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The Netherlands

ALTERNATIVE INVESTMENT FUNDS

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This country-specific Q&A provides an overview of alternative investment funds laws and regulations applicable in The Netherlands.

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THE NETHERLANDS
ALTERNATIVE INVESTMENT FUNDS

1. What are the principal legal structures used for Alternative Investment Funds?

In the Netherlands, alternative investment funds within the meaning of article 4(1)(a) of Directive 2011/61/EU (the **AIFMD** and such alternative investment funds **AIFs**) are generally structured in the form of a limited partnership (commanditaire vennootschap, **CV**), a co-operative (coöperatie, **Co-op**), a contractual fund for joint account (fonds voor gemene rekening, **FGR**), a private limited liability company (besloten vennootschap met beperkte aansprakelijkheid, **BV**) or a public limited company (naamloze vennootschap, **NV**), or a combination thereof.

In addition, there are two separate tax fund regimes, being the fiscal investment institution (fiscale beleggingsinstelling, **FBI**) which is often used as a REIT and the exempted investment institution (vrijgestelde beleggingsinstelling, **VBI**). These regimes provide for an attractive tax treatment subject to certain requirements having been met.

2. Does a structure provide limited liability to the investors? If so, how is this achieved?

CV

A CV is a limited partnership for the purpose of a durable co-operation between one or more managing (or general) partners (beherend vennoten), each with unlimited liability, and one or more limited partners (commanditaire or stille vennoten) who are not personally liable towards third parties for the obligations of the CV in excess of the amount they have contributed or have agreed to contribute to the CV, unless the names of the limited partners (or characteristic elements of their names) are used in the name of the CV or the limited partners engage in any act of management or control (daden van beheer) or are involved in any activities of the CV (even by virtue of a power of attorney).

Co-op

If the articles of association do not provide otherwise, members and former members of a Co-op are liable for deficits upon liquidation or bankruptcy. However, Dutch law allows for the liability of members to be limited or excluded in the articles of association. The letters W.A. (wettelijke aansprakelijkheid – unlimited liability), B.A. (beperkte aansprakelijkheid – limited liability), or U.A. (uitsluiting van aansprakelijkheid – exclusion of liability), respectively, must be added to the name of the Co-op in order to indicate the level of liability attached to the members. A member of a co-operative U.A. is not personally liable for any deficit of the Co-op.

BV/NV

A BV or NV is a legal entity with capital divided into one or more transferrable shares, that has legal personality (rechtspersoonlijkheid). A shareholder of a BV or NV is, in principle, not personally liable for acts performed in the name of the BV or NV (as the case may be) and does not have to contribute to the losses of the BV or NV (as the case may be) in excess of the amount to be paid up on its shares.

FGR

An FGR is a contractual fund that is typically established by a manager and a custodial entity (the titleholder). The liability of a participant of an FGR is generally limited to the amount that each participant has agreed to pay. This limitation of liability is achieved by virtue of the structure of the FGR which is a contractual arrangement sui generis, whereby the titleholder acts in its own name (but for the account of the participants) vis-à-vis third parties whilst the participants are contractually only liable towards the titleholder for an amount up to their commitment. Although the FGR is not a partnership (personenvennootschap) it cannot be ruled out completely that if, as a factual matter, the FGR meets the constitutive requirements of a partnership it

can be requalified as a general partnership (maatschap/vennootschap onder firma) or a limited partnership (commanditaire vennootschap) among the manager, the title holder and the participants, or among the participants only. Upon such a requalification, the participants may become liable for equal amounts (gelijke delen) (if the FGR is requalified as a maatschap) or jointly and severally liable (hoofdelijk aansprakelijk) (if the FGR is requalified as a vennootschap onder firma or commanditatire vennootschap) for the liabilities of such partnership.

General grounds for investor liability

In addition to the above-described specific circumstances there are certain other instances under which an investor may become liable for the obligations of the AIF in which it holds an interest. This could e.g. be the case if:

- such investor has committed a tort (onrechtmatige daad);
- such investor qualifies as a policy maker (beleidsbepaler) or a co-policy maker (medebeleidsbepaler) of the general partner or the AIF, as applicable, and there is evidently improper management;
- such investor voluntarily assumes liability for the obligations of the AIF; or
- in certain exceptional circumstances only, where "hiding" behind separate legal identities constitutes an abuse of law, the investor may be identified (vereenzelvigd) with the general partner or the AIF, as applicable.

