

## Advantages for Asia-based Managers of using Luxembourg Funds

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The advantages for Asia-based managers of using Luxembourg investment fund structures compared to offshore jurisdictions

### 亚洲资管经理在卢森堡设立基金的优势

#### —— 相较于其他离岸司法管辖区设立基金的条件分析

Asian asset managers need certainty to further sustain their international growth. In a context of political turbulences, time has come to seek for enduring solution and their onshore investment platform.

With a strong track record in the servicing of public funds, Luxembourg has already been chosen by a large number of Asian asset managers of all sizes for establishing fund platforms and providing continuity in their access to the European market. The passporting of funds is further complemented by efficient Luxembourg fund structuring and financing capabilities. These advantages explain a strong demand for Luxembourg entities originated from Asia and beyond.

亚洲资产管理人需要确定性以保证其可持续的国际化发展道路。在政治动荡的背景下，寻求长远的发展模式及在岸投资平台势在必行。

卢森堡凭借丰富的公募基金服务经验，吸引了来自世界各地的众多亚洲资产管理者在此开展海外基金业务。高效的基金架构和融资法律体系，加上便利的欧洲通行证制度，使得卢森堡的基金工具受到亚洲乃至全球基金从业者的青睐。

## 1. THE STRONG “MARKETABILITY” OF LUXEMBOURG FUNDS

Luxembourg funds managed or advised by Asian sponsors can access investors established or resident within the European Union. The ability to market a Luxembourg fund within 28 countries - and 27 post completion of Brexit - usually comes as a complement to pre-existing parallel structures established in offshore jurisdictions, such as Caymans Island. Access to European professional investors is operated through the appointment by the sponsor's wholly owned general partner or the board of the fund of a Luxembourg (or another EU) Alternative Investment Fund Manager (AIFM) subject to the Alternative Fund Managers Directive of 2011 (AIFMD). The AIFMD was implemented in Luxembourg by the eponymous Law of 12 July 2013. Although initially perceived as a major disruption to the industry, some substantial merits are now recognised, notably at the level of the funds' AIFMs, whose passport appears as the most efficient solution when marketing shares and units of Luxembourg alternative investment funds (AIF) throughout the EU, while approaching limited partners in Europe through private placement regime or reverse solicitation has now become very problematic for European larger pension funds and insurance companies, which represent around 50% of all capital raised and committed or invested in private equity, venture capital or real estate funds.

Despite the provisions in the AIFMD providing for the possible extension of a passport outside the European Union<sup>1</sup>, the opening of the passport to third-country managers remains uncertain. Even though some countries have been positively assessed by the European Securities and Markets Authority<sup>2</sup>, this extension of the passport to third-country managers seems very theoretical in the current context of Brexit.

The marketability of its fund structures has permitted Luxembourg to gradually establish its position as the jurisdiction of choice for Asian managers that use its structures, management and administration capacities to enter into the European market. The long and globally well-recognised experience in servicing public and private funds is further supported by the efficiency of its structures and the protective regime offered to lenders in the financing part of the funds' underlying investments.

## 2. AN EFFICIENT FUND STRUCTURING AND FINANCING LEGISLATION

The investment fund toolbox was extensively modernised in 2013 by creating two additional structures, namely the special limited partnership and the RAIF, which can both be passported and marketed to professional investors and

## 1. 卢森堡基金具有强大的适销性

亚洲发起人管理或提供咨询服务的卢森堡基金，可以向欧盟28国（英国脱欧后为27国）的投资者推广销售，在很多情况它作为平行基金成了其他离岸管辖区如开曼群岛的主基金的补充。按照2011年另类投资基金指令（下称AIFMD），基金发起人通过其在卢森堡的全资普通合伙人或董事会任命一位卢森堡（或欧盟其他国家）另类投资基金（下称AIFM）经理，可向欧洲专业投资者推广基金产品。卢森堡已于2013年7月12日颁布同名国内法实施AIFMD，开始时曾经被认为是对基金行业的冲击，但其巨大优势现在已得到认可。尤其是原来通过私募制度或反向询价向欧盟养老基金和保险公司进行的营销方式，已显露出诸多问题（此类投资总额占全球私募股权、风险投资、房地产基金投资总额的50%）。AIFM通行证已成为在欧洲销售卢森堡另类投资基金的最佳途径。

尽管AIFMD规定，欧洲通行证在满足一定条件的前提下，可延伸至欧盟以外的国家和地区<sup>1</sup>。但非欧盟国家基金管理人是否能最终取得欧洲通行证仍不明确。虽然欧洲证券及市场管理局<sup>2</sup>已对一部分国家进行了正面的评估，但在目前英国脱欧背景下向非欧盟国家基金管理人开放欧洲通行证，仍不具备可操作性。

