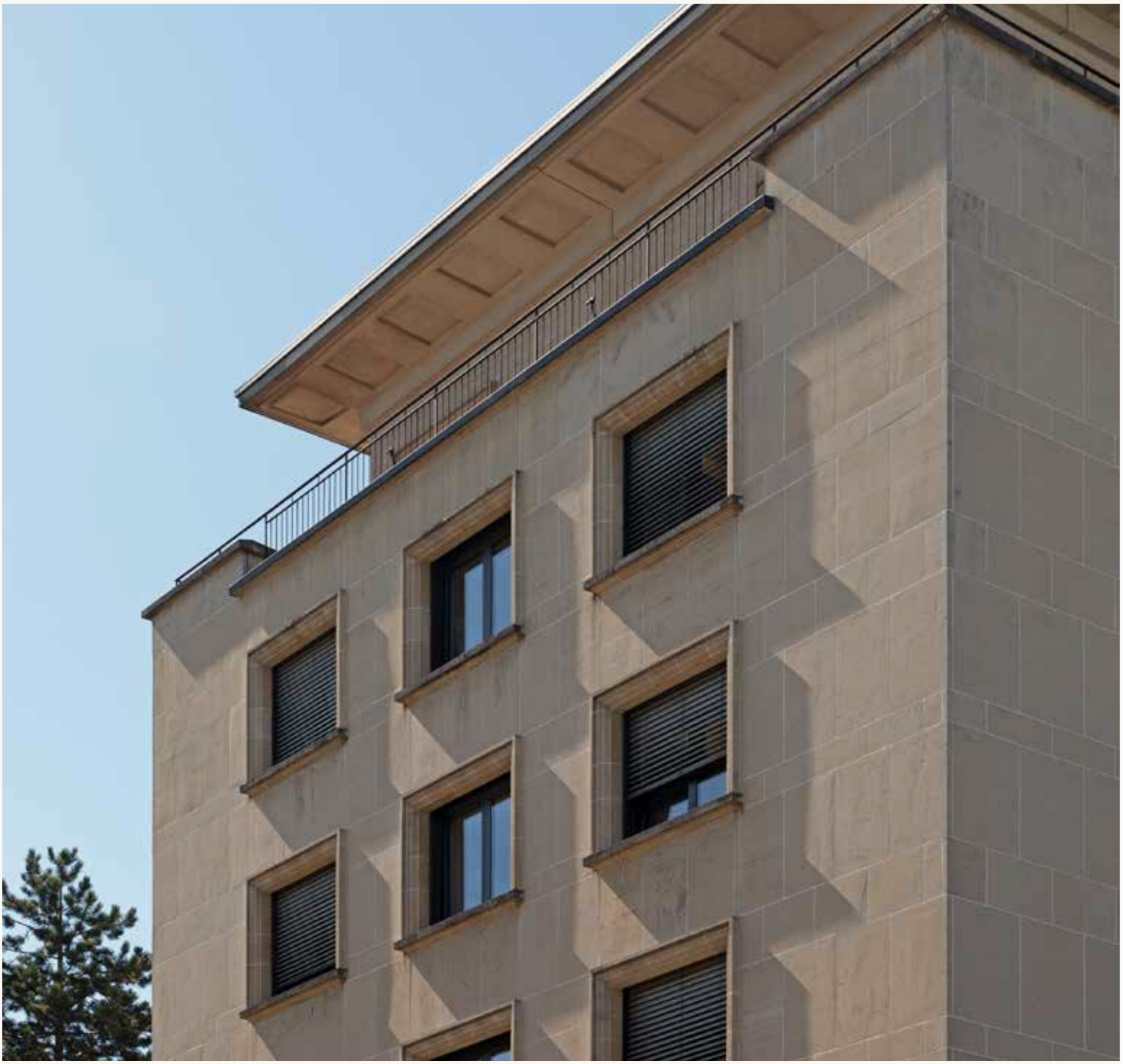

SICARs

Luxembourg regime for investment funds investing in risk capital and dedicated to sophisticated investors

ELVINGER HOSS LUXEMBOURG LAW

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Introduction

The Law of 15 June 2004 ("**SICAR Law**")[1] introduced into Luxembourg law the investment company in risk capital (*société d'investissement en capital à risque* or "**SICAR(s)**") which was conceived as a customised vehicle for investment in private equity and venture capital. The intention was to introduce a vehicle which could cope with the specific structural needs of private equity and venture capital projects, benefiting from a light regulatory regime while still being subject to the permanent supervision of the *Commission de Surveillance du Secteur Financier* ("**CSSF**"). Briefly, the SICAR regime offers a great deal of corporate flexibility along with recognised supervision and favourable tax treatment.

The SICAR regime was amended among others by the Law of 12 July 2013 on alternative investment fund managers ("**AIFM Law**") which implements the AIFMD[2] into Luxembourg law. Whilst the AIFM Law mainly purports to regulate alternative investment fund managers ("**AIFM(s)**"), it also contains various provisions applicable to alternative investment funds ("**AIF(s)**"), for which SICARs may qualify. The SICAR regime was also amended by the Law of 21 July 2023, which modernises the Luxembourg toolbox relating to investment funds (including SICARs), namely to take into account certain legal changes and market requirements.

The SICAR Law is divided into two parts. The first part contains general provisions applicable to all SICARs, while the second part contains specific provisions applicable only to those SICARs which qualify as AIFs ("**SICAR AIF(s)**") and which are managed by an AIFM that is authorised in accordance with the AIFM Law or AIFMD provisions. SICAR AIFs that are managed by an AIFM authorised in the European Union ("**EU**")[3] may benefit from the AIFMD passport in order to be marketed to professional investors in the EU through a regulator-to-regulator notification regime.

