

**GREAT FUND INSIGHTS**

# The final outcome of ELTIF review

February 2023







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# 1. Introduction

This memorandum aims to provide a comprehensive overview of the current ELTIF regime (see section 2 below) as well as the most salient features of the new ELTIF regime (see section 3 below), including a table showing the changes to the investment restrictions (see section 3.3 below).

## 1.1 Background

The European long-term investment fund (ELTIF) is an EU fund regime that was introduced in 2015 by Regulation (EU) 2015/760 (the **ELTIF Regulation**) to boost long-term investments through EU alternative investment funds (**AIFs**) in the European real economy, such as transport and social infrastructure projects, certain real estate properties and capital or private debt of small and medium-sized enterprises (**SMEs**).

One of the attractive features of the regime is that ELTIFs may take advantage of an EU retail marketing passport. However, ELTIFs which are marketed to retail investors (**Retail ELTIFs**) are subject to additional marketing rules that aim to ensure a high level of investor protection (see section 2.9 below for an overview of the marketing rules that currently apply to Retail ELTIFs).

The ELTIF label may also be of interest for the structuring of funds originating loans to borrowers based in certain Member States (such as France), where cross-border lending by an AIF is otherwise prohibited<sup>1</sup>.

The ELTIF regime is starting to gain momentum as the number of ELTIFs has tripled since the end of 2020<sup>2</sup>. However, the ELTIF has not been as successful as initially expected. As of January 2023, there are only 84 ELTIFs (48 in Luxembourg, 21 in France, 13 in Italy and 2 in Spain)<sup>3</sup>. Market players often attribute the limited success of ELTIFs to the overly prescriptive investment rules and complex marketing rules.

## 1.2 ELTIF review

In November 2021, the EU Commission proposed a revamping of the ELTIF regime with a view to simplifying and enhancing the overall attractiveness of the ELTIF. The initial proposal of the EU Commission was improved in the course of the EU legislative process. In particular, the 40% cap on fund investments for Retail ELTIFs, which was included in the initial proposal, has been removed. This means that, under the new regime, it will be possible to structure ELTIFs (including Retail ELTIFs) that deploy a pure fund of funds strategy.

The EU Parliament and Council agreed on a provisional text for the amending regulation (the **Amending Regulation**) at the end of 2022. It is expected that the Amending Regulation will be adopted by the EU Parliament in February 2023 and will be fully applicable as from January 2024 (see section 4 on the timeline for the entry into force of the new rules).

## 1.3. Impact of the ELTIF review

There is a gap in the EU funds regulatory framework between UCITS, which have a retail investor passport but may only invest in liquid financial assets, and AIFs, which may deploy alternative investment strategies but only have a professional investor passport.

The ELTIF aims to fill that gap, at least partially. This should benefit not only the European real economy, which will gain access to new sources of funding, but also EU retail investors. The retailisation of alternatives is underway and there is a huge demand for retail alternative investment products.

For the time being, it is very difficult, or impossible, for asset managers to offer alternative investment products to retail investors on a pan-EU basis. The EU institutions have recognised that the overly prescriptive rules of the current ELTIF regime have prevented ELTIFs from achieving their potential and fulfilling their role in the market.

The Amending Regulation will make the ELTIF regime more flexible and more attractive by:

- (a) broadening the scope of eligible assets for ELTIFs;
- (b) relaxing investment limits;
- (c) relaxing borrowing rules; and
- (d) relaxing rules regarding the marketing to retail investors.

The ELTIF 2.0 will be a game-changer in the retailisation of alternatives in the EU. Even if the ELTIF remains an imperfect product, many of the shortcomings of the initial ELTIF regime are addressed in the Amending Regulation. The new regime will allow alternative asset managers to benefit from unprecedented cross-border access to EU retail investors.

<sup>1</sup> At the time of entry into force of the ELTIF Regulation, article L. 511-6 of the French monetary and financial code was amended to authorise the granting of loans by ELTIFs in compliance with the French banking monopoly rules.

<sup>2</sup> There were only 28 ELTIFs in October 2020.

<sup>3</sup> Source: ESMA register of ELTIFs: <https://www.esma.europa.eu/document/register-authorised-european-long-term-investment-funds-eltifs>

# 2. Overview of the current ELTIF regime

## 2.1 An EU label for EU AIFs with EU AIFMs

Only EU AIFs managed by an EU authorised AIFM<sup>4, 5</sup> may obtain the ELTIF label. In an umbrella AIF, it is possible to have one or more ELTIF sub-funds alongside non-ELTIF sub-funds. The AIF must be authorised as an ELTIF by its national authority. The AIFM must also be authorised by the ELTIF's national authority to manage the ELTIF. However, in most cases, the national authority will mainly check that the AIFM's authorisation covers the relevant investment strategy(ies).

