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INTRODUCTION

On 23 July 2016, Luxembourg adopted legislation creating a new type of fund vehicle, the reserved alternative investment fund (*fonds d'investissement alternatif réservé*, RAIF/FIAR for short), designed for well-informed investors and offering much greater speed to market than the existing specialised investment fund.

KEY FEATURES

- **No direct regulation of fund by CSSF**
- **Must have AIFMD-authorised manager**
- **Minimum investment of €125,000 for non-professional investors and non-institutional investors**
- **May take any legal form and follow any strategy**
- **Benefits from pan-European marketing passport**

The reserved alternative investment fund, RAIF (or FIAR in French) for short, is distinguished by the fact that unlike SIFs or risk capital investment companies (SICARs), it is not subject to direct regulation by the Luxembourg regulator, the Financial Sector Supervisory Authority (CSSF). However, the RAIF must have an authorised and regulated manager.

The RAIF is designed to benefit from the

structuring flexibility of non-UCITS collective investment vehicles, which include SIFs and SICARs. However, it allows sophisticated, institutional and professional investors that do not require dual supervision of managers and funds to dispense with a layer of regulation that adds costs, delays and restrictions on the management and asset allocation of the funds. There is no minimum initial investment in a RAIF for institutional and professional investors, but a minimum of €125,000 for well-informed but which are neither professional nor institutional investors.

The RAIF is based on the alternative investment fund regime established by the European Union's Alternative Investment Fund Managers Directive and its application in Luxembourg through the national legislation of July 12, 2013 on alternative investment fund managers. However, the absence of a requirement for authorisation or ongoing supervision by the CSSF means that future changes to the fund's constitutional, information or other documents will not require regulatory approval either.

The manager of a RAIF must be authorised under the AIFMD as an alternative investment fund manager and domiciled in a European Economic Area member state in order to benefit from a pan-European marketing passport. According to the legislation, the manager of the RAIF may follow any kind of investment strategy, with no restrictions regarding eligible assets, and funds whose investment policy is

restricted to risk capital investments will not be required to adhere to risk-spreading rules.

A RAIF can take a contractual legal form (*fonds commun de placement* or FCP) or if an open-ended or closed-ended corporate fund (SICAV or SICAF) any corporate form including a public limited company (*société anonyme*), partnership limited by shares (*société en commandite par actions*), or common or special limited partnership (*société en commandite simple* (SCS) or *société en commandite spéciale* (SCSp)). It can be created as an umbrella structure with multiple sub-funds, as well as multiple share classes, making segregated compartment structures available to Luxembourg non-regulated funds for the first time.

Most RAIFs will enjoy the same tax treatment as SIFs, paying an annual subscription tax amounting to 0.01% of its net assets but enjoying complete exemption from corporate income tax or withholding tax on the distribution of returns, whether in the form of dividends or interest income. RAIFs limited to risk capital investments will be subject to the tax regime applicable to SICARs.

WHAT IS THE BACKGROUND TO THE ESTABLISHMENT OF THE RAIF REGIME?

Luxembourg's implementation of EU regulatory requirements regarding alternative investment funds has involved dual system of approval and ongoing supervision of both managers of AIFs and funds, whether Part II funds, SIFs or SICARs, by the regulator. Prior to the RAIF law, alternative fund managers seeking to manage and market funds from Luxembourg have been obliged to obtain separate authorisation from the CSSF in its capacity as an AIFM and for any funds it managed, as well as being subject to ongoing oversight of both manager and fund. This arises from the grand duchy's system of product-based regulation, stemming from the original UCITS Directive and that now encompasses a broad range of investment fund regimes under the supervision of the CSSF. These include not only UCITS but non-retail funds including Part II funds, so called after Part II of successive iterations of Luxembourg's fund legislation, the most recent dating from 2016, specialised investment funds (SIFs) introduced in 2007, and risk capital investment companies (SICARs) established in 2004.

However, the adoption of the AIFMD into

Luxembourg law in July 2013 introduced a different type of regulation for alternative investment based on regulation and ongoing supervision of alternative investment fund managers rather than the fund vehicles themselves. The AIFMD also introduced a change with the application of cross-border distribution through a passport to all funds managed by an authorised AIFM, irrespective of whether the funds themselves were subject to regulation or not.

In Luxembourg the regulation of managers introduced by the AIFMD represented an additional layer of supervision on top of the existing product oversight regime applicable to established vehicles for institutional and sophisticated investors. In certain circumstances, the double application of supervision could seem excessive and over-protective, in particular for funds targeting sophisticated investors, entailing extra costs and notably delays before a fund could be approved and marketed. Hence the concept of the RAIF as a vehicle for investors who do not need the additional layer of protection.

WHAT CHANGES DOES THE RAIF LEGISLATION BRING TO FUND STRUCTURING OPTIONS?

