New Technologies & Investment Funds Institute

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

Luxembourg SICARs, SIFs, and RAIFs

A 20-year Perspective on the "Well-Informed Investor" Notion

| ✎ | Ezechiel Havrenne | 🏛 | *Lecturer at the Luxembourg School of Business* | ⏱ | 60 min

Abstract: This article provides a comprehensive analysis of Luxembourg's "Well-Informed Investor" regime as applied to SICARs, SIFs, and RAIFs, tracing its legislative and regulatory evolution over the past two decades. It examines the classification criteria for eligible investors, including institutional, professional, and opt-in categories, and assesses the legal and operational implications of miscategorisation. Particular focus is given to the 2023 legislative reforms aligning Luxembourg with EU thresholds and verification standards. The article also explores the compliance duties of AIFMs, nominee structures, and the consequences of non-compliance under civil, regulatory, and criminal law, offering practitioners and academics a detailed guide to navigating investor eligibility in Luxembourg's private fund landscape.

KEY WORDS: SICAR · SIF · RAIF · WELL-INFORMED INVESTOR · INVESTOR CATEGORISATION · INSTITUTIONAL INVESTORS · PROFESSIONAL INVESTORS · OPT-IN INVESTORS · NOMINEE STRUCTURES · SUBSCRIPTION ELIGIBILITY · MINIMUM INVESTMENT THRESHOLD · INVESTOR VERIFICATION · AIFMD COMPLIANCE · DPMA TEST · REGULATORY RISK · INVESTOR PROTECTION · FUND GOVERNANCE · LEGAL REMEDIES · ASSESSMENT PROCEDURES · CONTRACTUAL & CRIMINAL LIABILITY

Quick Citation Reference: Ezechiel Havrenne, 'Luxembourg SICARs, SIFs and RAIFs, A 20-year Perspective on the "Well-Informed Investor" Notion', *NewTIFI Publishing – Investment Management Journal*, Vol. 1, N°1-2, pp.1-20, The New Technologies & Investment Funds Institute (2025)

Journal Home Page: www.newtifi.com/publishing/journals/investment-management

Introduction

(1) For the past 40 years, Luxembourg has been at the forefront of the international expansion of the investment fund industry. In recent years, it has also established itself as Europe's leading hub for "private funds". Currently, the country is home to over 300 regulated alternative investment fund managers (the "**AIFMs**"), and the sector provides more than 21,000 direct jobs as of 2021.[1] As the industry continues to evolve and competition from other fund centres – both within and beyond the European Union – intensifies, Luxembourg constantly looks at bettering its "private fund tool box" in order to maintain its position as European leader and 2nd global leader after the United States whilst growing its market share.[2] It is thus a heavy weight champion with EUR 5.14 trillion of assets under management.[3]

(2) Luxembourg's private fund ecosystem is built on a tiered regulatory framework carefully designed to balance investor protection with flexibility. This approach ensures that fund sponsors and investors can select the most suitable structure based on their risk appetite, regulatory preferences, and operational requirements. Private funds governed by specific product laws, such as investment companies in risk capital (the "**SICARs**"),[4] specialised

[1] *The State of the Financial Sector in Luxembourg – Key Figures 2020-2021*, jointly produced by Luxembourg for Finance and Deloitte; https://www.luxembourgforfinance.com/wp-content/uploads/2023/01/LFF-Deloitte-State-of-the-Financial-Sector-2011-2021.pdf (last accessed on 28 June 2025).
[2] See the interview with Tom Théobald, CEO of Luxembourg for Finance, where he reported that "*Luxembourg currently accounts for nearly two-thirds of the alternative investment funds in Europe*"; https://luxembourg.public.lu/en/invest/key-sectors/luxembourg-place-financiere.html#section-content (last accessed on 28 June 2025).
[3] See the statistics published for 2024 by Luxembourg for Finance: https://www.luxembourgforfinance.com/wp-content/uploads/2023/06/Luxembourg-Financial-Centre.pdf (last accessed on 28 June 2025).
[4] SICARs are subject to the Luxembourg Act of 15 June 2004 relating to investment companies in risk capital (the "**SICAR Act**") and amending (i) the Act of 4 December 1967 on income tax, as amended; (ii) the Act of 16 October 1934 on wealth tax, as amended; (iii) the law of 1 December 1936 on business tax, as amended; (iv) the Act of 12 February 1979 on value added tax, as amended; (v) the Act of 20 December 2002 relating to undertakings for collective investment, as amended; *Mémorial A – N° 95*, 22 June 2004, Parl. doc. 5201; for its

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

investment funds (the "**SIFs**"),[5] and reserved alternative investment funds (the "**RAIFs**"),[6] provide regulatory certainty, offering a level of investor selectivity that enhances market confidence. SICARs and SIFs, which fall under the direct supervision of the CSSF, benefit from well-defined legal frameworks that ensure compliance with asset eligibility (for SICARs) or risk diversification (for SIFs), governance, and reporting obligations.

(3) At the same time, Luxembourg also provides highly flexible structures that cater to sophisticated investors who seek bespoke fund arrangements with minimal regulatory constraints. The RAIF acts as a hybrid model, combining the benefits of a regulated fund structure without requiring CSSF approval. Unlike SICARs and SIFs, RAIFs are required by law to always operate under the oversight of an AIFM, ensuring compliance with the alternative investment fund manager directive (the "**AIFMD**"),[7] while streamlining the private fund's time-to-market. Meanwhile, partnership structures such as special limited partnerships (the "**SCSp**") and common limited partnerships (the "**SCS**") offer maximum contractual freedom, allowing fund initiators to tailor governance, economic terms, and investor rights without being bound by product law constraints. These flexible vehicles are widely used for private equity, venture capital, infrastructure, and debt investments, making Luxembourg a top 3 global leader in private fund structuring.

(4) Bearing in mind that the SICAR Act came out in 2004, the SIF Act in 2007 and the RAIF Act in 2016 (together hereinafter referred to as the "**Product Laws**"), each of those laws contained minor variations of the notion of "**Well-Informed Investors**". For namely this reason and shy of the 20th anniversary of the SICAR Act, the Bill of Law leading to the 2023 Act (the "**Bill**")[8] – which was developed in close dialogue with the Luxembourg financial supervisory authority (the *Commission de Surveillance du Secteur Financier* or "**CSSF**") and representatives of the Luxembourg investment fund sector – (i) enhanced consistency across the different laws including by extending the provisions on who can verify the status of a well-informed investor,[9] and (ii) align the Luxembourg regime with the European standard by lowering the current investment threshold from EUR 125,000 to EUR 100,000 in order to align the Luxembourg regime with the European standard, particularly in line with Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European Social Entrepreneurship Funds (the "**EuSEF Regulation**"),[10] and Regulation (EU) No 345/2013 of the European

coordinated version see: https://www.cssf.lu/wp-content/uploads/L_150604_SICAReng.pdf (last accessed on 28 June 2025).

[5] SIFs are subject to the Luxembourg Act of 13 February 2007 relating to specialised investment funds (the "**SIF Act**") (i) amending the Act of 20 December 2002 relating to undertakings for collective investment, as amended; and (ii) amending the Act of 12 February 1979 on value added tax, as amended; *Mémorial A – N° 13*, 13 February 2007, Parl. doc. 5616; for its coordinated version see: https://www.cssf.lu/wp-content/uploads/L_130207_SIF.pdf (last accessed on 28 June 2025).

[6] RAIFs are subject to the Luxembourg Act of 23 July 2016 relating to reserved alternative investment funds (the "**RAIF Act**") and amending (i) the Act of 16 October 1934 on wealth tax, as amended; (ii) the Act of 1 December 1936 on commercial tax, as amended; (iii) the Act of 4 December 1967 on income tax, as amended; (iv) the Act of 5 April 1993 on the financial sector, as amended; (v) the Act of 13 February 2007 relating to specialised investment funds, as amended; and (vi) the Act of 17 December 2010 relating to undertakings for collective investment, as amended, *Mémorial A – N° 140*, 28 July 2016, Doc. parl. 6929; https://www.cssf.lu/wp-content/uploads/L_230716_RAIF_eng.pdf (last accessed on 28 June 2025).

[7] See Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010; *OJ L 174*, 1 July 2011, p. 1 – 73; for its coordinated version see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0061-20250117 (last accessed on 28 June 2025).

[8] See PROJET DE LOI portant modification de : la loi modifiée du 15 juin 2004 relative à la société d'investissement en capital à risque (SICAR) ; la loi modifiée du 13 février 2007 relative aux fonds d'investissement spécialisés ; la loi modifiée du 17 décembre 2010 concernant les organismes de placement collectif ; la loi modifiée du 12 juillet 2013 relative aux gestionnaires de fonds d'investissement alternatifs ; la loi modifiée du 23 juillet 2016 relative aux fonds d'investissement alternatifs réservés ; *Doc. Parl. 8183*; *sess. Ord. 2022-2023*; https://legilux.public.lu/filestore/eli/dl/pl/2023/82/doc/dpl/2/fr/pdf/eli-dl-pl-2023-82-doc-dpl-2-fr-pdf.pdf (last accessed on 28 June 2025).

