

ELVINGER HOSS

LUXEMBOURG LAW

Reserved Alternative Investment Funds

Luxembourg regime for investment funds not supervised by the Luxembourg regulator and dedicated to sophisticated investors



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Disclaimer: The purpose of this Memorandum is to provide general information on the RAIF regime. It must not be considered as an exhaustive presentation and no action should be taken or omitted based on this Memorandum. In all instances, proper legal or other advice should first be taken. Elvinger Hoss Prussen shall not incur any liability in relation to the information provided herein or in relation to any actions taken or omitted based on this Memorandum.

INTRODUCTION

The reserved alternative investment fund ("**RAIF(s)**") was first introduced by the Law of 23 July 2016 ("**RAIF Law**")¹ and has since enjoyed great success. The RAIF is a Luxembourg undertaking for collective investment ("**UCI(s)**") qualifying as alternative investment fund ("**AIF(s)**") managed by an authorised alternative investment fund manager ("**AIFM(s)**") within the meaning of the AIFMD², but is not supervised by the *Commission de Surveillance du Secteur Financier* ("**CSSF**"), making it an attractive vehicle from a time-to-market perspective. The scope of eligible investors includes not only institutional investors and professional investors but also other types of well-informed investors, such as sophisticated private investors meeting certain conditions.

The RAIF regime was amended among others by the Law of 21 July 2023, which modernises the Luxembourg toolbox relating to investment funds (including RAIFs), namely to take into account certain legal changes and market requirements.

In order to be eligible for the RAIF regime, the RAIF has to be an AIF managed by an AIFM that is authorised in accordance with the Law of 12 July 2013 on alternative investment fund managers ("**AIFM Law**") or AIFMD. For the time being, the AIFM must be established in Luxembourg or in another Member State of the European Union ("**EU**")³. The RAIF Law also provides for the possibility for the AIFM of a RAIF to be established in a third country once the AIFMD passport is available to third countries.

Due to the necessity for the RAIF to be managed by an authorised AIFM, it is indirectly supervised through the prudential supervision exercised by the competent authority of its AIFM. For the same reason, the RAIF benefits from the EU passport granted by the AIFMD for marketing to professional investors in the EU.

The other features of the RAIF are substantially identical to those of the specialised investment fund ("**SIF(s)**")⁴ and the RAIF Law has been drafted drawing heavily from the text of the SIF Law⁵.

The main differences between the RAIF Law and the SIF Law result from the fact that all references to the role and mission of the CSSF found in the SIF Law have been excluded from the RAIF Law. However, certain mechanisms have been introduced to ensure compliance with the RAIF Law, particularly by the AIF's management body.

The European long term investment fund Regulation ("**ELTIF Regulation**")⁶ may also offer new opportunities to certain RAIFs as it enables AIFMs to market RAIFs with an ELTIF label to retail investors in the EU, provided that the relevant investors qualify as well-informed investors under the RAIF Law.

1 The RAIF Law is available on our website www.elvingerhoss.lu in both English and French.

2 "**AIFMD**" refers to Directive 2011/61/EU on alternative investment fund managers, as amended.

3 For the purposes of this Memorandum, the terms "European Union", "EU" and "EU Member States" also refer to and include the European Economic Area ("**EEA**") and the States that are contracting parties to EEA agreement other than the Member States of the European Union, within the limits set forth by this agreement and related acts.

4 Notably as regards the various legal forms (corporate and contractual) which are available, the absence of limitation as regards eligible assets or investment policies, the possibility to have multiple compartments and multiple share classes as well as the flexible subscription, redemption and distribution features and, as a matter of principle, the tax regime of a *taxe d'abonnement* at a 0.01% rate (or nil rate in certain circumstances).

5 "**SIF Law**" refers to the Law of 13 February 2007 on SIFs, as amended. For more information, see our Memorandum "*Specialised Investment Funds, Luxembourg regime for investment funds dedicated to sophisticated investors*" on our website www.elvingerhoss.lu.

6 "**ELTIF Regulation**" refers to Regulation (EU) 2015/760 on European long-term investment funds, as amended.

CHAPTER I: GENERAL PROVISIONS

1. SCOPE

The RAIF regime is applicable to Luxembourg AIFs (i) managed by an authorised AIFM, (ii) that invest in accordance with the principle of risk-spreading⁷, (iii) whose securities or partnership interests are reserved for well-informed investors, and (iv) whose constitutive documents⁸ provide that they are subject to the provisions of the RAIF Law.

1.1. AIF managed by an authorised AIFM

RAIFs represent a specific category of AIFs that must be managed by an authorised AIFM.

Therefore, unlike a SIF, a RAIF cannot be a non-AIF or be managed by an exempted AIFM⁹. Moreover, a RAIF cannot, in principle, be internally managed¹⁰.

1.2. Not supervised by the CSSF

An essential difference between the RAIF and the SIF is that the latter is subject to approval and supervision by the CSSF whereas the RAIF is not subject to such approval and supervision.

There is thus no need for CSSF approval for the creation, launch or even termination of a RAIF and, similarly, no approval is required in the event of changes to its constitutive documents, offering document or other documents governing its functioning. The operations and activities of the RAIF are at no point under the ongoing supervision by the CSSF or any supervisory authority (other than via the AIFM). The timeframe within which a RAIF can be set up and launched is therefore more attractive from a time-to-market perspective.

1.3. Reserved to well-informed investors

In the same manner as for SIFs, investment into RAIFs is limited to well-informed investors that are able to adequately assess the risks associated with an investment in such a vehicle.