Consequently, investors should refrain from the above-described actions.

3. Is there a market preference and/or most preferred structure? Does it depend on asset class or investment strategy?

Private equity funds are generally structured in the form of a CV or Co-op. Hedge funds and debt funds are often structured as an FGR. Real estate funds are commonly structured as an FGR, CV, Co-op, BV or NV (depending on the strategy and investor base).

4. Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs. hedge)) and, if so, how?

Yes, managers of open-ended funds are subject to stricter rules given the liquidity risks that such funds pose. Managers of AIFs (**AIFMs**) that are subject to the Small Managers Regime (see under question 12 below) and that manage open-ended funds are subject to lower assets under management thresholds in order to be able to use an exemption from the AIFMD license requirement (see under question 12 below) and licensed AIFMs managing open-ended funds are subject to additional rules regarding liquidity and risk management.

5. Are there any limits on the manager's ability to restrict redemptions? What factors determine the degree of liquidity that a manager offers investor of an Alternative Investment Fund?

This will depend on the fund terms. However, an AIFM cannot exclude the right of a limited partner in a CV to request a judge to rescind the limited partnership agreement in respect of itself for serious cause (gewichtige redenen) nor can an AIFM prohibit an investor in a Co-op to withdraw from a cooperative on the basis of an arrangement that exceeds what is permitted pursuant to the articles of association of the Co-op and applicable law.

6. What are potential tools that a manager may use to manage illiquidity risks regarding the portfolio of its Alternative Investment Fund?

All general tools are available to AIFMs of liquid AIFs to manage illiquidity risks, including the maintenance of cash reserves, applying redemption facilities (i.e. debt financing), redemption gates, in-kind distributions, matching of sale and purchase requests and redemption of interests following the sale of underlying assets as well as the use of side-pockets. A licensed AIFM managing AIFs that are open-ended or leveraged should implement a liquidity management policy.

7. Are there any restrictions on transfers of investors' interests?

In the Netherlands, a CV (and its foreign law equivalents) can currently be organised as a tax-transparent entity (a "closed" CV) or as a tax-opaque entity (an "open" CV). AIFs in the Netherlands are often structured as a tax-

transparent (closed) CV. The closed character requires that any admission or substitution of a limited partner, as well as any change in relative interests among the existing limited partners, is subject to prior unanimous consent of all partners, both the general and limited partners.

In March 2021 the Dutch government has published a draft legislative proposal for public consultation with the objective to change the Dutch legal entity qualification rules for tax purposes. If this legislative proposal is accepted and enacted into law, Dutch CVs will all be tax transparent, and the unanimous consent requirement will no longer apply. Currently, it is expected that a bill of law will be published in September 2023 and that such law will enter into force in 2025.

Similar to the current CV, also with regards to the FGR, two different types exist: so-called “closed” FGRs and “open” FGRs. A closed FGR is a transparent entity for Dutch tax purposes. An FGR is considered a closed FGR if either the participations in the FGR are not transferable other than to the FGR itself by way of redemption, or if the participations are transferable only with the consent of all other participants. Currently, it is also expected that these rules will change as per 2025, whereby the open FGR will likely only be available for (regulated) investment institutions going forward.

Finally, Co-ops that are used as principal fund vehicles may be eligible for an exemption of Dutch dividend withholding tax. AIFMs that seek confirmation from the Dutch tax authority that the Co-op fund vehicle is eligible for such exemption of Dutch dividend withholding tax are required to state in the articles of association of the Co-op that a transfer of a membership interest in the Co-op is subject to the approval of all members.

Finally, interests in AIFs which from a regulatory perspective are only offered to non-professional investors for a countervalue of more than EUR 100,000, or to professional investors, can only be transferred to investors which meet the same requirements.