[9] Previously, this verification framework by AIFMs was explicitly available only for RAIFs, creating an inconsistency in the regulatory landscape. The legislator addressed this gap by explicitly allowing AIFMs to assess investor status, recognising that these entities are among the best positioned to conduct such evaluations.

[10] See *OJ L 115*, 25 April 2013, p. 18 – 38; for its coordinated version see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0346-20240109 (last accessed on 28 June 2025).

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

Parliament and of the Council of 17 April 2013 on European Venture Capital Funds (the "**EuVECA Regulation**"),[11] both of which already set a threshold of EUR 100,000.

(5) This article[12] delves into the key regulatory practice governing well-informed investors under the Product Laws, and the compliance obligations imposed on AIFMs and investors alike in relation to those statutes. It further explores critical nuances such as investor verification, nominee structures, and the implications of miscategorisation. It will end by discussing some typical contractual limitations embedded in Luxembourg private funds whether subject to a Product Law or not.

(6) This article[13] examines the key regulatory practice governing well-informed investors under the Product Laws, as well as the compliance obligations imposed on both AIFMs and investors in relation to these statutes. It also explores important nuances, investor verification, the use of nominee structures, and the consequences of miscategorisation. Finally, it will discuss common contractual limitations found in Luxembourg private funds, regardless of whether they are subject to a Product Law.

(A) General Investor Categorisation Applicable to Product Funds

(7) As abovementioned, SICARs, SIFs, and RAIFs (together hereinafter referred to as the "**Product Funds**" each a "**Product Fund**") fall within the category of "private funds" and, as such, cannot be marketed to or have their units, shares, or interests (the "Securities") subscribed to or transferred to investors classified as members of the general public. This means that retail investors, who typically invest in undertakings for collective investment governed by Parts I and II of the Law of 17 December 2010 (commonly referred to as "**Public Funds**"), are excluded from these structures. Unlike Public Funds, which cater to a broad investor base including retail investors, Product Funds are designed for investments in alternative asset classes such as private equity, venture capital, real estate, infrastructure, or hedge fund strategies. Given the complexity and inherent risks of such investments, it is logical that access to these funds is restricted to more sophisticated investors.

(8) For clarity, the term "public" in the context of Public Funds refers to a broad spectrum of investors ranging from "pure" retail investors to institutional investors. By contrast, investors in Product Funds seek more complex investment structures that involve considerations such as risk-reward ratios, liquidity horizons, leverage options, and sophisticated fee structures, which go beyond what is typically available in Public Funds. Consequently, the Luxembourg legislator determined that only Well-Informed Investors should be eligible to subscribe to Securities in these alternative investment vehicles.

1. Categories of Well-Informed Investors

(9) Well-Informed Investors can be classified into distinct groups of sophisticated investors based on either (i) their nature, status or role, or (ii) their expertise, experience, and knowledge.

(10) The first category consists of investors who are considered well-informed / sophisticated by their nature, status or role. It includes Institutional Investors (as defined below), *Per Se* Professional Investors (as defined below), and individuals involved in the management of the relevant fund (all three (3) sub-categories being hereinafter referred to as the "***Per Se* Well-Informed Investors**"). These investors automatically qualify as well-informed investors without the need for additional certification or assessment.

(11) The second category includes those who must prove their well-informed status (hereinafter the "***Opt-In* Well-Informed Investors**"). This group comprises *Opt-In* Professional Investors (as

[11] See *OJ L 115*, 25 April 2013, p. 1 – 17; for its coordinated version see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0346-20240109 (last accessed on 28 June 2025).
[12] This article builds upon the author's 2017 publication, *The Notion of Well-Informed Investors Under the RAIF Law*, which has been accessed by about 2,000 readers on ResearchGate to date (28 June 2025). Given the sustained interest from industry professionals, the author deemed it timely to provide an updated analysis, reflecting the latest developments and insights in the field.
[13] This article builds upon the author's 2017 publication, *The Notion of Well-Informed Investors Under the RAIF Law*, which has been accessed by over 1,800 readers on ResearchGate to date (14 February 2025). Given the sustained interest from industry professionals, the author deemed it timely to provide an updated analysis, reflecting the latest developments and insights in the field.

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

defined below) and Other Well-Informed Investors (as defined below). The latter must – in addition to a self-declaration of adherence to the Well-Informed Investor status – either invest at least EUR 100,000 in the Product Fund or undergo an assessment confirming that they meet the necessary criteria to be classified as Well-Informed Investors. These requirements ensure that only those with the requisite financial knowledge, experience, and resources can access Product Funds, preserving the suitability of these investment vehicles for sophisticated investors.

2. Timing of Investor Qualification Verification

(12) The assessment of whether an investor qualifies as a Well-Informed Investor must take place before any subscription to a Product Fund. This principle was reinforced through a ruling delivered by the Luxembourg District Court, which stated that "*in assessing the status of a well-informed investor, one must consider the period before the disputed transactions […]. The number of transactions conducted after entering into the business relationship is therefore not relevant*".[14]

(13) This ruling suggests that changes in an investor's personal circumstances after making a commitment to a Product Fund do not retroactively affect the investor's status for the investment already made. For instance, if an investor is later declared legally incapable due to conditions such as Alzheimer's, their initial commitment remains valid.

(14) However, any new commitment would require the investor – or, in this case, their guardian – to make a fresh declaration of adherence to the status of Well-Informed Investor. If the guardian decides to make an additional investment, the guardian shall either personally declare adherence on behalf of the investor and invest an amount exceeding EUR 100,000 or undergo an assessment as an Other Well-Informed Investor.

(15) Similarly, if new investors appear in the shareholder, unitholder, or partner register of a Product Fund (the "**Register**") due to inheritance, their Well-Informed Investor status will have to be assessed anew. This requirement ensures that these investment vehicles maintain their investor eligibility criteria, safeguarding their compliance with regulatory requirements.

(B) The *Per Se* Well-Informed Investor Sub-Categories

(16) *Per Se* Well-Informed Investors represent a category of investors who, by virtue of their nature/status, are presumed to possess the necessary sophistication to engage in investments without requiring further qualification or assessment. As abovementioned, this classification encompasses Institutional Investors, *Per Se* Professional Investors, and individuals involved in the management of the relevant Product Fund. Given their *inherent* expertise, experience, or professional standing, these Well-Informed Investors are granted direct access to Product Funds, reflecting the legislator's recognition of their ability to evaluate risks and opportunities independently. Their automatic qualification streamlines the investment process while ensuring that the Product Fund remains accessible only to those with the requisite financial acumen. The following paragraphs will examine in details each one of these sub-categories of Well-Informed Investors.

1. Institutional Investor Categorisation in Product Funds

(17) The concept of an "**Institutional Investor**" is unfortunately not explicitly defined in the legal framework governing Product Funds. That said and as will be seen below, important sources can be used to better grasp the scope of this sub-category of Well-Informed Investors.

a) Entities Managing Significant Sums of Money

(18) The Bill of Law related to the Luxembourg Act of 19 July 1991 concerning the undertaking for collective investments whose securities are not intended for public distribution offers some guidance on the concept of Institutional Investors, referring to them as "*companies and organisations whose purpose is to manage large amounts of money and assets. In addition to professionals in the financial sector, these include insurance and reinsurance companies, social*

[14] See point I.C. of DC 9 January 2013, n° 135 165; https://anon.public.lu/Décisions%20anonymisées/Tribunal%20d%27arrondissement%20Luxembourg%20commerce/15_Chambre/2013/20130109-135165a-accessible.pdf (last accessed on 28 June 2025).

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

security institutions and pension funds, major industrial and financial groups and the structures they set up for this purpose".[15]

(19) The CSSF also clarified in its 1999 Annual Report[16] that should be included in this notion of Institutional Investors "*a local authority, such as a region, province, canton, commune or municipality, as long as it invests its own funds*".

(20) This general understanding provides a foundation for determining which entities automatically qualify – based on their nature and role – as Institutional Investors in the context of Product Funds.

b) Retail Investors and the DPMA & Non-Recourse Tests

(21) In certain circumstances, investments made by retail investors can be treated as institutional when channelled through financial intermediaries. Capital injected in a Product Fund through such entities will then be classified as capital coming from Institutional Investors by the very nature and role of such entities combined with the contractual arrangements they put in place up the capital chain.

(22) The 1999 Annual Report clarified that retail investors who are clients of a credit institution or another financial sector professional may be classified as institutional, provided that two (2) conditions are met. First, there must be a discretionary portfolio management agreement (the "**DPMA**") in place between the financial institution and the client before the investment is made (the "**DPMA Test**"). Second, the arrangement must ensure that the client has no direct recourse against the fund (the "**Non-Recourse Test**").