The RAIF Law defines well-informed investors as (a) institutional investors, (b) professional investors within the meaning of Annex II of MiFID¹¹, and (c) other investors who:

- confirm in writing that they adhere to the status of well-informed investors; and
- either
 - (i) invest a minimum of EUR 100,000; or
 - (ii) benefit from an assessment made by an EU credit institution, MiFID investment firm, UCITS management company or authorised AIFM certifying that they have the adequate expertise, experience and knowledge in order to appraise the contemplated investment in the RAIF.

Therefore, sophisticated retail or private investors will be authorised to invest in RAIFs through the use of this latter category (c).

The above conditions do not apply to the directors and those other persons involved in the management of the relevant RAIF.

1.4. Optional regime

The RAIF regime is optional to the extent that the constitutive documents must expressly provide that the investment vehicle is subject to the provisions of the RAIF Law. Accordingly, any investment vehicle which is reserved to one or more well-informed investors will not necessarily be governed by the RAIF regime. Instead it could opt to be established as an unregulated company subject to the general rules of Luxembourg Company Law¹² or as a SIF or an investment company in risk capital (*société d'investissement en capital à risque* or "SICAR(s)") supervised by the CSSF.

It should be noted that those various available Luxembourg regimes can also be combined when structuring an investment project either by setting up different vehicles to meet the specific needs of various investors (e.g. by creating dedicated feeder funds or parallel vehicles), but they can also be combined in a "phased" approach as conversions from one regime to the other are possible. A fund could, for instance, be established as a RAIF to be in a position to organise a rapid first closing with investors not requiring a product subject to direct supervision, and to be converted into a SIF later on, once CSSF approval is obtained to welcome other investors that wish to or must, invest in a directly supervised product.

⁷ Except for certain RAIFs investing solely in risk capital as discussed in Chapter III Section 1.2 of this Memorandum.

⁸ i.e., mainly the articles of incorporation (*statuts*), the management regulations (*règlement de gestion*) or the partnership agreement (*contrat social*), depending on the legal form of the RAIF.

⁹ An "exempted" AIFM is an AIFM that benefits from one of the exemptions of Article 3 of the AIFMD (i.e. small manager exemption or group exemption), that does not have to comply with all the provisions of the AIFMD, but which is therefore deprived of the benefit of the EU marketing passport provided for by the AIFMD.

¹⁰ In line with the provisions of the AIFMD, there is one exemption to the obligation for RAIFs to appoint an external AIFM, which applies to RAIFs that are AIFs exempted under Article 2.3(c) or (d) of the AIFMD because they are managed either (i) by a supranational institution or by another similar international institution acting in the public interest, or (ii) by the Central Bank of Luxembourg or another national central bank. Such RAIFs will have access to the RAIF Law without having to appoint an external AIFM.

¹¹ "MiFID" refers to Directive 2014/65/EU on markets in financial instruments, as amended.

¹² "Luxembourg Company Law" refers to the Law of 10 August 1915 on commercial companies, as amended.

2. INVESTMENT RULES

2.1 Flexibility with respect to eligible assets

The RAIF Law allows full flexibility with respect to the assets in which a RAIF may invest¹³.

The RAIF regime is expressly designed to accommodate AIFs that invest in any type of assets and which pursue both traditional and alternative investment strategies.

It indeed permits the structuring of, *inter alia*, equity funds, bond funds, money market funds¹⁴, real estate funds, hedge funds, private equity funds, debt funds, micro-finance funds, social entrepreneurship funds, venture capital funds, green funds, infrastructure funds and those funds which invest in tangible assets such as aircraft, ships, art, etc.

2.2. Applicability of the principle of risk-spreading

The RAIF Law does not provide for specific investment rules or restrictions applicable to the RAIF, it only requires that RAIFs are subject to the principle of risk-spreading.

The preparatory works of the RAIF Law clarify that, in the absence of any detailed rules in the law itself, the principle of risk-spreading and its interpretation in relation to SIFs should be taken into account¹⁵.

It is the responsibility of the governing body of the RAIF to ensure that the minimum diversification rules implied by the RAIF Law are complied with.

As an exception, certain RAIFs investing solely in risk capital¹⁶ do not need to spread the investment risk, which means that the diversification requirements set forth above do not apply to such RAIFs.

3. LEGAL FORMS

The RAIF Law specifically refers to the *fonds commun de placement* ("**FCP(s)**") and the *société d'investissement à capital variable* ("**SICAV(s)**") with multiple legal forms available.

In this Memorandum we will focus on the legal forms most commonly used by RAIFs, namely the FCP and the investment company.

3.1. *Fonds commun de placement*

An FCP itself is not a legal entity. It represents a co-proprietorship of assets which are managed, on behalf of the joint owners, by a Luxembourg management company generally established under, and governed by, either Chapter 15 of the UCI Law¹⁷ (i.e. a management company whose corporate object is to manage at least one UCITS, in addition to the management of the relevant RAIF) or Chapter 16 of the UCI Law.

Under the FCP structure, investors subscribe for units in the FCP, which represent a portion of the net assets of the RAIF, and they are only liable up to the amount they have contributed. The rights and obligations of the unitholders and their relationship with the management company are defined in the management regulations.

The management company on behalf of the FCP takes all decisions relating to the investments and the operations of the FCP.

Unlike investors in an investment company (as explained below), investors in an FCP are entitled to vote only if, and to the extent that, the management regulations provide for such a possibility.

3.2. Investment company

A RAIF can alternatively be established under the form of a corporate-type fund.

An investment company subject to the RAIF regime can be created either with variable capital ("**SICAV(s)**") or with fixed capital ("**SICAF(s)**").

The capital of a SICAV is increased or reduced automatically as a result of new subscriptions and redemptions without requiring any formalities such as the approval of the general meeting of unitholders/shareholders/partners or the intervention of a notary.

