

## 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 on the basis of 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 on the basis of this Memorandum.*

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# INTRODUCTION

The Law on Reserved Alternative Investment Funds dated 23 July 2016 (**"RAIF Law"**)<sup>1</sup>, introducing a new type of Luxembourg investment vehicle named "Reserved Alternative Investment Fund" (in short **"RAIF"**), entered into force on 1 August 2016.

The RAIF is regulated under the AIFMD<sup>2</sup> and benefits from the corresponding EU passport 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 AIFMD, a managers' directive and a change of paradigm***

The AIFMD requires that authorised alternative investment fund managers (**"AIFMs"**) ensure that the alternative investment funds (**"AIFs"**) they manage comply with the AIFMD product rules<sup>3</sup>, irrespective of whether or not the relevant AIF is subject to a product regulation.

When an AIF is a regulated and supervised product, compliance with product rules is consequently ensured at two levels: at the level of the AIF itself and at the level of its AIFM. Similarly, the AIF is subject to a double supervision system, by its supervisory authority and that of its AIFM, which could be based in a different country.

This double system of approval and supervision is not required by the AIFMD. It entails increased protection, which is not necessarily deemed justified by a series of professional and sophisticated investors performing their own review of the AIF's structure and documentation.

## ***The RAIF***

The introduction of the RAIF regime seeks to widen the range of investment vehicles available in Luxembourg, offering a new option to the initiators of Luxembourg AIF projects.

The creation, launch, documentation, activities and termination of the RAIF are not subject to the approval of or any supervision by the CSSF, but still

enjoy all the structuring flexibility from which (CSSF approved and supervised) Luxembourg funds benefit.

In order to be eligible for this new regime, the RAIF has to be an AIF managed by an authorised AIFM, both within the meaning of the AIFMD. The AIFM may be established in Luxembourg, in another Member State of the European Union (**"EU Member State"**) or even, once the AIFMD passport is available to third countries, in a third country in accordance with the provisions of the AIFMD.

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 European passport granted by the AIFMD for marketing to professional investors in the EU.

The other features of this new Luxembourg investment vehicle are substantially identical to those of the specialised investment fund (**"SIF"**)<sup>4</sup> and the RAIF Law has therefore been drafted drawing heavily from the text of the SIF Law<sup>5</sup>.

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 law, particularly by the AIF's management body.

The RAIF has become a vehicle of choice for managers and investors looking to combine contractual freedom and short time-to-market together with both the protection of the AIFMD framework and the RAIF Law, and the marketability of an investment vehicle benefiting from an EU passport.

The purpose of this Memorandum is to describe the main features of the RAIF regime.

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<sup>1</sup> The RAIF Law is available on our website together with an unofficial English translation of the same.

<sup>2</sup> **"AIFMD"** refers to Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers.

<sup>3</sup> The AIFMD includes provisions which apply to AIFs managed by authorised AIFMs. These are notably the requirements for the AIF to appoint a depositary and an approved statutory auditor, to provide certain information to investors, to publish an annual report and to comply with certain investment and leverage rules.

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<sup>4</sup> 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 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).

<sup>5</sup> **"SIF Law"** refers to the Law of 13 February 2007 on SIFs, as amended. For further information, see our Memorandum *Specialised Investment Funds, Luxembourg regime for investment funds dedicated to sophisticated investors*, on our website [www.elvingerhoss.lu](http://www.elvingerhoss.lu).

# 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-spreading<sup>6</sup>, (iii) whose securities or partnership interests are reserved for well-informed investors, and (iv) whose constitutive documents<sup>7</sup> 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 exempt AIFM<sup>8</sup>.

### 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 constitutional 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, 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 125,000; or
- (ii) benefit from an assessment made by a credit institution, an investment firm or a UCITS management company or an authorised AIFM certifying their expertise, experience and knowledge to adequately 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 aforementioned conditions do not, however, apply to those persons involved in the management of the relevant RAIF.

### 1.4 Optional regime

The RAIF regime is optional. 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 well-informed investors will not necessarily be governed by the RAIF regime; instead it could opt to be established as another unregulated company subject to the general rules of Luxembourg Company Law<sup>9</sup> or as a SIF or an investment company in risk capital (*société d'investissement en capital à risque* or "SICAR") 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

<sup>6</sup> Except for certain RAIFs investing solely in risk capital as discussed in Chapter III Section 1.2 of this Memorandum.