(23) The DPMA Test allows financial institutions to invest in Product Funds on behalf of their retail clients without the latter needing to meet individual investment thresholds, such as the EUR 100,000 minimum applicable to Other Well-Informed Investors.

(24) The crucial aspect in identifying an Institutional Investor lies in whether the financial institution invests in its own name or on behalf of unidentified clients through such arrangement. For investments indirectly made by retail clients through a financial institution to be considered as Institutional Investor it is therefore essential for subscribing institutions to avoid subscribing as mere "**Nominees**", *i.e.*, as intermediaries where the end-investor retains the ability to invest directly into the fund upon request (subject generally to terminating the contract between the end-investor and the intermediary). In the absence of a DPMA, each retail client behind the financial institution's investment into the Product Fund will thus need to qualify as an *Opt-In* Professional Investor or as an Other Well-Informed Investor in order to be able to subscribe and/or hold Securities in the Product Fund.

(25) The Non-Recourse Test requires that retail investors investing through a DPMA have no direct claim against the Product Fund. Instead, their recourse is solely against the financial institution managing their assets. In practice, this aspect could in practice be explicitly clarified within the DPMA itself, although it is likely implied by the nature of the agreement. Additionally, it is advisable that the subscription documents and the Register should reflect the financial institution as the legal owner of the Securities, acting in its own name or on behalf of unidentified clients having entered into a DPMA.

c) Holding Companies and the Institutional Investor Status

(26) The CSSF has also recognised in its 1999 Annual Report that certain holding companies may qualify as Institutional Investors under specific conditions. As will be seen below such investors will be classified as Institutional Investors based on their nature.

(27) Institutional Holding Vehicles, whether established in Luxembourg or abroad, may be considered Institutional Investors if all their shareholders are themselves Institutional Investors. If this criterion is not met, the holding company must demonstrate real substance, with its own

[15] See comment to Article 1, second paragraph; *Doc. parl. 3172; sess. ord. 1987-1988*; https://wdocs-pub.chd.lu/docs/archive/20/3e/3012670_pdf (last accessed on 28 June 2025).
[16] See Point 3.D of Chapter II of the CSSF 1999 Annual Report titled "*The interpretation of the Luxembourg Act of 19 July 1991 concerning undertakings for collective investment whose securities are not intended for public distribution*" (the "**1999 Annual Report**"); https://www.cssf.lu/wp-content/uploads/CSSF_RA_1999_FR.pdf (last accessed on 28 June 2025).

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

structure and activity, distinct from those of the individuals making it up, and which holds significant financial interests.

(28) Similarly, Family Holding Vehicles may also be considered Institutional Investors, even if their shareholders do not qualify as such, provided they hold significant financial assets on behalf of a family or a branch of a family.

(29) Further guidance may also be found in Annex III, Section A, point (4) of the Luxembourg law of 5 April 1993, which states that "*entities engaged in asset securitisation or other financing transactions*", as well as entities "whose principal activity consists in investing in financial instruments", qualify as other Institutional Investors.

(30) Consequently, if a holding vehicle – whether institutional or family-owned, and whether Luxembourgish or not – primarily invests in financial instruments, including Securities issued by a Product Fund, it should be recognised as an Institutional Investor under both Luxembourg and EU law.

2. Per Se Professional Investor Categorisation in Product Funds

(31) The concept of "**Professional Investor**" in the context of Product Funds has become clearer following the amendment introduced by the 2023 Act. Before this legislative change, there was no explicit definition of Professional Investors in the regulatory framework governing Product Funds. The amendment now expressly refers to Directive 2014/65/EU on markets in financial instruments (the "**MiFID**"),[17] aligning the definition contained in the Product Laws with the one established in the EU regulatory framework.

(32) Under MiFID, Professional Investors are divided into two (2) distinct categories: *Per Se* Professional Investors and *Opt-In* Professional Investors. In this Section (B) 2. we will only review the *Per Se* Professional Investors sub-category whereas points **(41)** et seq. will analyse the *Opt-In* Professional Investors.

(33) "*Per Se* Professional Investors" are those who, based on their status and their very nature, qualify as Professional Investors. MiFID outlines four (4) main sub-categories of *Per Se* Professional Investors.

(34) The first category consists of entities that are required to be authorised or regulated to operate in financial markets, including credit institutions, investment firms, insurance and reinsurance undertakings, UCIs and their management companies, pension funds and their management companies, commodity dealers, and other institutional investors.

(35) The second category comprises large undertakings (by opposition to SMEs) that meet at least two (2) of the following criteria: a total balance sheet of at least EUR 20 million, a net turnover of at least EUR 40 million, or equity of at least EUR 2 million.

(36) The third category includes public sector bodies such as national and regional governments, public bodies managing public debt, central banks, and supranational institutions like the World Bank, the ECB, and the EIB.

(37) Finally, the fourth category encompasses *other institutional investors* whose main activity is investing in financial instruments, including entities engaged in asset securitisation or financing transactions, which bears similarities to certain holding companies recognised as Institutional Investors.[18]

3. Product Fund Manager-Investor Categorisation in Product Funds

(38) The legislator has facilitated a framework in each of the Product Laws that aligns with the "skin in the game" principle, a fundamental concept in most areas of the investment fund industry. This principle ensures that those managing Product Funds invest their own capital alongside Institutional Investors, Professional Investors, and Other Well-Informed Investors. By doing so,

[17] See Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU; *OJ L 173*, 12 June 2014, p. 349 – 496; for its coordinated version see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014L0065-20250117 (last accessed on 28 June 2025).
[18] See points **(26)** et seq. above;

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

managers demonstrate their confidence in the Product Fund's strategy and align their interests with those of other investors, fostering a commitment to the Product Fund's success.

(39) The exemption introduced by the Product Laws for "*directors and other individuals who intervene in the management of*" Product Funds is grounded on their role. It also finds its roots in the presumption that these individuals (investing directly or indirectly through a carried interest vehicle, a personal holding or a group affiliate) inherently possess the necessary expertise, experience, and knowledge to evaluate investments in the Product Fund. Given their active role in management, they are deemed able by the legislator (this presumption being non-rebuttable) of making informed investment decisions without requiring the same level of investor protection that applies to *Opt-In* Well-Informed Investors.

(40) This exemption effectively relieves such individuals from the capital investment or assessment requirement imposed on the broader sub-category of Other Well-Informed Investors. Those falling under this sub-category include the Product Fund's management, the AIFM's staff, individuals employed by the investment advisor or portfolio manager appointed by the AIFM and who are directly involved in providing investment advice or portfolio management services to the AIFM in connection with the Product Fund, and any consultants engaged in the Product Fund's management. Their professional involvement ensures they are sufficiently knowledgeable about the fund's operations, making additional regulatory barriers unnecessary.

(C) The *Opt-In* Well-Informed Investor Sub-Categories

(41) Unlike *Per Se* Well-Informed Investors, who automatically qualify based on their nature, status or role, *Opt-In* Well-Informed Investors must actively demonstrate their eligibility to access Product Funds. This category encompasses *Opt-In* Professional Investors and Other Well-Informed Investors, both of whom are required to meet specific criteria before being granted access. While *Opt-In* Professional Investors may only qualify subject to a third-party assessment, Other Well-Informed Investors must – in addition to a self-declaration of adherence to the Well-Informed Investor status – either commit a minimum investment of EUR 100,000 or – like the *Opt-In* Professional Investors – undergo a third-party assessment. Assessments delivered to both *Opt-In* Professional Investors and the relevant Other Well-Informed Investors must confirm their expertise, experience, and knowledge, whereas. These requirements serve to maintain the integrity of Product Funds by ensuring that only investors with sufficient sophistication, experience, and financial resources participate, thereby safeguarding the Product Fund's exclusivity and risk-appropriate investor base.

1. Opt-In Professional Investor Categorisation in Product Funds

(42) Investors who do not fall within these predefined categories may still obtain professional status by opting in, provided they meet the requirements set out under MiFID. An "***Opt-In* Professional Investor**" is an investor that does not automatically qualify as a Per Se Professional Investor but has both the desire and the ability to be treated as such. To do so, the investor must meet specific eligibility criteria and follow a formal opt-in procedure.

a) Opt-In Procedure

(43) The request to opt-in must be initiated by the investor and addressed to a credit institution or investment firm regulated under EU law. It is important to note that an AIFM, even one holding a MiFID Top-Up License, is not authorised to handle these requests. Moreover, ESMA has emphasised in this respect that investment firms must not encourage or pressure individual investors to apply for professional status.[19]

(44) The investor's opt-in request must be submitted in writing, explicitly stating whether they wish to be considered a Professional Investor for *all* future transactions and investments or *only* for specific transactions or types of investments. To ensure clarity and regulatory compliance, this request must be documented separately from any contracts or business terms.