A RAIF created under the form of a SICAV can typically adopt one of the following corporate forms, namely that of a public limited company (*société anonyme*

¹³ If the RAIF wishes to adopt the same tax regime as the one applicable to a SICAR, it will however have to restrict itself to investment in risk capital as further discussed in Chapter III Section 1.2 of this Memorandum.

¹⁴ Since 21 July 2018, RAIFs, which qualify as money market funds ("**MMF(s)**") under Regulation (EU) 2017/1131 on MMF, must be specifically authorised as MMF. In addition, the manager of a MMF must be specifically authorised to manage a MMF (Article 5 of the MMF Regulation).

¹⁵ In the context of SIFs, the CSSF has issued guidelines in its Circular 07/309 as to the meaning of risk-spreading. Circular 07/309 stipulates (in summary) the following guiding principles that are applicable to SIFs:

1. A SIF may not invest, long or short, more than 30% of its assets or subscription commitments in securities of the same type issued by the same issuer. This restriction does not apply to:
 - (i) securities issued or guaranteed by an OECD Member State or its regional or local authorities or by EU, regional or global supranational institutions and bodies; and
 - (ii) target UCIs which are subject to risk-spreading requirements at least comparable to those applicable to SIFs. This flexibility allows a SIF to be structured as a feeder-fund of another Luxembourg or foreign investment fund (the master fund) provided that the constitutive or offering documents of the master fund provide sufficient evidence that it is subject to appropriate risk-spreading requirements.
2. When using derivative financial instruments, a SIF must ensure risk-spreading comparable to the above, by means of an appropriate diversification of such derivatives' underlying assets. In order to secure the same objective, the counterparty risk in an OTC transaction must, where applicable, be limited in consideration of the relevant counterparty's quality and qualification.

Whenever a SIF is structured as an umbrella fund with multiple compartments, any reference to the SIF in the foregoing guidelines must be understood as a reference to any of its compartments

The CSSF may grant exemptions on a case-by-case basis and there can be a "grace period" during which SIFs may depart from the diversification rules mentioned above.

¹⁶ See Chapter III Section 1.2 of this Memorandum.

¹⁷ "**UCI Law**" refers to the Law of 17 December 2010 on undertakings for collective investment, as amended.

or "SA"), a partnership limited by shares (*société en commandite par actions* or "SCA"), a common limited partnership (*société en commandite simple* or "SCS"), a special limited partnership (*société en commandite spéciale* or "SLP"), a private limited company (*société à responsabilité limitée* or "Sàrl") or a cooperative set up as a public limited company (*société coopérative organisée sous forme de société anonyme* or "SCSA").

SICAFs are not limited to specific corporate forms under the RAIF Law.

There are a number of aspects to consider when making a choice between the different corporate forms available.

One consideration is the control, which the initiator of the project would like to exercise over the RAIF. Whatever its form, different mechanisms may be put into place when structuring a RAIF, so as to reduce the risk of an unfriendly takeover. However, should the taking of control over the RAIF be a real concern, it is generally advisable to use the corporate form of an SCA, an SCS or an SLP which all provide for dissociation between the categories of partners allowing the initiator to retain control over the vehicle. Another aspect to consider is the restrictions on the transferability of the units, shares or partnership interests and the number of unitholders/shareholders/partners. The applicable tax regime may also influence the adoption of a particular corporate form.

Investment companies are subject to the provisions of the Luxembourg Company Law except in those cases where the RAIF Law expressly derogates therefrom. In fact, the provisions of the RAIF Law applicable to SICAV-RAIF deviate from the requirements of the Luxembourg Company Law on many aspects in order to offer the RAIFs a more flexible corporate framework.

An investor subscribing for shares/units/partnership interests in a SICAV/SICAF-RAIF becomes a unitholder/shareholder/partner of the investment company and can participate in and vote at general meetings of unitholders/shareholders/partners in accordance with the terms and conditions of the investment company's constitutive documents, subject however to the specific requirements imposed by applicable laws. Therefore, unitholders/shareholders/partners of a SICAV/SICAF-RAIF can or must decide on a variety of matters including the appointment or revocation of the members of the governing body, the approval of the annual accounts and the liquidation of the SICAV/SICAF-RAIF.

3.3 Focus on the special limited partnership

Among the corporate forms available for establishing an investment company, the SLP is very popular. The key characteristic, which distinguishes the SLP, is that it has no legal personality. It is very similar in structure to the Anglo-Saxon LP, which has traditionally been

favoured for private equity investments.

The SLP is a partnership entered into by one or more unlimited or general partners (*associés commandités*) who will bear an unlimited joint and several liability for all of the obligations of the partnership, with one or more limited partners (*associés commanditaires*) whose liability is limited to the amount they contributed pursuant to the provisions of the limited partnership agreement (*contrat social*). An SLP can be of a limited or unlimited duration. The law which governs SLPs allows flexibility and freedom in the organisation of an SLP due to the limited number of mandatory rules¹⁸.

4. REQUIREMENT TO APPOINT AN AIFM

Except for the limited internally managed exemption mentioned in Section 1.1 of this Chapter I, the RAIF Law provides that a RAIF must be externally managed through the appointment of a separate authorised AIFM responsible for managing the RAIF.

It is the governing body¹⁹ of the RAIF which must appoint the authorised AIFM which, for the time being, can either be established in Luxembourg or in another EU Member State²⁰.

The relevant external AIFM must be authorised and licensed to manage funds pursuing the same investment strategies as those pursued by the relevant RAIF. For instance, in Luxembourg, the AIFM licence granted by the CSSF may be limited to manage funds pursuing certain investment strategies only, such as real estate, infrastructure or private equity strategies. Moreover, if the AIFM is established in an EU Member State other than Luxembourg, it must have passported its management services in Luxembourg in accordance with the AIFMD before it can start managing the relevant RAIF on a cross-border basis.