8. Are there any other limitations on a manager’s ability to manage its funds (e.g., diversification requirements)?

AIFs that do not qualify as an FBI or VBI (see under question 1 above) and do not apply a specific EU fund label (EuVECA, EuSEF or ELTIF), are not subject to mandatory product requirements (such as diversification requirements). However, the license authorisation of a licensed AIFM may restrict the manager in its ability to manage certain types of funds. For instance, an AIFM that holds a licence for managing AIFs investing in financial instruments is not allowed to manage an AIF that invests in real estate without first applying for an extension of the scope of its licence.

9. What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds? Does the tax treatment of the target investment dictate the structure of the Alternative Investment Fund?

Dutch tax residents (entities and individuals) are subject to income tax in the Netherlands with respect to their worldwide net income, whilst non-Dutch residents (entities and individuals) are subject only to income tax in the Netherlands with respect to certain Dutch sources (including a permanent establishment or real estate located in the Netherlands).

Subject to certain conditions, pension funds may be entitled to a full exemption from Dutch corporate income tax and a full refund of Dutch dividend withholding tax. Other tax exempt (governmental) bodies (EU and non-EU) might also be entitled to a full refund of Dutch dividend withholding tax with respect to qualifying portfolio investments in Dutch (fund) entities.

The legal structure of an AIF strongly depends on the nature of its investments (see under question 3 above). Most AIFs are structured in a way that pursues tax neutrality, i.e. taxes are to be levied at investment level and at investor level, but not at the level of the fund. Further, various structures provide for the possibility to make distributions free from withholding tax.

10. What rights do investors typically have with respect to the management or operations of the Alternative Investment Fund?

Generally, pursuant to the AIFMD, the AIFM itself is responsible for performing the portfolio and risk management tasks on behalf of an AIF. In addition, as set forth under question 2 above, the involvement of investors in management tasks may trigger liability risks. Consequently, investors typically have limited rights with respect to the management and operation of the Fund (albeit that investors can typically vote on the removal of the AIFM, an extension of the term of the AIF, or the approval of the annual accounts and often certain other reserved matters). Some of the investors typically

also have a representative on the fund's investor advisory committee through which they can exercise certain approval and/or consultation rights.

11. Where customization of Alternative Investment Funds is required by investors, what types of legal structures are most commonly used?

Substantially all typical Dutch legal forms commonly used to structure AIFs (i.e. CV, Co-op, BV/NV or FGR) can be customized to a large extent to allow the implementation of specific arrangements. Having that said, the Dutch corporate entities (i.e. Co-op and BV/NV) are subject to mandatory Dutch corporate law and hence need to comply with mandatory rules governing their structure, whereas the CV and FGR are not subject to mandatory corporate law and therefore provide for more flexibility to be customized.

12. Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

Under Dutch law, the regulatory regime and supervision with respect to investment funds is the concern of the manager of an investment fund, rather than the investment fund itself (unless the latter is managed internally). In principle, AIFMs that are active in the Netherlands fall within the scope of the AIFMD and the Dutch implementation thereof in the Dutch Act on Financial Supervision (Wet op het financieel toezicht, or **AFS**) and the rules and regulations promulgated thereunder.

Pursuant to article 2:65 AFS, it is prohibited in the Netherlands for an AIFM to manage an AIF or to market interest in an AIF without having obtained a licence from the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten, **AFM**). This is different if an exemption to the licence requirement is available, such as a licensed EU AIFM using its passport or an AIFM making use of the Small Managers Regime (as further set out below) or another exemption or exception applies.

There is an exception from the above-mentioned licence obligation for Dutch AIFMs that can make use of the so-called "small managers registration regime" (**Small Managers Regime**) of section 2:66a of the AFS. In order to be able to make use of this exemption, each of the following conditions must be met by the AIFM:

- the AIFM manages directly – or through an undertaking with which it is linked through common management, common control or a qualified holding – portfolios of AIFs whose assets under management (AuM) in total do not exceed (AuM Thresholds):
    - EUR 100 million; or
    - EUR 500 million if all the AIFs managed by the AIFM are unleveraged and there are no redemption or repayment rights exercisable with respect to interests in the AIFs for a period of five years following the date of the acquisition of the interests in the respective AIFs; and
- interests in each AIF managed by the AIFM may only be marketed (Placement Restrictions):
    - to professional investors within the meaning of section 1:1 of the AFS;
    - to fewer than 150 persons; or
    - for a countervalue of at least EUR 100,000 per investor, with the amount of EUR 100,000 to be provided at once.