In Luxembourg, ELTIFs are typically established as Part II UCIs<sup>6</sup>, SIFs<sup>7</sup> or RAIFs<sup>8, 9</sup>. All Luxembourg ELTIFs, including RAIFs, must be approved by the CSSF.

### Minimum 70% allocation to “eligible investment assets”

An ELTIF must invest at least 70% of its “Capital” in eligible investment assets, ie:

- (a) equity, quasi-equity and/or debt instruments issued by qualifying portfolio undertakings;
- (b) loans issued to qualifying portfolio undertakings<sup>10</sup>;
- (c) units or shares of other ELTIFs, EuVECA<sup>11</sup> and EuSEFs<sup>12</sup>; and/or
- (d) real assets with a value of at least EUR 10 million.

The “**Capital**” of an ELTIF is defined as “the aggregate capital contributions and uncalled committed capital, calculated on the basis of amounts investible after deduction of all fees, charges and expenses that are directly or indirectly borne by investors”.

The 70% investment limit must be complied with by a date (the **Target Date**) specified in the ELTIF's documents, which must not be later than the earlier of:

- (a) five years from the authorisation of the ELTIF; and
- (b) half the ELTIF's life.

The Target Date may be postponed in exceptional circumstances with the approval of the national authority.

The ELTIF may also invest in UCITS eligible assets (ie UCITS eligible transferable securities, money market instruments, deposits, financial derivative instruments and funds), subject to a 5% concentration limit per issuer<sup>13</sup>. As from the Target Date, UCITS eligible assets may not represent more than 30% of the Capital of the ELTIF.

A “**qualifying portfolio undertaking**” is an undertaking which:

- (a) is not listed or has a market capitalisation of not more than EUR 500m;
- (b) is neither a collective investment undertaking nor a financial undertaking<sup>14</sup>; and
- (c) is established either (i) in the EU; or (ii) in a third country which:
  - (i) is not a FATF<sup>15</sup> high-risk and non-cooperative jurisdiction; and
  - (ii) has signed an agreement with the ELTIF manager's<sup>16</sup> home Member State and with each other Member State in which the interests of the ELTIF are intended to be marketed to ensure that the third country fully complies with the exchange information standards of the OECD Model Tax Convention.

A “**real asset**” in which an ELTIF may invest is defined as an “asset that has value due to its substance and properties and may provide returns, including infrastructure and other assets that give rise to economic or social benefit, such as education, counselling, research and development, and including commercial property or housing only where they are integral to, or an ancillary element of, a long-term investment project that contributes to the Union objective of smart, sustainable and inclusive growth”.

<sup>4</sup> Alternative investment fund manager within the meaning of the Alternative Investment Fund Managers Directive 2011/61/EU, as amended (AIFMD).

<sup>5</sup> Or are authorised as an internally managed AIF.

<sup>6</sup> Luxembourg undertakings for collective investment governed by Part II of the Luxembourg Act of 17 December 2010 on undertakings for collective investment, as amended.

<sup>7</sup> Specialised investment funds.

<sup>8</sup> Reserved alternative investment funds.

<sup>9</sup> But ELTIFs can take other forms as well (eg, a SICAR (*société d'investissement en capital à risque*) or a limited partnership that is not subject to a specific product law).

<sup>10</sup> Loans must not have a maturity longer than the life of the ELTIF.

<sup>11</sup> ie European venture capital funds under Regulation (EU) 345/2013.

<sup>12</sup> ie European social entrepreneurship funds under Regulation (EU) 346/2013.

<sup>13</sup> This 5% limit is raised to 25% for bonds issued by an EU credit institution, which are subject by law to special public supervision designed to protect bondholders.

<sup>14</sup> The term “financial undertaking” encompasses in particular credit institutions, investment firms, insurance undertakings, management companies and AIFMs. Financial holding companies and mixed-activity holding companies within the meaning of EU Regulation 575/2013 (CRR) are also financial undertakings. However, an ELTIF may invest in financial undertakings, which exclusively finance qualifying portfolio undertakings or eligible real assets.

<sup>15</sup> Financial Action Task Force.

<sup>16</sup> In this memorandum, any reference to the ELTIF manager is a reference to the EU AIFM of the ELTIF or (unless the context otherwise requires) to the ELTIF itself for internally managed ELTIFs.

## 2.2 Strict risk diversification requirements

An ELTIF may invest up to 10% of its Capital in:

- (a) equity, quasi-equity or debt instruments issued by, or loans granted to, any single qualifying portfolio undertaking; or
- (b) any single real asset.