(45) The necessary *expertise*, *experience*, and *knowledge* of a hopeful *Opt-In* Professional Investor cannot be presumed by a credit institution or investment firm. For this reason, an assessment

[19] See Annex II of ESMA's Interactive Single Rulebook on MiFID (the "**Single Rulebook**"); https://www.esma.europa.eu/publications-and-data/interactive-single-rulebook/mifid-ii (last accessed on 28 June 2025).

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

must be conducted one of the aforementioned entities in accordance with their written internal policies and procedures to categorise investors. Once the assessment confirms that the investor indeed possesses the necessary expertise, experience, and knowledge to make independent investment decisions and understand the risks involved in light of the transactions envisaged based on them meeting at least two of the required Criteria (as defined below), the credit institution or investment firm must issue a clear written warning outlining the protections and investor compensation rights that may be lost by opting in.

(46) Please note that:[20]

- the fitness test applied to managers and directors of entities licensed under European Directives in the financial field could be regarded as an example of the assessment of expertise and knowledge; and
- in the case of small entities, the person subject to the assessment should be the person authorised to carry out transactions on behalf of the entity.

(47) Finally, the investor must acknowledge in writing, in a separate document from the contract, that they understand the consequences of relinquishing these protections.

b) Opt-In Requirements

(48) To qualify as an *Opt-In* Professional Investor, at least two (2) of the following criteria must be met. First, the investor must have carried out transactions of significant size on the relevant market at an average frequency of ten (10) per quarter over the previous four (4) quarters (the "**Transaction Volume & Frequency Criterion**"). Second, the investor must have a financial instrument portfolio – including cash deposits and financial instruments – exceeding EUR 500,000 (the "**Portfolio Size Criterion**"). Third, the investor must have worked in the financial sector for at least one (1) year in a professional position requiring knowledge of the relevant transactions or services (the "**Employment Criterion**" and together with the Transaction Volume & Frequency Criterion and the Portfolio Size Criterion, the "**Criteria**").

(49) Regarding the Transaction Volume & Frequency Criterion, ESMA made it clear that a full year of trading history is necessary to assess whether an investor satisfies the condition.[21] This requirement is intended to confirm that the investor has a sustained and active participation in the relevant markets.

(50) For the Portfolio Size Criterion, investment firms must evaluate the size of the transactions in the relevant market rather than merely considering transactions previously executed by the investor. The aim is to determine whether the investor has been exposed to sufficiently large transactions to develop the necessary expertise. If the investor's portfolio contains leveraged positions or financial instruments requiring margin deposits, ESMA has specified that the assessment should be based on net equity rather than the notional value or gross asset value.[22]

c) On-Going Requirement

(51) Under MiFID, both the *Opt-In* Professional Investor and the credit institution or investment firm share responsibility for ensuring that the investor's categorisation remains accurate.

(52) On the investor's side, the *Opt-In* Professional Investor is responsible for informing the credit institution or investment firm of any changes that may impact its current categorisation. This means that if an investor no longer meets the criteria for professional status (*e.g.*, due to changes in financial standing based on the Portfolio Size Criterion or trading activity based on the Transaction Volume & Frequency Criterion), they are obligated to disclose this information.

(53) On the firm's side, if the credit institution or investment firm becomes aware that the *Opt-In* Professional Investor no longer meets the conditions for professional categorisation, it must take appropriate action. This implies a duty to conduct ongoing monitoring and not rely solely on investor disclosures. If the firm identifies that an *Opt-In* Professional Investor no longer

[20] See Annex II. II of MiFID.
[21] See Annex II of the Single Rulebook.
[22] *Ibidem*.

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

qualifies as professional, it must reassess their status and potentially reclassify them as a retail investor, ensuring they receive the appropriate level of protection.

d) Liability Implications

(54) If the *Opt-In* Professional Investor fails to notify the firm about a relevant change, they may bear responsibility for any regulatory consequences or contractual breaches.

(55) If the firm becomes aware (or ought to have been aware) of a misclassification and fails to act, it could be held liable for non-compliance with its MiFID obligations, including failing to provide the required level of investor protection.

(56) Thus, while *Opt-In* Professional Investors must proactively update their status, firms cannot blindly rely on self-disclosure and must have systems in place to detect and address miscategorisation due to a need or re-categorisation.

2. Other Well-Informed Investor Categorisation in Product Funds

(57) Luxembourg's regulatory framework as contained namely in the Product Laws categorises investors based on their financial expertise and risk awareness. Among these, the Other Well-Informed Investors represent a residual category, primarily comprising retail investors who must demonstrate their eligibility before being accepted into a Product Fund. While not classified as Institutional Investors or Professional Investors, they are can be seen as capable of understanding investment risks at a level comparable to more experienced investor classes. Their classification serves as an intermediary category between "pure" retail investors and *Opt-In* Professional Investors.

a) Adherence to the Well-Informed Investor Status

(i) Requirement for Adherence Confirmation

(58) Only Other Well-Informed Investors must confirm their adherence to this status or classification. Institutional and Professional Investors, as well as individuals involved in managing the Product Fund, are automatically deemed eligible. This adherence is typically embedded within the subscription agreement between the AIFM/the Product Fund and the investor.

(59) The Luxembourg legislator has imposed this requirement because, much like the opt-in mechanism under MiFID for retail investors seeking to be treated as *Opt-In* Professional Investors, this formal adherence serves as the starting point for an investor to be classified as an Other Well-Informed Investor. Without this express request, similar to the MiFID's opt-in framework, no assessment could legally be conducted by a credit institution or an investment firm to determine the investor's eligibility. As a result, the investor could never be considered an Other Well-Informed Investor and would remain outside the scope of eligible subscribers (unless, as will be seen below, he was to later rectify the absence of statement either spontaneously or following a formal request from the Product Fund).

(60) This parallel is particularly relevant because, aside from the alternative qualification route of investing a minimum of EUR 100,000, the criteria for an Other Well-Informed Investor closely mirror those set out under MiFID for *Opt-In* Professional Investors. In both cases, the investor must demonstrate their "*expertise, experience, and knowledge*" to adequately assess an investment. The Luxembourg legislator has therefore ensured that investors who do not automatically qualify must proactively request to relinquish protection afforded only to "pure" retail investors.

(ii) Consequences of Adherence

(61) Adherence to the well-informed investor status leads, rightfully so, to the investor taking responsibility of his investment choice and actions.

(62) According to the *Conseil d'État*'s opinion dated 30 January 2007 and given in light of the Bill of Law which later became the SIF Act, "*any investor who takes the initiative of subscribing to the well-informed investor status and who either meets the objective criterion of the minimum investment amount, or obtains an assessment of expertise and experience from one of the competent bodies within the meaning of the draft, cannot then seek to shift any responsibility onto others in the event of losses or other setbacks linked to his investment. Whilst specialised*

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

funds are becoming more accessible than in the past, they cannot become a guaranteed, risk-free product for the prudent investor".[23]

(63) The *Conseil d'État*'s view should also be read on the basis of the following clarifications:

- adherence – if motivated by incomplete or contradictory information (such as those required to be disclosed to the investor in the offering memorandum (or other medium (as applicable) as per the Product Laws and the Luxembourg Act of 12 July 2013 on alternative investment fund managers (the "**AIFM Act**"))[24] – could vitiate the contract on the basis of error as to substance and lead to damages;[25] and
- adherence – if given on the basis of improper assessment coupled the case being with an investment recommendation made by the relevant professional such as a credit institution marketing a Product Fund – may lead to the professional's liability (see for instance a ruling from the Luxembourg District Court, which concluded to the liability of the bank and commented that "*Where a bank has, on its own initiative, suggested that its client invest in a particular security, the bank's general duty to inform and advise is greatly increased, especially where, as in this case, the bank is a distributor of the fund and is therefore interested in the sale of the units. In such a case, this obligation exists irrespective of whether the investor (who, as in the present case, has expressly indicated that he wishes to invest with the help of an adviser) is to be considered a well-informed investor or not. With regard to the content of the banker's obligation to provide information and advice when marketing [funds], the professional must remain consistent in the presentation of the product and must avoid disseminating contradictory information. […] the bank failed in its duty to inform and warn by not providing the applicant with a coherent presentation of this product and more complete information on the fund itself, which offered fewer guarantees than a regulated fund. The bank's failure to do so constitutes serious misconduct for which it may be held liable*").[26]

(iii) Consequences of Absence of Adherence

(64) Failing to comply with this formal requirement of confirming adherence to the Well-Informed Investor status can have serious repercussions for investors, Product Funds and/or the directors or managers of such Product Funds alike. The below paragraphs will focus on the potential consequences from a contractual standpoint of the absence of such a written adherence in the

[23] See comments to Articles 1 to 3 of the *Conseil d'État* opinion n° 47.387 of 30 January 2007, p. 2; https://conseil-etat.public.lu/content/dam/conseil_etat/fr/avis/2007/01/47387/47387.pdf (last accessed on 28 June 2025).

