

## PART II Funds

Luxembourg regime for alternative investment funds  
accessible to non-professional investors



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

# INTRODUCTION

The collective investment undertaking governed by Part II of the UCI Law<sup>1</sup> (“**Part II Fund(s)**”) may be traced back to the Law of 25 August 1983 on undertakings for collective investment. It has regained considerable interest in the past few years as alternative managers have sought to expand their investor base and target non-professional investors with evergreen vehicles, replicating in the European Union (“**EU**”)<sup>2</sup> strategies and terms that were successful in the United States.

In doing so, these managers have selected Part II Funds that are alternative investment funds (“**AIF(s)**”), regulated by the Luxembourg *Commission de Surveillance du Secteur Financier* (“**CSSF**”) and that allow subscriptions by any type of investors (including full retail investors). Part II Funds may invest in all types of assets with limited regulatory and leverage restrictions.

The Part II Fund regime was amended among others by the Law of 12 July 2013 on alternative investment fund managers (“**AIFM Law**”) which transposes the AIFMD<sup>3</sup> into Luxembourg law. Although the AIFM Law mainly regulates alternative investment fund managers (“**AIFM(s)**”), it also contains various provisions that apply to AIFs.

The Part II Fund regime was last amended by the Law of 21 July 2023, which modernises the Luxembourg toolbox relating to investment funds (including Part II Funds), and new legal forms are now available to structure a Part II Fund (including the partnership limited by shares (*société en commandite par actions* or “**SCA**”), the common limited partnership (*société en commandite simple* or “**SCS**”) and the special limited partnership (*société en commandite spéciale* or “**SLP**”).

Part II Funds are AIFs. When managed by an AIFM authorised in the EU, they benefit from the AIFMD marketing passport in the EU for professional investors as well as some semi-professional investors. They cannot be marketed to retail investors with this passport (unless they are set up as an ELTIF - see Chapter II of this Memorandum), but the regulated status of the Part II Fund eases registration with certain local authorities in the EU and beyond.

Managers generally approach investors indirectly via third party distributors, platforms or nominees. For certain countries, the setting up of a parallel fund is necessary, whilst other countries may require a local feeder.

The European long term investment fund Regulation (“**ELTIF Regulation**”)<sup>4</sup> enables AIFMs to market their AIFs in the EU with a passport to retail investors. A Part II Fund (or a compartment thereof) may be set up as an ELTIF to release the full potential of the ELTIF retail marketing passport, but ELTIF Regulation contains a series of investment limitations and the eligibility of alternative portfolios of assets under the ELTIF Regulation needs to be duly assessed case by case.

In addition, the European venture capital Regulation (“**EuVECA Regulation**”)<sup>5</sup> and the European social entrepreneurship Regulation (“**EuSEF Regulation**”)<sup>6</sup> may also offer new opportunities as they enable AIFMs to market Part II Fund with EuVECA/EuSEF label to certain eligible investors.

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1 “**UCI Law**” refers to the Law of 17 December 2010 on undertakings for collective investment, as amended, which governs UCIs the units, shares or partnership interests of which may be placed with the public. Part I of UCI Law deals with undertakings for collective investment in transferable securities (“**UCITS**”) regulated pursuant to Directive 2009/65/EC of 13 July 2009 (as amended) (“**UCITS Directive**”), whereas Part II of the UCI Law governs UCIs which are not subject to the UCITS Directive. The UCI Law is available on our website [www.elvingerhoss.lu](http://www.elvingerhoss.lu) in both English and French.

2 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.

3 “**AIFMD**” refers to Directive 2011/61/EU on alternative investment fund managers, as amended.

4 “**ELTIF Regulation**” refers to Regulation (EU) 2015/760 on European long-term investment funds, as amended (see Chapter II of this Memorandum).

5 “**EuVECA Regulation**” refers to Regulation (EU) 345/2013 on European venture capital funds, as amended (see Chapter II of this Memorandum).

6 “**EuSEF Regulation**” refers to Regulation (EU) 346/2013 on European social entrepreneurship funds, as amended (see Chapter II of this Memorandum).

# CHAPTER I: GENERAL PROVISIONS

The Part II Fund regime is applicable to undertakings for collective investment (“UCI(s)“):

- qualifying as AIFs under the AIFM Law;
- whose securities or partnership interests are intended to be placed with the public by means of a public or private offer;
- whose exclusive object is the collective investment of their funds in assets in order to spread investment risks and to provide their investors with the benefit of the result of the management of their assets; and
- whose constitutive documents<sup>7</sup> and prospectus provide that they are subject to the Part II Fund regime.