In addition, the European long term investment fund Regulation ("**ELTIF Regulation**")[4] and the European venture capital Regulation ("**EuVECA Regulation**")[5] may also offer new opportunities as they enable AIFMs to market SICAR AIFs with an ELTIF label to retail investors in the EU and SICAR AIFs with EuVECA label to certain eligible investors other than professional investors in the EU, provided that the relevant investors qualify as well-informed investors under the SICAR Law.

1 The SICAR 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 "**ELTIF Regulation**" refers to Regulation (EU) 2015/760 on European long-term investment fund, as amended. For more information, please see also our Memorandum "*European Long-Term Investment Funds (ELTIFs) in a nutshell*" on our website www.elvingerhoss.lu.

5 "**EuVECA Regulation**" refers to Regulation (EU) 345/2013 on European venture capital funds, as amended

Chapter I: General provisions applicable to all SICARs

The SICAR regime is applicable to investment companies:

- whose securities or partnership interests are reserved to one or several well-informed investors;
- whose exclusive object is the investment of their assets in securities representing risk capital in order to ensure for their investors the benefit of the result of the management of their assets in consideration for the risk which they incur; and
- whose constitutive documents[6] provide that they are subject to the SICAR regime.

1. Scope

1.1. Well-informed investors

Investment in SICARs is restricted to well-informed investors who are deemed to be able to adequately assess the risks associated with an investment in such a vehicle.

The SICAR Law defines well-informed investors not only as (a) institutional investors and (b) professional investors within the meaning of Annex II of MiFID[7], but also as (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 to appraise the contemplated investment in risk capital and the risks thereof.

Within this category (c), sophisticated retail or private investors are authorised to invest in a SICAR.

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

1.2. Optional regime

The SICAR regime is optional to the extent that the constitutive documents must expressly provide that the investment vehicle is subject to the provisions of the SICAR Law. Accordingly, any investment vehicle which is reserved to one or more well-informed investors will not necessarily be governed by the SICAR regime. Instead it could opt to be established as an unregulated company subject to the general rules of Luxembourg Company Law[8].

2. Object and investment rules

2.1. Concept of risk capital

The SICAR regime may be opted for by vehicles whose purpose is to invest their assets in securities representing "risk capital". The concept of risk capital is defined by the SICAR Law as "*the direct or indirect contribution of assets to entities in view of their launch, development or listing on a stock exchange*".

The parliamentary documents of the SICAR Law clearly state that this definition is only indicative. A comprehensive definition was not adopted in order to avoid the SICAR Law lagging behind the market.

The SICAR Law does not impose any restrictions regarding the type of assets that may be held by a SICAR. Parliamentary documents confirm that the definition includes any kind of contribution of assets, whether in the form of capital, debt, or financing of the "mezzanine" or "bridges" type. Loan contracts structured either as senior or subordinated debt can also constitute eligible assets.

On a case-by-case basis, the CSSF assesses compliance of the proposed investment policies with the SICAR Law. In particular, in its Circular 06/241, the CSSF describes its interpretation of the concept of risk capital under the SICAR Law and the criteria to be applied when assessing the eligibility of contemplated investment policies.

Pursuant to the CSSF Circular 06/241, the concept of "risk capital" generally hinges on two cumulative elements, namely (i) a high risk associated with the relevant assets, and (ii) an intention to develop the target entities (portfolio companies). The main objective of a

6 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 SICAR.

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

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

SICAR must be to contribute to the development of the target entities. This concept is to be understood, in the broad sense, as value creation at the level of the target entities. Basically, the investment of the SICAR should, directly or indirectly, enable the target entities to finance their own development. Besides, as opposed to a holding company, a SICAR is in essence an investment vehicle. Accordingly, its primary objective must be to acquire financial assets in order to sell them at a profit.

The CSSF Circular 06/241 lists a series of elements that should be considered in order to assess whether an investment policy is acceptable, for example:

- the number and the nature of the target entities;
- their maturity level;
- the SICAR's development projects; and
- the envisaged duration of holding.

The CSSF Circular 06/241 confirms that an indirect investment through another investment vehicle is acceptable, provided that the exclusive investment policy of such a vehicle is to invest in eligible assets within the meaning of the SICAR Law.

The Circular further confirms that a SICAR may invest in real estate if this investment can be considered as "risk capital". Such an investment must be made through special purpose vehicles ("**SPV(s)**") as a SICAR cannot directly acquire real estate. The Circular specifies under what conditions private equity real estate is eligible under the SICAR Law. Again, eligibility criteria are based on the concept of development. The SICAR may not be used to make a long-term, passive investment in stabilised real estate assets. Rather, the SICAR can be used to implement value-enhancing real estate strategies where it proposes to achieve high yields through redevelopment or repositioning of properties.

Finally, investments in listed securities are also permitted under certain limited circumstances, for example, in the case of investments in a distressed company in view of a de-listing, in companies listed on immature markets which do not offer real liquidity to the securities listed, or when the issuer has recently been listed or is in a new phase of development.

As an alternative to the SICAR, reserved alternative investment funds ("**RAIF(s)**") incorporated as investment companies, 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 Article 48 of the RAIF Law[9]), will benefit from certain features of the SICAR regime, such as the non-applicability of the diversification requirement and the specific SICAR tax regime, the so-called "RAIF-SICAR"[10]. Contrary to the SICAR, RAIFs are not subject to the supervision of the CSSF but they must, in principle, always be managed by an authorised AIFM.