<sup>7</sup> i.e., mainly the articles of incorporation (*statuts*), the management regulations (*règlement de gestion*) or the partnership agreement (*contrat social*).

<sup>8</sup> An "exempt AIFM" is an AIFM that benefits from one of the exemptions of Article 3 of the AIFMD, that does not have to comply with all the provisions of the AIFMD, but which is therefore deprived of the benefit of the European passport for marketing provided for by the AIFMD.

<sup>9</sup> "Luxembourg Company Law" refers to the Law of 10 August 1915 on commercial companies, as amended.

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.

## 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 invest<sup>10</sup>.

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 permits the structuring of, inter alia, equity funds, bond funds, money market funds<sup>11</sup>, 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 art, luxury goods, wines, etc.

### 2.2 Applicability of the principle of risk-spreading

The RAIF Law does not provide for specific investment rules or restrictions, 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 account<sup>12</sup>.

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 capital<sup>13</sup> 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") and the *société d'investissement à capital variable* ("SICAV"), but does not limit the legal forms a RAIF may take. Other legal forms are therefore possible<sup>14</sup>. 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 management company established under, and governed by, either Chapter 15 of the UCI Law<sup>15</sup> (i.e. a management

<sup>10</sup> 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.

<sup>11</sup> Since 21 July 2018, RAIFs which qualify as money market funds ("MMF") under Regulation (EU) 2017/1131 on MMFs must be specifically authorised as MMF. In addition, the manager of an MMF must be specifically authorised to manage an MMF (Art. 5 of the MMF Regulation).

<sup>12</sup> 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.

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.

2. When using derivative financial instruments, a SIF must ensure a 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.

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 aforementioned diversification rules.

<sup>13</sup> See Chapter III Section 1.2 of this Memorandum.

<sup>14</sup> It is possible, for example, to establish a RAIF as an investment company with fixed capital ("SICAF") or even under a fiduciary contract.

<sup>15</sup> "UCI Law" refers to the Law of 17 December 2010 on undertakings for collective investment, as amended.



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 in further detail below), investors in an FCP are entitled to vote only if, and to the extent that, the management regulations provide for such a possibility<sup>16</sup>.

### 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") or with fixed capital ("SICAF").

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 shareholders or the intervention of a notary to be performed.

A RAIF created under the form of an investment company can typically adopt one of the following corporate forms, namely that of a public limited company (*société anonyme*), a partnership limited by shares (*société en commandite par actions*), a common limited partnership (*société en commandite simple*), a special limited partnership ("SLP") (*société en commandite spéciale*) or a private limited company (*société à responsabilité limitée*).

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 RAIF Law deviates from the requirements of the Luxembourg Company Law on

many aspects in order to offer the RAIFs a more flexible corporate framework.

### 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 from other corporate forms 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 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 contains limited mandatory rules and therefore allows for maximum flexibility and freedom in the organisation of an SLP<sup>17</sup>.

## 4. APPOINTMENT OF AN AIFM

According to the RAIF Law, a RAIF must be externally managed through the appointment of a separate authorised AIFM responsible for managing the RAIF<sup>18</sup>. Contrary to SIF-AIFs, a RAIF cannot be internally managed.

It is the governing body<sup>19</sup> of the RAIF which must appoint the authorised AIFM, which can, either be established in Luxembourg or in another EU Member State<sup>20</sup>.

The AIFM may delegate portfolio management or risk management to third parties in accordance with the provisions of the AIFMD. Delegation arrangements must be disclosed in the offering document of the RAIF.

<sup>16</sup> This is not usually the case, which makes the FCP a flexible vehicle that is attractive for initiators who wish to maintain maximum control over the RAIF.

<sup>17</sup> For further information, please see our Memorandum *Luxembourg Partnerships* on our website [www.elvingerhoss.lu](http://www.elvingerhoss.lu).

<sup>18</sup> In line with the provisions of the AIFMD, supranational institutions managing RAIFs acting in the public interest will have access to the RAIF Law without having to appoint an authorised AIFM.