This 10% limit may be increased to 20% if the aggregate value of the assets held by the ELTIF in qualifying portfolio undertakings or real assets in which it invests more than 10% of its Capital does not exceed 40% of its Capital.

Qualifying portfolio undertakings, which are included in the same group for the purposes of consolidated accounts, must be regarded as a single qualifying portfolio undertaking for calculating the above 10/20/40% limits.

An ELTIF may invest:

- (a) up to 20% of its Capital in other ELTIFs, EuVECAs and EuSEFs in aggregate; and
- (b) up to 10% of its Capital in any single ELTIF, EuVECA or EuSEF.

## 2.3 Derivatives and SFTs

The use of derivatives and securities financing transactions (SFTs)<sup>17</sup> by ELTIFs is highly restricted:

- (a) ELTIFs may only use derivatives for hedging purposes;
- (b) derivatives may not relate to more than 10% of the assets of the ELTIF;
- (c) the counterparty risk for the ELTIF resulting from OTC derivatives and SFTs may not exceed 5% of the Capital of the ELTIF;
- (d) ELTIFs may not enter into short sale transactions; and
- (e) ELTIFs may not take direct or indirect exposure to commodities.

## 2.4 Borrowings

ELTIFs may only borrow cash provided such borrowing:

- (a) represents no more than 30% of the Capital of the ELTIF;
- (b) serves the purpose of investing in eligible investment assets where the ELTIF does not have sufficient cash or cash equivalents to make the investment;
- (c) is contracted in the same currency as the assets to be acquired;
- (d) does not have a maturity longer than the life of the ELTIF; and
- (e) is secured by assets that represent no more than 30% of the Capital of the ELTIF.

ELTIFs may not borrow to grant loans to qualifying portfolio undertakings<sup>18</sup>.

## 2.5 Conflicts of interest

ELTIFs are subject to strict conflict of interest rules. In particular, an ELTIF may not invest in an asset in which the ELTIF manager has or takes a direct or indirect interest.

## 2.6 Term and liquidity

An ELTIF must be established with limited duration. The constitutive documents of the ELTIF must indicate a specific date for the end of the life of the ELTIF, subject to potential extensions.

It is therefore not possible to set up ELTIFs as true evergreen funds (ie funds with an unlimited term). However, the practical implications of this prohibition are very limited, as ELTIFs may be established with a very long term (eg, in excess of 50 years).

The term of an ELTIF must be sufficient to cover the life cycle of each of the individual assets it holds. This condition is deemed met where:

- (a) the term of the ELTIF is aligned with the investment horizon date of the asset which has the longest investment horizon at the time of the application as an ELTIF; and
- (b) any investment made after the authorisation of the ELTIF has a residual investment horizon within the remaining life of the ELTIF at the time that investment is made.

<sup>17</sup> Securities lending, securities borrowing, repurchase transactions and similar transactions.

<sup>18</sup> But, according to the AMF and the CSSF's administrative practice, this does not prevent ELTIFs investing in loans from entering into a commitment liquidity facility.

In principle, an ELTIF must be closed-ended<sup>19</sup>. However, an ELTIF may provide for liquidity as from the Target Date if certain specific conditions are fulfilled. In particular:

- (a) redemptions may not be allowed before the Target Date;
- (b) the ELTIF must have an appropriate liquidity management system in place;
- (c) the ELTIF must have a redemption policy, which ensures that the overall amount of redemptions within any given period is limited to a percentage of the “liquid assets” of the ELTIF (ie the UCITS eligible assets). If redemption requests within any given period of time exceed such percentage, redemptions must be effected on a pro rata basis; and
- (d) investors may request the winding-down of the ELTIF if their redemption requests are not satisfied within one year.

One year before the date of the end of the ELTIF’s life, the ELTIF must adopt and submit to its national authority an itemised schedule for the orderly disposal of its assets to redeem investors’ interests. The schedule should include an assessment of the market for potential buyers, an assessment and comparison of potential sales price, a valuation of the assets to be divested and a timeframe for such divestments.

## 2.7 Transferability

Interests in an ELTIF must be freely transferable<sup>20</sup>. Interests in an ELTIF may be listed<sup>21</sup>.