2.2. Investment rules

The SICAR Law does not impose any risk-spreading requirements (i.e. the SICAR is not prevented from holding only securities of the same or of different types issued by the same issuer), nor does it impose any investment rules or restrictions other than those set out above. Further, there are no restrictions on investments in any jurisdictions, industries or currencies.

In addition, there is no prohibition against holding a majority stake in an entity nor is there any prohibition on being the sole owner thereof.

However, where the constitutive documents or the prospectus of the SICAR detail specific investment rules or restrictions, these will have to be complied with.

3. Structural aspects and functioning rules

3.1. Legal forms available

A SICAR must adopt one of the corporate forms listed by the SICAR Law, i.e. a public limited company (*société anonyme* or "**SA**"), a partnership limited by shares (*société en commandite par actions* or "**SCA**"), a cooperative in the form of a public limited company (*société coopérative organisée sous forme de société anonyme* or "**SCSA**"), a private limited company (*société à responsabilité limitée* or "**Sàrl**"), a common limited partnership (*société en commandite simple* or "**SCS**") or a special limited partnership (*société en commandite spéciale* or "**SLP**").

Among the corporate forms available for establishing a SICAR, the SLP is a flexible investment vehicle the main feature of which is that it has no legal personality. It is very similar to the Anglo-Saxon LP, which has traditionally been favoured for private equity investments.

The SLP is a partnership entered into for a limited or unlimited duration between one or more unlimited or general partners (*associés commandités*) with unlimited joint and several liability for all the obligations of the partnership and one or more limited partners (*associés commanditaires*) contributing only a specific amount pursuant to the provisions of the limited partnership agreement (*contrat social*). The law which governs SLPs allows flexibility and freedom in the organisation of an SLP due to the limited number of mandatory rules[11].

9 "**RAIF Law**" refers to the Law of 23 July 2016 on RAIFs, as amended.

10 For more information on RAIFs, see our Memorandum "*RAIFs, Luxembourg regime for investment funds not supervised by the Luxembourg regulator and dedicated to sophisticated investors*" on our website www.elvingerhoss.lu.

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

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 SICAR. Whatever its form, different mechanisms may be put into place when structuring a SICAR, so as to reduce the risk of an unfriendly takeover. However, should the taking of control over the SICAR 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.

For the avoidance of doubt, a SICAR must always be a company (*société*) and can never be organised under the form of a mutual fund (*fonds commun de placement*).

SICARs are subject to the provisions of Luxembourg Company Law except in those cases where the SICAR Law expressly derogates therefrom. In fact, the provisions of the SICAR Law deviate from the requirements of the Luxembourg Company Law on many aspects in order to offer the SICARs a more flexible corporate framework.

3.2. Umbrella and multiple class structures

The SICAR Law specifically refers to the possibility of creating a SICAR with multiple compartments ("**Umbrella SICAR(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 SICAR Law further provides that each compartment of such a vehicle will be linked to a specific portfolio of assets and liabilities which is segregated from the portfolio of assets and liabilities of the other compartments, unless a clause included in the constitutive documents provides otherwise. Pursuant to this so-called "ring-fencing" principle, although the Umbrella SICAR constitutes one single legal entity, the assets of a compartment are exclusively available to satisfy the rights of investors in relation to that compartment and the rights of creditors whose claims have arisen in connection with the operation of that compartment, unless a clause included in the constitutive documents of the Umbrella SICAR specifically provides otherwise.

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

The CSSF may withdraw the authorisation it granted to one compartment without automatically undermining the authorisation it granted to the other compartments of the Umbrella SICAR. Moreover, each compartment of an Umbrella SICAR may be liquidated separately and the liquidation of a compartment shall not involve the liquidation of another compartment. Only the liquidation of the last remaining compartment of the Umbrella SICAR involves the liquidation of the SICAR as a whole.

In addition or as an alternative to the umbrella structure, different classes of securities or partnership interests can be created within the same SICAR or even within a compartment of an Umbrella SICAR. Such classes may have different characteristics, notably as regards the fee structure, the type of targeted investors or the distribution policy.

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

3.3. Capital structure and debt financing

The minimum subscribed capital of a SICAR, increased by the share premium, if any or, where applicable, the value of the amount constituting the partnership interests, is EUR 1,000,000. This minimum must be reached within 24 months following the authorisation of the SICAR by the CSSF.

It is possible to set up a SICAR with variable share capital[12]. In this case, the capital of the SICAR would at all times be equal to its net asset value. Variations in capital take place automatically, without the need to comply with Luxembourg Company Law requirements and procedures for increases and decreases of capital, which apply to ordinary companies (shareholder meetings, notarial deeds, etc.).

A SICAR can issue partly paid shares, which must in principle be paid up to a minimum of 5% per share on issue, except for certain legal forms.

A SICAR may also finance its activities and the acquisition of its portfolio of investments, as the case may be, substantially via borrowings, and the issue of bonds, or other types of debt instruments.

3.4. Issue of securities or partnership interests

The SICAR Law provides that a SICAR can issue securities or partnership interests in accordance with the conditions and procedures set forth in its constitutive documents, without imposing more precise rules. This allows great flexibility in the operation of fund raising and notably facilitates the adequate structuring of drawdown mechanisms.