5. APPOINTMENT OF AN INVESTMENT MANAGER

The investment management function in relation to a RAIF (including the portfolio management and risk management functions) may be delegated (and sub-delegated) by the AIFM to some extent to third-party service providers with the requisite resources and expertise.

Any such delegation is subject to the prior approval of the regulator (both of the AIFM and of the RAIF, if they are located in different jurisdictions), the performance of appropriate due diligence on the delegate(s), appropriate disclosure of the delegation arrangements and compliance with all other delegation conditions as prescribed by the AIFM legislation.

¹⁸ For more information, please see our Memorandum "Luxembourg Partnerships in the asset management industry" on our website www.elvingerhoss.lu.

¹⁹ In the case of an FCP (see Chapter I Section 3.1 of this Memorandum), it is either its management company which acts as AIFM or another entity, as appointed by the management company.

²⁰ The RAIF Law also refers to the possibility for an AIFM established in a third country to manage the RAIF but only when the AIFMD passport has become available to third countries (see Chapter II Section 1 of this Memorandum).

In particular, the appointed investment managers must be authorised or registered as investment managers, be subject to the prudential supervision of their relevant supervisory authority and in the case of a delegation to a third-country investment manager, cooperation between the CSSF and the relevant supervisory authority must be ensured. If these conditions are not met, the CSSF must specifically approve the investment manager prior to the delegation, based on the latter's experience and reputation. Other conditions might apply if the AIFM is located in another EU Member State.

6. REQUIREMENT TO APPOINT A DEPOSITARY

The assets of a RAIF must be entrusted for safekeeping to a depositary, which must have its registered office in Luxembourg or be established in Luxembourg if its registered office is in another EU Member State²¹.

The depositary must be a credit institution or investment firm within the meaning of the Financial Sector Law²². Investment firms, however, are eligible to act as a depositary only if they fulfil certain conditions laid down by the AIFM Law (such as the capital and own funds requirements and the requirements to be in possession of appropriate organisational, administrative and corporate governance structures).

In addition to the types described above, a professional depositary of assets other than financial instruments²³ may also be appointed as depositary. Pursuant to the RAIF Law, this type of depositary may only be used by RAIFs which have no redemption rights exercisable during a period of five years from the date of the initial investments and that, in accordance with their core investment policy, either (i) do not generally invest in financial instruments that must be held in custody in accordance with the relevant provisions of the AIFM Law²⁴ or (ii) generally invest in issuers or non-listed companies in order to potentially acquire control over such companies within the meaning of the AIFM Law²⁵.

Depositaries of RAIFs must comply with the depositary regime as provided for by the AIFM Law²⁶ as further clarified in CSSF Circular 18/697, which applies, amongst others, to all Luxembourg AIFs managed by an authorised AIFM²⁷.

This regime imposes specific duties on the depositary, which include:

- the obligation to safekeep the RAIF's assets;
- the obligation to monitor the RAIF's cash flow; and
- specific oversight duties.

The depositary is strictly liable in the event of a loss of financial instruments it held in custody and it must, without undue delay, return financial instruments of an identical type or of a corresponding amount to the RAIF or the AIFM, which is acting on behalf of the RAIF. In certain circumstances specified in the AIFM Law, the RAIF, the depositary and the sub-depositary may contractually agree for the sub-depositary to assume liability instead of the depositary. In all other respects, the possibility of avoiding the consequences of this strict liability regime of the depositary is very limited.

In addition, the depositary is also liable to the RAIF or its investors for other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations under the AIFM Law.

A prime broker which acts as counterparty to a RAIF is only allowed to act as a depositary for that RAIF if it has functionally and hierarchically separated the performance of its depositary functions from its functions as a prime broker. Delegation by a depositary of its custody tasks to a prime broker is only allowed if all of the relevant conditions set forth in the AIFM Law are met.

7. CENTRAL ADMINISTRATION REQUIREMENT

In accordance with the RAIF Law, a RAIF must have its registered office and head office (central administration) in Luxembourg.

The meaning of the central administration in Luxembourg includes registrar, accounting and net asset value calculation, as well as client communication functions.

A RAIF is not, however, required to have employees or its own premises. In most cases, a RAIF will appoint one or more Luxembourg-based central administration agent(s), which will act as domiciliary agent, registrar, and transfer agent, among other tasks, and which will also keep the accounts for the RAIF and calculate the net asset value.

CSSF Circular 22/811 clarifies the rules applicable to entities entrusted with the central administration of Luxembourg regulated and unregulated UCIs ("UCI administrator"), namely in terms of authorisation, substance, internal organisation (including but not limited to delegation models) and reporting.

Luxembourg non-regulated UCIs (including RAIFs) remain, in principle, outside the scope of CSSF Circular 22/811 in the sense that they can continue to act

²¹ This obligation lies on the shoulders of both the RAIF pursuant to the RAIF Law and its appointed AIFM pursuant to the AIFMD.

²² "Financial Sector Law" refers to the Law of 5 April 1993 on the financial sector, as amended.

²³ The professional depositary of assets other than financial instruments is the "*dépositaire professionnel d'actifs autres que des instruments financiers*" within the meaning of Article 26-1 of the Financial Sector Law.

²⁴ Typically (but not only) real estate or infrastructure funds.

²⁵ Typically (but not only) private equity funds.

²⁶ The description of the depositary regime below is only a summary.

²⁷ CSSF Circular 18/697 provides in particular clarification on the organisational arrangements that need to be complied with by a depositary of UCIs other than UCITS and falling under either (i) the regime of AIFM Law or (ii) the distinctive regime provided for by other Luxembourg laws.

as UCI administrator for themselves without being subject to the requirements of this Circular 22/811. However, RAIFs may be affected indirectly, should they use an external UCI administrator, such as an AIFM or certain other external service providers authorised under the Financial Sector Law, which will themselves be subject to Circular 22/811 as the latter applies to all Luxembourg eligible entities carrying out the activity as UCI administrator (or part thereof) for regulated and non-regulated UCIs.