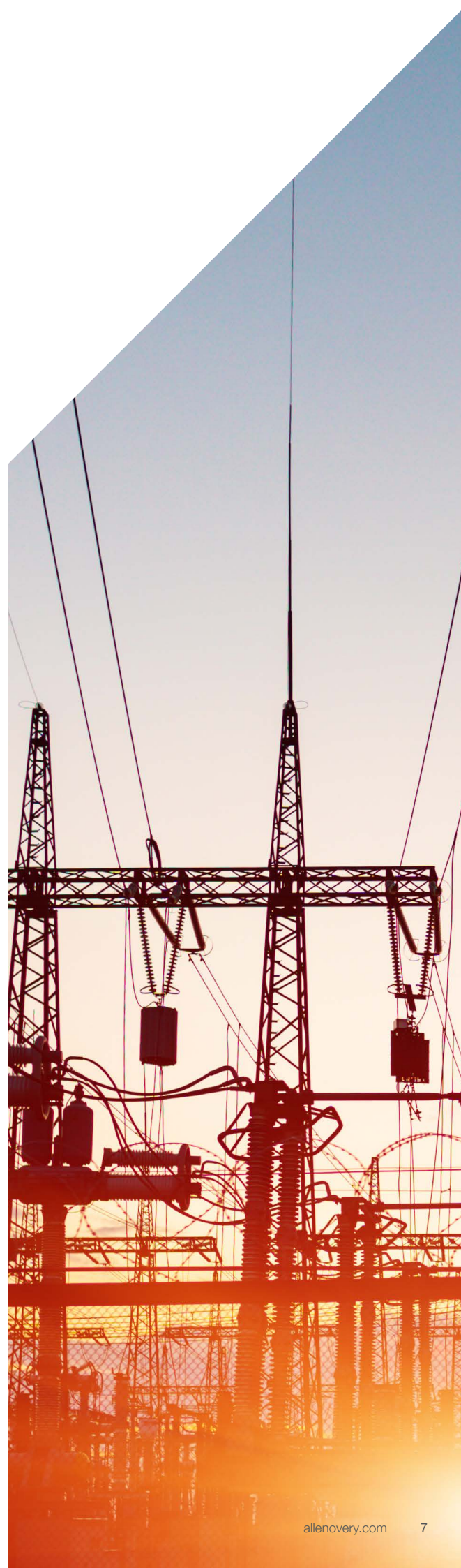
An ELTIF may only issue new interests at a price below their net asset value (**NAV**) subject to a pre-emptive right of existing investors<sup>22</sup>.

<sup>19</sup>The ELTIF Regulation somewhat misleadingly provides that “Redemptions to investors shall be possible from the day following the date of the end of the life of the ELTIF”. This can be addressed by providing in the fund documents that the end of life of the ELTIF will correspond to the term of the ELTIF (ie the date on which the ELTIF will enter into liquidation) and that interests in the ELTIF will be redeemed from all investors by the liquidator in one or more instalments during the liquidation process.

<sup>20</sup>In our view, this does not prevent the ELTIF’s documents from providing that: (i) the proposed transferee must be an eligible investor; and (ii) transfers of undrawn commitments are subject to the prior approval of the board or the general partner.

<sup>21</sup>According to the ELTIF Regulation, the fund documents of the ELTIF must not prevent a listing of the interests of the ELTIF.

<sup>22</sup>In our view, this does not prevent the issue of interests at a fixed price as would occur in a typical closed-ended private equity fund structure. In the case where the NAV per interest falls below the fixed issue price before final closing, it should be sufficient to provide for an obligation of the ELTIF to inform existing investors before each closing that new interests will be issued to new investors at a price below the NAV (in the context of the equalisation with previous investors) and offer them the opportunity to increase their commitment at the relevant closing. After final closing, interests are normally always issued on a pro rata basis among all investors (except in the case of default or excuse).





## 2.8 Transparency requirements

ELTIFs must publish a prospectus, which must contain all the information required for an investor to make an informed judgement about the proposed investment and the associated risks.

The prospectus of an ELTIF must comply with the additional disclosure requirements which apply to closed-ended funds under the Prospectus Regulation<sup>23, 24</sup>.

Specific disclosure obligations are also set out in the ELTIF Regulation. Particular attention must be paid to the requirements regarding the cost disclosures. The prospectus must include prominent disclosures of the different costs, regrouped under specific prescribed headings<sup>25</sup>, borne directly or indirectly by investors. The prospectus must disclose an overall ratio of costs to the Capital of the ELTIF.

## 2.9 Distribution of ELTIFs to retail investors

### General

ELTIFs may benefit from a marketing passport enabling them to be marketed to retail investors across the EU. However, Retail ELTIFs are subject to certain specific requirements which are summarised below. These requirements apply in addition to MiFID<sup>26</sup> rules.

Retail ELTIFs must follow the passporting process under the AIFMD, subject to certain additional requirements.

