

欧盟将另类投资基金作为企业架构工具

European Union Harmonised Alternative Investment Funds as Corporate Structuring Vehicles

Olaf Koehler



Olaf Koehler

富地基金管理有限公司
首席执行官
BENDURA FUND
MANAGEMENT BETA AG
CEO

自2008年以来, KOEHLER先生一直以多种身份服务于投资基金业, 包括结构律师、执行董事或投资基金清算人。在成为富地基金管理有限公司的首席执行官之前, KOEHLER先生全面掌管着列支敦士登富地银行的存托与证券发行局服务部门, 那里他拥有100%的股份。

Since 2008, Mr. KOEHLER has been serving the investment fund industry in several capacities, inter alia as structuring lawyer, managing director or investment fund liquidator. Before having become Chief Executive Officer of BENDURA FUND MANAGEMENT BETA, Mr. KOEHLER was in charge of the Depositary & Security Issuer Services Department of BENDURA BANK, the Liechtenstein based 100%-owner of his current company.

With the Alternative Investment Fund Managers Directive (AIFMD), the European Parliament and the Council of the European Union (EU) have harmonised the regulatory framework for Alternative Investment Funds (AIF). The Principality of Liechtenstein as a member of the European Economic Area (EEA) participates in the EU's internal market and adopts most EU legislation concerning the single market. Liechtenstein's adoption of the AIFMD entered into force as from July 2, 2013 and the inclusion of the AIFMD in the EEA Agreement opened the EU for potential marketing of Liechtenstein AIFs on September 30, 2016.

1. Alternative Investment Funds

There generally are no limits regarding the types of assets an AIF could hold: certainly securities, as well as real estate, private equity, commodities, art or intellectual property.

The resilient AIF structure

The AIFM regime is based on the regulation of the licenced Alternative Investment Fund Managers. The AIFM is responsible for portfolio

management and risk management of the AIF as well as for the fund administration and other tasks with regards to the AIF. Although it is possible to delegate all these tasks to third parties, the AIFM is not allowed to delegate portfolio management and risk management of an AIF at the same time and cannot dispose of its overall responsibility.

Separation of powers regarding the AIF's assets is one of the measures taken to prevent misconduct and to preserve the interests of the investors. Therefore, the second most important actor in an AIF structure is the depositary, usually a bank. While it is the AIFM's duty to manage the assets of the AIF, the depositary has to take the bankable assets into custody and to make sure that the property of non-bankable assets of the AIF is not inadvertently encumbered with any rights of third parties. Regarding bankable assets the rule is: the AIFM manages the assets but must not possess them, the depositary has to keep the assets in custody but must not manage them. Furthermore, the depositary has the duty to check any transactions of the AIF regarding the adequacy of the according considerations and it is not allowed to

在 欧盟颁布《另类投资基金经理指令》(AIFMD)的同时，欧盟议会和欧盟理事会已将法规框架融入了“另类投资基金”(AIF)中。列支敦士登公国作为欧盟经济区 (EEA) 的成员国，参与欧盟的内部市场活动，并实施了大多数欧盟针对单一市场的法律法规。列支敦士登从2013年7月2日起开始实施AIFMD，在EEA协议中加入的AIFMD让欧盟在2016年9月30日对列支敦士登另类投资基金的潜在市场进行了开放。