8. REQUIREMENT TO APPOINT AN AUDITOR

The annual accounts of a RAIF must be audited by a Luxembourg approved statutory auditor (*réviseur d'entreprises agréé*), which must have proven adequate professional experience in that it already performs these functions for UCIs, SIFs or SICARs.

9. AML/CFT AND TFS REQUIREMENTS

A RAIF is a professional subject to, and must consequently comply with the requirements imposed on it by, applicable Luxembourg laws and regulations on the fight against money laundering and terrorist financing, including in particular the AML/CFT Law²⁸ as well as the requirements and guidance imposed on it by the *Administration de l'enregistrement, des domaines et de la TVA* ("**AED**") in respect of AML/CFT matters²⁹ ("**AML/CFT Legislation**").

This includes, without limitation, the obligation for a RAIF to define adequate AML/CFT framework, including an AML/CFT risk appetite and risk assessment, as well as policies, controls and procedures (including in terms of investors, counterparties and assets due diligence) and training programmes, in compliance with AML/CFT Legislation, to mitigate and manage effectively the risks of money laundering and terrorist financing. These policies, controls and procedures shall be proportionate to the nature, specificities and size of the RAIF.

In addition, a RAIF must appoint two distinct responsible persons for the purpose of compliance with its AML/CFT obligations. These persons are generally defined by the AED as "**RR**" (being the person responsible for the "compliance" by the RAIF with its AML/CFT obligations) and "**RC**" (being the person responsible for the "control" of the compliance by the RAIF with its AML/CFT obligations), and both must be notified to the AED.

The AED FAQ regarding the persons involved in AML/CFT for a Luxembourg RAIF, the AED Guide on AML/CFT professional obligations for RAIFs and other guidance published on the AED website provide further

clarifications on (i) the duties and scope of functions of the RR and RC, and (ii) the content of the AML/CFT policies and procedures and annual RC report.

RAIFs shall further comply with the targeted financial sanction ("**TFS**") regimes applicable in Luxembourg pursuant to the TFS Law³⁰, i.e. the TFS regimes issued at the level of the United Nations, the EU and, if any, the Grand Duchy of Luxembourg, and report to relevant competent authorities accordingly, including the Luxembourg Ministry of Finance³¹.

10. ESTABLISHMENT PROCEDURES

A RAIF shall be created via the appropriate constitutive documents prescribed by law. These constitutive documents will vary depending upon the legal form adopted by the RAIF. To illustrate, an FCP shall be created via the adoption of its management regulations by the management company, a SICAV taking the form of an SA, Sàrl or SCA shall be created via the adoption of articles of incorporation by the founding shareholders before a notary, whereas an SCS or SLP may be created via the execution by at least one general partner and one limited partner of a partnership agreement merely in the form of a private deed.

Notwithstanding the foregoing, the establishment of a RAIF, which is not incorporated itself before a notary, must be formalised by notarial deed within 5 business days. This does not imply that the constitutive documents referred to above, such as the management regulations of an FCP or the partnership agreement of an SCS or SLP, must take the form of a notarial deed or be passed before a notary. This means that within 5 business days after the conclusion of the management regulations or the partnership agreement under private deed, a notary must record in a notarial deed that the RAIF has been established.

The RAIF Law also imposes certain formalities in terms of publication:

- within a deadline of 15 business days from its constitution, if the RAIF is established by notarial deed or from the ascertainment of its constitution by notarial deed, a mention that the RAIF has been established, with an indication of the AIFM that is managing it, must be filed with the Register of Trade and Companies ("**RCS**") for the purposes of publication on the *Recueil électronique des sociétés et associations* ("**RESA**")³²; and
- within a deadline of 20 business days from its constitution, if the RAIF is established by notarial deed, the RAIF must be registered on a list held by the RCS and available on the RCS website.

In addition, where the RAIF is managed by a

²⁸"**AML/CFT Law**" refers to the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended.

²⁹As RAIFs are not regulated by the CSSF, they are not subject to its supervision also in respect of AML/CFT matters. However, according to the AML/CFT Law, RAIFs are subject to the supervision of the AED in respect of AML/CFT matters.

³⁰"**TFS Law**" refers to the Law of 19 December 2020 on the implementation of restrictive measures in financial matters, as amended.

³¹ Further guidance may be found on the dedicated webpages maintained by the Luxembourg Ministry of Finance and the AED.

³²The publication of this mention comes in addition to the publication required by the Luxembourg Company Law.

Luxembourg authorised AIFM, an information form must be sent to the CSSF within 10 business days after the day on which the AIFM started to manage the RAIF³³. The purpose of this form is to enable the CSSF to have full and up-to-date information on AIFs managed by Luxembourg AIFMs.

11. STRUCTURING ASPECTS

11.1. Umbrella structure and multiple securities or partnership interests classes

(a) Umbrella structure

The RAIF Law specifically refers to the possibility of creating a RAIF with multiple compartments ('**Umbrella RAIF(s)**'). These compartments may differ in, *inter alia*, their investment policy, redemption policy, dividend policy, fee structure, reference currency, appointed investment manager/adviser and/or type of target investors.

The RAIF Law further provides that each compartment of such a vehicle will be linked to a specific portfolio of investments, which is segregated from the investment portfolios pertaining to the other compartments unless a clause included in the constitutive documents provide otherwise. Pursuant to this so-called "ring-fencing" principle, although an Umbrella RAIF constitutes a single legal entity, the assets of each compartment can only be used to satisfy the rights of investors in that particular compartment and the rights of creditors whose claims have arisen in connection with the operation of that particular compartment, unless a clause to the contrary is included in the constitutive documents of the Umbrella RAIF.

