

# The Luxembourg Reserved Alternative Investment Funds Law Has Arrived!

A Legal Update from Dechert's Financial Services Practice

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## Background

The entry into force of AIFMD<sup>i</sup> in Europe has resulted in a double layer of regulation, as we now have regulation and supervision at the level of the product (regulated investment funds) and supervision at the level of the manager (AIFM<sup>ii</sup>).

## The New Product

Reflecting the need for greater efficiency, Luxembourg has now adopted the reserved alternative investment funds (“RAIF”) regime. This offers greater flexibility on the product side by avoiding this double layer of regulation. The RAIF product will be regulated only through its manager which will significantly reduce the time to market in Luxembourg.

It offers the advantages of specialized investment funds (*fonds d’investissement spécialisé* or “SIF”) or investment companies in risk capital (*sociétés d’investissement d’investissement en capital à risque* or “SICAR”) in terms of structuring (e.g., the ability to adopt a variable capital structure and to establish sub-funds) but is not required to seek the prior authorization of the Luxembourg supervisory authority, the *Commission de Surveillance du Secteur Financier* (“CSSF”). The Law is consequently largely inspired by the existing Luxembourg SIF Law<sup>iii</sup> and the Luxembourg SICAR Law<sup>iv</sup>.

A comparison with a selection of other European regimes can be seen at the end of this article. The RAIF is available in a variety of legal forms.

## Main Features and Conditions

### *Requirement to have an External AIFM*

The RAIF is an undertaking for collective investment and must be an AIF<sup>v</sup>. Unlike the SIF or the SICAR, the RAIF cannot be structured as a non-AIF<sup>vi</sup>.

The RAIF must always be managed by an external AIFM that is authorized in the EU but not by a small AIFM that seeks exemption under the sub-threshold regime of article 3(2) of the AIFMD<sup>vii</sup>.

Although the RAIF will not be authorized by the CSSF, the AIFM must ensure that the RAIF complies with the terms of the AIFMD. The RAIF is therefore indirectly regulated, as it is managed by an external AIFM that in turn must be authorized and ensure compliance by the fund with AIFMD requirements.

As is the case with any AIF, the AIFM must notify its own supervisory authority before it starts to manage a RAIF.

### *Eligible Investments – Risk Spreading – Concept of Risk Capital*

Subject to the following, a RAIF can invest in any type of assets and follow any type of investment strategy.

The portfolio of the RAIF must be managed in compliance with the principle of risk spreading, unless the RAIF invests exclusively in risk capital.

The Law simply refers to the requirement of risk spreading (as is the case with the SIF Law), but does not provide further guidance. The governing body of the RAIF may look to current Luxembourg guidelines for assistance on

risk spreading applicable to SIFs<sup>viii</sup> and to the current guidelines on the concept of risk capital applicable to SICARs<sup>ix</sup>. The concept of risk capital in the Law is taken from the SICAR Law, and provides that investment in risk capital means the direct or indirect contribution of assets to entities in expectation of their launch, development or listing on a stock exchange.

The governing body of the RAIF has the responsibility to assess the level of risk spreading deemed appropriate for the RAIF's portfolio or, where applicable, whether the investments of the RAIF may qualify as risk capital.

It is unclear whether a RAIF may have lending activities as its main objective without falling within the scope of article 28-4<sup>x</sup> of the Financial Sector Law<sup>xi</sup>, as the Law does not contemplate amending the Financial Sector Law to explicitly exclude the RAIF from its scope (as is the case for the SIF or the SICAR). Please refer to our recent On Point Loan Origination: Update to the CSSF FAQ Concerning the Luxembourg Law on AIFMs. Caution is advised in this area.

## Management and Administration of the RAIF

Any authorized AIFM established in Luxembourg or another EEA Member State can manage a RAIF. A non-EEA AIFM will be permitted to manage a RAIF, if in future, non-EEA AIFMs are authorized under the passport regime to manage and/or market AIFs in the EEA<sup>xii</sup>.

The safe-keeping of the assets of the RAIF must be entrusted to a Luxembourg depositary. This can either be a Luxembourg credit institution or the Luxembourg branch of a credit institution established in another Member State. If the RAIF invests mainly in non-financial instruments, is not leveraged and does not grant any redemption rights to its investors during a period of five years after the first investment has been made, the depositary can also be a depositary of assets other than financial instruments in accordance with article 26-1 of the Financial Sector Law.

The administration of the RAIF must be conducted in Luxembourg. As an undertaking for collective investment, the administration and register-keeping of a RAIF can only be entrusted to an administrative agent<sup>xiii</sup> and registrar<sup>xiv</sup> authorized by the CSSF under the Financial Sector Law.