It is only possible to use one Placement Restriction for each AIF (i.e. it is not possible to combine them). The AFM clarified that the following conditions should be met, in order to make use of the Placement Restriction set forth under paragraph (c) above:

- the amount of the first capital commitment per investor is at least EUR 100,000 (exclusive of costs);
- the first amount called under the commitment per investor should be at least EUR 100,000; and
- the amount of committed capital may never fall below EUR 100,000.

A Dutch AIFM that meets the AuM Thresholds and the Placement Restrictions and wants to make use of the Small Managers Regime needs to register itself and the AIF it manages/intends to market with the AFM, by submitting a registration form (including, inter alia, an overview of the AuM and a description of the investment strategy). The AFM charges EUR 4,400 for a registration. After review and acceptance of the registration form by the AFM, the AIFM and the AIFs managed by it will be included in the public register of the AFM kept on its website. If the AIFM meets the conditions of the Small Managers Regime, it can start marketing after the registration is submitted to the AFM; there is no waiting period. If the AIFM wishes to raise a new AIF after

registering itself, it should register the AIF two weeks prior to the commencement of the marketing on the AIF. If the AIFM exceeds the AuM Thresholds (and is expected to continue to do so for a period of at least three months thereafter) or does not comply with the Placement Restrictions, the AIFM must apply for a licence from the AFM within 30 calendar days.

Exemptions to the general licence requirement are also available in (inter alia) the following instances:

- an EU sub threshold AIFM which registers itself with the AFM under the Small Managers Regime, provided that interests in the AIF are offered to professional investors only;
- when using a passport by a licensed EEA AIFM; and
- when marketing units in an AIF in the Netherlands under the Dutch implementation of the national private placement regime of article 42 AIFMD.

13. Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Reference is made to our answer under question 12 above.

14. Does the Alternative Investment Fund require a manager or advisor to be domiciled in the same jurisdiction as the Alternative Investment Fund itself?

With reference to our answer under question 18 below, this is in principle not the case.

15. Are there local residence or other local qualification or substance requirements for the Alternative Investment Fund and/or the manager and/or the advisor to the fund?

Dutch law entities that are non-transparent from a Dutch tax perspective, like the Co-op, BV, NV, open FGR and open CV are deemed to be a Dutch tax resident by virtue of their Dutch domicile. Nevertheless, in an international tax environment also the effective place of management of the entity may be of relevance. The Dutch concept of the place of effective management is very similar to the international (OECD driven) standards, predominantly focussed on the place where the management exercises its executive tasks. Further, subject to certain strict conditions, Dutch tax law stipulates that AIFs are deemed to be effectively managed in their country of establishment.

16. What service providers are required by applicable law and regulation?

Licensed AIFMs must appoint a depositary for the AIFs they manage. In principle, in the Netherlands such depositary is subject to a licence requirement (a depositary generally holds a licence as a trust office, investment firm or credit institution), unless a specific exemption to the licence requirement is available. If an AIF managed by a licensed AIFM does not have legal personality, the legal ownership of the assets under management must be held by a separate legal entity whose sole object according to the articles of association is holding the legal ownership of the assets of one or more AIFs (and if there is a real risk that the assets of a particular AIF will provide insufficient recourse, such separate legal entity may only hold the assets for one AIF).

17. Are local resident directors / trustees required?

We refer to question 14 above. Generally speaking, no specific requirements for Dutch resident trustees or directors apply to AIFs.

18. What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

An AIFM authorised in another EEA Member State in accordance with article 6 sub 1 of the AIFMD may manage a Dutch AIF in the Netherlands on a cross-border basis with a passport, provided that the procedure of article 33 AIFMD is followed, which, in summary, entails certain documentation and information being provided to the home Member State regulator of the AIFM.