The above structuring possibility and its terms must be expressly provided for by the constitutive documents of the Umbrella RAIF and reflected in its offering document (which must also describe each compartment's specific investment policy).

(b) Multiple securities and partnership interests classes

In addition or as an alternative to the umbrella structure, different classes of securities and partnership interests can be created within the same RAIF or, where the latter is set up as an Umbrella RAIF, within each and any of its compartments. Such classes may have different characteristics particularly as regards their fee structuring arrangement, their targeted investors, and/or their distribution policy.

The issue of tracking shares by a RAIF, i.e. shares tracking the performance of a specific underlying asset, is also possible under certain conditions.

11.2. Cross-compartment investments

A compartment of an Umbrella RAIF can invest under certain conditions in one or more other compartments of the same RAIF, resulting in a so-called "cross-compartment investment".

This type of investment should be provided for in the RAIF offering document, but not necessarily in its constitutive documents. The RAIF Law does not prohibit the possibility to create a master/feeder structure within the same RAIF.

11.3. Capital structure and debt financing

The RAIF Law provides that the minimum capitalisation of a RAIF is EUR 1,250,000. This minimum amount must be reached within 24 months following the date of creation of the RAIF. Except in the case of an FCP, the reference point for this minimum amount is the subscribed capital plus any issue premium paid or the value of the amount constituting partnership interests, rather than the net assets.

A RAIF set up as an investment company can issue partly paid shares, which must be paid up to a minimum of 5% per share on issue, except for certain legal forms.

A RAIF may also finance its activities and the acquisition of its portfolio of investments, where appropriate, on a substantially predominant basis, via borrowings as well as via the issue of bonds or other debt instruments.

11.4. Issue and redemption of securities or partnership interests

The conditions and procedures applicable to the issue and, if applicable, the redemption or the repurchase of securities or partnership interests are to be determined in the constitutive documents.

RAIFs can function as either open-ended or closed-ended funds, for both subscriptions and redemptions.

In addition, there is no requirement for the issue, redemption or repurchase price to be based on the net asset value, such as the requirement placed on an open-ended SICAV or FCP governed by the UCI Law. RAIFs can therefore issue shares, units or partnership interests at a predetermined fixed price or repurchase them below net asset value (for example to reduce the discount in the case of a listed closed-ended RAIF). Similarly, the issue price may be composed of a portion of par value and a portion of issue premium.

Subscriptions in different tranches can be achieved through the successive subscriptions of new securities ascertained at the initial subscription through subscription commitments or by means of partly paid securities, the remaining amount of the issue price of the securities initially issued being payable in further instalments.

A RAIF set up under the form of an SCS or an SLP may also offer partnership interests that do not take the form of securities, but which set up capital accounts for each partner (and/or if relevant loan accounts) onto which contributions, withdrawals, loans, allocation of profits and other financial movements of the partners will be recorded, and which show the financial standing of each partner *vis-à-vis* the RAIF and his co-partners. The use of the capital accounts may provide for more flexibility in response to any

³³ CSSF Circular 15/612 of 5 May 2015 on the information to be submitted to the CSSF in relation to unregulated alternative investment funds (established in Luxembourg, in another EU Member State or in a third country) and/or regulated alternative investment funds established in a third country.

specific requirements and/or constraints that investors in the RAIF may have.

11.5. Reserves and distribution policy

A RAIF set up as an FCP or SICAV is not required to maintain a legal reserve and the RAIF Law does not provide for any restriction on the distribution of dividends or income in general, provided that the minimum capitalisation referred to under Chapter I Section 11.3 of this Memorandum is complied with.

11.6. Valuation of assets

In light of the virtually unlimited types of assets in which a RAIF can invest, RAIFs are subject to flexible valuation rules. The RAIF Law states that, unless otherwise provided for in the constitutive documents, the assets of a RAIF must be valued at fair value. This value is to be determined in accordance with the rules set forth in the constitutive documents and the applicable provisions of the AIFMD.

The AIFM is in charge of the valuation function (namely the valuation of the assets), where appropriate with external support.

The AIFM may also delegate, under its responsibility, the valuation function to an external valuer that is subject to mandatory professional registration or to legal/regulatory/professional conduct rules. The external valuer cannot delegate its functions to a third party.

The assets must be valued and the net asset value must be calculated at least once a year (although some type of additional determination of total net assets may have to be performed on a quarterly basis for the purpose of assessing the amount of the *taxe d'abonnement* to be paid on a quarterly basis, as discussed in Chapter III Section 11 of this Memorandum)³⁴.

12. INFORMATION TO BE SUPPLIED TO INVESTORS AND REPORTING REQUIREMENTS

12.1. Requirement for an offering document

Pursuant to the RAIF Law, the RAIF is required to produce an offering document.

The RAIF Law does not impose any specific schedule with respect to the minimum content of the offering document. However, the offering document must include the information necessary for investors to be able to make an informed judgment of the investment

proposed to them and, in particular, of the risks attached thereto. It must also specify clearly and visibly on its covering page that the RAIF is not subject to supervision by a Luxembourg supervisory authority.

A continuous updating of the offering document is not required, but the essential elements of such a document must be updated whenever new securities or partnership interests are issued to new investors.

For RAIFs structured as Umbrella RAIFs, a separate offering document may be established for each compartment on condition that an indication is made that the RAIF may comprise other compartments.

12.2. Additional information to be provided to investors

The AIFM of a RAIF must provide the additional information imposed by the AIFM legislation³⁵ or other specific legislation as applicable to the AIFM and/or the RAIF, as well as any material changes thereof to the investors before they invest in the RAIF. This information must be made available to investors, but must not necessarily be inserted in the offering document.