The RAIF must produce an annual report, which must be made available to investors within six months of the end of the accounting year. The annual report must be reviewed by a Luxembourg statutory auditor (*réviseur d'entreprises agréé*). Separate annual reports may be drawn up on a sub-fund basis, provided consolidated information on all sub-funds is also contained in these annual reports.

## Available Structures

A RAIF can be structured:

- i. as a common fund (*fonds commun de placement* or "**FCP**"), which is a contractual co-ownership scheme without legal personality;
- ii. as an investment company with variable capital (*société d'investissement à capital variable* or "**SICAV**") whose capital is automatically adjusted to its net asset value ("**NAV**"); or
- iii. in a form other than an FCP or SICAV, in which case the capital of the RAIF is generally fixed.

A RAIF in the form of an FCP must always be managed by a Luxembourg management company. This management company can be a Luxembourg AIFM<sup>xv</sup>. If the Luxembourg management company is not authorized as a Luxembourg AIFM<sup>xvi</sup>, it must appoint an AIFM either in Luxembourg or in another EU Member State.

In the case of a SICAV, the RAIF can be formed as a public limited liability company (*société anonyme* or “SA”), private limited liability company (*société à responsabilité limitée* or “Sàrl”), corporate partnership limited by shares (*société en commandite par actions* or “SCA”), common limited partnership (*société en commandite simple* or “SCS”), special limited partnership (*société en commandite spéciale* or “SCSp”), or cooperative company formed as a public limited liability company (*société cooperative sous forme de société anonyme* or “SCoSA”).

A RAIF can be structured as an umbrella fund with one or more sub-funds, where the assets and liabilities of each sub-fund can be segregated from the assets and liabilities of other sub-funds. The Law also permits cross-investment between sub-funds.

## Creation of the RAIF

The creation of a RAIF must be acknowledged by notarial deed within five business days following its creation. Within 15 days thereafter, a confirmation (which must name the AIFM of the RAIF) must be deposited with the electronic gazette RESA (*Recueil Electronique des Sociétés et Associations*).

RAIFs must be registered on a publicly available list maintained by the Luxembourg trade and companies' register.

## Eligible Investors – Marketing of the RAIF

The following may invest in RAIFs:

- i. institutional investors (as defined by the administrative practice of the CSSF);
- ii. Professional Investors<sup>xvii</sup>; and
- iii. any other investor who is neither an institutional investor nor a Professional Investor, and who, subject to the following, invests or commits to invest at least EUR 125,000 (or equivalent in another currency) in the RAIF and confirms in writing that it will maintain the status of a well-informed investor. Where such an investor wishes to invest less than EUR 125,000 (or equivalent in another currency), such investor's experience and knowledge adequately to appraise the investment in the RAIF must be certified pursuant to an assessment by: a credit institution (within the meaning of Regulation (EU) No 575/2013); an investment firm (within the meaning of Directive 2004/39/EC); a management company (within the meaning of Directive 2009/65/EC); or an authorized AIFM.

A RAIF can be marketed to Professional Investors throughout the EEA under the passport regime, in accordance with the notification process established under the AIFMD.

A RAIF must have an offering document that contains all information necessary for investors to assess their participation in the RAIF. To avoid any confusion with a SIF or a SICAR (whose offering documents are approved by the CSSF), the cover page of the RAIF's offering document must clearly indicate that the RAIF is not subject to the supervision of the CSSF. Important information in the offering document must be kept up-to-date before new investors are admitted to the RAIF. Separate offering documents may be established on a sub-fund by sub-fund level, provided that the issuing document of a relevant sub-fund discloses that there are other sub-funds.

Although marketing under the passport regime of the AIFMD is limited to Professional Investors, well-informed investors who do not qualify as Professional Investors are permitted as a matter of Luxembourg law to invest in the RAIF.

## Tax Regimes

As with the SIF, the RAIF is subject to an annual subscription tax (*taxe d'abonnement*) of 0.01%, unless it invests exclusively in risk capital. The RAIF is exempt from the subscription tax on, among other items, investments in other Luxembourg undertakings for collective investment subject to the subscription tax. A RAIF whose investment objective is to invest in money market instruments and bank deposits or microfinance, or whose units or interests are held by institutions for occupational retirement or by similar institutions, is also exempt from the subscription tax.

Where the constitutional documents of a RAIF limit investment exclusively to investment in risk capital, the RAIF's income generated from securities or capital gains is exempted. In such a case, the tax regime of the RAIF is thus comparable to that of the SICAR.

The applicable tax regime must be determined for the RAIF as a whole – the Law does not permit one sub-fund of a RAIF to be subject to a tax regime comparable to SICARs while another sub-fund of the same RAIF is subject to the subscription tax.