To maintain the competitiveness of Luxembourg as a fund domicile and servicing and distribution centre, the legislation of July 12, 2013 that transposed the AIFMD into national law also incorporated measures to modernise the country's limited partnership regime, changing the rules applicable to common limited partnerships and creating a new type of vehicle without legal personality, the special limited partnership.

Both types of limited partnership can be used for structuring regulated fund vehicles, as SIFs and SICARs, but also unregulated investment vehicles. Although common or special limited partnerships are not subject to direct product regulation, they are subject to indirect supervision if they are alternative investment funds that must have an authorised AIFM.

While unregulated limited partnerships are popular with fund promoters and investors, particularly for closed-ended vehicles

investing in illiquid assets such as real estate and private equity, they may not be suitable for all circumstances, particularly for investment in securities and other liquid assets.

While SCSs and SCSPs are tax-transparent, in some circumstances a tax-opaque vehicle may be preferred because of its ability to benefit from double taxation avoidance treaties. Another restriction is that unregulated limited partnerships cannot adopt umbrella structures and thus may not create segregated portfolios within legally separate sub-funds.

The introduction of the RAIF was therefore intended to ensure the broadest possible range of options for promoters, managers and investors, under a regime broadly similar to that applicable to SIFs except that RAIFs are not subject to supervision by the CSSF, offering Luxembourg alternative investment funds the option to escape the double layer of supervisory requirements. AIFs that are subject to management supervision through their authorised AIFM now have the choice between establishment as regulated products (Part II funds, SIFs or SICARs) or as unregulated products (unregulated SCSs and SCSPs or RAIFs).

HOW IS A RAIF CREATED?

Under the legislation, a RAIF must be established or incorporated by notarial deed. In the case of a RAIF created as a contractual fund (FCP) or as a common or special limited partnership (SCS or SCSP), the deed is drawn up subsequently to record that the RAIF in question has been established. Within 10 working days of establishment or incorporation, a notice of confirmation, including the identity of the RAIF's designated alternative investment fund manager, must be deposited with the Luxembourg trade and companies' register, published in the official gazette, the Mémorial, and recorded on a publicly available list maintained by the register. Details of the list and the information to be published in the Mémorial will be set out in a Grand-Ducal regulation.

The constitutional documents of the RAIF depend on its corporate or contractual structure. They consist of articles of incorporation if the RAIF is incorporated as a public limited company (SA), a partnership limited by shares (SCA) or a private limited liability company (Sàrl); management regulations if the RAIF is established as an FCP; or a limited partnership agreement if it is established as an SCS or SCSP. Articles of incorporation must be established by notarial deed, but management

regulations and LPAs may be established under private deed.

Promoters of existing Luxembourg entities may wish to convert them into RAIFs. In the case of regulated entities, this may be to facilitate the speedy launching of new sub-funds, while unregulated limited partnerships may be converted in order to enjoy the benefits of an umbrella structure.

An existing Specialised Investment Fund (SIF), Part II fund or Risk Capital Investment Company (SICAR) may be converted into a RAIF in accordance with applicable legislation and provisions governing its constitutional documents, subject to prior approval from the CSSF of amendments to those documents, and amendment of the fund's prospectus or issue document, unless the fund is a SIF or SICAR that is not open to new investors. The conversion of an existing unregulated limited partnership requires an amendment of the LPA, subject to the applicable requirements of that agreement.

The conversion of a non-Luxembourg entity into a RAIF is also possible as long as redomiciliation of the entity is authorised under the law of its country of origin, otherwise the transfer may be carried out through a contribution in kind, merger or another mechanism. The entity in question must be brought into compliance with the AIFMD through the appointment of a fully authorised

external AIFM by the time of the conversion. The legislation also makes it possible for a fund established as a RAIF to be converted subsequently into a regulated vehicle as a Part II fund, SIF or SICAR.

WHO MAY MANAGE A RAIF?

The RAIF is an undertaking for collective investment that automatically qualifies as an alternative investment fund, and cannot be structured as a non-AIF. This is in contrast to SIFs or SICARs that are not covered by the definition of an AIF in Luxembourg's legislation of July 12, 2013 on alternative investment fund managers, if they do not raise any capital from investors, have only one investor, or if access is restricted to a predefined group of investors.

With very limited exceptions, RAIFs must appoint as manager an external AIFM that is fully authorised under the AIFMD, in Luxembourg or another EU member state, and does not seek exemption from full regulation under the directive's sub-threshold registration regime, applicable to managers of fund assets of less than €100m or of €500m in the case of non-leveraged funds with a lock-up period of at least five years. This means that internally-managed AIFs and funds that benefit from an exemption from the AIFMD requirement, for instance under de minimis exemption, are not eligible to become RAIFs.

In line with AIFMD article 2.3(c) and (d), the legislation does provide for exemption from the obligation for RAIFs to appoint an external AIFM for funds that act in the public interest and are managed by a supranational or international institution such as the European Central Bank, EIB or EIF, European development finance institutions, bilateral development banks, World Bank and IMF, and funds which are managed by a national central bank.