12 Applicable to SICAR under the legal forms of SA, SCA, SCSA and Sàrl.

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

Moreover, SICARs are not required to issue units, shares or partnership interests at a price based on the net asset value. For instance, the SICAR may issue units, shares or partnership interests at a predetermined fixed price and adopt a structure that is composed of a portion of par value and a portion of issue premium.

Subscription in different tranches can be achieved by means of 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 these securities being payable in further instalments.

A SICAR 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 SICAR and his co-partners. The use of capital accounts may provide for more flexibility in response to any specific requirements and/or constraints that investors in the SICAR may have.

3.5. Reimbursements and dividends

A SICAR is not required to maintain a legal reserve and the SICAR Law does not provide for any restriction on repayments or on the distribution of dividends, provided the minimum amount of subscribed capital (see Section 3.3 of this Memorandum) is respected. As regards reimbursement and distribution of dividends, a SICAR is exclusively governed by the rules set out in its constitutive documents. The absence of such constraints is particularly valuable for vehicles which are structured to make reimbursements or distributions as their investments mature or are sold.

3.6. Valuation of assets

The SICAR Law provides that the assets of a SICAR must be valued at fair value. This value is to be determined in accordance with the rules set out in the constitutive documents. In practice, these constitutive documents often refer to valuation principles endorsed by specialised professional bodies such as Invest Europe and the International Private Equity and Venture Capital Valuation Guidelines (also known as IPEV Guidelines).

Yet, SICARs are not required to calculate and publish the net asset value per share on a regular basis[13].

3.7. Risk management system

SICARs (unless they are internally managed SICAR AIFs as discussed in Chapter II, Section 1.2 of this Memorandum) are not subject to a legal obligation to employ a risk management system. However, the CSSF expects SICARs to have an appropriate risk management infrastructure with respect to the investment to be undertaken[14].

3.8. Conflicts of interest

A SICAR must be structured and organised so as to reduce to a minimum the risks that any conflicts of interest, which may arise between the SICAR and any person being involved in the activities of the SICAR, or being directly or indirectly linked to the SICAR, could harm the interests of its investors. In the case of potential conflicts of interest, the SICAR must ensure that the interests of its investors are preserved.

In this respect, SICARs are required to establish a conflict of interests policy, which must be communicated to the CSSF. CSSF Regulation 15-08 further details the expectations of the CSSF as regards the conflicts of interest policy for SICARs, including the obligation to keep and regularly update a record of the types of collective portfolio management activities carried out by or on behalf of the SICAR in which a conflict of interests entailing a material risk of damage to its interests has arisen or may arise. The Regulation makes a distinction between SICARs managed by an authorised AIFM and the other SICARs and it restricts its application to SICARs which are not managed by an authorised AIFM.

4. Regulatory aspects

4.1. Supervision by the CSSF

SICARs are regulated vehicles subject to the permanent supervision of the CSSF. However, due to the fact that well-informed investors do not need similar protection to that of non-sophisticated retail investors, SICARs are subject to a somewhat "light" regulatory regime in terms of the regulatory requirements to which they are subject.

A SICAR does not necessarily need to be initiated by a financial institution with significant financial resources. The CSSF will focus on the specific professional expertise and experience of those who are in charge of the portfolio management, as described below.

A SICAR is obliged to obtain approval from the CSSF

13 For the specific valuation aspects applicable to a SICAR AIF, which is managed by an authorised AIFM, see Chapter II, Section 4 of this Memorandum.

14 For more information, see CSSF SICAR FAQ: the starting point of any risk management should be the development of an adequate model for the valuation of investments and identification of the risk categories to which the investments are likely to be exposed. Moreover, SICARs shall implement appropriate risk management procedures according to their investment policy. In this context, the procedures aiming to measure the risk and to develop strategies in order to mitigate the risk are considered as the key element for a sound risk management. In a SICAR, the risk management framework shall allow the directors and managers to monitor the relevant risks during the realisation of investments while taking into account the specific characteristics of the investments. Information about the risk management policy, in particular as regards the management of financial risks, shall be communicated to investors.

before its launch[15]. The CSSF has to approve the constitutive documents and the prospectus, the choice of the directors/managers, the persons or entities in charge of the portfolio management function, the administration agent, the depositary and the auditor of a SICAR. During the life of a SICAR, any change to the constitutive documents and the prospectus and any change of director/manager or of the aforementioned service providers will also require the CSSF's approval.

As regards the choice of the SICAR's directors/managers and the persons or entities in charge of the portfolio management function, the CSSF will check that they are of sufficiently good repute, have the required experience and can devote the appropriate time to their mandate in order to properly perform their functions in relation to the SICAR.

The length of time required for the approval of a SICAR by the CSSF will depend on the complexity and quality of the file and the approval process is also subject to the payment of a fixed fee, the amount of which varies depending on, among others, the stand-alone or umbrella structure of the SICAR.

Once approved by the CSSF and established, the SICAR is registered on the official list of SICARs by the CSSF.

4.2. Appointment of an investment manager

A SICAR may appoint one or more investment managers, to whom the SICAR can delegate the investment management functions.

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. Any delegation arrangements must be disclosed in the prospectus of the SICAR.

4.3. Requirement for a depositary

A SICAR must entrust the safekeeping of its assets to a depositary, which must either have its registered office in Luxembourg or be established in Luxembourg if its registered office is located abroad.