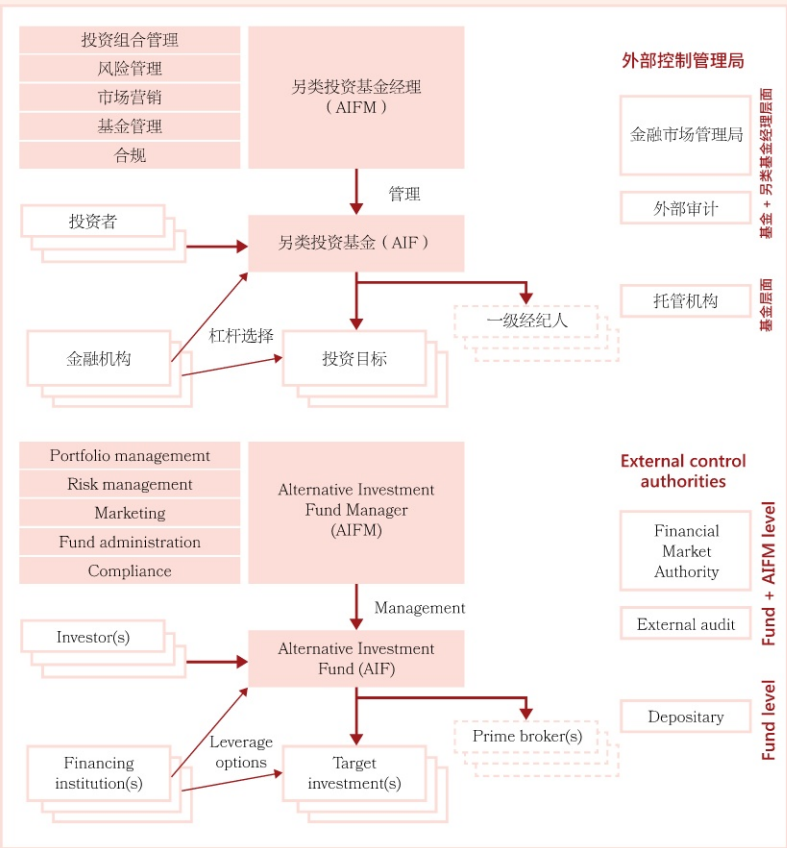
1. 另类投资基金

另类投资基金可以持有的资产种类在总体上是没有限制的：包括证券、房产、私募基金、商品、艺术品或知识产权。

灵活强健的AIF架构

另类基金管理公司 (AIFM) 是基于“授权另类基金经理”的法规而建立。AIFM负责投资组合管理、AIF的风险管理，以及基金管理和与其它与AIF有关的任务。虽然可以交由第三方来负责上述的所有工作，但AIFM不允许将AIFM的投资组合管理和风险管理同时交由代理负责，也不能够撇清它的总体责任。

AIF资产所分离的权力是防止滥用和保护投资者权利的对策之一。因此，AIF架构中位列第二重要的因素是它的保管者，通常是银行。虽然AIFM的责任是管理AIF中的资产，保管者必须保留其中可在银行交易的资产，并确保AIF中不可在银行交易的资产并不会在无意中妨碍第三方任何权利的实施。关于可在银行交易的资产，其规则是：AIFM对资产进行管理，却不能持有上述资产。此外，保管者有责任根据情况就AIF交易的准确性进行检查，而且不



图例 1: 另类投资基金的基本架构
Diagram 1: Basic AIF structure

hand over the bankable assets to the AIFM.

Every AIF has to appoint an external auditor and is subject to regulatory supervision by the regarding regulator, in Liechtenstein by the Financial Market Authority (FMA). Diagram 1 shows the basic structure of an AIF with its mandatory parties and the possible involvement of prime brokers and financing third parties.

AIF fund unit transactions via clearing systems using central counterparty (CCP)

Other than with hedge funds in most Anglo-American jurisdictions, Central European AIF fund units usually are not registered with the AIF. In fact, the settlement of subscriptions and redemptions of AIF units is conducted via the clearing systems (e.g. Clearstream, Euroclear, SIX SIS) by using a CCP as counterparty for both parties of the transaction.

允许将可交易资产移交给AIFM。
每一只AIF基金都必须委任一名外部审计师，并需要符合相关监管部门制定的监管规定，在列支敦士登，是由“金融市场管理局”（FMA）来实施监管的。（另类投资基金的基本架构详见前页图例1）

通过清算系统采用中央交易方（CCP）进行的另类投资基金（AIF）单元交易

和大多数的盎格鲁美属司法辖区中建立的对冲基金不同，中欧的另类投资基金单元通常并不会在AIF中注册。事实上，AIF单元的交易和认购，和AIF单元的赎回都是通过清算系统（例如，Clearstream、Euroclear、SIX SIS）用CCP作为双方交易的对手方来进行的。