[24] See the Luxembourg Act of 12 July 2013 on alternative investment fund managers transposing Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010; amending: (i) the Luxembourg Act of 17 December 2010 relating to undertakings for collective investment, as amended; (ii) the Luxembourg Act of 13 February 2007 relating to specialised investment funds, as amended; (iii) the Luxembourg Act of 15 June 2004 relating to the investment company in risk capital (SICAR), as amended; (iv) the Luxembourg Act of 13 July 2005 on institutions for occupational retirement provision in the form of a SEPCAV and an ASSEP, as amended;(v) the Luxembourg Act of 13 July 2005 on the activities and supervision of institutions for occupational retirement provision; (vi) the Luxembourg Act of 5 April 1993 on the financial sector, as amended; (vii) the Luxembourg Act of 12 November 2004 on the fight against money laundering and terrorist financing, as amended; (viii) the Luxembourg Act of 23 December 1998 establishing a financial sector supervisory commission ("Commission de surveillance du secteur financier"), as amended; (ix) the Luxembourg Act of 10 August 1915 on commercial companies, as amended; (x) the Luxembourg Act of 19 December 2002 on the trade and companies register and the accounting practices and annual accounts of undertakings, as amended; (xi) the Commercial Code; (xii) the Luxembourg Act of 4 December 1967 on income tax, as amended; (xiii) the Luxembourg Act of 1 December 1936 on business tax, as amended; (xiv) the Luxembourg Act of 16 October 1934 on fiscal adjustment, as amended; (xv) the Luxembourg Act of 16 October 1934 on the valuation of assets and values, as amended; (xvi) the Luxembourg Act of 12 February 1979 on value added tax, as amended; *Mémorial A – N° 119*, 15 July 2013, Parl. doc. 6471; for its coordinated version see: https://www.cssf.lu/wp-content/uploads/L_120713_AIFM_eng.pdf (last accessed on 28 June 2025).

[25] See DC 19 October 2011, n° 126 923; https://anon.public.lu/Décisions%20anonymisées/Tribunal%20d%27arrondissement%20Luxembourg%20commerce/15_Chambre/2011/20111019-TALux15-126923a-accessible.pdf (last accessed on 28 June 2025).

[26] See DC 27 January 2012, n° 124646 + 128123; https://anon.public.lu/Décisions%20anonymisées/Tribunal%20d%27arrondissement%20Luxembourg%20commerce/02_Chambre/2012/20120127_TALux2-124646+128123a-accessible.pdf (last accessed on 28 June 2025).

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

subscription agreement or any other contract between the Other Well-Informed Investor and the Product Fund. Developments regarding the potential tax, regulatory and criminal consequences will be apprehended under points **(115)** et seq.

(65) The written adherence to the Well-Informed Investor status is far more than a mere formality; it is a fundamental legal requirement for an investor's eligibility to subscribe to a Product Fund. This was exemplified in a French Supreme Court case concerning a SIF (*Noble Crus*), where the Product Fund's issuing document explicitly restricted (as it should) subscriptions to Well-Informed Investors. In that case, the Other Well-Informed Investor had signed a declaration affirming his status as a Well-Informed Investor and had additionally provided an assessment from a French investment firm (*MB Conseils et Patrimoines*) confirming his qualification.[27] These two (2) elements played a decisive role, as the Court treated him as a non-retail, Well-Informed Investor, thereby excluding him from certain investor protections. His formal adherence to the Well-Informed Investor status, reinforced by the independent assessment, was central to the Court's decision. Conversely, had he failed to provide this written adherence, he could have contested his classification as a Well-Informed Investor, potentially successfully challenging the validity of his subscription under the Product Fund's legal framework.

(66) If a court declares a contract – be it a subscription agreement – null and void, it is as if the contract never existed. The primary consequence is restitution – each party must return what was received. The investor would be entitled to the return of their investment monies (subscription amount) against returning or cancelling the Securities they received. The goal is to unwind the transaction and put the parties back in their pre-contract position. In practice, unwinding a fund investment can be messy: the Product Fund may have since deployed the capital and the net asset value may have changed. But legally, nullity means the investor should get their money back, possibly with interest, and surrender any rights in the Product Fund. If the Product Fund has made distributions or the investor enjoyed some profit before the nullity is declared, those would also be returned or accounted for. Likewise, if there were losses, an issue arises – nullity would ordinarily require the Product Fund to return the full subscription amount, not just the current diminished value, since the investor's participation is considered void *ab initio*.

(67) Importantly, the investor might also claim damages in addition to nullity – for example, arguing that the Product Fund's manager breached a duty by allowing an ineligible investor to subscribe, causing the investor loss. A damages claim would require showing fault and loss – *e.g.*, that the Product Fund manager's failure to ensure the investor was qualified (and to obtain the written adherence) was a form of negligence or regulatory breach that caused the investor to enter an unsuitable investment. Under Luxembourg law, if nullity is granted, typically the remedy is restitution rather than expectation damages, but a separate criminal claim on the basis of Article 65(1) of the SIF Act, Article 56 of the RAIF Act, as the case may be and provided of course that the Product Fund is not a SICAR, could potentially be made if misconduct is proven.

(68) As we are in contractual matter, and as none of the Product Laws derogated from this principle, in light of the above, Article 1304 of the Luxembourg Civil code will apply, i.e., "*in all cases where the action for nullity or rescission of an agreement is not limited to a shorter period by a particular statute, the action lasts for five (5) years*". Furthermore, the relative nullity which is statute bared after 5 years may also be waived or remedied by the parties.

(69) There is also a strategic consideration: by signing a corrective adherence letter or by continuing to act as a Product Fund investor after learning of the defect (*e.g.*, voting in general meetings, or complying with a drawdown notice), an investor might be deemed to have confirmed or waived the ability to void the subscription agreement. Courts could consider that as a ratification of the initially defective subscription agreement, especially as the nullity is relative. Thus, an investor's right to nullify is strongest if they raise the issue promptly after learning of the defect.

[27] See French Supreme Court, Civil Division 1, 26 June 2019, 18-15.101; https://www.legifrance.gouv.fr/juri/id/JURITEXT000038734194/#:~:text=expérience%20et%20sa%20connaissance%20pour,et%2018%20du%20règlement (last accessed on 28 June 2025).

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

b) Sub-Categories of Other Well-Informed Investors

(70) "**Other Well-Informed Investors**" are subdivided into two (2) sub-categories depending on the "proof" to be presented to the Product Fund regarding their Well-Informed status:

(71) those investors investing a minimum of EUR 100,000 in the Product Fund; and

(72) those investors receiving an assessment from an authorised entity in compliance with the relevant Product Law.

(i) Other Well-Informed Investors Investing a Minimum of EUR 100,000 in the Product Fund

- *Split Ownerships*

(73) In cases where securities are held under split ownership structures, such as co-ownership or usufruct arrangements, all affected investors must qualify as Well-Informed Investors. If this requirement is not met or ceases to be met – such as in the event of the original owner's death, where heirs inherit the securities without qualifying as Well-Informed Investors – the Product Fund must enforce a compulsory redemption of the Securities. This requirement should be clearly stated in the issuing document and subscription agreement to ensure investor awareness. To mitigate such risks and avoid complications, investors in such situations may choose to invest through a financial institution with which they have entered into a DPMA (see points (**21**) et seq. for more information).

- *Umbrella Product Funds*

(74) For Other Well-Informed Investors who have not undergone a formal assessment, a minimum investment threshold of EUR 100,000 is required. This investment threshold applies at the umbrella fund level, meaning that an investor's allocation may be distributed across multiple compartments of the same Product Fund rather than being compartment-specific.

- *Currency of the Investment*

(75) Investors are not required to make their investment in euros; however, if subscriptions are made – by an Other Well-Informed Investor not subject to an assessment – in a different currency, they must commit a minimum amount equivalent to EUR 100,000 at the time of entering into the subscription agreement.

- *NAV drop*

(76) Should the net asset value of an Other Well-Informed Investor's holdings fall below EUR 100,000 due to market fluctuations, they are not obligated to contribute additional funds to maintain their initial investment value.

- *Redemption*

(77) In open-ended Product Funds, an Other Well-Informed Investor who has not undergone an assessment and seeks to redeem a portion of their Securities that would result in their remaining stake falling below EUR 100,000 shall find their request treated as a full redemption. This stipulation should be explicitly outlined in the issuing document and subscription agreement to avoid misunderstandings.

(ii) Interactions with the EuSEF Regulation, EuVECA Regulation and ELTIF Regulation

(78) In relation to European fund regulations, both the EuVECA Regulation and EuSEF Regulation stipulate that investors must commit a minimum of EUR 100,000 and must provide a written declaration, separate from the investment agreement, confirming their awareness of the risks associated with their investment.