The safekeeping of the SICAR's assets is a function to be understood in the sense of "supervision", which implies that the Luxembourg depositary must have knowledge at all times of how the assets of the SICAR are invested, where they are located and how these assets are available. However, this requirement does not prevent the physical safekeeping of the assets from being entrusted to local sub-depositaries. The depositary is liable for any losses suffered by investors as a result of a wrongful failure to perform its obligations[16].

The SICAR's depositary must be a credit institution or an investment firm within the meaning of the Law of 5 April 1993 on the financial sector, as amended ("**Financial Sector Law**"). Investment firms, however, are eligible to act as a depositary only if they fulfill 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 type of depositary described above, a professional depositary of assets other than financial instruments[17] may also be appointed as depositary. Pursuant to the SICAR Law, this type of depositary may only be used by SICARs which do not have redemption rights exercisable during a period of 5 years from the date of the initial investments and that, in accordance with their core investment policy, either (i) generally do not invest in financial instruments that must be held in custody in accordance with the relevant provisions of the AIFM Law 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 Law[18].

CSSF Circular 18/697 clarifies, in particular, the organisational arrangements that need to be complied with by a depositary of investment funds other than UCITS. The depositary of a SICAR (qualifying as an AIF or not) must comply with this Circular.

4.4. Requirement for central administration

In accordance with the SICAR Law, a SICAR 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 SICAR is not, however, required to have employees or its own premises. A SICAR could perform this central administration function internally (subject to CSSF authorisation and sufficient resources) but in most cases, a SICAR will appoint one or more Luxembourg-based

15 The approval request must be completed and filed through the "UCI Approval" application available under the eDesk portal of the CSSF.

16 For more information concerning the specific duties and liability regime that apply to the depositary of a SICAR AIF, which is managed by an authorised AIFM, see Chapter II, Section 3 of this Memorandum.

17 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.

18 Typically (but not only) private equity or venture capital funds.

central administration agent(s) which will, among other tasks, act as domiciliary agent, registrar agent, and which will also keep the books for the SICAR and calculate the net asset value.

The entity entrusted with central administration functions of a SICAR needs to be authorised by the CSSF as a "UCI administrator". This entity can be, *inter alia*, an AIFM or certain other external service providers authorised under the Financial Sector Law.

CSSF Circular 22/811 clarifies further the rules applicable to the central administration of Luxembourg investment funds, including SICARs, namely in terms of authorisation, substance, internal organisation and reporting. Notably, this circular foresees that, the CSSF may, on a case-by-case basis and subject to particular requirements, authorise the UCI administrator located in Luxembourg to delegate certain tasks (including to an entity located outside Luxembourg).

4.5. Requirement for an auditor

The annual accounts of a SICAR must be audited by a Luxembourg approved statutory auditor (*réviseur d'entreprises agréé*) which must provide evidence that it has an appropriate level of professional experience and shall be approved by the CSSF.

The auditor is responsible, *inter alia*, for controlling the accounting data comprised in the SICAR's annual report. It must also report to the CSSF any findings which would constitute a material breach of the SICAR Law or which would otherwise be detrimental to the operations of the SICAR, and must further perform certain AML/CFT works the scope of which will vary depending on whether the SICAR has appointed an investment fund manager (in Luxembourg or abroad) or not[19].

4.6. AML/CFT and TFS requirements

A SICAR (qualifying as an AIF or not) is a professional and is 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 Law[20] as well as related laws and regulations, including the various regulations, circulars and guidelines issued by the CSSF with respect to AML/CFT matters[21] ("**AML/CFT Legislation**").

This includes, without limitation, the obligation for a SICAR to define an 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 programme, 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 SICAR.

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

CSSF Regulation 12-02, CSSF FAQ regarding the persons involved in AML/CFT for a Luxembourg investment fund or investment fund manager and CSSF FAQ on the AML/CFT RC Report provide further clarifications notably 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.

SICARs shall further comply with the targeted financial sanction ("**TFS**") regimes applicable in Luxembourg pursuant to the TFS Law[22], 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 Finance[23].

4.7. Information to be supplied to investors and reporting requirements

(a) Prospectus

A SICAR is required to produce a prospectus, which must be approved by the CSSF.

The SICAR Law does not impose any specific schedule with respect to the minimum content of the prospectus. However, the prospectus 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 and it must also contain any specific information as may be required by the CSSF or imposed by specific laws and regulations as may be applicable to the relevant SICAR depending on, amongst others, its legal structuring and investment policy. As a guideline, the CSSF requests that the

19 See in particular Article 49 of CSSF Regulation No 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing, as amended ("**CSSF Regulation 12-02**") and CSSF Circular 21/788.

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

21 See in particular, without limitation, CSSF Regulation 12-02.

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

23 Further guidance may be found on the dedicated webpages maintained by the Ministry of Finance and the CSSF.

prospectus provides investors with certain transparent and adequate information[24].

A continuous updating of the prospectus 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. Any amendment to the prospectus is also subject to the CSSF's approval.

(b) PRIIPs KID

In addition to the prospectus, in the case where the units, shares or partnership interests of a SICAR 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 Regulation[25] and delivered to those retail investors before any offering or subscription to units, shares or partnership interests.

(c) Financial statements

A SICAR must publish an audited annual report within six months from the end of period to which it relates. The SICAR Law specifies the minimum content of the annual report, and stresses that it must contain any significant information enabling investors to make an informed judgement on the development of the activities and the results of the SICAR[26].

The SICAR Law does not require a semi-annual report to be prepared and published.

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

(d) Reporting

The CSSF has issued various circulars and FAQs, which detail the reporting duties and processes to be complied with, *inter alia*, by a SICAR including (but not limited) from a financial as well as from an AML/CFT perspectives.