因此，AIF单元总体上说都是作为未认证的可清算证券来创建的。在认购AIF单元时，投资者的资产保管银行会制作一个关于此AIF单元的认购表格，并提交给AIF的保管者，该保管者在此AIF中扮演着过户登记人的角色。在认购表格中，投资者的保管银行用它自己的名字对AIF单元进行认购，但认购时代表其客户且是客户保密的，并对投资者客户进行约定，根据AIF基金文档的规定要求有资格持有该AIF基金单元。在认购被接受之后，交易通过清算系统，作为付款交割（DVP）来完成交易。在其保管银行的证券账户中收到AIF单元后，投资者就有权支配此AIF单元，举例说明，可以通过柜台交易自由出售给任何第三方。因此，AIF、AIFM或保管者通常都不知道投资者是谁。

2. AIF的管理框架和内部监管系统

AIF针对它们的内部控制系统和外部控制实体来说，是遭到严格监管的。有多

Therefore, the AIF units generally are created as uncertificated clearable securities. To subscribe for the AIF units, the custodian bank of the investor files a subscription form for the regarding AIF units and submits it to the depositary of the AIF which acts as transfer agent for the AIF. In the subscription form, the investor's custodian subscribes the AIF units in its own name but on behalf of its customer without disclosing him, and covenants that its customer, the investor, is eligible for the AIF units pursuant to the AIF's fund documents. After the subscription has been accepted, the transaction is settled via the clearing systems as delivery versus payment (DVP) transaction. After having received the AIF units in his security account at his custodian bank, the investor has the AIF units at his disposal and, for example, would be free to sell them in an over the counter transaction to any discretionary third

party. As a result, neither the AIF nor the AIFM or the depositary usually do know who the investors are.

2. Governance framework and internal monitoring system of AIFs

AIFs are heavily regulated regarding the functioning of their internal control systems and their external control bodies. There is a variety of dimensions of the governance framework and the monitoring instances which can be listed as

- functional (rule adherence = compliance; risk avoidance; damage repair),
- hierarchical (lines of defence: operations, internal control system, internal audit) and
- perspective (internal control system; external control authorities).

Diagram 2 gives an overview of the implementation of these three



重维度的管理框架和监管方式，如下文所述：

- 功能性（合规=合法；风险规避；损害修复），
- 多重分级（多重防线：运营、内部控制系统、外部审计）以及
- 多角度（内部控制系统；外部控制管理局）。

图例2 此处给您一个上述三个维度执行的总览。AIFM有责任建立内部控制系统。外部控制实体为保管银行、外部审计师和政府监管者。

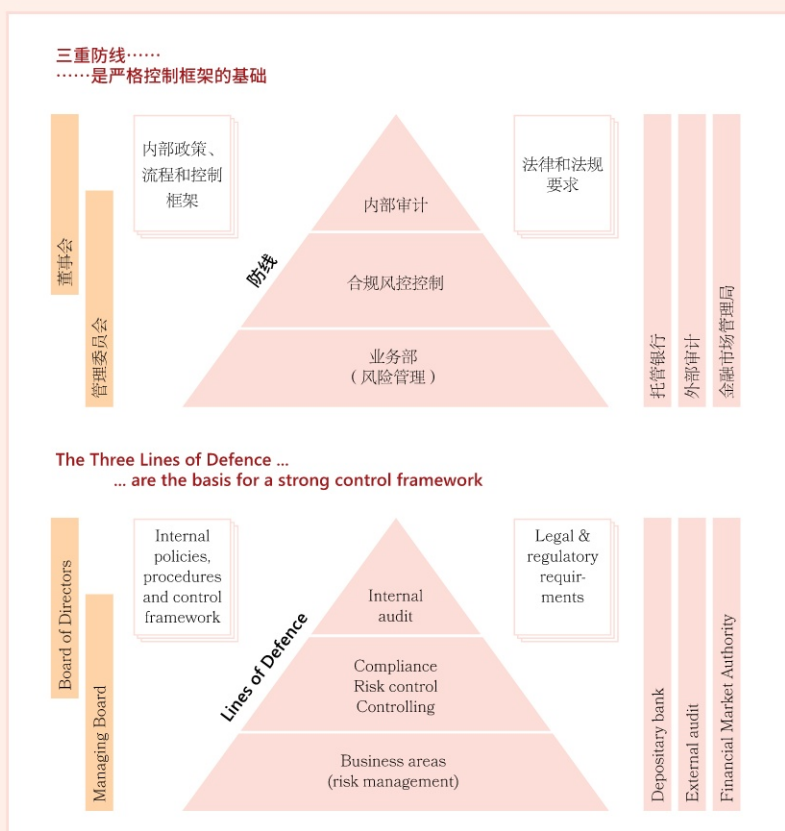
对于传统的证券投资基金来说，定量风险控制的方法比较流行，AIF经常包含少数的资产，或者甚至只有单一资产，比如说，不对外开放的私人俱乐部或单人投资者AIF中的私募基金或房地产资产。所以运营风险管理中在此间就扮演了更为重要的角色。