卢森堡凭借其基金工具的强大适销性、全球公认的公募及私募基金服务经验、高效的基金结构和融资体系，以及对基金投资者健全的保护体制，已逐渐成为亚洲基金管理人进军欧洲市场的首要选择。

## 2. 高效的基金结构和融资体系

2013年，卢森堡创立的两个新型投资工具——特殊有限合伙和另类保留投资基金，使卢森堡基金行业的现代化得到巨大提升。这两种工具分别类似于传统的离岸有限合伙制度和独立投资组合公司(SPC)，均能向专业投资者推广。

有限合伙制度，是指受1915年8月10日颁布的卢森堡商业公司法修订法监管的一种投资工具，包括有限合伙和特殊有限合伙。除非基金发起人另作决定，两者均不受卢森堡金融监管局（CSSF）的监管，因此可以迅速成立。这类工具因其灵活性及组织结构上的充分契约自由被广泛使用，与广为人知的开曼

<sup>1</sup> Article 67 of the AIFMD, referring to the regime applicable to third country managers as set out in Article 35 of the AIFMD. AIFMD第67条明确本指令适用于第35条列明的第三方国家的基金管理人。

<sup>2</sup> ESMA Pnal advice on AIFMD passport of 12 September 2016 relating to Australia, Bermuda, Canada, Cayman Islands, Guernsey, Hong Kong, Japan, Jersey, Isle of Man, Singapore, Switzerland and the United States.

欧洲证券及市场管理局关于AIFMD通行证的最終指导意见规定对下列国家和地区开放通行证：澳大利亚、百慕大、加拿大、开曼群岛、根西岛、香港、日本、泽西岛、马恩岛、新加坡、瑞士和美国。

which are very similar to traditional offshore partnerships and SPC structures, respectively.

Limited Partnerships refer to a category of investment vehicles governed by the amended Luxembourg Law of 10 August 1915 on commercial companies, and which comprises both Luxembourg common limited partnership (*société en commandite simple*) and special limited partnership (*société en commandite spéciale*). Unless otherwise decided by the fund sponsor, neither of them is supervised by the Luxembourg supervisory authority (CSSF) and can be formed very rapidly. These vehicles, similarly to the well-known Cayman partnership or other Anglo-Saxon models, are used for their flexibility and characterised by the contractual freedom in structuring. Asian sponsors who are used to such structures but willing to open to Europe and onshore part of their activity, have chosen to set up parallel funds under the form of Luxembourg limited partnerships which seek exposure to the same assets alongside the offshore fund. Luxembourg partnerships are also used on a stand-alone basis to bring aboard any investors, irrespective of their status (regulated or not) or geographical establishment, and is largely seen as an optimised solution for Asian managers. Limited Partnerships offer a competitive tax environment and may benefit from the AIFMD marketing passport described above.

The second successful structure created in Luxembourg is the reserved alternative investment funds (RAIF) which is governed by the Luxembourg Law of 23 July 2016 (RAIF Law). To the same extent as most of the partnerships formed since 2013, the RAIF is not subject to authorisation or supervision by the CSSF. The RAIF must designate a licensed AIFM, thus benefiting from the AIFMD passport and protection of the AIFMD framework. The possibility to have sub-funds such as in an SPC-type of vehicle is one of the key features of the RAIF, making it an alternative to the above partnership.

Finally, Luxembourg special purpose vehicles (SPVs), generally incorporated as ordinary taxable private limited company (*société à responsabilité limitée; S.à.r.l.*), generally known as "Soparfi", are largely used in financial transactions as required by credit institutions and other major lenders, given the protection offered by Luxembourg financial collateral arrangements which creates a favourable environment to such entities. This results from the provisions of the Luxembourg Law of 5 August 2005 on financial collateral arrangements and case law.

Corporate fund structures, despite being tax exempt, may benefit from access to about 45 double tax treaties (DTT) out of 81 concluded by Luxembourg (including 38 with countries and regions that are part of the One Belt One Road (OBOR) initiative). Corporate fund structures have notably access to treaty benefits under the treaties concluded by Luxembourg with China and Hong Kong. Where a fund does not benefit from treaty access, in particular where the fund is set-up as tax transparent partnership, the use of SPVs may secure treaty access. The participation exemption regime through the use of a Luxembourg SPV as the holding entity in an acquisition structure provides for an exemption from income and capital gains for qualifying investments held by qualifying