## Comparison of the RAIF to Other Luxembourg Regulated and Unregulated AIFs

	Luxembourg ordinary company	Part II UCI <sup>xviii</sup>	SIF	SICAR	RAIF
<b>Qualification under the AIFMD – Supervision – Regulation</b>					
Qualification as an AIF	Generally, an ordinary company is a non-AIF unless its activities fall within the scope of article 1(39) of the AIFM Law <sup>xix</sup>	Always an AIF.	In principle, an AIF but can be structured as a non-AIF.		Always an AIF.
Exemption from the AIFMD where the AIFM is Sub-Threshold	Possible.	Possible.	Possible.	Possible.	Not possible.
Appointment of an external authorized AIFM	Required if the company is an AIF that is not internally managed and whose assets under management (“AUM”) are not Sub-Threshold.	Required if the Part II UCI is not internally managed and its AUM are not Sub-Threshold.	Required if the SIF is an AIF that is not internally managed and whose AUM are not Sub-Threshold.	Required if the SICAR is an AIF that is not internally managed and whose AUM are not Sub-Threshold.	Always required.
Authorization and supervision by the CSSF	No.	Yes.	Yes.	Yes.	No.
Risk spreading requirement	No.	Yes.	Yes.	No.	Yes, unless investments are made in

					risk capital only.
<b>Registered Office – Administration – Depositary – Audit</b>					
Registered office and administration	Registered office must be in Luxembourg; administration is generally in Luxembourg.	Registered office and administration must be in Luxembourg; administration can only be delegated to a service provider authorized by the CSSF under the Financial Sector Law.		Registered office and administration must be in Luxembourg; administration can only be delegated to a service provider authorized to provide administration services.	Registered office and administration must be in Luxembourg; administration can only be delegated to a service provider authorized by the CSSF under the Financial Sector Law.
Appointment of a depositary	<p>Luxembourg depositary under article 19 of the AIFM Law<sup>xx</sup> is required if the company is an AIF managed by an external AIFM whose AUM are not Sub-Threshold or if the company is an internally managed AIF with AUM above this threshold.</p> <p>Otherwise, there is no obligation to appoint a depositary.</p>	<p>Luxembourg depositary under article 19 of the AIFM Law is required if AUM of the external AIFM are not Sub-Threshold or if the AUM of the internally managed Part II UCI are above this threshold.</p> <p>Otherwise, a Luxembourg depositary fulfilling the requirements and obligations under part II of the UCI Law must be appointed.</p>	<p>Luxembourg depositary under article 19 of the AIFM Law is required if the SIF is an AIF and AUM of the external AIFM are not Sub-Threshold or if the AUM of the internally managed SIF are above this threshold.</p> <p>Otherwise, a Luxembourg depositary fulfilling the requirements and obligations under part I of the SIF Law must be appointed.</p>	<p>Luxembourg depositary under article 19 of the AIFM Law is required if the SICAR is an AIF and AUM of the external AIFM are not Sub-Threshold or if the AUM of the internally managed SICAR are above this threshold.</p> <p>Otherwise, a Luxembourg depositary fulfilling the requirements and obligations under part I of the SICAR Law must be appointed.</p>	Luxembourg depositary under article 19 of the AIFM Law is always required.
Appointment of an auditor	Required, unless the company is not an AIF managed by an AIFM with AUM which are not Sub-Threshold and two of the following three criteria are fulfilled: (i) balance sheet below EUR 4.4 million; (ii) net turnover below EUR 8.8 million; and (iii) average number of	Required.	Required.	Required.	Required.

	employees below 50.				
<b>Structuring Options – Tax</b>					
Possibility to adopt variable capital structure	Joint stock companies cannot be structured with variable capital.	Yes.	Yes.	Yes.	Yes.
Possibility to be structured as a common fund	No.	Yes.	Yes.	No.	Yes.
Possibility to create sub-funds	No.	Yes.	Yes.	Yes.	Yes.
Subject to ordinary tax regime on profit and wealth	Yes, unless the company is an AIF adopting the form of an SCS or SCSp (which are tax transparent and considered as not carrying out a business activity under circular LIR 14/4 of the Luxembourg tax authorities), provided the general partner formed as a joint stock company does not hold more than 5% of the interests of the AIF.	No.	No.	In principle, a taxable person whose income and capital gains from securities qualifying as risk capital are exempted.  Exempted from wealth tax.	No.
Subject to subscription tax	No.	Annual subscription tax of 0.05% on NAV (with the possibility to reduce the rate to 0.01% or to be exempted).	Annual subscription tax of 0.01% on NAV (with the possibility to be exempted).	No.	Annual subscription tax of 0.01% on NAV (with the possibility to be exempted), unless the AIF is a joint stock company investing exclusively in risk capital (in which case, income and capital gains generated from securities qualifying as risk capital are exempted).