至于防止犯罪方面，在私募基金和房地产AIF的日常管理工作中，反洗钱（AML）对策是重中之重。这会一方面影响到投资者对AIF单元的认购，另一方面，也会影响到AIF的资产交易。幸运的是，中欧基金单元清算系统DVP交易减轻了投资者方面的AIFM在反洗钱方面的许多工作量：交易另一方的认购银行有责任检查认购投资者的资金来源。由于只有银行才有足够的反洗钱手段，银行才被允许参与清算系统，通常它们也是可以信赖的。

3.用AIF建立架构

由于对持有的资产来说，AIF事实上是不会受到任何限制的，它们适用于下列情形：

- 私募基金、初创公司、衍生投资或
- 受限于投资者数量的未监管资产经理的财务杠杆作用，他们可以整合于



图例 2: 三重防线
Diagram 2: The three lines of defence

dimensions. The AIFM has the duty to establish the internal control system. External control bodies are the depository bank, the external auditor and the governmental regulator.

Whereby for conventional security funds the quantitative risk controlling approach is prevailing, AIFs often comprise of a small number of assets, or even only one single asset, as, for example, in a closed-club or single-investor AIF with private equity or real

estate assets. Hence operational risk management plays a more important role.

With respect to crime prevention, in the day-to-day business of an AIFM for private-equity and real-estate AIFs, anti money laundering (AML) measures are the main focus. This affects on the one hand the subscription of AIF units by investors, on the other hand the AIF's asset transactions. Fortunately, the Central

投资项目之中。

不仅如此，在许多其它种类的金融工具中，投资基金的应用可能性要比它们主要用于集合属于众多投资者的资金来共同购买证券的目的更大。第二个非常重要的目的就是用于以下目的的投资基金：

- 在相对复杂的企业架构中用于资产架构，
- 传承和税务规划，
- 策略或基金投资的匿名方式，
- 针对恶意收购的保护，或者
- 作为任何种类资产的打包方式

AIF的多种企业架构

列支敦士登AIF有五种不同的企业架构，满足发起人和投资者在架构、控制和税务规划方面的需求。最重要的企业架构为：

- 有可变资本的有限公司的投资公司（SICAV），其中投资者是投资者股份的持有者，AIFM为常务董事；
- 集体托管制度，其中投资者为受益人，AIFM为受托人；以及
- 有限合伙制，其中投资者为有限合伙人，AIFM为普通合伙人的常务董事。

在发起人和AIFM两者之间取得平衡

此案例中对AIFM最重要的是，在其顾客作为AIF发起人和AIFM作为受监管的基金经理的自身利益之间取得平衡。由于AIFM不允许把投资组合交给发起人，无法避免的是，需要事先清晰地定义发起人的目标和目的。这些目标和目的可以整合入AIF的组建文件，目的是给AIFM一个清晰的指导，告诉它这个AIF必须给负责管理的发起人一个确定性，在“他”所管辖的AIF中，到底会发生什么，它的经济目标到底是什么。对于非公开俱乐部或单个投资者的AIF来说，如果需要一些私密性，就没必要公布AIF的文件。此外，可以指定流程，

European custom of delivering fund units via the clearing systems as DVP transactions relieves the AIFM of much of the workload with the investor's side regarding AML prevention: it is the duty of the subscribing bank on the other side of the transaction to check the source of funds of the subscribing investor. Since only banks with sufficient AML measures are allowed to participate in the clearing systems, them generally can be trusted.