群岛合伙公司及英美法下的合伙制度极为相似。熟悉这类离岸投资工具并希望进军欧洲市场的亚洲基金发起人，都选择通过卢森堡该类有限合伙制度，设立其离岸主基金的平行基金，一并投资到目标资产中。卢森堡有限合伙制度也作为独立投资基金设立，向任何国家和地区、是否受监管的投资者销售。有限合伙同时也是一个十分具有竞争力的税收实体，并受益于另类投资基金经理指令（AIFMD）通行证。因此，这类合伙制被认为是亚洲基金经理的最优选择。

保留另类投资基金（RAIF）作为第二种成功的新型投资工具，诞生于2016年7月23日颁布的卢森堡“保留另类投资基金法”（RAIF法）。与大多数2013年后成立的合伙制度一样，RAIF不需要卢森堡金融监管局的授权且不受其监管。RAIF须委任一位另类投资基金经理(AIFM)，从而获利于其持有的欧盟AIFMD通行证，以及AIFMD框架的保护。可设立类似于开曼独立投资组合公司类型的子基金是RAIF的主要特征之一，使RAIF得成为上述合伙制度的一个替代投资工具。

最后，由于2005年8月5日颁布的金融担保法、相关案例法，向贷款方的权利维护提供了充分的法律保护，帮助其创造的有利环境，应信用机构及其他主要的贷款机构的要求，卢森堡的特殊目的公司（下称SPVs）被广泛运用于融资交易中。一般保取的形式为完全应纳税的有限责任公司，称为Soparfi。

公司型投资基金无须缴纳卢森堡税，但仍可享受45个卢森堡与其签订避免双重征税协定协议（DTT）的国家和地区的税收优惠，（总共有81个，其中38个在一带一路（OBOR）沿线，包括中国和香港特别行政区）。若某基金不享有税收协定优惠，尤其是作为税收透明实体的合伙型基金，可使用在卢森堡设立SPVs，即可享受税收协议优惠。在卢森堡，SPVs作为控股公司可享受免税制度。即在某些情况下，通过符合条件的参股，获得的股息及股份转让之资本收益均享受免税优惠（在符合一定条件的前提下）。值得注意的是，税收协定优惠及参股豁免制度，将受到修订后的经济合作暨发展组织（OECD）避免双重征税协定范本的影响。该修订旨在防止故意的税基侵蚀和利润转移的逃税行为（下称BEPS）。BEPS将于2018年7月1日生效。目前全球各大投资基金中心包括香港特别行政区、新加坡、中国均已开始实施该计划，而卢森堡正通过两项欧盟反避税指令（ATAD）实施该计划。BEPS行动计划的目标是消除利用企业利润发生地与价值创造地之间差异的不当商业行为。实践中，BEPS行动计划和AIFMD均追寻同一目标，即设立非以避税为主要目

entities. The access to DTT and the application of the participation exemption, however, are to be analysed under the new rules introduced by the OECD which aim at avoiding artificial and tax-motivated base erosion and profit shifting (BEPS). BEPS, which will enter into force on 1 July 2018, is in the process of implementation in all prime investment fund centres, including Hong Kong, Singapore, the PRC and Luxembourg through the two EU Anti-Tax Avoidance directives (ATAD). BEPS purports to put an end to business malpractices that artificially segregate taxable income from the activities that generated it. In practice BEPS and AIFMD converge in the same achievement where the principal purpose of setting up a structure cannot be driven by a tax avoidance objective but must also rely on other factors such as economic substance. The increase of activity in the fund jurisdiction, e.g. through the appointment of the AIFM, proper head office, board members' involvement and administration, partly fulfils the objective. Using SPVs for financing purpose is another strong demonstration of the intention to concentrate the operating substance in Luxembourg. In this regard, AIFMD, BEPS and Brexit have accelerated the growth of activity taking place in Luxembourg and assisted this jurisdiction to comply with these rules, as shown on a recent survey and recently echoed in terms of job searches<sup>3</sup> in the press and social media.

Luxembourg, as one of the founding Member States of the European Union, provides an element of stability and neutrality in this evolving environment that is very suitable in a capital-raising environment. With full access to the market and the capacity to levy funds within the EU and far beyond in Asia, a very comprehensive fund toolbox and financing and structuring capabilities through the use of SPVs, Luxembourg is perceived by the Asian asset management industry as a competitive and highly skilled jurisdiction. The impact of the new quotas, QDII and QDLP, decided by China in April 2018 has already been felt in Luxembourg and there is no doubt that the two re-opened Chinese programmes will further foster activity between the two countries.

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<sup>3</sup> <https://www.ft.com/content/e608f14e-44b1-11e8-803a-295c97e6fd0b>

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