annual Reports - http://www.cssf.lu/documentation/publications/rapports-annuels/
- CSSF Investment Funds information and FAQs – http://www.cssf.lu/en/documentation/faq/
- CSSF laws, regulations & CSSF Circulars - http://www.cssf.lu/documentation/reglementation/lois-reglements-et-autres-textes/ =→ and then choose your vehicle type. In particular:
  - CSSF Circular 10/437 on remuneration in the financial sector -
  - Circular 18/698 (replacing 12/546) on authorisation and organisation of investment fund managers incorporated under Luxembourg lawCircular 15/611 on managing the risks related to the outsourcing of systems that allow the compilation, distribution and consultation of management board/strategic documents
  - Circular 14/585 on the transposition of the European Securities Markets Authority's (ESMA) guidelines on remuneration policies and practices (MiFID)
  - CSSF Regulation 10-4 on organisational requirements
  - CSSF Circular 07/308 on risk management
  - CSSF Circular 02/77 on errors in the NAV
  - Anti-Money Laundering Regulations and Circulars

ESMA – The European Securities & Markets Authority - https://www.esma.europa.eu/

- EU Legislation and CESR Guidelines can be found under "ESMA's Work" and then "Documents"
- CESR Guidelines of Risk Measurement and the Calculation of Global Exposure and Counterparty RISK for UCITS" (ref: CESR/10-788) - CESR Guidelines of Risk Measurement and the Calculation of Global Exposure and Counterparty RISK for UCITS
- ESMA Guidelines on ETFs and other UCITS Issues and CSSF Circular 14/592 http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf14_592eng.pdf

ALFI - Code of Conduct for Investment Funds - http://www.alfi.lu/legal-technical/alfi-guidelines-and-recommendations

15.2 Major laws relating to Funds

Luxembourg Law – primary sources

- Légilux - www.legilux.public.lu/

  Légilux is the Luxembourg government portal for laws and regulations. Note that only those versions of the laws which are found on Legilux (in their original French) are official versions.
- The CSSF also has a list of relevant laws and regulations – many also translated into English (unofficial translations) - http://www.cssf.lu/en/documentation/regulations/laws-regulations-and-other-texts/

1915 Companies Law–

- French - http://legilux.public.lu/eli/etat/leg/recueil/societes_associations/20190101

2013 AIFM Law (12 July 2013)

- French – https://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_120713_GFIA_upd_060618.pdf
- Unofficial English translation – https://www.cssf.https://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_120713_AIFM_eng_upd_060618.pdflu/fileadmin/files/Lois_reglements/Legislation/Lois/L_120713_AIFM_eng_upd_060618.pdf

2010 Investment Fund Law (as amended up to 6 June 2018)

- French – https://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_171210_OPC_upd_060618.pdf
- Unofficial English translation – https://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_171210_OPC_upd_060618.pdf

2004 SICAR Law (as amended up to 15 June 2004)

- French – https://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_150604_SICAR_upd270516.pdf
- Unofficial English translation – https://www.cssf.lu/fileadmin/https://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_150604_SICAReng_upd270516.pdffiles/Lois_reglements/Legislation/Lois/L_150604_SICAReng_upd270516.pdf

2007 SIF Law (as amended up to 13 February 2007)

- French - https://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_130207_FIS_upd230716.pdf
- Unofficial English translation – https://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_130207_SIF_upd_230716.pdf

The voice of corporate governance in Luxembourg

ILA MISSION STATEMENT

The mission of ILA is to promote the profession of Directors by developing its members into highly qualified, effective and respected Directors.

In parallel, it will promote best practices in Luxembourg in the field of Corporate Governance of companies and institutions by actively engaging with those institutions charged with the introduction, application and oversight of those Corporate Governance rules and practices. It will achieve this through high quality training, forum discussions, research, publications and conferences.

ILA aims to be the premier interlocutor in Luxembourg on issues affecting Directors.

www.ila.lu