This information includes, in particular, the relevant sustainability-related information and disclosure as required by SFDR³⁶ and Taxonomy Regulation³⁷. It must also specify, where applicable the securities financing transactions ("**SFT**") and total return swaps that the AIFM is authorised to use and a clear statement that those transactions and instruments are used must be included³⁸.

12.3. Requirement for a PRIIPs KID

In addition to the offering document, in the case where the units, shares or partnership interests of a RAIF are available within the EU territory to well-informed investors which do not qualify as professional investors under MiFID, a key information document ("**KID**") must be drawn up in accordance with the PRIIPs Regulation³⁹ and delivered to those retail investors before any offering or subscription to units, shares or partnership interests.

12.4. Annual report

(a) RAIF Law requirements

The RAIF is required to publish an audited annual report within six months from the end of the period to which the report relates. The RAIF Law contains an appendix, which describes the specific information to be included in the annual report. This appendix only requires qualitative and/or quantitative information to be given on the portfolio of investments in a

³⁴If the RAIF is of the open-ended type, such valuations and calculations must also be carried out at a frequency which is both appropriate to the assets held by the RAIF and its issue and redemption frequency. If the RAIF is of the closed-ended type, such valuations and calculations must also be carried out in the event of an increase or decrease of the capital by the relevant RAIF.

³⁵See in particular Article 23 of the AIFMD and Article 21 of the AIFM Law.

³⁶"SFDR" refers to Regulation (EU) 2019/2088 on sustainability related disclosures in the financial services sector, as amended.

³⁷"Taxonomy Regulation" refers to Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment and amending SFDR.

³⁸"SFTR" refers to Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse and amending the EMIR Regulation, as amended. See Article 14 SFTR according to which this information must also include the data provided for in Section B of the Annex of the SFTR.

³⁹"PRIIPs Regulation" refers to Regulation (EU) 1286/2014 on packaged retail and insurance-based investment products, as amended.

manner which allows investors to make an informed judgement concerning the evolution of the activity and the results achieved by the RAIF. The RAIF Law does not require a semi-annual report to be prepared and published.

For RAIFs structured as Umbrella RAIFs, a separate annual report may be established for each compartment on condition that an indication is made that the RAIF may include other compartments.

RAIFs are exempt from the obligation to prepare consolidated accounts, which is normally required by Luxembourg Company Law.

(b) AIFMD and other legislation requirements

Under the AIFMD, RAIFs are required to disclose additional information in their annual reports. This information includes: (i) the total amount of remuneration paid by the AIFM to its staff for the financial year (split into fixed and variable remuneration), (ii) the number of beneficiaries, and, where relevant, (iii) any carried interest paid by the RAIF, and (iv) the aggregate amount of remuneration, as broken down by senior management and by AIFM staff members whose actions have a material impact on the risk profile of the RAIF.

In addition, the annual reports of a RAIF must contain certain sustainability-related information as imposed by SFDR and Taxonomy Regulation. They must also disclose specific information as may be imposed by specific laws and regulations where applicable to the relevant RAIF, such as for instance information on the use of SFT and total return swaps under SFTR⁴⁰.

⁴⁰See Article 13 of SFTR according to which this information must also include the data provided for in Section A of the Annex of the SFTR.

CHAPTER II: MARKETING AND LISTING

The applicable marketing rules vary depending on whether the RAIF is marketed to professional clients as defined in MiFID (“**Professional Investors**”) or to other well-informed investors, which do not qualify as Professional Investors. In addition, specific marketing rules may apply to closed-ended RAIF.

1. MARKETING

1.1. Marketing/pre-marketing to EU Professional Investors

As RAIFs can only be managed by an authorised external AIFM currently established in the EU, they benefit from a passport allowing the AIFM to market the RAIF’s shares, units or partnership interests to Professional Investors within the EU, through a regulator-to-regulator notification regime.

The AIFMD and AIFM Law also allow an authorised EU AIFM to perform, under certain conditions, pre-marketing activities to test an investment idea or an investment strategy with Professional Investors within the EU in order to test their interest in a RAIF (or a compartment thereof) which has not yet been established, or which is established but has not yet been notified for marketing in the EU Member State where the potential investors are domiciled or have their registered office. Such pre-marketing in the EU is not, however, permitted where the information presented to potential Professional Investors is sufficient to allow them to take an investment decision and to commit to acquiring units, shares or partnership interests of a particular RAIF.

1.2. Marketing/pre-marketing to other well-informed investors

The marketing/pre-marketing of RAIFs outside or within the EU to well-informed investors, which do not qualify as Professional Investors but comply with the

other well-informed investors eligibility requirements of the RAIF Law, requires compliance with the national placement rules of each country where such marketing/pre-marketing is done.⁴¹

For the avoidance of doubt, RAIFs may be marketed to such other well-informed investors on the territory of Luxembourg in accordance with the provisions of the RAIF Law. The marketing to such other well-informed investors, which do not qualify as Professional Investors, is also subject to the application of the PRIIPs Regulation’s requirements.

1.3. Closed-ended RAIFs

Closed-ended RAIFs may in addition be subject to the provisions of the Prospectus Regulation⁴² in the case where they intend to carry out a public offering or admission to trading of their shares, units or partnership interests.

If they do not benefit from one of the exemptions provided for by the Prospectus Regulation, they might have to prepare a prospectus within the meaning of the Prospectus Regulation. In practice, however, most of the RAIFs concerned will benefit from an exemption in that respect.

2. LISTING

A RAIF may apply for listing of its units, shares or partnership interests on the Luxembourg Stock Exchange (“**LSE**”) provided that it complies with the requirements of the LSE and in particular with the requirement that the units, shares or partnership interests are freely negotiable.