## Conversion of an Existing Luxembourg Entity into a RAIF

A SIF or SICAR can be converted into a RAIF in accordance with applicable laws and the provisions of its constitutional documents. The conversion is subject to the prior approval of the CSSF with respect to the amendments of the entity's constitutional documents.

A non-regulated Luxembourg AIF can also be converted into a RAIF. In addition to applicable laws and the provisions governing the constitutional documents of the relevant AIF, the Law requires that the conversion be approved by a majority of two-thirds of the votes cast. The Law does not require a minimum quorum for the conversion vote.

## RAIF – Comparison with Similar EU Regimes

	Luxembourg RAIF	Irish QIAIF	French FPI	German Spezial AIF	Maltese Notified AIF
<b>AIF approval required?</b>	No	Yes (24 hours)	No, AMF notification only	No, BAFIN notification only	No, MFSA notification only
<b>Authorized EU AIFM</b>	Yes	AIFM, sub-threshold AIFM (to upgrade within 2 yrs) or self-managed	Yes	AIFM or sub-threshold AIFM	Yes
<b>AIF type/form</b>	SA, Sàrl, SCA, SCS, SCSp, ScoSA, FCP	ICAV, PLC, Unit Trust, CCF, ILP	SA, SAS, SCS, FCP	Contractual or Corporate (investment restrictions apply)	SICAV, INVCO, Cell Co, RICC, LP, Trust, Contractual Fund
<b>Depository</b>	Local	Local	Local	Local	EU; from 22 July 2017 local
<b>AIF strategy</b>	All	All	All	Restrictions: structure/form driven	Various restrictions
<b>Local board</b>	No	2 Irish residents required	No	No	1 Maltese resident required



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<sup>i</sup> Directive 2011/61/EU on Alternative Investment Fund Managers.

<sup>ii</sup> An Alternative Investment Fund Manager.

<sup>iii</sup> Law of 13 February 2007 on SIFs, as amended.

<sup>iv</sup> Law of 15 June 2004 on SICARs, as amended.

<sup>v</sup> AIFs are collective investment undertakings, including any sub-funds thereof, that: (a) raise capital from a number of investors, with a view to investment in accordance with a defined investment policy for the benefit of those investors; and (b) do not require authorization pursuant to article 5 of Directive 2009/65/EC on undertakings for collective investment funds in transferable securities.

<sup>vi</sup> SIFs or SICARs that do not raise any capital from investors do not fall within the scope of the definition of an AIF under article 1(39) of the AIFM Law. Examples of such SIFs or SICARs are entities whose access is limited to a predefined group of investors or which have only one investor within the meaning of the ESMA/2013/600, Final Report, Guidelines on key concepts of the AIFMD.

<sup>vii</sup> The sub-threshold exemption applies to AIFMs managing assets below EUR 100 million or AIFMs managing assets below EUR 500 million provided no redemption rights are granted to investors during a minimum period of five years after the first investment was made and no leverage is undertaken. AIFMs qualifying for this exemption must only register with their home supervisory authority for the purpose of reporting.

<sup>viii</sup> CSSF circular 07/309 on risk spreading.

<sup>ix</sup> CSSF circular 06/241 on the concept of risk spreading.

<sup>x</sup> Professionals performing lending operations under article 28-4 of the Financial Sector Law are professionals engaging for their own account in the business of granting loans to the public. These professionals must be authorized by the Minister of Finance.

<sup>xi</sup> Law of 5 April 1993 on the financial sector, as amended.

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<sup>xii</sup> Article 66(3) of the AIFMD.

<sup>xiii</sup> Article 29-2 of the Financial Sector Law.

<sup>xiv</sup> Article 25 of the Financial Sector Law.

<sup>xv</sup> Such a management company is authorized as an AIFM under article 125(2) of the law of 17 December 2010 on undertakings for collective investment, as amended (“**UCI Law**”).

<sup>xvi</sup> A management company that is not an AIFM is subject to article 125(1) of the UCI Law.

<sup>xvii</sup> The term “Professional Investor” is defined under Directive 2015/65/EU on markets for financial instruments (as amended).

<sup>xviii</sup> A Part II UCI is an undertaking for collective investment under part II of the UCI Law. Units of a Part II UCI can be distributed to retail investors in Luxembourg and abroad, provided local rules on marketing permit the distribution to retail investors.

<sup>xix</sup> Law of 12 July 2013 on AIFMs, as amended.

<sup>xx</sup> The depositary under article 19 of the AIFM Law must fulfill the requirements and obligations set forth under the AIFMD.

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