24 See CSSF FAQ SICAR available on CSSF website and, for the additional requirements regarding disclosure to investors that are applicable for a SICAR AIF, which is managed by an authorised AIFM, see Chapter II, Sections 5 and 6 of this Memorandum.

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

26 For the additional disclosure requirements applicable to the annual report of a SICAR AIF, which is managed by an authorised AIFM, see Chapter II, Section 5 of this Memorandum.

Chapter II: Specific regulatory aspects applicable to SICAR AIFs managed by an authorised AIFM

The SICAR Law makes a distinction between two SICAR regimes, namely:

- SICARs which do not qualify as SICAR AIFs or although qualifying as AIFs fall within the small manager exemption or group exemption, and thus are only subject to Part I of the SICAR Law[27]; and
- SICARs which do qualify as SICAR AIFs and are managed by an AIFM authorised in accordance with the AIFM Law or AIFMD, and are thus required to comply with the AIFMD and AIFM Law product rules[28] to which Part II of the SICAR Law cross-refers.

This Chapter examines the provisions contained in Part II of the SICAR Law, which apply to SICAR AIFs managed by an authorised AIFM in addition to (or, where applicable, by way of derogation from) the general provisions of Part I of the SICAR Law, as described in Chapter I of this Memorandum.

This Chapter II is relevant because the AIF's definition is broad and as a result, most SICARs will qualify as SICAR AIFs and will appoint an authorised AIFM.

1. Requirement to appoint an AIFM

Unless they can benefit from one of the limited exemptions provided for by the AIFMD and AIFM Law, SICAR AIFs must be managed by an authorised AIFM, which may either be established in Luxembourg, in an EU Member State, or in a third country[29].

According to the AIFM Law, a SICAR AIF can either be (i) externally managed through the appointment of a separate AIFM responsible for managing the SICAR AIF, or (ii) internally managed, where the SICAR AIF's legal form permits internal management and where its governing body has chosen not to appoint an external AIFM.

1.1. Externally managed SICAR AIFs

In the case of an externally managed SICAR AIF, it is the governing body of the SICAR AIF which is empowered to appoint an authorised AIFM, which can either be established in Luxembourg, in another EU Member State or in a third country.

In such a case, the relevant external AIFM must be authorised and licensed to manage funds pursuing investment strategies as those pursued by the relevant SICAR AIF. 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 may start managing the relevant SICAR AIF on a cross-border basis.

1.2. Internally managed SICAR AIFs

In the case of an internally managed SICAR AIF, the SICAR AIF will itself be considered and authorised as the AIFM. For that purposes, the SICAR AIF will be required to:

- have an initial share capital of EUR 300,000 and additional own funds or professional indemnity insurance in order to cover professional liability risks. Additional own funds can also be required depending on the size of the SICAR AIF's portfolio;
- comply with most of the substance, organisational, operating, delegation and reporting requirements applicable to an external AIFM that is authorised under the AIFM Law. The most important of these concern, *inter alia*, the general internal governance and organisation, number of managers, conducting

27 SICARs which fall under this category will comprise:

- SICARs that do not fall within the definition of AIF as contained in the AIFM Law;
- SICARs that do fall within the AIF definition but whose manager's total assets under management, including any assets acquired through the use of leverage, do not exceed EUR 100 million, or whose total assets under management do not exceed EUR 500 million and whose portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during the 5-year period following the date of initial investment in each AIF (Article 3.2 (a) and (b) of the AIFM Law). This category benefits from the so-called "small manager" exemption; and
- SICARs that do fall within the AIF definition but whose only investors are the AIFM, the parent undertakings, the subsidiaries of the AIFM, or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.

28 The AIFMD and AIFM Law include provisions, which apply to AIFs managed by authorised AIFMs. These are notably the requirements for the AIF to appoint a depositary in accordance with the AIFMD/AIFM Law provisions, to provide certain information to investors, to publish an annual report and to comply with certain valuation, investment and leverage rules all of which in accordance with the specific requirements of the AIFMD/AIFM Law.

29 In the case where a SICAR AIF is managed by a non-EU AIFM, specific AIFMD third country rules shall apply.

officers and other key personnel functions, programme of activity and appropriate internal procedures and policies such as (but not limited to) a risk management policy, liquidity risk management policy, marketing policy, valuation policy, remuneration policy and conflict of interest policy;

- be authorised and obtain an AIFM licence from the CSSF in accordance with the AIFM Law.

All of the above requirements will be satisfied in accordance with the conditions set forth in the AIFM Law and CSSF Circular 18/698 on the authorisation and organisation of investment fund managers incorporated under Luxembourg law[30].

2. Investment management functions

The investment management functions in relation to SICAR AIFs, which are managed by an authorised AIFM (including the portfolio management and risk management functions), may also be delegated (and sub-delegated) 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 SICAR, 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 AIFM legislation delegation conditions, which are nearly identical to those described under Section 4.2 of Chapter I of this Memorandum. Other conditions might apply if the AIFM is located in another EU Member State.

3. Depositary functions

In keeping with the regime applied to SICARs subject to Part I of the SICAR Law, the depositary of a SICAR AIF, which is managed by an authorised AIFM, may either be a credit institution, an investment firm or, subject to the same conditions outlined previously[31], a professional depositary of assets other than financial instruments[32].

Depositaries of SICAR AIFs managed by an authorised AIFM must comply with the depositary regime as provided for by the AIFM Law and CSSF Circular 18/697.