## 1. SCOPE

### 1.1 Undertakings for collective investment

Part II Funds represent a specific category of UCIs that invest in accordance with the principle of risk-spreading. They are regulated UCIs subject to prior authorisation, and thereafter permanent prudential supervision, by the CSSF.

### 1.2 Qualifying as AIF managed by an AIFM

Part II Funds always qualify as AIFs and must be managed by an AIFM.

The UCI Law makes a distinction between two Part II Fund regimes namely:

- Part II Funds, which fall within the small manager exemption or group exemption, and thus are only subject to certain limited provisions of the AIFM Law and AIFMD<sup>8</sup>; and
- Part II Funds, which are managed by an AIFM

authorised in accordance with the AIFM Law or AIFMD, and are thus required to comply with the full AIFMD and AIFM Law product rules<sup>9</sup> to which Part II of the UCI Law cross-refers.

Part II Funds managed by an exempted/registered AIFM will not be covered in this Memorandum.

### 1.3 Eligible investors

Part II Funds may accept all types of investors and may in particular be offered to retail investors in Luxembourg and in other jurisdictions subject to compliance with local laws and regulations.

This remains a clear advantage over other types of vehicles and in particular reserved alternative investment funds (“RAIF(s)“)<sup>10</sup> or specialised investment funds (“SIF(s)“)<sup>11</sup>, which are only available to a sub-set of investors (namely well-informed investors) requiring the RAIF/SIF and its intermediaries to check the eligibility of any investors with Luxembourg criteria.

## 2. INVESTMENT RULES

### 2.1 Flexibility with respect to eligible assets

The UCI Law allows significant flexibility with respect to the assets in which a Part II Fund may invest.

The Part II Fund 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>12</sup>, hedge funds, real estate funds, infrastructure funds, private equity funds, debt funds, micro-finance funds, social entrepreneurship funds, venture capital funds, green funds, funds which invest in tangible assets such as aircraft, ships, art etc.

<sup>7</sup> 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 Part II Fund.

<sup>8</sup> Part II Funds which fall under this category will comprise:

- Part II Funds 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” or “registered manager” exemption; and
- Part II Funds that do fall within the AIF definition but whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.

<sup>9</sup> 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.

<sup>10</sup> For more information on RAIFs, see our Memorandum “Reserved Alternative Investment Funds, Luxembourg regime for investment funds not supervised by the Luxembourg regulator and dedicated to sophisticated investors” on our website [www.elvingerhoss.lu](http://www.elvingerhoss.lu).

<sup>11</sup> For more information on SIFs, 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).

<sup>12</sup> Since 21 July 2018, Part II Funds which qualify as money market funds (“MMF(s)“) under Regulation (EU) 2017/1131 on MMF must be specifically authorised as MMF. In addition, the manager of a MMF must be specifically authorised to manage a MMF (Article 5 of the MMF Regulation).

## 2.2 Applicability of the principle of risk-spreading

The UCI Law does not provide for specific investment rules or restrictions applicable to Part II Funds, it only requires that Part II Funds are subject to the principle of risk-spreading. The CSSF has issued guidelines as to the meaning of risk-spreading in the context of Part II Funds in IML Circular 91/75 and CSSF Circular 02/80.

Generally, IML Circular 91/75 provides that a Part II Fund may not invest more than 20% of its net assets in a single company.

Moreover, CSSF Circular 02/80 provides that a Part II Fund pursuing a fund-of-fund strategy shall not invest more than 20% of its net assets in securities issued by the same target UCI<sup>13</sup>. The Part II Fund may hold more than 50% of the units of a target UCI with multiple compartments, provided that such an investment in the target UCI represents less than 50% of the net assets of the Part II Fund.

These guidelines shall apply in principle to all Part II Funds, although the CSSF may grant exemptions under the IML Circular 91/75 and the CSSF Circular 02/80 on a case-by-case basis.

The CSSF may also allow less stringent risk diversification requirements for certain types of Part II Funds. For instance, the CSSF has separately indicated that infrastructure Part II Funds may be permitted to invest up to 30% of their net assets in certain infrastructure investments, subject to certain conditions (including but not limited to appropriate disclosures in the prospectus).