A non-EEA AIFM may manage a Dutch AIF on a cross-border basis if such AIFM complies with certain reporting, disclosure and transparency requirements relating to the annual report, disclosures to investors (both initially and on an ongoing basis), disclosures relating to sustainability pursuant to Regulation (EU) 2019/2088 (**SFDR**), reporting obligations to regulatory authorities and, where relevant, transparency and asset stripping requirements relating to investments in

portfolio companies, and if appropriate co-operation arrangements are in place between the supervisory authority of the non-EEA country where the AIFM is established and the AFM. In addition, a notification should be filed with the AFM, including an attestation of the home country supervisor of the non-EEA AIFM. Furthermore, the non-EEA country where the AIFM is established should not be listed as a non-co-operative country for the purposes of the Financial Action Task Force (FATF). In this event, units in the relevant AIFs may only be offered to qualified investors (gekwalificeerde belegger) within the meaning of the AFS.

Previously, sub-threshold EU AIFMs from another country than the Netherlands were not allowed to manage or market AIFs in the Netherlands. This has changed as of 1 January 2023, following which it is allowed for sub-threshold EU AIFMs to manage or market AIFs to professional investors in the Netherlands provided that a registration process with the Dutch regulator is followed.

19. What are common enforcement risks that managers face with respect to the management of their Alternative Investment Funds?

The AFM may impose sanctions such as fines, incremental penalties and the publication thereof in case of a violation of the AIFMD as implemented in the Netherlands.

20. What is the typical level of management fee paid? Does it vary by asset type?

When it comes to management fees the Dutch market is generally in line with the international market. The typical management fee levels for private equity funds range from 1.75% to 2.25% of the aggregate capital commitments during the investment period and on invested capital thereafter. For fund-of-funds the management fees are typically lower and for other strategies (e.g. real estate, mortgage receivables, etc.) the typical level of fees is dependent on the strategy (for instance core or opportunistic).

21. Is a performance fee typical? If so, does it commonly include a “high water mark”, “hurdle”, “water-fall” or other condition? If so, please explain.

Yes, most fund agreements provide for a performance fee or carried interest model. For liquid strategies/open-ended funds a high-water mark or otherwise benchmark performance fee model is more common. Illiquid strategies such as private equity strategies generally provide for a carried interest model with a hurdle, commonly ranging from 5% to 8% (where we see most private equity funds provide for an 8% hurdle). Although the 80/20 carry split is the most common model in the Netherlands, a ratchet model with premium carried rates at higher IRR/MOIC thresholds has gained some territory over the past years.

22. Are fee discounts / fee rebates or other economic benefits for initial investors typical in raising assets for new fund launches?

First closing management fee discounts are sometimes applied for initial investors.

23. Are management fee “break-points” offered based on investment size?

Some funds indeed offer lower management fee rates for investors that make a commitment that exceeds a certain threshold.

24. Are first loss programs used as a source of capital (i.e., a managed account into which the manager contributes approximately 10-20% of the account balance and the remainder is furnished by the investor)?

To the best of our knowledge, first loss programs are not widely applied in the Netherlands.

25. What is the typical terms of a seeding / acceleration program?

What terms are typical is to a large extent dependent on the nature of the seeding / acceleration program deployed (whether it comes as a seeding program only or has a comprehensive accelerator course allowing potential portfolio investments to further develop, etc.). The Dutch Ministry of Economic Affairs and Climate Policy does provide for a Seed Capital scheme that market participants commonly apply for. This scheme has attractive terms that enhance the returns for the other investors. There are various tenders within the Seed Capital scheme under which a funding can be obtained, with each having their own specific requirements in relation to, for instance, the term of the

investment period and the amount of management costs.

26. What industry trends have recently developed regarding management fees and incentive/performance fees or carried interest? In particular, are there industry norms between primary funds and secondary funds?