### Internal assessment process

The ELTIF manager must assess whether the ELTIF is suitable for marketing to retail investors, taking into account in particular its term and investment strategy.

### Investment advice and distribution channels

An ELTIF may only be marketed to retail investors on the condition that retail investors are provided with appropriate investment advice from the ELTIF manager or the distributor.

Therefore, an ELTIF may only be marketed to retail investors in the EU by an entity authorised under MiFID to provide investment advice, that is:

- (a) the ELTIF manager itself if it has a MiFID top-up<sup>27</sup>;
- (b) another EU AIFM (or a UCITS management company) with a MiFID top-up; or
- (c) an EU credit institution; or
- (d) a MiFID investment firm.

The ELTIF manager must provide distributors with all appropriate information on the ELTIF, including regarding its term and investment strategy, the ELTIF manager's internal assessment process and the jurisdictions in which the ELTIF is allowed to invest.

### Suitability test

When directly offering an ELTIF to or placing one with a retail investor, the ELTIF manager must obtain information concerning the retail investor, in particular, his/her:

- (a) knowledge and experience in the relevant investment field;
- (b) financial situation and ability to bear losses; and
- (c) investment objectives and investment time horizon.

Based on the information collected, the ELTIF manager must assess whether the ELTIF is suitable and may only recommend the ELTIF if it is suitable for that particular retail investor.

Where the financial instrument portfolio of a retail investor does not exceed EUR 500,000, the ELTIF manager must ensure that the potential retail investor invests at least EUR10,000 but not more than 10% of his/her financial instrument portfolio<sup>28</sup> in ELTIFs.

### ELTIF with a term in excess of ten years

Where the life of a Retail ELTIF exceeds ten years, the ELTIF manager or the distributor must warn retail investors in writing that the Retail ELTIF may not be suitable if they are unable to sustain such a long-term and illiquid commitment.

<sup>23</sup> Prospectus Regulation (EU) 2017/1129.

<sup>24</sup> But, for the avoidance of doubt, an ELTIF must not issue a prospectus compliant with the Prospectus Regulation, unless it makes a non-exempted public offer of securities or seeks a listing on a regulated market.

<sup>25</sup> I.e. costs of setting up the ELTIF, costs related to the acquisition of assets, management and performance-related fees, distribution costs and other costs, including administrative, regulatory, depositary, custodial, professional service and audit costs.

<sup>26</sup> The Markets in Financial Instruments Directive 2004/39/EC.

<sup>27</sup> I.e. a licence for the ancillary MiFID services under art. 6(4) of the AIFMD.

<sup>28</sup> Including cash deposits and financial instruments, but excluding any financial instruments that have been given as collateral.



## Miscellaneous

Retail ELTIFs which are marketed to retail investors are subject to additional requirements. In particular:

- (a) retail investors must receive a key information document (**KID**) in accordance with the PRIIPs Regulation<sup>29</sup> before they invest in the Retail ELTIF;
- (b) the Retail ELTIF must have local facilities in each Member State where it is marketed to retail investors to allow subscriptions and redemptions by, and payments to, retail investors and make available the information which must be provided to retail investors;
- (c) the Retail ELTIF must have an EU credit institution as depositary, and such depositary may not transfer its liability to sub-custodians in the case of a loss of assets;
- (d) the Retail ELTIF may not grant any right of reuse over its assets to the depositary or any sub-custodian;
- (e) no preferential treatment or specific economic benefits may be granted to individual investors or groups of investors;
- (f) the liability of retail investors must be limited to their capital commitment;
- (g) retail investors must be able, during the subscription period and at least two weeks after the date of their subscription, to cancel their subscription and have their money returned without penalty; and
- (h) the ELTIF manager must have appropriate investor complaints procedures in place, which allow retail investors to file complaints in the official language or one of the official languages of their Member State.

<sup>29</sup> Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).



# 3. ELTIF review

## 3.1 Wider scope of eligible assets

### Minimum 55% allocation to “eligible investment assets”

Under the current regime, ELTIFs are required to invest (as from the Target Date) at least 70% of their Capital in “eligible investment assets”, with the permission to invest the remaining assets in “liquid assets” (ie UCITS eligible assets).

The Amending Regulation lowers the minimum percentage of the Capital of an ELTIF that must be invested in “eligible investment assets” from 70% to 55%.

### Broadening eligible qualifying portfolio undertakings

The maximum market capitalisation of listed qualifying portfolio undertakings will be increased from EUR 500m to EUR 1.5 billion.

The Amending Regulation clarifies that the maximum market capitalisation must be met only at the time of the initial investment

### Simplified rules regarding investments in third countries

The Amending Regulation removes the reference to the European nature of the long-term investments of ELTIFs and specifies expressly (in its recital section) that an ELTIF may have an objective to invest mainly outside of the EU.

