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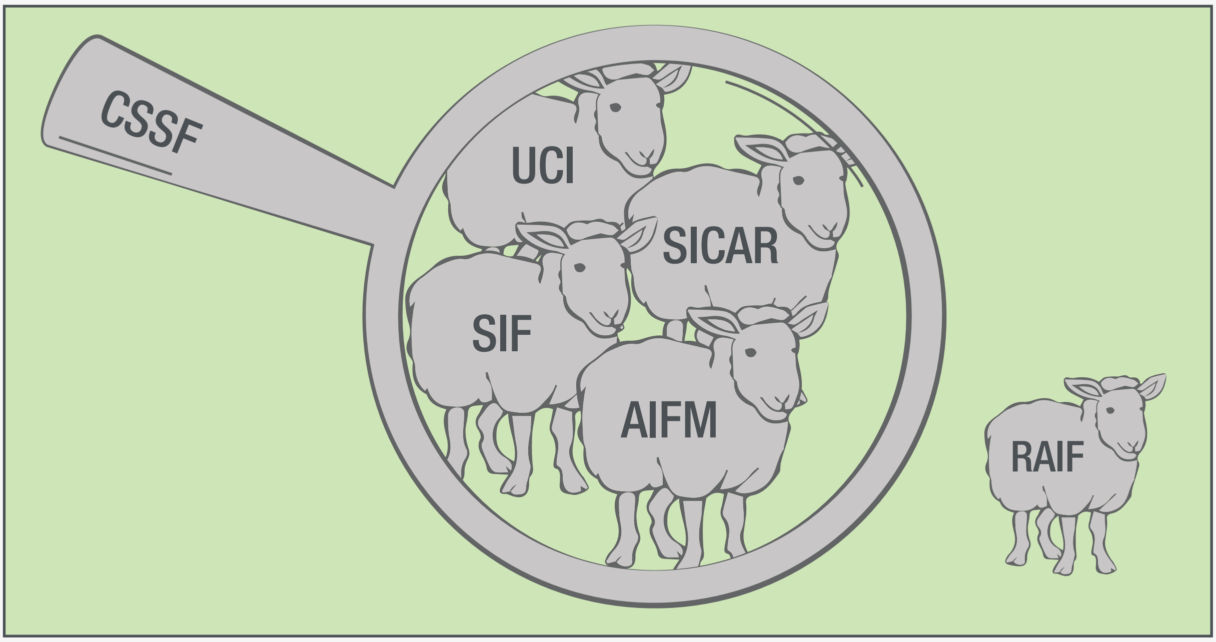
20 July 2016

The RAIF is Coming!

Luxembourg has implemented the proposed new fund type. This new fund type combines the advantages of the specialized investment fund governed by the Law of 13 February 2007 with minimal fund supervision pursuant to the AIFM Directive. The new fund type is called the "reserved alternative investment fund", or "RAIF" or "FIAR" for short. As the Conseil d'Etat has agreed to waive the second parliamentary vote, the law on reserved alternative investment funds (the "RAIF Law") can now be signed and published in the Mémorial. Following its entry into force, RAIFs may be set up in Luxembourg.

With its Law of 13 February 2007 on specialized investment funds, Luxembourg has a tried and tested legal framework for funds for institutional investors. The specialized investment fund (SIF) offers flexible structuring options with regard to legal form and investment policy under a single advantageous Luxembourg tax regime. These funds are subject to direct supervision by the Luxembourg Commission de Surveillance du Secteur Financier (CSSF); these funds are scrutinized and authorized prior to issue and each significant amendment of the fund documents also requires the approval of the CSSF. Moreover, the entity managing the fund is also subject to the CSSF's supervision.

Following the transposition of the AIFM Directive in July 2013, funds that are outside of the scope of the Law of 13 February 2007 or other similar laws may now be established in Luxembourg. Unlike the SIF, these new funds are not subject to any (product) regulation; they do not require an authorization by the CSSF. Only the managers are regulated under the Law of 12 July 2013 on alternative investment fund managers. Such funds, which are also known as "unregulated AIFs", may be set up only in legal forms available under Luxembourg civil and corporate laws. The general provisions of Luxembourg tax law govern the taxation of such funds.



