VANDENBULKE
CORPORATE, FINANCE AND TAX LAWYERS

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LUXEMBOURG OFFERS A NEW FLEXIBLE AND QUICK TIME TO MARKET ALTERNATIVE INVESTMENT FUND - THE *RAIF*

On 14 July 2016, the Luxembourg Parliament adopted the law creating a new fund structure, the Reserved Alternative Investment Fund ('RAIF'), complementing the existing Luxembourg investment toolbox for sophisticated investors and fund managers. The following highlights the most salient features of this new investment vehicle which benefits from a lighter supervision and investment restrictions.

For which investors and assets is the RAIF designed?

Similarly to SICARs or SIFs, RAIFs are reserved to well-informed investors. [1]

These conditions are however not applicable to persons involved in the management of a RAIF.

A RAIF may invest into any kind of assets as it is not generally subject to any particular investment and borrowing rules or restrictions. However, it may also elect to invest only in "risk capital investments" as such terms are defined under the SICAR law and therefore benefit from the SICAR tax and regulatory regime.

Which legal form for the RAIF?

A RAIF may be set up under any of the corporate or contractual forms available to a SIF or SICAR. If constituted under a contractual form, the RAIF shall be created as a common fund (Fonds Commun de Placement). If set up under a corporate form it can be created either as an investment company with fixed capital (SICAF) or variable capital (SICAV) and take the corporate form of a public limited liability company (SA), a private limited liability company (SARL), a corporate partnership limited by shares (*SCA*) or a common or special limited partnership (*SCS/SCSp*). Furthermore, a RAIF may be set up as a stand-alone fund or as an umbrella fund with its assets being allocated to one or more sub-funds with the possibility in either case to issue multiple classes of shares or units.

Although the RAIF is not regulated by the CSSF, it must appoint a fully-authorised alternative investment fund manager ('AIFM'). It should be noted that a RAIF cannot be internally managed and must appoint a management entity which is external to the fund. Such AIFM can be established either in Luxembourg, in another EU member or, subject to the implementation of the third-country AIFM management passport, in a third-country authorised AIFM. One of the main interests of a RAIF is that it can be converted into a SIF or a SICAR at any time. Investors may therefor start to operate without any burdensome approval process, but still benefit from the CSSF label post conversion.

[1] A well-informed investor is defined either as an institutional investor, a professional investor or other investors fulfilling strict conditions. Investors of the latter category must (i) state in writing that they adhere to the status of well-informed investor and (ii) either invest a minimum of 125,000 euros in the RAIF or provide an assessment made by certain credit institutions, investment firms or management companies certifying their expertise, experience and knowledge to appraise an investment in the RAIF at issue.

Which supervisory protection for a RAIF?

As per the AIFM directive, the RAIF must appoint a depositary bank or a professional of the financial sector providing depositary services, with a registered office located in Luxembourg or being established in Luxembourg, as custodian of the fund's assets.

In addition, the accounting information given in the annual report of RAIFs must be audited by an independent statutory auditor (*réviseur d'entreprises agréé*).

The RAIF must also prepare an issuing document in accordance with the requirements laid out under the AIFM directive unless a prospectus complying with the prospectus directive is required under the law of 10 July 2005.

What are the investment rules applicable to a RAIF?

A RAIF may in principle invest into any classes of assets and follow any kind of investment policy or strategy. It can however opt for the SICAR's rules of investment and accordingly restrict its investment policy to investment in risk capital only.

In terms of risk spreading requirements, a RAIF will in principle be subject to the restrictions imposed by the SIF regulation. In such case, the RAIF will not be authorized to invest more than 30% of its assets in securities of the same nature issued by the same issuer.

This restriction does not apply to securities issued by, amongst others, OECD member states, EU regional or global supranational institutions or target UCIs which are subject to risk-spreading requirements at least comparable to those applicable to SIFs.

When opting for the SICAR's rules of investment, a RAIF shall follow the regulatory and tax scheme of a SICAR and will not be obliged to comply with the principles of risk diversification.

For RAIF investing exclusively in risk capital the appointed auditor must annually prepare a report to certify that the RAIF complied with the capital risk investment policy during the relevant accounting period. This report must be filed with the Inland Revenue.

What taxes apply to the RAIF?

A RAIF is generally subject to a subscription tax (*taxe d'abonnement)* in Luxembourg which is calculated on the basis of its net asset value at a rate of 0.01%. There are certain exemptions applying to the subscription tax which include assets invested in other Luxembourg based UCIs, SIFs and RAIFs already subject to this subscription tax, as well as institutional cash funds, microfinance funds and pension pooling funds.

If a RAIF opts for the SICAR regime and invests only into risk capital investments, the RAIF will be subject to corporate income tax on its yearly profits at a rate of 29.22%. Such corporate tax rate includes the municipal business tax whose rate varies depending on the municipality of residency, being currently set at 6.75% for Luxembourg city.

Although the RAIF is subject to corporate income tax, substantial tax exemptions apply to income or capital gains arising from transferable securities, and resulting in particular from any sale, contribution or liquidation. In addition, the proceeds arising from the disposal of transferable securities remain tax exempt for a twelve-month period in the hands of a RAIF. Such exemption facilitates their re-investment into other transferable securities. This tax regime allows the RAIF to be de facto exempt of corporate taxation on its investment portfolio. Also, RAIFs incorporated under the form of opaque companies have full access to the Luxembourg double tax treaty network, i.e. currently more than 77 double tax conventions to avoid double taxation in Luxembourg and, worldwide.

Finally, any management services rendered to a RAIF benefit also from the value added tax (VAT) exemption in Luxembourg.

How and where can the RAIF be marketed?

Considering that a RAIF shall be managed by a licensed AIFM, it fully benefits from the AIFMD passport for cross-border marketing to professional investors across the EU. According to the AIFM Directive, the marketing of a RAIF in another Member-State requires only a prior notification to the financial regulator of the AIFM Member-State.

The benefit of the foregoing procedure is however currently limited to AIFMs established in the European Union. The EU commission may resolve in the future to extend these provisions to AIFMs located outside the EU allowing them to fully benefit from the EU passport.

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