Due to recent developments (ongoing war in Ukraine, soaring interest rates and turbulence in the banking sector) the market seems to have been cooling down to some extent. However, even though fundraising periods may take a bit longer, fundraisings in the private equity, infra and private debt space continue at quite a steady pace. Until now, said market developments did not result in any significant changes in respect of management and/or performance fees when compared to the past few years. We also noticed a fair number of managers that have been struggling recently to dispose of all of the assets towards the end of their funds' lifetimes. To tackle these issues, managers are looking increasingly for alternative liquidity options, such as continuation vehicles or NAV credit facilities.

27. What restrictions are there on marketing Alternative Investment Funds?

A Dutch licensed AIFM is in principle only authorised to offer the interests in the AIF it manages to professional investors within the meaning of the AFS and non-professional investors who invest more than EUR 100,000. However, if the AIFM complies with the "retail top-up regime", the AIFM may also offer interests to non-professional investors in the Netherlands who invest less than EUR 100,000.

An AIFM authorised in another EEA Member State in accordance with article 6 sub 1 of the AIFMD may offer the interests in an AIF in the Netherlands to professional investors on a cross-border basis with a passport, provided that the procedure of article 32 AIFMD is followed. In addition, such AIFMs may market interests to non-professional investors who invest more than EUR 100,000, or to non-professional investors in the Netherlands who invest less than EUR 100,000 whilst complying with the "retail top-up regime", provided that a notification has been made to the AFM in addition to the article 32 AIFMD procedure.

A non-EEA AIFM may offer interests in a EEA or non-EEA AIF to qualified investors in the Netherlands if such AIFM complies with certain reporting, disclosure and transparency requirements relating to the annual report, disclosures to investors (both initially and on an ongoing basis), disclosures relating to sustainability pursuant to SFDR, reporting obligations to regulatory authorities and, where relevant, transparency and asset stripping requirements relating to investments in portfolio companies, and if appropriate co-operation arrangements are in place between the AFM and the supervisory authority of the non-EEA country in which the AIFM is established. In addition, a notification should be filed with the AFM, including an attestation of the home country supervisor of the non-EEA AIFM. Furthermore, the non-EEA country where the AIFM is established should not be listed as a non-co-operative country for the purposes of the FATF.

Certain specific marketing restrictions apply with respect to AIFs which are marketed under the EuVECA or ELTIF label.

With respect to interests offered to non-professional investors in the Netherlands a key information document prepared in accordance with the requirements of the PRIIPS Regulation needs to be provided to such non-professional investors.

For marketing restrictions under the Small Managers Regime, reference is made to question 12 above.

28. Is the concept of "pre-marketing" (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

For licensed AIFMs and AIFMs marketing an AIF with an EuVECA-label (as further set out under question 34 below), the concept of pre-marketing is defined as follows:

"pre-marketing" means provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment"

Authorised AIFMs and AIFMs marketing an AIF with an EuVECA label may engage in pre-marketing, except where the information presented to potential investors:

- is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
- amounts to subscription forms or similar documents whether in a draft or a final form; or
- amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Where a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow investors to take an investment decision and shall clearly state that:

- they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and
- the information presented therein should not be relied upon because it is incomplete and may be subject to change.

For AIFMs benefitting from the Small Managers Regime that are not looking to market an AIF with an EuVECA-label (as further set out below), the analysis as to whether or not an action constitutes pre-marketing in principle will still be based on the current definition in Dutch law on when interests in a fund are marketed in the Netherlands (although we would expect that the aforementioned definition will have consequential effect to some extent). Offering (i.e. marketing) is defined in the AFS, as:

- making a direct or indirect, sufficient defined proposal to, as counterparty, enter into an agreement regarding units in an AIF; or
- directly or indirectly requesting or obtaining funds or other goods for the purposes of participation in an AIF.

29. Can Alternative Investment Funds be marketed to retail investors?

With respect to licensed AIFMs, as the authorisation pursuant to the AIFMD is, in principle, limited to professional investors, managers who intend to offer interest in the AIF they manage to non-professional investors (retail) in the Netherlands should comply with the so-called retail top-up. The licence for these authorised AIFMs should specifically include the retail top-up. The authorised AIFM with a retail top-up will have to meet all requirements that apply for authorised AIFMs under the fully licensed regime. In addition, the retail top-up regime, inter alia, requires the manager to comply with certain additional compliance, information and reporting requirements. However, the manager is not required to comply with the requirements under the retail top-up regime if interests are offered to non-professional investors for a countervalue of more than EUR 100,000 per investor.