3.Structuring with AIFs

Since AIFs virtually have no limits regarding the assets they hold, they are ideal for

- private equity, start-ups, spin-off investments, or
- financial leverage of non-regulated asset managers who are restricted regarding the number of investors they could incorporate into an investment project.

But furthermore as with many other types of financial instruments, there are more application possibilities for investment funds than only their primary purpose of pooling capital belonging to numerous investors used to collectively purchase securities. Very important secondary purposes are to use an investment fund for

- asset structuring within more or less complex corporate structures,
- succession and tax planning,
- anonymising of strategic or activist investments,
- protection against hostile takeovers, or
- as wrapper for any types of assets.

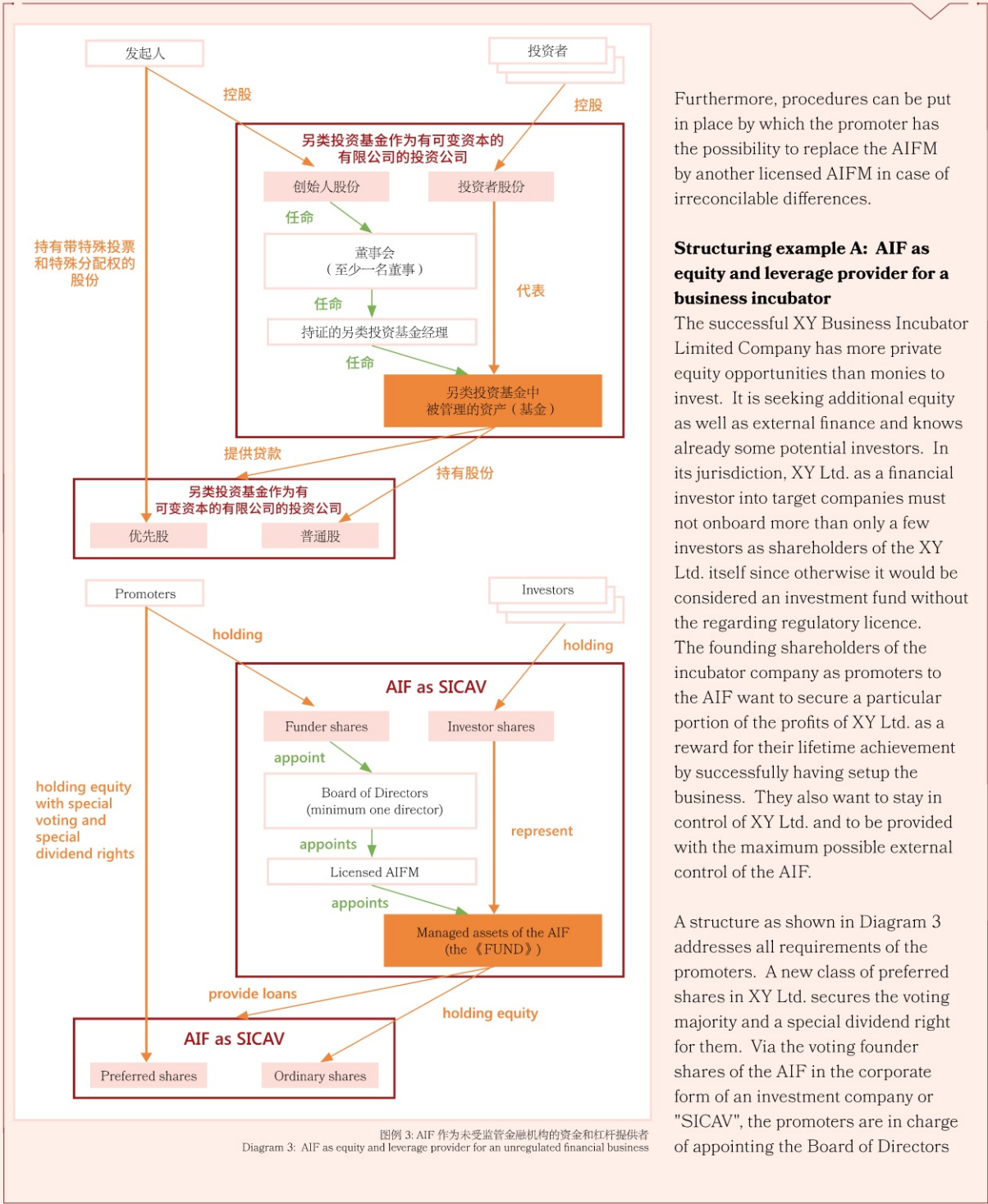
Variety of corporate structures for AIFs