Furthermore, the CSSF may grant a ramp-up period to Part II Funds, during which the Part II Fund may deviate from the above risk diversification rules.

Whenever a Part II Fund is structured as an Umbrella Part II Fund (see Section 3.2 (a) below), any reference to the Part II Fund in the foregoing guiding principles must be understood as a reference to any of its compartments.

## 3. STRUCTURAL ASPECTS AND FUNCTIONING RULES

### 3.1 Legal forms

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

This Memorandum focuses on the legal forms most commonly used by Part II Fund, namely the FCP and the investment company.

### (a) Fonds commun de placement

An FCP itself is not a legal entity. It represents a co-proprietorship of assets which are managed, on behalf of the joint owners, by a Luxembourg management company generally established under, and governed by, either Chapter 15 of the UCI Law (i.e. a management company whose corporate object is to manage at least one UCITS, in addition to the management of the relevant Part II Fund) 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 Part II Fund, 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 will be explained in further detail below), investors in an FCP are not entitled to vote, unless the management regulations provide for such a possibility.

### (b) Investment company

A Part II Fund can alternatively be established under the form of a corporate-type fund.

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

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

A Part II Fund created under the form of a SICAV can adopt any one of the corporate forms listed by the UCI Law, namely that of a public limited company (*société anonyme* or "**SA**"), a partnership limited by shares (*société en commandite par actions* or "**SCA**"), a common limited partnership (*société en commandite simple* or "**SCS**"), a special limited partnership (*société en commandite spéciale* or "**SLP**"), a private limited company (*société à responsabilité limitée* or "**Sàrl**") or a cooperative set up as a public limited company (*société coopérative organisée sous forme de société anonyme* or "**SCSA**").

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

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

<sup>13</sup> For the purpose of this restriction, in the case where the issuer is a target UCI with multiple compartments, each compartment is deemed to be a distinct issuer provided that the principle of segregation of the commitments of the different compartments vis-à-vis third parties is ensured.



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

Investment companies are subject to the provisions of Luxembourg Company Law<sup>14</sup> except in those cases where the UCI Law expressly derogates therefrom. In fact, the provisions of the UCI Law applicable to SICAV-Part II Fund deviate from the requirements of the Luxembourg Company Law on many aspects in order to offer the Part II Funds a more flexible corporate framework.

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

Among the forms recently made available for establishing an investment company, the SCA, SCS and the SLP were specifically awaited by the industry<sup>15</sup>.

### 3.2 Other structuring aspects

#### (a) Umbrella structure

The UCI Law specifically refers to the possibility of creating a Part II Fund with multiple compartments ("**Umbrella Part II Fund(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 UCI Law further provides that each compartment of such a vehicle will be linked to a specific portfolio of investments segregated from the investment portfolios pertaining to the other compartments, unless a clause included in the constitutive documents provides otherwise. Pursuant to this so-called "ring-fencing" principle, although an Umbrella Part II 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 Part II Fund.

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

Each compartment of an Umbrella Part II Fund 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 Part II Fund involves the liquidation of the Umbrella Part II Fund as a whole.

#### (b) Multiple securities/partnership interests classes

Different classes of securities or partnership interests can be created within the same Part II Fund or even within the same compartment of an Umbrella Part II Fund.

Such classes may have different characteristics particularly as regards their fee structuring arrangement, their targeted investors, and/or their distribution policy.

#### (c) Cross-compartment investments

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

This type of investment must be provided for in the Part II Fund prospectus, but not necessarily in its constitutive documents. The UCI Law does not prohibit the possibility to create a master/feeder structure within the same Part II Fund.

#### (d) Capital structure and debt financing

The UCI Law provides that the minimum capitalisation of a Part II Fund is EUR 1,250,000 that must be reached within 12 months following the authorisation of the Part II Fund by the CSSF.

Except in the case of an FCP, the reference point for this minimum amount is the capital plus any issue premium paid or, where applicable, the value of the amount constituting the partnership interests, rather than the net assets.

A Part II Fund may also finance its activities and the acquisition of its portfolio of investments, where appropriate, via borrowings as well as via the issue of bonds or other debt instruments.

#### (e) 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.

<sup>14</sup> "Luxembourg Company Law" refers to the Law of 10 August 1915 on commercial companies, as amended.

<sup>15</sup> For more information, please see our Memorandum "Luxembourg Partnerships in the asset management industry" on our website [www.elvingerhoss.lu](http://www.elvingerhoss.lu).