No CSSF Supervision of RAIF

In contrast to the SIF, the RAIF is not subject to the authorization and supervision by the CSSF. The Luxembourg government is of the opinion that the twofold supervision of the fund as well as its manager is not necessarily in the best interest of institutional and professional investors, who are prepared to forego the additional protection for reasons of costs or flexibility.

RAIF Taxed Like SIF or SICAR

According to Art. 45(1), the RAIF has no tax liability other than the taxe d'abonnement (notwithstanding the levy of registration and recording charges and the application of national legislation to VAT).

No withholding tax is imposed on distributions (Art. 45(2)).

In the event the RAIF invests in risk capital, the tax regime pursuant to Art. 48, which is analogous to that of the SICAR, may be chosen.

Structuring Options Like a SIF

Similar to a SIF, the RAIF can be set up in all possible legal forms: FCP, SICAV and all legal forms that are available under Luxembourg law, in particular the legal forms pursuant to the Law of 1915. A RAIF must be managed by an external AIFM that is authorized in accordance with the AIFM Directive.

In addition, like a SIF, a RAIF may set up sub-funds, regardless of the legal form chosen. Like a SIF, the RAIF must also invest in accordance with the principle of risk diversification if the RAIF is not investing, analogous to the SICAR, in risk capital. The RAIF is therefore only of limited use as a vehicle for investments in single assets.

While the RAIF need not obtain authorization and is not subject to supervision, the RAIF must nonetheless observe certain formalities:

- If permitted by law, the RAIF may be established by private agreement (e.g., a RAIF in the form of either a simple or the special limited partnership). The intended manager of the RAIF must have the establishment of the RAIF notarized before a notary within 5 days thereof.
- For the purpose of the publication in the electronic company register (registre électronique des sociétés et associations, or "RESA"), the trade registry office must be notified of the establishment and of the identity of the AIFM within 15 days following the notarization.
- The RAIF must also be entered in a list maintained by the trade registry office within 20 business days following the notarization.

The circle of investors also remains the same: Analogous to the SIF, the RAIF is reserved only for qualified investors as defined in the RAIF Law. The definition set forth in Art. 2 of the RAIF Law is identical to that in Art. 2 of the SIF Law.

What Good is the RAIF?

The RAIF can do no more and no less than the SIF. However, the RAIF can be set up more quickly and more cost-efficiently because the CSSF is not involved. However, this is also true for the unregulated AIF.

The main advantage of the RAIF is therefore the fact that it can be set up without any supervisory pressure of obtaining authorization and ongoing supervision. However, in contrast to the unregulated AIF, it is not limited on the structures under company law. The efficiency of the umbrella structure can be used.

The tax regime of the RAIF is also advantageous. Unregulated AIFs in the form of partnerships are deemed not to be commercially active according to the Luxembourg tax authorities because the AIFs do not pursue a commercial purpose but undertake capital investments. The tax exemption of the RAIF (with the exception of the taxe d'abonnement) is set forth directly in the RAIF Law. Thus, there is no room for exceptions or changes to the tax authorities' view: the statutory tax exemption of the RAIF provides more legal certainty.

The RAIF is interesting for German tax-exempt investors. An investment in an unregulated AIF is out of the question for many of these investors. The reason therefor is that German tax-exempt investors cannot invest in a partnership as their tax-exemption may be lost in certain circumstances.

However, as a corporation, an unregulated AIF is subject to corporate income and trade tax. This is the reason why unregulated AIFs are usually not set up as corporations. Thus, German tax-exempt investors have not had access to the more cost-efficient unregulated fund structures until now. The RAIF rectifies this situation. The German tax-exempt investors can now invest in a RAIF in the form of a corporation without endangering their tax-exempt status. Due to the RAIF's tax-exempt status (with the exception of the taxe d'abonnement), no substantial tax burden arises at fund level, particularly as there are the same opportunities for a tax exemption from the taxe d'abonnement as with the SIF.

With the RAIF, Luxembourg finally catches up to the German Special AIF, which could always be set up without the BaFin's authorization.

be in touch: If you have any questions, please do not hesitate to contact us!

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