Assurance would be needed, however, that trading on the exchange does not permit non-eligible investors to become shareholders of a RAIF.

There is no prohibition in Luxembourg against a RAIF seeking a listing on any other stock exchange.

⁴¹ Except in the case where the RAIF qualifies as ELTIF under the ELTIF Regulation (see Chapter IV of this Memorandum).

⁴² “**Prospectus Regulation**” refers to Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, as amended.

CHAPTER III: TAXATION

1. TAXATION OF THE RAIF

1.1. General tax regime

RAIFs are exempt from Luxembourg income⁴³ and wealth taxes.

RAIFs are subject to an annual subscription tax (*taxe d'abonnement*) charged at an annual rate of 0.01% based on the total net assets of the RAIF, valued at the end of each calendar quarter.

The RAIF Law, however, exempts, *inter alia*, the following from the subscription tax: (i) the assets invested in other Luxembourg based UCIs, SIFs and RAIFs subject to this tax, (ii) certain short-term money market funds meeting certain criteria, (iii) microfinance funds (iv) pension pooling funds and (v) ELTIFs.

Individual compartments and classes, which are reserved to pension schemes may also benefit from the subscription tax exemption.

1.2. Optional alternative tax regime for RAIFs investing in risk capital

A different tax regime applies for RAIFs set up under the corporate form which state in their constitutive documents that their sole objective is to invest their funds in securities representing risk capital and that they are subject to the provisions of the specific article of the RAIF Law⁴⁴ which provides for this alternative tax regime. The tax regime intended here is similar to that currently applicable to SICARs.

RAIFs with this alternative tax regime are subject to general corporation taxes in Luxembourg at ordinary rates. However, any income derived from securities that represent risk capital held by the RAIF, as well as any income from the sale, contribution or liquidation thereof, are fully tax exempt. Income derived from assets held pending their investment in risk capital (i.e. liquid assets) does not constitute taxable income provided such assets are invested in risk capital assets within 12 months.

2. TAXATION OF THE INVESTORS IN A RAIF

Distributions made by a RAIF to investors as well as any payment of proceeds made upon the redemption of RAIF units or shares are not subject to Luxembourg withholding tax. Non-Luxembourg-resident investors in a RAIF, not acting via a Luxembourg permanent establishment, will not be taxed in Luxembourg on any income or capital gains they derive from their units or shares in a RAIF.

3. VAT

Management services provided to a RAIF are exempt from Luxembourg VAT. This exemption covers, *inter alia*, the provision of portfolio management services, investment advisory services and certain administrative services. Mere technical services, however, are not exempt from VAT, nor are supervision and control services supplied by a depositary to the RAIF. Depositary services, however, can benefit from a reduced VAT rate of 14%.

4. INTERNATIONAL TAX ASPECTS

RAIFs subject to the general tax regime and set up as a limited company should benefit, in the same way as UCIs, from a certain number of tax treaties concluded by Luxembourg.

RAIFs subject to the optional regime and set up as a limited company are considered as tax resident in Luxembourg for domestic and for treaty purposes.

For tax treaties purposes, RAIFs, which have been established as an FCP, a common limited partnership or as an SLP, are regarded as fully tax transparent for Luxembourg tax purposes and may therefore enable investors to claim the benefits of tax treaties.

⁴³Anti-hybrid mismatch rules to be monitored for the RAIF established as a partnership. For further information, please see our Memorandum "Luxembourg Partnerships in the asset management industry" on our website www.elvingerhoss.lu.

⁴⁴Article 48 of the RAIF Law.

CHAPTER IV: ELTIF REGULATION'S IMPACT AND BENEFITS

1. KEY FEATURES OF ELTIF REGULATION

The ELTIF Regulation applies on an optional basis to EU AIFs managed by authorised EU AIFMs.

AIFs which are authorised as a European long-term investment fund ("**ELTIF(s)**"), benefit from an EU passport to market their units, shares or interests to any type of investors, whether professional or retail (as defined by MiFID) within the EU.

AIFs which apply for the ELTIF label need to comply with the provisions of the ELTIF Regulation, which includes, amongst others, eligible assets and portfolio composition rules⁴⁵. The ELTIF Regulation also provides for specific diversification, concentration and borrowing limits.

2. ELTIF RAIF

A RAIF can apply for the ELTIF label. While the RAIF is not subject to the approval of, or the supervision by the CSSF, a RAIF which would like to use the ELTIF label, has to be authorised by the CSSF as an ELTIF under the ELTIF Regulation.

While the ELTIF Regulation does not impose any limitation on the type of eligible investors, an ELTIF RAIF is still subject to the provisions of the RAIF Law and is therefore reserved to well-informed investors.⁴⁶

In the case of an Umbrella RAIF with multiple compartments, the authorisations as ELTIF may be applied at the level of one or more compartments. ELTIF compartments may co-exist with non-ELTIF compartments under the same Umbrella RAIF.

After authorisation, the ELTIF RAIF can be marketed in the EU to both professional and retail investors which have well-informed investor status by following the notification procedure for marketing foreseen under the AIFMD. Marketing to retail investors, however, is subject to certain additional requirements including, amongst other things, compliance with the MiFID suitability test requirement as well as application of the UCITS depositary regime and PRIIPs KID requirements.

⁴⁵Please see the definition of eligible investment assets for ELTIFs in the ELTIF Regulation. For more information, please see also our Memorandum "*European Long-Term Investment Funds (ELTIFs) in a nutshell*" on our website www.elvingerhoss.lu.

⁴⁶It should be noted that other types of Luxembourg AIFs such as the so-called Part II fund may also apply for an ELTIF label and may accept all types of investors.

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