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

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

The liability regime of the depositary has been strengthened by the AIFM Law. The depositary is strictly liable in the case of a loss of financial instruments it held in custody and it must, without undue delay, return financial instruments of an identical type or the corresponding amount to the SICAR AIF or the AIFM, which is acting on behalf of the SICAR AIF. In certain circumstances specified by the AIFM Law, the SICAR AIF, the depositary and 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 SICAR AIF 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.

4. Valuation function

For a SICAR AIF managed by an authorised AIFM, the AIFM is in charge of the valuation function (namely the valuation of the assets), where appropriate with external support.

The AIFM may also, under its responsibility, delegate 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[33].

5. Annual report

SICAR AIFs managed by an authorised AIFM are required to disclose additional information in their annual reports in accordance with the AIFMD and AIFM Law requirements. 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,

30 See in particular Part VII of Circular 18/698 for more information on the conditions that must be complied with by authorised internally managed AIFs, including authorised internally managed SICAR AIFs.

31 See Chapter I, Section 4.3 of this Memorandum.

32For a SICAR AIF managed by an authorised AIFM, only Luxembourg branches of credit institutions with a registered office in another EU Member State of the EU (and not in a third country) can act as depositary.

33 If the SICAR AIF 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 SICAR AIF and its issue and the redemption frequency. If the SICAR AIF 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 SICAR AIF.

where relevant, (iii) any carried interest paid by the SICAR AIF; 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 SICAR AIF.

In addition, the annual reports of SICAR AIFs must contain certain sustainability-related information as imposed by SFDR[34] and Taxonomy Regulation[35]. They must also disclose specific information as may be imposed by specific laws and regulations where applicable to the relevant SICAR AIF that is managed by an authorised AIFM, such as information on the use of securities financing transactions ("**SFT**") and total return swaps under SFTR[36].

6. Additional information to be provided to investors

The authorised AIFM of a SICAR AIF must provide the investors with additional information before they invest in the SICAR AIF, as specified by the AIFM legislation and other specific legislation as applicable to the AIFM and/or the SICAR AIF, as well as any material changes thereof to the investors before they invest in the SICAR AIF.

This information must be made available to investors but must not necessarily be inserted in the prospectus referred to in Chapter I Section 4.7 (a) above.

This information includes, in particular, all relevant information prescribed by Article 23 of the AIFMD and Article 21 of the AIFM Law as well as the relevant sustainability related information and disclosure as required by SFDR and Taxonomy Regulation. This information must also specify the SFT and total return swaps that the authorised AIFM is authorised to use and a clear statement that those transactions and instruments are used must be included[37].

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

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

36 "**SFTR**" refers to Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse and amending the EMIR Regulation. See SFTR, Article 13.

37 See SFTR, Article 14: this information must also include the data provided for in Section B of the Annex of the SFTR.

Chapter III: Marketing and listing

1. Marketing

The applicable marketing rules vary depending on whether or not the SICAR is a SICAR AIF, whether or not it is managed by an authorised EU AIFM, and whether the SICAR 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 SICARs.

1.1. SICAR AIFs managed by an authorised AIFM

(a) Marketing/pre-marketing to EU Professional Investors

Currently, only SICAR AIFs managed by an authorised EU AIFM benefit from a passport allowing the AIFM to market the SICARs' shares, units or partnership interests to Professional Investors within the EU, through a regulator-to-regulator notification regime.

SICAR AIFs managed by a non-EU AIFM do not yet benefit from this EU passport. The marketing of their securities or partnership interests in the EU is subject to the national placement rules ("**NPR**") (with some minimum requirements provided by the AIFMD) of the countries where the marketing is performed.

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 SICAR AIF (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 SICAR AIF.

Non-EU AIFMs may also be allowed by an EU Member State's national laws, regulations and administrative provisions to carry out pre-marketing activities at national level (which is the case in Luxembourg), under the condition that any such pre-marketing does not in any way disadvantage EU AIFMs *vis-à-vis* non-EU AIFMs.

(b) Marketing/pre-marketing to other well-informed investors

The marketing/pre-marketing of SICAR AIFs managed by an authorised EU AIFM outside or within the EU to well-informed investors, which do not qualify as Professional Investors, requires compliance with the NPR of each country where such marketing/pre-marketing is done[38].

For the avoidance of doubt, SICARs may be marketed to such other well-informed investors on the territory of Luxembourg in accordance with the provisions of the SICAR Law. The marketing to such other well-informed investors is also subject to the application of the PRIIPs Regulation's requirements.

1.2. Other SICARs

SICAR AIFs managed by a registered AIFM[39] do not benefit from an EU passport for the marketing of their shares, units or partnership interests and therefore remain subject to the NPR of each country where the SICAR AIF is intended to be marketed[40].

The same treatment applies to SICARs that are not SICAR AIFs due to the fact that they do not fall under the definition of an AIF.

1.3. Closed-ended SICARs

Closed-ended SICARs, irrespective of their qualification as SICAR AIFs or not, may in addition be subject to the provisions of the Prospectus Regulation[41] in the case where they intend to carry out a public offering or admission to trading of their shares, units or partnership interests.

38 Except in the case where the SICAR AIF qualifies as ELTIF under the "**ELTIF Regulation**", which refers to Regulation (EU) 2015/760 on European long term investment funds, as amended.