(79) Conversely, under the revised Article 30 of the ELTIF Regulation,[28] since all retail investors are to pass a MiFID suitability assessment, they automatically qualify as Other Well-Informed

[28] See Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds, *OJ L 123*, 19 May 2015, p. 98 – 121; for its coordinated version see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015R0760-20240110 (last accessed on 28 June 2025); see also Commission delegated regulation (EU) 2018/480 of 4 December 2017 supplementing Regulation (EU) 2015/760 of the European Parliament and of the Council with regard to regulatory technical standards on financial derivative instruments solely serving hedging purposes, sufficient length of the life of the European long-term

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

Investors under Product Law rules. Therefore, in practical terms, the EUR 100,000 minimum investment requirement does not apply to retail investors subscribing to an ELTIF structured under a Product Law.

(iii) Other Well-Informed Investors Receiving an Assessment from an Authorised Entity

- *Assessment Process of Other Well-Informed Investors*

(80) Other Well-Informed Investors who have not invested at least EUR 100,000 must undergo an assessment before being admitted to the Product Fund. The applicable laws provide limited guidance on the precise contents of this assessment, and the CSSF has not issued specific instructions regarding the criteria to be evaluated. However, the law does require that the assessing entity evaluate the investor's expertise, experience, and knowledge to ensure that they are capable of adequately assessing and understanding the investment.

(81) For investors seeking to opt into Professional Investor status under AIFMD/MiFID II, the assessment must verify their ability to make independent investment decisions and understand the associated risks. The assessment typically involves a fitness test, requiring investors to meet at least two out of three prescribed criteria, followed by a formal procedure.

(82) For Other Well-Informed Investors who require an assessment but do not qualify as Professional Investors, evaluating entities may impose slightly less stringent requirements than those applied under MiFID II, while still ensuring that only sufficiently knowledgeable investors are admitted. This assessment may consider various factors, such as the investor's financial standing (including annual disposable income and net wealth), investment objectives (including risk tolerance and ability to bear financial loss), and prior experience and knowledge regarding relevant financial products. An investor may be required to declare that they meet at least two of the following conditions: (i) prior relevant experience with trading or managing similar asset classes; (ii) current or past professional employment handling similar financial products; (iii) relevant education or training; or (iv) a detailed review of the Product Fund's investment policy, risk factors, and other relevant aspects, accompanied by a discussion with the assessing entity.

- *Scope and Applicability of Assessments*

(83) Bearing in mind that Other Well-Informed Investors are a category of retail investors somewhere between "pure" retail investors *Opt-In* Professional Investors, assessing undertakings could set somewhat lower requirements compared to those provided under the AIFMD/MiFID for *Opt-In* Professional Investors (and yet high enough not to include just any retail investor).

(84) Such standards for a Product Fund fitness test could verify for instance the potential investor's:

- financial situation, including his yearly disposable income (*i.e.*, the investor's yearly income after tax minus the investor's yearly expenses) and net wealth (*i.e.*, the investor's investable liquid and illiquid assets as well as other assets, reduced by the investor's liabilities);
- investment objective, including the investor's risk tolerance, ability to bear financial loss and investment time horizon; and
- experience and knowledge about various products including the assets in which the Product Fund invests. In this respect, it would be good practice for the investor to be in a position to declare in writing during the assessment that he meets two or more of the following thresholds:
    - that he has – via previous relevant experience with trading and/or handling assets falling in a similar category as to those in which the Product Fund (or the relevant compartment(s) thereof) invests (the "**Assets**") – attained the necessary knowledge and understanding of the essential elements linked to investments in such Assets; and/or

investment funds, assessment criteria for the market for potential buyers and valuation of the assets to be divested, and the types and characteristics of the facilities available to retail investors, *OJ L 81*, 23 March 2018, p. 1 - 5; https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0480&from=EN (last accessed on 28 June 2025).

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

- that he is – or has within the last 10 years been – employed in a position where he handles, trades or otherwise works in connection with the Assets and has thereby attained the required knowledge and understanding; and/or
- that he has received an education and/ or has experience which gives him the required knowledge and understanding of investments in such Assets; and/or
- that he has reviewed in details together with the assessing undertaking (i) the investment policy of the Product Fund (or the relevant compartment(s) thereof) as contained in the Product Fund's issuing document, (ii) the risk factors as described in the issuing document, as well as (iii) any other relevant elements linked to an investment in the Product Fund (or the relevant compartment(s) thereof) and indirectly in the Assets, and has had the time and opportunity to ask the assessing undertaking any additional questions and received answers thereto to its full and complete satisfaction.

(85) The Product Laws provide assessing entities with significant flexibility in evaluating an investor's background and determining whether a retail investor meets the eligibility criteria to be classified as an Other Well-Informed Investor.

(86) Accordingly, an assessment may be conducted at the umbrella Product Fund level or for a specific compartment thereof. It may apply to both existing and future compartments launched within the Product Fund, provided that the investor's experience, expertise, and knowledge remain relevant across all applicable compartments. This approach aligns with the MiFID framework, which requires an assessing entity to obtain a written statement from an investor requesting classification as a Professional Investor, either on a general basis or for a specific investment type. Similarly, assessing entities in connection with a Product Fund will typically require a comparable statement from an investor indicating their willingness to invest in future compartments with similar characteristics.

(87) If a prior assessment is deemed insufficient to support an investor's continued classification as an Other Well-Informed Investor, the assessing entity should conduct a new evaluation. This ensures that the investor remains seen as eligible, particularly when subscribing to a newly launched compartment within the umbrella Product Fund.

(88) Finally, when the investor is a person investing less than EUR 100,000 and is not classified as an Institutional or Professional Investor, the beneficial owners of that entity should be assessed as the Other Well-Informed Investors rather than merely the board or general partner of the entity.

- *Entities Performing the Assessments*

(89) Assessments for Other Well-Informed Investors investing less than EUR 100,000 may be issued by a limited number of authorised entities, including credit institutions, investment firms, UCITS-compliant management companies, and authorised AIFMs.

(90) Where the sponsor of the Product Fund is one of the aforementioned entities, the assessment may also be conducted by said sponsor, provided that adequate conflict-of-interest procedures are in place and strictly followed.

(91) Similarly, depositary agents of a Product Fund that are also credit institutions may conduct assessments, subject to compliance with their own conflict-of-interest policies and procedures.

- *Responsibilities and Legal Consequences*

(92) Both the investor and the assessing entity bear responsibility for ensuring the adequacy of the investment decision. Investors must acknowledge that Product Funds are not retail funds and that they carry higher risk exposure compared to Public Funds. Subscription agreements should contain clear language, often in bold, drawing the investor's attention to this risk.

(93) Entities conducting assessments should establish reasonable procedures to ensure that their evaluation is thorough and aligns with industry best practices. Georges Ravarani writes in the case of an assessment carried out by a credit institution that "*a banker has a duty to get to know his customers. He must assess his customer's profile and ensure that the customer has the knowledge needed to understand the risks inherent in the financial services […] he is*

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

offering. Assessing a customer's profile requires the banker to gather information".[29] In line with this principle, the assessing entity must apply a "reasonable professional standard", *i.e.*, that other professionals active in the field would also have considered such individual as an Other Well-Informed Investor with respect to this particular investment. Hindsight cannot be taken into consideration when using this concept.

(94) If an investor is misclassified, both the investor and the assessing entity could face liability. Most issuing documents and subscription agreements include provisions allowing the Product Fund to exclude ineligible investors and impose penalties where necessary.

(95) The Product Fund's (in the case of SICARs and SIFs) or AIFM's financial supervisory authority, the Luxembourg tax authorities (for RAIFs), or the Product Fund's auditor may request records of investor assessments and the procedures in place to ensure compliance with legal requirements. The Product Fund must be able to demonstrate that it has taken appropriate steps to verify investor eligibility, as mandated under Article 2(3) of the Product Laws.

(D) Compliance and Nominee Matters

1. Ensuring Compliance with Well-Informed Investor Requirements

(96) Although the responsibility for screening potential investors is typically contractually delegated to a transfer agent, the AIFM and the Product Fund remain ultimately responsible for ensuring that only Well-Informed Investors are included in the Register. This requires the implementation of both *a priori* and *a posteriori* verification processes.

(97) *A priori* verifications are primarily conducted by the transfer agent, relying on the information provided by subscribers in their subscription agreements and supporting documents. If any doubt arises, additional information should be requested from the subscriber and properly evaluated. If uncertainty persists, the subscription should be rejected. Product Fund's issuing document commonly contains warnings regarding the consequences of an ineligible subscription, including the potential application of penalties.

(98) *A posteriori* checks may be necessary in specific situations, such as when an investor subscribes through a Nominee, but the Nominee later discloses that it is acting on behalf of another party. This may also occur in cases of inheritance, donations, or indirect transfers. Nominee arrangements should be distinguished from the DPMA. If the discretionary portfolio manager qualifies as an Institutional Investor, it is generally sufficient for a corresponding statement to be included in the subscription agreement.