<sup>19</sup> 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.

<sup>20</sup> 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).

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## 5. APPOINTMENT OF A DEPOSITARY

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The assets of a RAIF must be entrusted to a depositary for safe-keeping<sup>21</sup>.

The depositary must be a Luxembourg credit institution or investment firm within the meaning of the **Financial Sector Law**<sup>22</sup>. 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 instruments<sup>23</sup> 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 Law<sup>24</sup> 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<sup>25</sup>.

Depositaries of RAIFs must comply with the depositary regime as provided for by the AIFM Law<sup>26</sup> and in the CSSF Circulars<sup>27</sup>.

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 allowed only if all of the relevant conditions set forth in the AIFM Law are met.

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## 6. AUDITOR AND CENTRAL ADMINISTRATION

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### 6.1 Auditor

The annual accounts of a RAIF must be audited by a Luxembourg approved statutory auditor (*réviseur d'entreprises agréé*).

The approved statutory auditor must have proven adequate professional experience in that it already performs these functions for UCIs, SIFs or SICARs.

### 6.2 Central administration

The RAIF Law requires that the central administration of a RAIF must be located in Luxembourg.

A RAIF is not however, required to have employees or its own premises. In most cases, a RAIF will appoint a Luxembourg-based central administration agent which will, act as domiciliary agent, registrar, and transfer agent, among other tasks, and which will

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

<sup>22</sup> **Financial Sector Law** refers to the Law of 5 April 1993 on the financial sector, as amended.

<sup>23</sup> 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. This type of Luxembourg depositary was introduced by the AIFM Law.

<sup>24</sup> Typically (but not only) real estate or infrastructure funds.

<sup>25</sup> Typically (but not only) private equity funds.

<sup>26</sup> The description of the depositary regime below is only a summary.

<sup>27</sup> See in particular CSSF Circular 18/697 which became applicable on 1 January 2019 and which, in particular, provides clarification on the organisational arrangements that need to be complied with by a depositary falling under either (i) the regime of AIFM Law or (ii) the distinctive regime provided for by other Luxembourg laws.

also keep the accounts for the RAIF and calculate the net asset value.

## 7. 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 a public limited company shall be created via the adoption by the founding shareholders of articles of incorporation before a notary, whereas an SLP may be created via the execution by at least one general partner and one limited partner of a partnership agreement in the form of a mere private deed.

Notwithstanding the foregoing, and/or in addition to the foregoing, the establishment of a RAIF must be formalised by notarial deed. This does not imply that the constitutive documents referred to above, such as the partnership agreement of an 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 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 the date of the 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)<sup>28</sup>; and
- within a deadline of 20 business days from the date of the 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 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 RAIF<sup>29</sup>. The purpose of this form is to enable the CSSF to have full and up-to-date information on AIFs managed by Luxembourg AIFMs.

## 8. STRUCTURING ASPECTS

### 8.1 Umbrella structures and multiple securities or partnership interests classes

#### (a) *Umbrella structures*

The RAIF Law specifically refers to the possibility of creating a RAIF with multiple compartments (a so-called "umbrella fund").

The RAIF Law further provides that each compartment of such a vehicle is to be linked to a specific portfolio of investments which is segregated from the investment portfolios pertaining to the other compartments. Pursuant to this so-called "ring-fencing" principle, although an umbrella fund 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 RAIF.

#### (b) *Multiple securities and partnership interest classes*

In addition, different classes of securities and partnership interests can be created within the same RAIF or, where the latter is set up as an umbrella structure, 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.

### 8.2 Cross-compartment investments

A compartment of an umbrella RAIF can invest 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

<sup>28</sup> The publication of this mention comes in addition to the publication required by the Luxembourg Company Law.

<sup>29</sup> 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.



prohibit double charging of management fees and the possibility to create a master/feeder structure within the same RAIF.

### 8.3 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 12 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 which has been set-up as an investment company can issue partly paid shares. Subscriptions in different tranches can thus be achieved through the successive subscriptions of new shares committed through subscription commitments or by means of partly paid shares, the remaining amount of the issue price of the shares initially issued being payable in further instalments. Shares must be paid up to a minimum of 5% per share on issue.

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.