39 Registered AIFM refers to an AIFM who manages AIFs whose total assets under management, including any assets acquired through use of leverage, do not exceed EUR 100 million, or whose total assets under management do not exceed EUR 500 million and whose portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

40 Except in the case where the SICAR AIF qualifies as EuVECA under the "**EuVECA Regulation**", which refers to Regulation (EU) 345/2013 on European venture capital funds, as amended.

41 "**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.

If they are not exempt from the Prospectus Regulation, they might have to prepare a prospectus within the meaning of the Prospectus Regulation. However, most closed-ended SICARs will benefit from an exemption in that respect.

2. Listing

A SICAR 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 unitholders/shareholders/partners of a SICAR.

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

Chapter IV: Tax features

The SICAR benefits from an attractive tax regime, which varies depending on the legal form adopted.

SICARs in the form of an SCS or an SLP are fully transparent for Luxembourg tax purposes[42].

SICARs established under the form of a limited company are subject to general corporation taxes in Luxembourg at ordinary rates; however, any income derived from securities that represent risk capital held by SICARs as well as any income from the sale, contribution or liquidation thereof are fully 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.

SICARs are exempt from net wealth tax. However, SICARs established under the form of a limited company are in principle subject to a minimum annual net wealth tax of EUR 4,815.

No Luxembourg withholding tax applies on dividend distributions made by a SICAR. Non-resident investors are not subject to taxation in Luxembourg on capital gains derived from a sale of units or shares in a SICAR.

A SICAR organised as a limited company, generally benefits from the double tax treaties entered into by Luxembourg. The Luxembourg tax authorities are therefore prepared to issue, on demand, unqualified residence certificates.

Management services (such as investment advisory services, portfolio management, risk management and certain administrative services) provided to a SICAR are exempt from Luxembourg VAT.

42 Anti-hybrid mismatch rules need however to be monitored. For more information, please see our Memorandum "*Luxembourg Partnerships in the asset management industry*" on our website www.elvingerhoss.lu.

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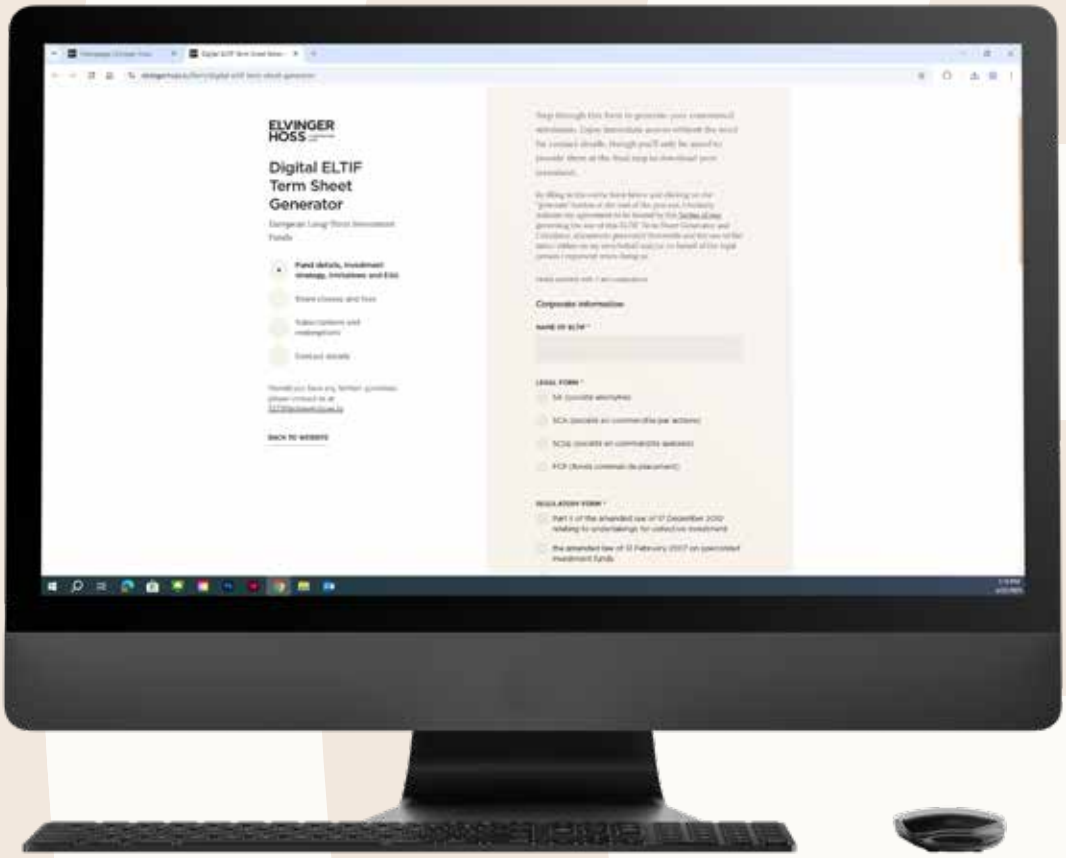

The Elvinger Hoss Digital ELTIF Term Sheet Generator & Calculator

In order to assist managers with the first steps of an ELTIF project, Elvinger Hoss Prussen now provides a web-based tool that allows the automatic generation of a first term sheet for an evergreen ELTIF. The generated term sheet may then be used by managers to further conceptualise the project.

The tool calculates, in particular, the redemption limits that will apply to the ELTIF based on set criteria, which facilitates for instance the conversion of a limit applying to the liquidity pocket back into the global NAV of the fund. The tool is accessible via the QR code on the right or on our website at www.elvingerhoss.lu.

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