ELTIFs will remain prohibited from investing in qualified portfolio undertakings established in high-risk AML jurisdictions but the reference to the FATF list is replaced by a reference to the list of high-risk third countries established by the EU Commission in accordance with article 9 of the AML Directive<sup>30,31</sup>.

Similarly, the rule according to which ELTIFs may only invest in qualified portfolio undertakings established in non-EU countries that have concluded tax conventions with the ELTIF manager’s home Member State and each other Member State in which the interests of the ELTIF are intended to be marketed is replaced by a prohibition to invest in third countries listed in the EU Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes<sup>32</sup>.

### Investments in funds

Under the current regime, ELTIFs may only invest (up to 20% of their Capital) in other ELTIFs, EuVECAs and EuSEFs. Investment in other funds is currently not permitted.

Under the new regime, ELTIFs will also be permitted to invest in EU AIFs that are managed by an EU AIFM<sup>33,34</sup> or UCITS that comply with the following requirements:

- (a) they invest in “eligible investment assets” and/or in UCITS eligible assets; and
- (b) they do not invest more than 10% of their assets in other funds<sup>35</sup>.

ELTIFs that invest in funds will be required to look-through the target funds to:

- (a) assess the percentage of their assets which are invested (directly or indirectly) in “eligible investment assets” versus UCITS eligible assets, provided that the former must represent at least 55% of the ELTIF’s Capital by the Target Date;

- (b) (for Retail ELTIFs) aggregate direct investments and investments of target funds for the purpose of applicable risk diversification requirements; and

- (c) calculate the maximum amount of borrowing permitted.

In complying with the obligation to look-through target funds, ELTIFs will be able to rely on information updated at least on a quarterly basis or, if the information is not available on a quarterly basis, on the basis of the most recent available information.

Under the initial version of the Amending Regulation, it was proposed to cap investments in funds by Retail ELTIFs at 40% of their Capital. This would have prevented Retail ELTIFs from deploying a pure fund of funds strategy. Fortunately, this restriction has been waived in the course of the EU legislative process. Under the new regime, ELTIFs (including Retail ELTIFs) will therefore be authorised to invest exclusively into funds.

Master-feeder structures will also be permitted under the new regime, provided both the master and the feeder funds are ELTIFs<sup>36</sup>.

<sup>30</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

<sup>31</sup> Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing Directive (EU) 2015/849, last modified by Commission Delegated Regulation (EU) 2022/229 of 7 January 2022.

<sup>32</sup> Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes 6437/22, 24 February 2022.

<sup>33</sup> The Amending Regulation does not specify that the EU AIFM must be an EU authorised AIFM. Investment in EU AIFs managed by a registered (ie de minimis) EU AIFM should therefore be permitted as well.

<sup>34</sup> EU internally-managed internally managed AIFs should be permitted as well, although they are not referred to expressly by the Amending Regulation.

<sup>35</sup> This restriction also applies in cases of investment in ELTIFs, EuVECAs and EuSEFs.

<sup>36</sup> The attractiveness of ELTIF master-feeder structures is therefore limited and we do not expand in this brochure on the rules applicable to ELTIF master-feeder structures.

### Simplified definition of real assets

The definition of “real asset” will be simplified and will cover “any asset that has intrinsic value due to its substance and properties”.

The recitals of the Amending Regulation include a rather extensive list of assets that constitute real assets such as immovable property (including commercial and housing), infrastructure assets and other assets (intellectual property, vessels, equipment, machinery, aircraft or rolling stock) and water, forest, building and mineral rights. By contrast, investments in works of art, manuscripts, wine stocks and jewellery are excluded.

The Amending Regulation also removes the rule according to which ELTIFs may only invest in real assets with an individual minimum value of EUR 10m.

### Investments through intermediary vehicles and co-investments

The ELTIF Regulation currently provides that investments into a listed qualifying portfolio undertaking must be held either directly by the ELTIF or via an SPV, but in the latter case, only if the relevant SPV is the majority shareholder of the listed underlying qualifying portfolio undertaking. The Amending Regulation removes that restriction and clarifies that ELTIFs may hold minority participations in listed qualifying portfolio undertakings via SPVs.

One of the recitals of the Amending Regulation makes clear that ELTIFs may invest via intermediary entities, including SPVs, securitisation or aggregator vehicles and holding companies.

Co-investments alongside the ELTIF by the ELTIF manager, its affiliates and staff will be permitted, provided appropriate organisational and administrative arrangements are in place to identify, prevent, manage and monitor conflicts of interest and ensure such conflicts of interest are adequately disclosed.