### 8.4 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. Also, 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 a SICAV or an FCP governed by the UCI Law. RAIFs can therefore issue shares at a predetermined fixed price or repurchase shares at 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.

### 8.5 Reserves and distribution policy

A RAIF 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 8.3 above is complied with.

### 8.6 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 1.1 below)<sup>30</sup>.

## 9. INFORMATION TO BE SUPPLIED TO INVESTORS AND REPORTING REQUIREMENTS

### 9.1 Requirement for an offering document

Pursuant to the RAIF Law, the RAIF is required to produce an offering document. The offering document must contain the necessary information for investors to be able to make a reasoned

<sup>30</sup> If 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.

judgment on the investment being proposed to them. However, the RAIF Law does not impose a specific schedule with respect to the minimum content of the offering document.

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.

The offering document must specify clearly and visibly on its covering page that the RAIF is not subject to supervision by a Luxembourg supervisory authority.

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

In addition, in the case where the units or shares of a RAIF are available within the EU territory to well-informed investors which do not qualify as professional investors under MiFID II<sup>31</sup>, a key information document (KID) must be drawn up in accordance with the PRIIPs Regulation<sup>32</sup> and delivered to those retail investors before any offering or subscription to units or shares.

## 9.2 Additional information to be provided to investors

The AIFM of a RAIF must provide the additional information imposed by the AIFM legislation<sup>33</sup>, 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 referred to in Chapter I Section 9.1 above.

This information must specify the securities financing transactions (“SFT”) and total return swaps that the AIFM is authorised to use and a clear statement that these transactions and instruments are used must be included<sup>34</sup>.

Regarding other possible additional information to be provided to investors, see also Chapter II Section 1.3.

## 9.3 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 manner which allows investors to make an informed judgment 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 funds, 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 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 must disclose information on the use made of SFT and total return swaps<sup>35</sup>.

<sup>31</sup> “MiFID II” refers to Directive 2014/65/EU on markets in financial instruments.

<sup>32</sup> “PRIIPs Regulation” refers to Regulation (EU) 1286/2014 on packaged retail and insurance-based investment products.

<sup>33</sup> See in particular Article 23 of the AIFMD and Article 21 of the AIFM Law.

<sup>34</sup> See Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse and amending Regulation (EU) 648/2012 (“SFT Regulation”), Article 14: this information must also include the data provided for in Section B of the Annex of the SFT Regulation.

<sup>35</sup> See SFT Regulation, Article 13.

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# CHAPTER II: MARKETING AND LISTING

## 1. MARKETING

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### 1.1 Marketing to European professional investors

RAIFs benefit from a passport allowing the AIFM to market the RAIF's shares, units or partnership interests to professional investors (as defined in MiFID II) within the EU, through a regulator-to-regulator notification regime.

The benefit of the foregoing procedure (and the management of a RAIF) is currently limited to AIFMs established in the European Union. At a later stage, subject to an opinion and positive advice from the European Securities and Markets Authority, the EU Commission may decide to extend the passport to non-EU AIFMs which may then, subject to compliance with all AIFMD requirements, also manage RAIFs and benefit from the passport.

### 1.2 Marketing to other well-informed investors

The marketing of RAIFs outside or within Europe to well-informed investors which do not qualify as professional investors requires compliance with the local placement rules of each country where such marketing is done.

### 1.3 Closed-ended RAIFs

Closed-ended RAIFs and RAIFs not investing in accordance with the principle of risk spreading (see Chapter III Section 1.2 below) may in addition be subject to the provisions of the Prospectus Law<sup>36</sup> in the case where they intend to carry out a public offering or admission to trading of their shares or units.

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

## 2. LISTING

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A RAIF may apply for listing of its shares on the Luxembourg Stock Exchange ("LSE") provided that it complies with the requirements of the LSE and in particular with the requirement that the shares 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.

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<sup>36</sup> "Prospectus Law" refers to the Law of 10 July 2005 on prospectuses for securities, as amended.

# CHAPTER III: TAXATION

## 1. TAXATION OF THE RAIF

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### 1.1 General tax regime

RAIFs are exempt from Luxembourg income 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 exempts the following from the subscription tax: (i) the assets invested in other Luxembourg based UCIs, SIFs and RAIFs subject to the subscription tax, (ii) certain institutional cash funds, (iii) microfinance funds and (iv) pension pooling funds.