(99) To maintain compliance, Product Funds must reserve the right to request, at any time, additional information regarding the ultimate beneficial owner of the Securities issued. This may be necessary for audit purposes and in accordance with Article 2(3) of the applicable Product Laws.

2. Governing Law on Securities and Ownership Determination

(100) To determine the ownership of Securities issued by a Product Fund, it is first necessary to establish the applicable governing law. Drawing on principles established by the Luxembourg Court of Appeal,[30] the *lex societatis*, i.e., the law governing the relationship between the Product Fund and its shareholders or unitholders, is the relevant Luxembourg law. This includes the applicable Product Laws and, where relevant, the Luxembourg Act of 10 August 1915 on commercial companies (the "**Company Act**"). The *lex societatis* not only governs the creation of registered Securities but also the determination of their ownership, the real rights attached to Securities, and the conditions required for transfers to be enforceable against the Product Fund.

(101) Ownership provisions differ depending on whether the Product Fund is structured as a common fund (the "**FCP**"), an investment company with variable capital (the "**SICAV**"), or an investment company with fixed capital (the "**SICAF**"). For FCP structures, ownership and transfer of units, whether in registered or bearer form, are governed by Articles 430-4 and 430-6 of the Company Act. The rights and transfers of securities held in a securities account are also subject to the

[29] See G. Ravarani: *La responsabilité civile des personnes privées et publiques*, 3rd ed., no. 575 et seq.
[30] See CA 7 May 2015, n° 37382; https://anon.public.lu/Décisions%20anonymisées/CSJ/09_Chambre/2015/20150507_CA9-37382a-accessible.pdf (last accessed on 28 June 2025).

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

Law of 6 April 2013 on dematerialised securities and the amended Law of 1 August 2001 on the circulation of securities. For SICAVs, Article 24(1) of the Product Laws states that SICAVs are subject to the Company Act unless otherwise specified. This means that ownership of registered securities is established by an entry in the register maintained at the Product Fund's registered office, recording the identity of each shareholder, the number of shares held, transfers, and their dates. Bearer securities ownership, by contrast, is determined based on the bearer share register, in line with Article 430-6(3) of the Company Act. For SICAFs structured as an SCS, SCSp, SCA, SA, or Sàrl, the same provisions of the Company Act applicable to SICAVs apply.

(102) It is important to note that, in the case of registered Securities, their inclusion in the Register serves as evidence of ownership rather than a title deed.[31] The Luxembourg courts have consistently held that such registration is merely a means of proof and does not, in itself, constitute ownership.[32] The same should be true of bearer Securities.

3. Legal Presumptions and the Role of Nominees

(103) The registration of a person's name in the Register of a Product Fund creates a presumption of ownership intended to protect the registered individual. However, this presumption may be overturned.

(104) When a Nominee's name appears as the sole entry in the Register, the Nominee is presumed to be the owner of the Securities and may, in principle, rely on this presumption against the Product Fund. It is the responsibility of the Register keeper – whether the Product Fund (for registered Securities) or the depositary (for bearer Securities) – to establish that an entry was made either mistakenly or as a result of fraud.[33] Additionally, the Register keeper must determine whether the registration was incomplete, particularly where the Nominee had disclosed in the subscription agreement that it was acting on behalf of another party, but this information was not recorded correctly. In other words, the Product Fund (or the depositary of the bearer Securities) being the keeper of the Register and the Nominee has had no part in it, the Product Fund cannot create a document of title for itself, in the preparation of which the Nominee had no part[34] whether against the nominee or "*against third parties, who may provide evidence to the contrary*".[35]

(105) Luxembourg jurisprudence has reaffirmed that Nominees and third parties are entitled to challenge ownership presumption using any legally admissible means of proof under the Company Act.[36]

(106) The Luxembourg Court of Appeal in an effort to qualify the nominee relationship pointed out that the term nominee is a "*concept originally developed in Anglo-Saxon practice, [which] refers to a person who holds shares – by one legal means or another – on behalf of another*", which qualification would depend on the will expressed by the parties in the nominee agreement and in particular regulating the Nominee's role as an intermediary between the Nominee's client and the Product Fund.[37]

(107) Paraphrasing Isabelle Riassetto,[38] subscription of Securities on behalf of a client on the basis of a nominee agreement could take on – from a Luxembourg law standpoint and depending on the terms of the contract – one of the following forms which would vary in their consequences:

- *Opacity* as to the Nominee relationship:
    - *"pure" Nominee*: if the intermediary does not indicate to the Product Fund that it is acting on behalf of a third party, it is considered to be a Nominee. In this case, the

[31] See CA, 30 October 2002, *Bulletin d'information sur la jurisprudence (BIJ)*, 2003, p. 26.
[32] See Isabelle Riassetto, *Pas. Lux.*, 2015/4, p. 375-382.
[33] See Charles Resteau, *Traité des sociétés anonymes*, T. I, 3rd ed. Brussels, 1981, n° 626
[34] See Charles Resteau, *ibidem*.
[35] See Isabelle Riassetto, *ibidem*.
[36] See namely CA 15 July 2009, n° 34505; https://anon.public.lu/Décisions%20anonymisées/CSJ/07_Chambre%20référé/2009/090715_34505-1a-accessible.pdf (last accessed on 28 June 2025).
[37] See *Pas. Lux.*, 2015/4, p. 370-375.
[38] See Isabelle Riassetto, *ibidem*.

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

intermediary does not become the owner of the Securities but is presumed by the Product Fund so to be;

- *Transparency* as to the nominee relationship:
    - *Trustee*: if the intermediary indicates to the Product Fund that it is acting as a trustee/Nominee, it will acquire ownership of the Securities but only for the duration of the trust agreement. Indeed, under Swiss law, a trust agreement is a contract by which one person – the settlor – transfers rights to another – the trustee – which the trustee undertakes to exercise in its own name, but in accordance with the settlor's instructions, and to return them to the settlor or to a third party once the trust relationship has ended. In relation to third parties, it is the trustee alone who appears and acts in its own name, while indicating that it is dealing on behalf of the trustee, whose name is not revealed;
    - *Agent*: if the intermediary indicates to the Product Fund that it is acting as a Nominee for a principal, a "perfect representation" would be required for the agency qualification to be retained. If so retained, the principal/end-investor would have to be entered directly at the moment of subscription as a shareholder in the Register in the stead of the Nominee;
    - *Commission agent*: if the Nominee indicates to the Product Fund when completing the subscription form or entering into the commitment agreement that it is acting as commission agent while preserving the anonymity of his client, the commission agent's name shall appear on the Register and therefore will be presumed to be the owner of the Securities. Furthermore, it will never become the owner of the Securities subscribed on behalf of its client (*i.e.*, the principal), the ownership thereof being therefore transferred directly to the client's assets without passing through the commission agent's assets.

(108) As the spirit and letter of most nominee agreements should reflect that (A) the Nominee is (i) to act in its name, (ii) to appear as the owner of the Securities and (iii) to be able to exercise the rights related to the Securities, and yet (B) for the end-investor to remain the actual owner of the Securities from the beginning, only the commission agency qualification or "imperfect representation" should in principle be retained from a Luxembourg law standpoint.

4. Trading and Transferability of Product Fund Securities

(109) In regulated markets, agreements restricting liquidity are generally prohibited. However, Product Funds may be listed on the Luxembourg Stock Exchange (the "**LuxSE**"), provided that their Securities are exclusively traded on the "**Professional Segments**" of the LuxSE, which are accessible only to Well-Informed Investors. The LuxSE Rules & Regulations (R&R) clarify that the exchange does not verify investor qualification or cancel trades executed on behalf of ineligible investors. It is therefore the responsibility of the issuing Product Fund to ensure compliance. The LuxSE's Rule 5106.7 requires funds to enforce proper verification procedures, typically involving coordination between the seller's and buyer's intermediaries to confirm the buyer's Well-Informed Investor status before executing and registering a trade.

(110) Given these additional verification steps, the settlement of trades involving Product Funds on the LuxSE may take somewhat longer than standard securities transactions.

5. Issuance of Dematerialised Securities

(111) Although still rarely utilised in practice, the Product Laws allow a Product Fund to issue dematerialised securities. In such cases, the AIFM must ensure that the Product Fund's constitutional documents provide for mechanisms that enable it to verify, on an ongoing basis, that its securities are held exclusively by Well-Informed Investors. These verifications are typically conducted on an *a posteriori* basis.