### Permitted investments in securitisations, green bonds and FinTechs

ELTIFs will be allowed to invest in:

- (a) simple, transparent and standardised securitisations (**STS Securitisations**)<sup>37</sup>, where underlying exposures consist of commercial, residential or corporate loans or trade receivables;
- (b) bonds issued under EU legislation on environmentally sustainable bonds by qualifying portfolio undertakings; and
- (c) financial undertakings<sup>38</sup> that have been organised or registered less than five years before the date of the investment by the ELTIF.

For Retail ELTIFs, investments in STS Securitisations may not (in aggregate) represent more than 20% of the Capital.

<sup>37</sup> In order to be eligible for an ELTIF, securitisations must comply with article 18 of Regulation (EU) 2017/2402.

<sup>38</sup> To the exclusion of financial holding companies and mixed-activity holding companies within the meaning of CRR.



## 3.2 Relaxed investment limits

The Amending Regulation relaxes investment rules (risk diversification requirements, acquisition limits and borrowing limits). In particular, all risk diversification requirements will be waived for non-Retail ELTIFs<sup>39</sup>.

The new investment rules are summarised below (in comparison with those currently applicable).

	Current regime	New regime	
		Retail ELTIFs	Non-Retail ELTIFs
<b>Risk diversification requirements<sup>40</sup></b>			
Minimum investment in eligible investment assets <sup>41</sup>	70%	55%	55%
Maximum investment in instruments issued by or loans granted to a single qualifying portfolio undertaking	10% <sup>42</sup>	20%	Unrestricted
Maximum investment in a single real asset	10%	20%	Unrestricted
Maximum investment in a single ELTIF, EuvECA or EuSEF	10%	20%	Unrestricted
Maximum investment in a single UCITS or EU AIF	Not permitted	20%	Unrestricted
Maximum investment in UCITS eligible assets issued by any single body	5% <sup>43</sup>	10% <sup>44</sup>	Unrestricted
Maximum investment in bonds issued by an EU credit institution subject to supervision designed to protect bondholders	25%	25%	Unrestricted
Maximum aggregate value of investments in ELTIFs, EuvECAs, EuSEFs, UCITS and EU AIFs	20%	40%	Unrestricted
Maximum aggregate value of investments in STS Securitisations	Not permitted	20%	Unrestricted
Counterparty risk in the context of OTC derivatives or SFTs (per counterparty)	5%	10%	Unrestricted
<b>Acquisition limits</b>			
Percentage of the shares or units of a single ELTIF, EuvECA or EuSEF which may be acquired by an ELTIF	25%	30%	Unrestricted
Percentage of the shares or units of a single UCITS or EU AIF which may be acquired by an ELTIF	Not permitted	30%	Unrestricted

<sup>39</sup>This is without prejudice to the risk diversification requirements that may be applicable under national product regulation (eg in Luxembourg, 30% maximum concentration ratio for SIFs and RAIFs and 20% maximum concentration ratio for Part II funds).

<sup>40</sup>Expressed as a percentage of the ELTIF's Capital.

<sup>41</sup>Minimum percentage to be reached by Target Date.

<sup>42</sup>Subject to the 10/20/40% rule according to which the 10% limit may be raised to 20%, provided the aggregate value of the assets held by the ELTIF in qualifying portfolio undertakings and real assets in which it invests more than 10% of its Capital does not exceed 40% of its Capital.

<sup>43</sup>Or 25% for bonds issued by an EU credit institution, which are subject by law to special public supervision designed to protect bondholders.

<sup>44</sup>Idem.



### 3.3 Relaxed borrowing rules

The Amending Regulation relaxes borrowing rules. Under the new regime:

- (a) Retail ELTIFs will be allowed to borrow up to 50% of their NAV and non-Retail ELTIFs up to 100% of their NAV;
- (b) the borrowing limit will apply as from a date set out in the ELTIF's rules or instruments of incorporation, provided that such date may not be later than three years after the start of the marketing of the ELTIF;
- (c) the borrowing limit may be temporarily suspended for up to 12 months where the ELTIF raises additional capital or reduces its existing capital;
- (d) borrowings covered by investors' capital commitments (ie subscription lines) will be excluded for the purpose of the borrowing limit;
- (e) ELTIFs will be allowed to borrow not only with a view to investing in eligible investment assets, but also for liquidity purposes (including to pay fees and expenses) and the prohibition from borrowing to grant in loans will be waived;
- (f) the 30% cap on the ELTIF's assets that may be encumbered to secure any such borrowings will be removed; and
- (g) ELTIFs will be allowed to borrow in another currency than the assets to be acquired, provided currency exposure is appropriately hedged.