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 form of a limited company 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 Law<sup>37</sup> which provides for this alternative tax regime. The tax regime intended here is the same as that currently applicable to SICARs. As is the case for SICARs, these RAIFs do not need to spread the investment risk which means that the diversification requirements set forth in Chapter I Section 2.2 of this Memorandum do not apply to such RAIFs.

Because a RAIF is obliged to mention specifically in its constitutive documents that it will invest exclusively in risk capital and that the relevant article of the RAIF Law is applicable, there can be no uncertainty as to which tax regime will apply. Where a RAIF is created with multiple compartments, it is only the RAIF in its entirety, all compartments combined, which may be subject to this alternative tax regime. It is not possible, therefore, for some compartments

of a RAIF to be subject to the subscription tax regime and for other compartments to be subject to the alternative tax regime.

The RAIF Law specifies that risk capital investment means the direct or indirect provision of funds to entities with a view to their launch, development or their listing on a stock exchange. This text is identical in the definition of the same concept in Article 1(2) of the SICAR Law<sup>38</sup>. Similarly to the latter, the RAIF Law does not include further clarification on the concept of investment in risk capital. In the context of SICARs, the CSSF, being the competent authority for approving and supervising SICARs, issued its Circular 06/241 which further clarifies this concept. It is therefore this text that the RAIFs and/or their representatives and the RAIF's auditor may draw from to interpret the concept of investment in risk capital.

The auditor of a RAIF must draw up a report to certify that, during the relevant accounting period, the RAIF has complied with the capital risk investment policy. This report must be transmitted to the Direct Tax Administration. This method of control has been introduced to ensure compliance with the requirement to invest exclusively in securities representing risk capital whereas, unlike SICARs, the CSSF does not supervise RAIFs or compliance with the provisions which are the basis of the alternative tax treatment.

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.

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<sup>37</sup> Article 48 of the RAIF Law.

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<sup>38</sup> "SICAR Law" refers to the Law of 15 June 2004 relating to the investment company in risk capital, as amended.

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## 2. TAXATION OF INVESTORS IN A RAIF

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Distributions made by a RAIF to investors as well as any payment of proceeds made upon the redemption of RAIF units, shares or partnership interests 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, shares or partnership interests in a RAIF.

## 3. VAT

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Management services provided to a RAIF are exempt from Luxembourg VAT. This exemption covers 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

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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.

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.



# OUR EXPERIENCE

We are the firm of choice for asset management and investment funds.

We advise on a wide range of investment products, with a client base of similar diversity: from boutique investment houses to the largest American, British, continental European and Asian fund promoters. We are the leading firm in Luxembourg in terms of net assets of investment funds for which we act as legal adviser.

Our service is based on our deep understanding of the fund industry and its needs, as well as on the collective legal and regulatory knowledge of our teams. We have extensive experience in setting up all types of investment vehicles such as UCITS (Undertakings for Collective Investments in Transferable Securities), regulated AIFs (Alternative Investment Funds), like SIF (Specialised Investment Funds), and SICAR (Investment Company in Risk Capital) and non-regulated AIFs, like RAIF (Reserved Alternative Investment Fund). We have dedicated teams of specialists covering all asset classes, from hedge funds to private equity, real estate, infrastructure, debt and microfinance funds. Our teams guide fund promoters and asset managers on fund structuring, eligible investments and strategies, draft the required legal documentation and ensure that regulatory approval is obtained.

We are committed to the evolution of Luxembourg as the primary European investment fund centre. We actively participate in discussions with the government and the regulator on the evolution of the financial sector – thus contributing to legislative development and origination of new legal structures.

Our partners are members of a number of advisory committees led by the *Commission de Surveillance du Secteur Financier* (CSSF) where regulatory developments are discussed with industry practitioners. As a result of our participation in such committees and our day-to-day involvement in the CSSF approval process, we have a very good relationship with the CSSF. Our clients therefore benefit from efficient resolution of their regulatory matters.

Over the last decade, the Association of the Luxembourg Fund Industry (ALFI) has become a powerful association, taking numerous initiatives to develop the Luxembourg investment fund industry. Our lawyers are members of ALFI's board of directors, regulatory board and various working groups, giving us direct exposure to the latest developments and the ability to keep our clients ahead of regulatory changes and opportunities.