Part II Funds can function as either open-ended or closed-ended funds, for both subscriptions and redemptions. Managers must be cautious that closed-ended Part II Funds issuing shares to the public might fall within the scope of the Prospectus Regulation<sup>16</sup>.

The UCI Law requires that the issue, redemption or repurchase price of securities or partnership interests of an open-ended SICAV or FCP is based on the net asset value. Closed-ended Part II Funds can issue securities or partnership interests at a predetermined fixed price.

#### (f) Dividend policy

A Part II Fund set up as an FCP or a SICAV is not required to maintain a legal reserve and the UCI Law does not provide for any restriction on the distribution of dividends, provided that the minimum capitalisation referred to in Section 3.2 (d) above is complied with.

#### (g) Valuation of assets

In light of the virtually unlimited types of assets in which a Part II Fund can invest, Part II Funds are subject to flexible valuation rules. The UCI Law states that, unless otherwise provided for in the constitutive documents, the assets of a SICAV-Part II Fund must be valued at fair value. For a FCP-Part II Fund, the management regulations shall also specify how assets shall be valued; unless specified otherwise, the rules of Article 9(3) of the UCI Law shall apply.

Part II Funds are required to calculate and publish their asset value per share each time they issue, sell and repurchase their securities or partnership interests, and at least once a month. The CSSF may, however, grant derogations. Some type of determination of total net assets will 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 IV of this Memorandum).

The AIFM shall value the assets of the Part II Fund it manages, unless it has appointed an external valuer subject to the AIFMD.

## 4. REGULATORY ASPECTS

### 4.1 Supervision by the CSSF

Part II Funds are regulated vehicles subject to the permanent supervision of the CSSF.

A Part II Fund is obliged to obtain approval from the CSSF before its launch<sup>17</sup>. The CSSF has to approve the constitutive documents and 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 Part II Fund. During the life of a Part II Fund, any change to the constitutive documents or 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 Part II Fund's directors/managers and of the persons or entities who are 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 Part II Fund.

The length of time required for the approval of a Part II Fund 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 Part II Fund.

Once approved by the CSSF and established, the Part II Fund is registered on the official list of Part II Funds by the CSSF.

### 4.2 Appointment of an investment manager

The investment management function in relation to Part II Funds (including the portfolio management and risk management functions) may be delegated (and sub-delegated) by the AIFM of a Part II Fund 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 Part II Fund, if they are located in different jurisdictions), the performance of appropriate due diligence on the delegate(s), appropriate disclosure of the delegation arrangements and compliance with all other delegation conditions as prescribed by the AIFM legislation.

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 Part II Fund. Other conditions might apply in case the AIFM is located in another EU Member State.

### 4.3 Requirement for a depositary

A Part II Fund has to entrust the safekeeping of its assets to a depositary, which must either have its registered office in Luxembourg or be established there through a branch if its registered office is located abroad.

Depositaries of Part II Funds managed by an authorised AIFM and which do not market their units, shares or partnership interests to retail investors in Luxembourg must comply with the depositary regime as provided for by the AIFM Law and further clarified by CSSF Circular 18/697. If the Part II Fund intends to market its units, shares or partnership interests to retail investors in Luxembourg, the applicable depositary regime shall

<sup>16</sup> "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.

<sup>17</sup> The approval request must be completed and filed through the "UCI Approval" application available under the eDesk portal of the CSSF.

be the one specified in the UCITS Directive and further clarified by CSSF Circular 16/644.

#### 4.4 Requirement for central administration

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

The entity entrusted with central administration functions of a Part II Fund 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.<sup>18</sup>

CSSF Circular 22/811 clarifies further the rules applicable to the central administration of Luxembourg investment funds, including Part II Funds, namely in terms of authorisation, substance, internal organisation (including but not limited to delegation models) 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 Part II Fund 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 Part II Fund's annual report.

It must also report to the CSSF any findings which would constitute a material breach of the UCI Law or which would otherwise be detrimental to the operations of the Part II Fund, and must further perform certain AML/CFT works<sup>19</sup>.

#### 4.6 AML/CFT and TFS requirements

A Part II Fund is a professional which 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<sup>20</sup> as well as related laws and regulations, including the various regulations, circulars and guidelines issued by the CSSF with respect to AML/CFT matters<sup>21</sup> ("**AML/CFT Legislation**").