(112) Under Article 17 of the Luxembourg Act of 6 April 2013 on dematerialised securities (the "**Dematerialised Securities Act**"), the AIFM may, at the Product Fund's expense, request the settlement organisation or central account keeper to provide the identities of holders of dematerialised securities. This includes details such as the name, nationality, date of birth (or incorporation), address, and number of securities held. In cases where an investor does not

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

provide the requested information within two (2) months, or if the information is found to be incomplete or incorrect, the AIFM may suspend voting rights related to the affected Securities until the issue is resolved.

(113) The settlement organisation or the central account keeper must then provide the AIFM with the identification data that it has on the Securities account holders in its books and the number of dematerialised Securities held by each one of them. The same information on Securities account holders for own account must be gathered by the Product Fund throughout the Securities account holders or other persons, whether from Luxembourg or abroad, who have a Securities account in a settlement organisation or a central account keeper credited with the relevant dematerialised Securities.

(114) The Product Fund (or the relevant compartment thereof) may request the persons indicated on the lists given to it to confirm that they have the relevant dematerialised Securities for own account.

(115) When a person who holds a Securities account with a central account keeper or a settlement organisation or a person who holds a Securities account with an account keeper or a foreign account keeper does not communicate the information requested by the AIFM in accordance with this procedure which should be inserted in the Product Fund's constitutive documents within two (2) months as from the request or if he communicated incomplete or erroneous information relating to his capacity or the quantity of dematerialised Securities held by him, the AIFM may suspend until settlement the voting rights up to the amount of the portion of dematerialised Securities for which the information requested was not received.

(116) If it is determined that the securities holder is not a Well-Informed Investor, the AIFM must take steps to exclude the investor from the Product Fund and may apply any penalties provided for in the Product Fund's issuing documents.

(E) Failure to Comply

(117) In addition to the contractual considerations discussed under points **(64)** et seq., the acceptance of a non-Well-Informed Investor in a Product Fund can have significant tax, regulatory, and criminal consequences, affecting not only the Product Fund itself but also its directors / managers, and the investor involved.

1. Implications for the Product Fund

(118) From a tax perspective, a Product Fund that allows non-Well-Informed Investors to participate risks losing its status under the relevant regulatory framework. This could result in the loss of tax benefits specifically granted to such vehicles, particularly if the Product Fund is structured as a tax-opaque entity. The gravity of this consequence is heightened in cases where negligence or fraudulent conduct is involved, whether on the part of the directors / managers of the Product Fund itself or its AIFM.

(119) Regulatory consequences may also arise, with the severity of the response depending on the circumstances of the breach. Luxembourg's regulatory framework strictly mandates compliance with the Well-Informed Investor requirement, and any deviation from this obligation could trigger regulatory intervention.

(120) In addition to facing potential administrative sanctions, a Product Fund in violation of these rules risks reputational damage, which may, in turn, impact its ability to attract investors and maintain its standing within the financial sector.

2. Liability of Directors and Managers

(121) The legal consequences of admitting a non-Well-Informed Investor extend beyond the fund itself to its directors and managers, who may be held personally liable for non-compliance. Under Luxembourg law, directors and managers of a SIF or a RAIF or its management company can face criminal sanctions, including imprisonment ranging from one month to one year and fines between EUR 500 and EUR 25,000.[39] This liability stems from the express requirement

[39] See Article 65(1) of the SIF Act and Article 56 of the RAIF Act.

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

under the SIF Act and the RAIF Act for the fund to implement the necessary mechanisms to ensure compliance with the Well-Informed Investor provisions.

(122) Given the clear statutory obligation imposed on the Product Fund's management, it would be difficult to argue that this responsibility does not rest squarely on their shoulders. In cases of non-compliance, the failure to uphold this duty could result in criminal liability for those in charge. However, it is important to note that the obligation is not one of absolute result but rather one of means. Directors and managers are expected to demonstrate that they have taken all reasonable steps to ensure compliance, measured against the standard of a *bonus pater familias* – a prudent and diligent professional.

3. Consequences for Non-Well-Informed Investors

(123) An investor who does not meet the Well-Informed Investor criteria at the time of subscription may also face serious repercussions. If the Product Fund reasonably determines that an investor is ineligible, their Securities must be compulsorily redeemed or transferred without delay, in accordance with the procedures outlined in the Product Fund's issuing document. The issuing document typically provides that such compulsory transactions may occur at a discount, meaning the investor could suffer financial losses.

(124) In addition to discounted pricing, payments for redeemed or transferred securities may be subject to significant delays. This is particularly relevant for closed-ended Product Funds, where liquidity constraints may result in investors having to wait until the liquidation of the Product Fund or the relevant compartment before receiving any consideration. The issuing document commonly includes clauses specifying these potential sanctions, with some even stating that the listed measures are non-exhaustive. Market practice also dictates that investors' attention is drawn to these risks explicitly in the subscription agreement, ensuring they are aware of the potential financial and procedural consequences of failing to meet the eligibility criteria.

4. Potential Liability of Third Parties

(125) Entities involved in assessing investor eligibility without advising on the appropriateness of an investment should refer to the relevant provisions governing their role. However, where an entity actively recommends a non-Well-Informed Investor to invest in a Product Fund, it may be exposed to liability.

(126) The Luxembourg Court of Appeal has reaffirmed the principle that financial institutions have an inherent duty to inform and advise their clients.[40] In said ruling, the court confirmed that even in the absence of a discretionary management agreement, banks and financial institutions must act with due care when executing transactions on behalf of clients. This duty extends to ensuring that clients are adequately informed of the risks associated with their investments.

(127) Legal scholars, such as Georges Ravarani, have further elaborated on the scope of this obligation, particularly in relation to credit institutions. According to Ravarani, financial advisors are required to assess their clients' financial situations, investment experience, and objectives before making recommendations. Advisors must also provide clear and comprehensive information about the risks involved in any proposed transaction, enabling investors to make informed decisions. This duty of care is particularly relevant when advising clients on investments in complex financial products, such as Product Funds.[41]

(128) Furthermore, where an advisor has actively guided a client in making an investment decision, they may be held liable for any losses incurred if it is demonstrated that they failed to act as a prudent professional. The duty to advise is considered an obligation of means rather than an obligation of result, meaning that an advisor is expected to exercise reasonable care and diligence rather than guaranteeing a specific investment outcome. Courts will assess this duty in light of the investor's level of knowledge and experience, ensuring that advisors tailor their recommendations accordingly.[42]

---

[40] See namely CA 11 February 2015, n° 39428; https://anon.public.lu/Décisions%20anonymisées/CSJ/04_Chambre/2015/20150211_39428_II_a-accessible.pdf (last accessed on 28 June 2025).
[41] George Ravarani, *La responsabilité civile des personnes privées et publiques*, 3rd ed., no. 575 et seq.
[42] George Ravarani, *ibidem*.

Investment Management Journal
Vol. 1 – N° 1-2 – pp.1-20
ISSN: XXXX-XXXX – eISSN: XXXX-XXXX
Quarterly publication

Conclusion

(129) Over the past two (2) decades, Luxembourg has solidified its position as Europe's leading hub for private funds, underpinned by a robust yet flexible regulatory framework. The introduction and refinement of the Well-Informed Investor concept through successive legislative reforms have played a pivotal role in ensuring that access to private funds remains reserved for sophisticated investors who possess the necessary expertise, experience, and financial capacity to engage in alternative investments. By carefully balancing investor protection with market adaptability, Luxembourg has reinforced its competitive edge in the global investment fund landscape.

(130) The evolution of statutory and contractual investor eligibility restrictions has provided Luxembourg's private fund ecosystem with clarity and consistency. The 2023 legislative amendments, which further harmonised the definition of Well-Informed Investors across the SICAR, SIF, and RAIF regimes, demonstrate Luxembourg's commitment to maintaining regulatory coherence while aligning with broader European Union standards. These refinements have strengthened the legal certainty surrounding investor categorisation, verification processes, and compliance obligations, thereby fostering market confidence.

(131) The comprehensive framework governing investor eligibility ensures that fund sponsors, AIFMs, and other market participants have well-defined rules to follow, reducing ambiguity and the risk of regulatory breaches. However, the potential consequences of miscategorising an investor – ranging from contractual disputes and financial penalties to tax liabilities, regulatory sanctions, and even criminal liability – underscore the importance of strict adherence to eligibility criteria. As explored in this article, Luxembourg law imposes stringent obligations on fund managers to verify investor qualification, with non-compliance potentially resulting in severe repercussions for the fund, its management, and investors alike.

(132) Going forward, Luxembourg's ability to maintain its global leadership in private fund structuring will depend on its capacity to adapt to market developments, regulatory trends, and investor demands. The country's continued efforts to streamline compliance processes, enhance investor protection, and uphold transparency in fund structuring will be crucial in sustaining its reputation as a premier jurisdiction for alternative investment funds. While the Well-Informed Investor framework has evolved significantly over the years, ongoing dialogue between regulators, industry stakeholders, and policymakers will remain essential to ensuring that Luxembourg's private fund ecosystem continues to thrive in an increasingly competitive international market.