Liechtenstein AIFs come in five different corporate structures to satisfy the promoter's and the investor's needs regarding structuring, control and taxes. The most important corporate structures are the

- investment company as limited company with variable capital (SICAV), whereby the investors are the holders of the investor shares and the AIFM is the managing director;
- collective trusteeship, whereby the investors are the beneficiaries and the AIFM is the trustee; and
- limited partnership, whereby the investors are the limited partners and the AIFM is the managing director of the general partner.

Balancing the interests of the promoters and the AIFM

Most important for the AIFM in such cases is the balancing of the interests of his customer as AIF promoter with the own interests of the AIFM as regulated fund manager. Since the AIFM is not allowed to leave the portfolio management to the promoter, it is imperative to clearly define the promoter's goals and targets beforehand. These goals and targets then can be incorporated into the AIF's constituent documents in order to give the AIFM a clear guidance how this AIF has to be managed and to give the promoter the certainty that in "his" AIF exactly will happen what was economically intended. For closed-club or single-investor AIFs there is no need to publish the AIF documents in case some privacy might be needed.





在产生不可调和分歧时，来规定发起人有可能用另一个持证的AIFM来替换这个AIFM。

架构范例A: AIF作为商务孵化器的资产和杠杆提供者

一家成功的XY商务孵化器有限公司有更多的私募机会，超过它能够支配的资金额。该公司寻求额外的资金和外部融资，并已经认识了一些潜在的投资者。在它所在司法辖区，XY有限公司作为一家进入目标公司的金融投资商不可以让高于一定数量的投资者担任XY有限公司的股东，否则其自身将被认为是一只没有相关认证的投资基金。

孵化器公司的创始人作为AIF的发起人希望得到XY有限公司一个特定的投资组合，作为对其穷尽一生成功创立该公司的奖赏。他们也希望继续保留对XY有限公司的控制权，并获得AIF的最大外部控制权。

of the AIF and could take seats in the Board themselves. While not allowed to take over the portfolio management of the AIF from the AIFM, the Board of Directors has the power to replace the AIFM as corporate managing director of the SICAV-AIF by any other licensed AIFM. With the non-voting investor shares in the SICAV-AIF, new investors have the opportunity to get exposure to XY's business returns. In the general assembly of XY Ltd. on the other hand, only the AIFM as manager of the SICAV-AIF would appear on grounds of the AIF's ordinary shares, eliminating any risk of being exposed to aggressive activist shareholders. Besides subscribing shares of XY Ltd., the AIF could also agree with XY Ltd. on other instruments of financing, e.g. performance linked loans with regards to the performance of XY Ltd. itself or with regards to single investment

targets of XY Ltd.

Diagram 3: AIF as equity and leverage provider for an unregulated financial business

Structuring example B: protection against hostile takeover

The Board of Directors of a listed company holding multiple business companies has been made aware that a hostile takeover shall take place. The attacker intends to rip the company's holdings apart and to sell them in pieces. After consultation with the company's lawyers, the Board of Directors decides to take measures making the company unalluring for the attacker.