This includes, without limitation, the obligation for a Part II Fund 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 Part II Fund.

In addition, a Part II Fund 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 Part II Fund with its AML/CFT obligations) and "**RC**" (being the person responsible for the "control" of the compliance by the Part II Fund 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.

Part II Funds shall further comply with the targeted financial sanctions ("**TFS**") regimes applicable in Luxembourg pursuant to the TFS Law<sup>22</sup>, 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<sup>23</sup>.

<sup>18</sup> "**Financial Sector Law**" refers to the Luxembourg Law of 5 April 1993 on the financial sector, as amended.

<sup>19</sup> See in particular Article 49 of CSSF Regulation 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.

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

<sup>21</sup> See in particular, without limitation, CSSF Regulation 12-02.

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

<sup>23</sup> Further guidance may be found on the dedicated webpages maintained by the Luxembourg Ministry of Finance and the CSSF.



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

### 5.1 Prospectus

A Part II Fund is required to produce a prospectus, which must be approved by the CSSF<sup>24</sup>.

The UCI Law imposes a specific schedule with respect to the minimum content of the prospectus. 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 (such as the IML Circular 91/75) or imposed by specific laws and regulations as may be applicable to the relevant Part II Fund depending on, amongst others, its legal structuring and investment policy<sup>25</sup>.

A continuous updating of the prospectus is not required, but the essential elements of such a document must be kept up to date. Any amendment to the prospectus is also subject to the CSSF's approval.

If a Part II Fund which is closed-ended is required to issue a prospectus within the meaning of the Prospectus Regulation, it shall not in addition be required to issue a separate prospectus under the UCI Law.

### 5.2 PRIIPs KID

In addition to the prospectus, in the case where the units, shares or partnership interests of a Part II Fund are available within the EU territory to retail investors which do not qualify as professional investors under MiFID<sup>26</sup>, a key information document ("KID") must be drawn up in accordance with PRIIPs Regulation<sup>27</sup> and delivered to those retail investors before any offering or subscription to units, shares or partnership interests.

### 5.3 Financial statements

#### (a) UCI Law requirements

The Part II Fund will be required to publish (i) an audited annual report within six months from the end of the period to which the report relates and (ii) an un-audited, semi-annual report within three months from the end of the period to which the report relates. The UCI Law contains an appendix, which describes the specific information to be included in the annual and semi-annual reports. 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 judgement concerning the evolution of the activity and the results achieved by the Part II Fund.

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

#### (b) AIFM Law and other legislation requirements

Under the AIFM Law, Part II Funds 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 Part II Fund, 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 Part II Fund.

In addition, the annual reports of Part II Funds must contain certain sustainability-related information as imposed by SFDR<sup>28</sup> and Taxonomy Regulation<sup>29</sup>. They must also disclose specific information as may be imposed by specific laws and regulations where applicable to the relevant Part II Fund that is managed by an authorised AIFM, such as information on the use of securities financing transactions ("SFT") and total return swaps under SFTR<sup>30</sup>.

### 5.4 Regular reporting

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

In addition, the authorised AIFM of a Part II Fund shall provide its regulator with the regular reporting required under Article 24 of the AIFMD.

### 5.5 Additional information to be provided to investors

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

This information must be made available to investors, but must not necessarily be inserted in the prospectus.

This information includes, in particular, all relevant information prescribed by Article 23 of the AIFMD

<sup>24</sup> It must be noted that such CSSF approval (the so-called "Visa") does not represent a positive appreciation by the CSSF with respect to the quality of the securities/partnership interests offered and may not under any circumstances be used as a sales argument.

<sup>25</sup> For the additional requirements regarding disclosure to investors that are applicable to AIF, see Chapter I, Section 5.5 of this Memorandum.

<sup>26</sup> "MiFID" refers to Directive 2014/65/EU on markets in financial instruments, as amended.

<sup>27</sup> "PRIIPs Regulation" refers to Regulation (EU) 1286/2014 on packaged retail and insurance-based investment products, as amended.

<sup>28</sup> "SFDR" refers to Regulation (EU) 2019/2088 on sustainability related disclosures in the financial services sector, as amended.

<sup>29</sup> "Taxonomy Regulation" refers to Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment and amending SFDR.

<sup>30</sup> "SFTR" refers to Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse and amending the EMIR Regulation, as amended. See SFTR, Article 13.

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<sup>31</sup>.