AIFMs benefiting from the Small Managers Regime may offer their interest to retail investors in the Netherlands, provided that they do not offer their interest to more than 150 persons or if such retail investors agree to participate for a countervalue of at least EUR 100,000 payable at once.

Finally, an AIFMs that manages an AIF for which it has obtained an EuVECA-label or EuSEF-label can market interests in such AIF to retail investors in the Netherlands, provided these investors subscribe for at least EUR 100,000.

30. Does your jurisdiction have a particular form of Alternative Investment Fund be that can be marketed to retail investors (e.g. a Long-Term Investment Fund or Non-UCITS Retail Scheme)?

No, whether an AIF can be marketed to retail investors is not dependent on the chosen legal form (e.g. a CV, Co-op, BV/NV or FGR), be it that some legal forms are less practical for marketing to a large number of investors due to practical reasons (such as the unanimous consent requirement for transfers that applies to a CV or the requirement that a transfer of shares in a BV must be in the form of a deed executed before a Dutch civil law notary). Reference is further made to our answer under question 29.

31. What are the minimum investor qualification requirements for an Alternative Investment Fund? Does this vary by asset class (e.g. hedge vs. private equity)?

Reference is made to our answers under question 29 and 12 above.

32. Are there additional restrictions on marketing to government entities or similar investors (e.g. sovereign wealth funds) or pension funds or insurance company investors?

Not that we are aware of.

33. Are there any restrictions on the use of intermediaries to assist in the fundraising process?

Whether or not there are restrictions on the use of intermediaries for the fundraising process depends on the agreements entered into with such intermediaries and the tasks performed by the intermediaries. For instance, depending on the relationship, the Dutch rules on outsourcing of tasks to be performed by the AIFM itself pursuant to Annex I of the AIFMD may be applicable. If such intermediary performs certain regulated activities in its role as intermediary, for instance as a placement agent or broker, the intermediary itself may be required to have for instance a license pursuant to MiFID II (2014/65/EU). Whether or not these rules apply should be assessed on a case-by-case basis.

Additionally, if pre-marketing is done through an intermediary, Directive 2019/1160/EU requires that such intermediary is either authorised as an investment firm in accordance with MiFID II, as a credit institution in accordance with Directive 2013/36/EU, as a UCITS management company in accordance with Directive 2009/65/EC, as an AIFM in accordance with Directive 2011/61/EU, or acts as a tied agent in accordance with Directive 2014/65/EU.

34. Is the use of “side letters” restricted?

No, in principle AIFMs are allowed to enter into side letters with investors. Side letters are also common practice in the Dutch investment management business.

Dutch fund agreements generally provide for a most favoured nation’s clause with respect to the disclosures of side letters to investors. Often investors are allowed to receive the side letters entered into with other investors and elect the provisions thereof (which entitlement to elect may be restricted, for instance to provisions negotiated by other investors that have a capital commitment equal to or lower than the capital commitment of the electing investor). Licensed AIFMs are required to disclose preferential treatment of investors to the other investors under article 23(1)(j) AIFMD.

35. Are there any disclosure requirements with respect to side letters?

Reference is made to our answer under question 34 above.

36. What are the most common side letter terms? What industry trends have recently developed regarding side letter terms?

In our experience, the most common side letter terms are as follows: rights relating to disclosure of information and confidentiality, rights to appoint members of the investors advisory committee, acknowledgement of co-investment appetite of investors, particular reporting requirements that investors need for internal reporting purposes, excuse rights, and (other) regulatory and tax requirements of certain investors.

We see a trend where excuse rights become more elaborate and where investors emphasise ESG reporting.

Also, we feel the number of side letter requests from investors have substantially increased more generally. In order to efficiently handle such requests, many of the AIFMs we assist have made an effort in aligning and standardising their side letter procedures. This allows them to address the investors’ concerns whilst limiting operational compliance burden and costs.

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