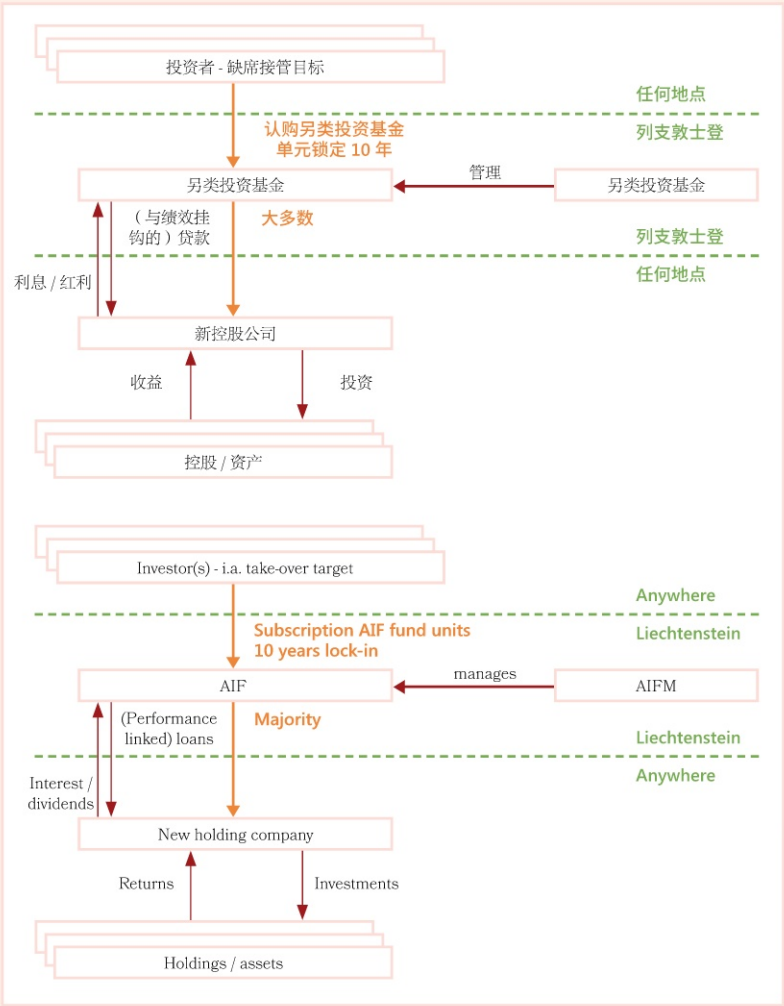
Diagram 4 shows a possible final structure as result of these measures. A new holding company is being established. The holdings of the

在图例3 (前页) 中所示的架构中, 展示了发起人的所有需求。XY有限公司新类别的优先股保证了多数投票权和他们所能享受的特殊红利权。通过投资公司或“SICAV”企业形式的AIF中的投票创始人股, 发起人负责委任AIF的董事会成员, 也可以自己担任董事会的成员。在不被允许在AIF中接管AIFM负责的投资组合管理权的同时, 董事会有权用另一名持证AIFM来替换AIFM担任SICAF-AIF的公司常务董事的职务。在SICAF-AIF中有非投票投资者股权的同时, 新投资者有机会在XY公司业务中获利。另一方面, 在XY有限公司的成员大会中, 只有作为SICAF-AIF经理的AIFM可以出现在AIF的普通股中, 消除了存在任何抱有恶意的激进股东的可能性。除了XY有限公司的认购股本之外, AIF也可以允许其它融资工具, 比如针对XY有限公司自身绩效的绩效关联贷款或者与XY有限公司单一投资目标相关。

架构范例B: 针对恶意收购的保护

上市公司的董事会持有多个商务公司, 并意识到恶意收购将会发生。攻击者希望拆散公司的持股并出售。在得到公司律师的咨询意见后, 董事会决定采取措施, 让公司不再对攻击者具有吸引力。

图例4显示了上述方法实施后可能造成的结果。一个新的控股公司得以成立。老控股公司所控的股份以申购注入新的控股公司为目的所设立的AIF, 并以AIF基金单元的方式作为回报。AIF有一个为期十年的锁定时间, 对第三方投资者开放。在遭遇恶意收购时, 攻击者能够得到一家有AIF基金单元的公司, 同时不可能对其进行赎回或获得老控股公司所持的原始股份。



图例 4: 针对恶意收购进行保护的 AIF
Diagram 4: AIF for protection against hostile takeover

old holding company are put into the new holding company. The old holding company puts the new holding company as subscription in kind into an AIF set up for this purpose and gets AIF fund units in return. The AIF has a lock-in period of ten years and

is open for third-party investors. In case of a hostile takeover, the attacker would get a company with AIF fund units in it and no possibility to redeem them or to lay hands on the original holdings of the old holding company. ©