#### **5.6 Issue and redemption price of shares/units/partnership interests**

Part II Fund must make public the issue, sale and repurchase price of their shares/units/partnership interests each time they issue, sell and repurchase their shares/units/partnership interests at least once a month<sup>32</sup>. The CSSF may, however, grant derogations therefrom upon a duly justified application.

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<sup>31</sup> See SFTR, Article 14: this information must also include the data provided for in Section B of the Annex of the SFTR.

<sup>32</sup> For additional information regarding the determination of the issue and redemption prices, see Chapter I, Section 3.2 (e) of this Memorandum.

# CHAPTER II: ELTIF, EuVECA AND EuSEF REGULATIONS' IMPACT AND BENEFITS

## 1. KEY FEATURES OF ELTIF, EuVECA AND EuSEF REGULATIONS

### 1.1 ELTIF Regulation

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

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

AIFs, which apply for the ELTIF label, need to comply with the provisions of the ELTIF Regulation, which includes, amongst others, eligible assets and portfolio composition rules<sup>33</sup>. The ELTIF Regulation also provides for specific diversification, concentration and borrowing limits.

### 1.2 EuVECA and EuSEF Regulations

Both EuVECA and EuSEF Regulations also apply on an optional basis to eligible AIFs managed by registered or authorised EU AIFMs.

These Regulations provide for a passport for the marketing of AIFs, which qualify either as European venture capital funds ("**EuVECA(s)**") or European social entrepreneurship funds ("**EuSEF(s)**"), to EU-based professional investors (as defined by MiFID) and investors who commit to investing a minimum of EUR 100,000 and who have stated in writing that they are aware of the risks associated with the investment.

A Part II Fund may qualify as a EuVECA or as a EuSEF essentially if it invests at least 70% of its aggregate capital contributions and uncalled committed capital in qualifying investments<sup>34</sup>.

## 2. ELTIF PART II FUND

A Part II Fund, which would like to use the ELTIF label, has to be authorised by the CSSF as an ELTIF under the ELTIF Regulation.

While the ELTIF Regulation and the UCI Law do not impose any limitation on the type of eligible investors, an ELTIF Part II Fund may therefore accept all types of investors<sup>35</sup>.

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

After authorisation, the ELTIF Part II Fund can be marketed in the EU to both professional and retail investors by following the notification procedure for marketing foreseen under the AIFMD. Marketing to retail investors is, however, subject to certain additional requirements including, amongst others, compliance with the MiFID suitability test requirement as well as application of the UCITS depository regime and PRIIPs KID requirements.

## 3. EuVECA/EuSEF PART II FUND

In the case where (i) the manager of a Part II Fund intends to use the designation of EuVECA Part II Fund (or EuSEF Part II Fund as applicable) for the marketing of its qualifying venture capital funds/social entrepreneurship fund, and (ii) the Part II Fund and its manager comply with the requirements provided by the EuVECA Regulation (or the EuSEF Regulation), the manager of that Part II Fund will be entitled to submit a request to its competent authority in order to be registered as an EuVECA manager (or an EuSEF manager).

The CSSF must inform the manager of the registration of the Part II Fund as EuVCA (or EuSEF) fund within 2 months of the request.

After registration as EuVECA Part II Fund (or EuSEF Part II Fund), the manager will be entitled to use the EU passport for the marketing of the EuVECA Part II Fund (or EuSEF Part II Fund) that it manages to eligible investors.

<sup>33</sup>Please see the definition of eligible investment assets for ELTIFs in the ELTIF Regulation. For more information, please see also our Memorandum "*European Long-Term Investment Funds (ELTIFs) in a nutshell*" on our website [www.elvingerhoss.lu](http://www.elvingerhoss.lu).

<sup>34</sup>Please see the definition of qualifying investments for EuVECA in the EuVECA Regulation and for EuSEF funds in the EuSEF Regulation.

<sup>35</sup>It should be noted that other types of Luxembourg AIFs such as the SIF or the RAIF may also apply for an ELTIF label but are reserved to well-informed investors.

# CHAPTER III: MARKETING AND LISTING

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

## 1. MARKETING

### 1.1 Part II Fund managed by an authorised AIFM

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

Currently, only Part II Funds managed by an authorised EU AIFM benefit from a passport allowing the AIFM to market the Part II Fund’s shares, units or partnership interests to Professional Investors within the EU, through a regulator-to-regulator notification regime.