### 3.4 Relaxed retail marketing rules

The rules regarding marketing to retail investors are considerably simplified. Only the MiFID suitability test will have to be performed vis-à-vis retail investors (ie no additional ELTIF-specific suitability test).

In addition, the Amending Regulation waives:

- (a) the minimum investment holding of EUR 10,000 and the 10% exposure cap for retail investors whose financial portfolios are below EUR 500,000; and
- (b) the requirement to have local facilities in the Member States where the ELTIF is marketed to retail investors.

The Amending Regulation clarifies that the prohibition of preferential treatment applies on a class-by-class basis.

### 3.5 Term and liquidity

ESMA's recommendation to allow for the structuring of ELTIFs with an unlimited term has not been taken on board. However, the practical implications of such prohibition are very limited as ELTIFs may be established with a very long term.

Under the new rules:

- (a) investors will no longer have the right to ask for the ELTIF's winding-up if their redemptions have not been satisfied within one year; and
- (b) ELTIFs will only be required to provide an itemised schedule for the orderly disposal of assets after the end of the ELTIF's life upon the request of their home Member State regulator.

Redemptions before the Target Date will be permitted, subject to an appropriate minimum holding (ie lock-up) period.

The Amending Regulation also introduces an optional liquidity window mechanism with a matching of exiting and subscribing investors organised by the ELTIF manager, subject to the implementation of an appropriate policy.

ESMA will develop draft regulatory technical standards (**RTSs**) on (i) open-ended ELTIFs, including criteria to determine the appropriate length of the minimum lock-up period, and (ii) the optional liquidity window mechanism.

### 3.6 No approval of ELTIF manager

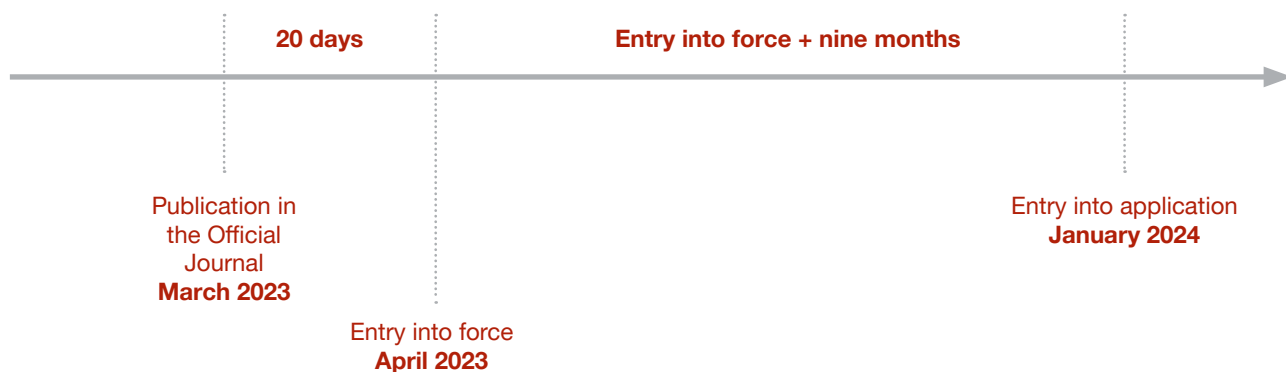
EU authorised AIFMs will no longer be subject to the approval of the ELTIF's home Member State regulator.

### 3.7 Cost disclosure requirements

The cost disclosure requirements in the prospectus of all ELTIFs including non-Retail ELTIFs will be fully aligned with the PRIIPs Regulation.

# 4. Timeline

It is expected that the Amending Regulation will be adopted by the EU Parliament in February 2023 and will be published in the EU Official Journal in March 2023. The Amending Regulation will enter into force after 20 days and then will apply nine months after its publication. The expected timeline is as follows<sup>45</sup>:



In Luxembourg, the CSSF is already reviewing applications for the approval of ELTIFs making use of the new rules. The Amending Regulation expressly provides for the possibility for ELTIFs to opt-in for the new regime as from the entry into force of the Amending Regulation, although it is unclear if Member States will accept the passporting on their territory of ELTIFs benefiting from the new regime before the Amending Regulation enters into application.

ELTIFs existing on the date of entry into application of the Amending Regulation will benefit from a five-year grand-fathering period to comply with the new rules. Existing ELTIFs that do not raise capital beyond the date of entry into application of the Amending Regulation are not required to comply with the new rules.

<sup>45</sup> The dates are indicative.





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