In addition, our partners are also actively involved in the Luxembourg Private Equity and Venture Capital Association (LPEA) which plays a major role in the promotion and the development of the private equity industry in Luxembourg. We co-chair the legal committee of the LPEA.

Our full-service approach spans not only all types of investment funds, but also the entities providing supporting management, custody, administration and distribution services.

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# OUR MILESTONES

<b>1964</b>	Our firm was founded by André Elvinger and Jean Hoss.
<b>1966</b>	We acted as legal adviser for the first Luxembourg investment fund – The United States Trust Investment Fund.
<b>1973</b>	We advised on the structure and setup of the first Luxembourg investment fund to be publically offered in Japan – Fidelity World Fund.
<b>1983</b>	<p>Working with the Luxembourg government and supervisory authority, our partners drafted the first comprehensive set of Luxembourg investment fund legislation.</p> <p>We advised on the first bond issue in the form of a fiduciary contract commonly used to structure tier 1 financing for banks.</p>
<b>1988</b>	We assisted in the set-up of the first investment fund ever authorised as a UCITS - The World Capital Fund.
<b>2000-2001</b>	We were lead advisers in creating the then largest steelmaker in the world: ARCELOR was the result of the first tripartite merger in the form of three interconditional public exchange offers.
<b>2004</b>	We helped to set-up the first authorised Investment Company in Risk Capital (SICAR).
<b>2006</b>	We assisted ARCELOR with an initially unsolicited takeover by Mittal Steel – resulting in a friendly merger of both companies and the creation of the world's number one steelmaker.
<b>2007</b>	We helped set up the first UCITS 130/30 fund registered in Hong Kong.
<b>2009</b>	Following the liquidation of Kaupthing Bank, we assisted in the first successful reorganisation of a Luxembourg credit institution, using a securitisation vehicle to act as a "bad bank".
<b>2011</b>	We advised the first UCITS RMB bond fund to be permitted to invest 100% of net assets in the Hong Kong RMB OTC bond market.
<b>2012</b>	<p>Our Hong Kong office opened.</p> <p>We acted for the first Luxembourg UCITS IV Management Company to be authorised with the full benefit of the EU passport – Mirabaud Management Company.</p>
<b>2013</b>	We advised the first UCITS to be authorised to invest 100% in China A Shares.
<b>2014</b>	We received CSSF clearance for the classification of the China Interbank Bond Market as regulated market for UCITS and for UCITS to invest through the Shanghai – Hong Kong Stock Connect Program.
<b>2015</b>	We advised the private banking department of a major Chinese bank on the creation and approval of a specialised investment fund offering wealth management solutions for a global client base.
<b>2016</b>	<p>We were instrumental in the development of the legislation on the reserved alternative investment fund (RAIF). On 23 July 2016, the day of publication of the RAIF law, we created the first Luxembourg RAIFs for Quilvest.</p> <p>We assisted in the structuring and implementing of the transfer of the largest car dealer group in Luxembourg to a charitable foundation. This is a unique structure in Luxembourg and it was the first time such a significant group is transferred to a charitable foundation.</p>
<b>2017</b>	Elvinger New York opened.
<b>2018</b>	We advised numerous asset managers on their Brexit planning including the creation of new Luxembourg UCITS platforms for UK managers and the creation or extension of licence of UCITS management companies and AIFMs to include management and marketing activities previously performed from the UK.
<b>2019-2020</b>	We assisted, and continue to assist, the largest PE managers in setting up their AIFM and AIF platforms in Luxembourg
<b>2021</b>	We assisted our IFM client Azimut in obtaining the first AIFM - Virtual Assets licence issued by the CSSF.
<b>2022</b>	We proactively assist our clients in implementing SFDR, Taxonomy and MiFID related regulations.
<b>Today</b>	We are ready to assist in all aspects of Luxembourg law and guide financial institutions, investment managers, insurance companies, bond issuers, multinationals and other companies and entrepreneurs on their most critical Luxembourg legal matters.

Contact us to discuss how we can support  
your business with Luxembourg legal matters.

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