Part II Funds managed by a non-EU AIFM do not yet benefit from this EU passport. The marketing of their shares, units 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 Part II Fund (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 Part II Fund.

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 such pre-marketing does not in any way disadvantage EU AIFMs *vis-à-vis* non-EU AIFMs.

#### *(b) Marketing/pre-marketing to other investors*

The marketing/pre-marketing of Part II Funds managed by an authorised EU AIFM outside or within the EU to investors which do not qualify as Professional Investors requires compliance with the NPR of each country where such marketing/pre-marketing is done<sup>36</sup>.

Indeed, EU Member States may authorise AIFMs to market AIFs to retail investors in their territory. In addition to the requirements of AIFMD, the EU Member States may impose stricter requirements on the AIFM or the AIF than those applicable to marketing to Professional Investors.

For the avoidance of doubt, Part II Funds may be marketed to retail investors on the territory of Luxembourg in accordance with the provisions of the UCI Law. The marketing to retail investors is also subject to the application of the PRIIPs Regulation’s requirements.

### 1.2 Part II Fund managed by a registered AIFM

Part II Funds managed by a registered AIFM<sup>37</sup> do not benefit from an EU passport for the marketing of their units, shares or partnership interests and therefore remain subject to the NPR of each country where the Part II Fund is intended to be marketed<sup>38</sup>.

### 1.3 Closed-ended Part II Fund

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

If they are not exempt from the Prospectus Regulation, they might have to prepare a prospectus within the meaning of the Prospectus Regulation.

## 2. LISTING

A Part II Fund 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.

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

<sup>36</sup>Except in the case where the Part II Fund qualifies as ELTIF under the ELTIF Regulation (see Chapter II of this Memorandum).

<sup>37</sup>“**Registered AIFM**” refers to an AIFM who manages AIFs described under the first dash of footnote 8 of this Memorandum.

<sup>38</sup>Except in the case where the Part II Fund qualifies as EuVECA fund under the EuVECA Regulation or as EuSEF fund under the EuSEF Regulation (see Chapter II of this Memorandum).

# CHAPTER IV: TAX FEATURES

## 1. TAXATION OF A PART II FUND

Part II Funds are exempt from Luxembourg wealth and income taxes.

Part II Funds are subject to an annual subscription tax (*taxe d'abonnement*) charged at an annual rate of 0.05% based on the total net assets of the Part II Fund, valued at the end of each calendar quarter.

Under certain conditions, (i) money market funds and (ii) individual compartments and classes which are reserved to institutional investors may benefit from a reduced subscription tax of an annual rate of 0.01%. Subject to specific formalities, certain Part II Funds, or their compartments, may benefit from other reduced subscription tax rates provided they invest in environmentally sustainable economic activities within the meaning, and meeting the requirements, of Article 3 of the Taxonomy Regulation.

Under certain conditions, the UCI Law exempts from the subscription tax, *inter alia*, (i) the assets invested in other Luxembourg based UCIs subject to this tax, (ii) certain short-term money market funds meeting certain criteria, (iii) institutional cash funds, (iv) microfinance funds (v) pension pooling funds and (vi) ELTIF.

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

## 2. TAXATION OF INVESTORS IN A PART II FUND

Distributions made by a Part II Fund to investors as well as any payment of proceeds made upon the redemption of Part II Fund units or shares are not subject to Luxembourg withholding tax. Non-

Luxembourg-resident investors in a Part II Fund (namely those investors who are not acting via a Luxembourg permanent establishment) will not be taxed in Luxembourg on any income or capital gains they derive from their units or shares in a Part II Fund.

## 3. VAT

Management services provided to a Part II Fund are exempt from Luxembourg VAT. This exemption, *inter alia*, covers the provision of portfolio management services, investment advisory services and certain administrative services. Mere technical services are not, however, exempt from VAT (standard rate of 17%), nor are supervision and control services supplied by a depositary bank to the Part II Fund. Depositary bank services, however, can benefit from a reduced VAT rate of 14%.

## 4. INTERNATIONAL TAX ASPECTS

Part II Funds structured under the form of a SICAV or SICAF may benefit from a certain number of double tax treaties which have been concluded by Luxembourg authorities.

For tax treaties purposes, Part II Funds, which have been established as an SLP, an FCP or an SCS are regarded as fully tax transparent from a Luxembourg tax point of view and may therefore enable investors to claim benefits of the tax treaties.



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