While the RAIF is not itself directly authorised by the CSSF, it is indirectly regulated under the directive, since the fund's AIFM must ensure that as an AIF, it complies with the requirements of the AIFMD. An AIFM must notify its home regulator (whether in Luxembourg or another EU country) as soon as it is appointed as manager of a RAIF. A non-EU AIFM may be permitted to manage a RAIF in the future if it is fully authorised in a home jurisdiction to which the third-country passporting regime has been extended.

If the external AIFM ceases to manage the RAIF, whether at its own initiative or that of the fund, another authorised external AIFM must be appointed as a replacement within a maximum period of two months. If no replacement external AIFM is appointed within this period, the directors, managers or management company of the RAIF must introduce a request within one month of the deadline's expiry to the appropriate District Court (Tribunal d'arrondissement) in Luxembourg to place the

RAIF into liquidation.

WHAT DOCUMENTATIONS AND REPORTING REQUIREMENTS MUST A RAIF COMPLY WITH?

A RAIF must draw up an issue document, a prospectus or placement memorandum, containing all information necessary for investors to be able to make an informed judgement about the proposed investment and its inherent risks. A RAIF's issue document should typically include all AIFMD-mandated disclosure requirements, which are designed to provide the information required for an informed judgement, but the legislative documents accompanying the legislation expressly allow these disclosure requirements to be met by other means. The issue document must be up to date in all material aspects if additional securities are being issued to new investors.

Issue documents must state prominently on their cover page that the RAIF is not subject to supervision by any Luxembourg regulatory authority. Otherwise the law offers broad flexibility in terms of the content of RAIFs'

constitutional and issue documents. To avoid having to amend constitutional documents every time a RAIF issues new sub funds, these are likely to be drafted in a generic manner, with the particular features of each sub-fund described in a specific issue document. In this case, each sub-fund's issue document must state that the RAIF is structured as an umbrella fund, as is the case for Luxembourg-domiciled SIFs and SICARs.

RAIFs must issue annual reports, no later than six months following the end of the accounting year and reviewed by a certified Luxembourg auditor, containing at least the minimum information required by Appendix 1 of the RAIF legislation and Article 22 of the AIFMD. Umbrella RAIFs may produce separate annual accounts for each sub-fund, provided that in addition to specific financial information for each compartment, it incorporates consolidated financial information regarding the structure's other sub-funds, again a practice accepted by the CSSF for umbrella SIFs and SICARs.

WHAT REGULATORY OVERSIGHT IS A RAIF SUBJECT TO?

RAIFs are not subject to any kind of supervision or oversight by the CSSF or any other Luxembourg regulatory authority, and can be launched without obtaining regulatory approval beforehand or afterwards, but they are indirectly subject to AIFMD requirements applicable to authorised AIFMs. Notably, the appointed AIFM must enjoy authorisation for the investment strategy to be followed by the fund – in Luxembourg some AIFMD authorisations are valid for certain strategies only.

If established outside the grand duchy, the AIFM must have obtained authorisation to provide management services in Luxembourg under the terms of article 33 of the AIFMD regarding passporting of management services, in which case the RAIF's constitutional and issue documents must be filed with the CSSF. Where a RAIF has a Luxembourg-based AIFM, there is no systematic review of the fund documents by the regulator. However the CSSF may refuse management services passporting for an AIF if the documents submitted by the foreign AIFM regarding its authorisation as an AIF do not cover management of the type of AIF in question.

Once a RAIF has been established, no regulatory approval is required for subsequent actions in the course of the fund's existence, such as amendments to documentation, the launch of new sub-funds, changes of service provider or liquidation.

WHAT INVESTMENTS MAY A RAIF UNDERTAKE?

A RAIF can invest in any type of asset and follow any type of investment strategy, subject to the requirement that its portfolio must be managed according to the principle of risk spreading, except where the RAIF makes exclusively risk capital investments and opts for the associated special tax regime. The concept of risk capital in the legislation comes from the SICAR law, under which investment in risk capital means the direct or indirect contribution of assets to entities in the expectation of their launch, development or listing on a stock exchange.

The governing body of the RAIF is responsible for determining the level of risk spreading appropriate for its portfolio, or alternatively assessing whether the investments qualify as risk capital. There are currently no guidelines on the minimum level of diversification required for a RAIF portfolio, but government commentaries

on the bill preceding its enactment have indicated that the CSSF guidelines on risk spreading for SIFs in circular 07/309 should be followed. As a general rule, this would mean that a RAIF or an individual sub-fund should not invest more than 30% of its gross assets or aggregate investor commitments in any single asset, subject to certain exemptions.

The 30% restriction does not apply to securities issued or guaranteed by an OECD member state or its local authorities, or EU or other regional or global bodies, nor to collective investment schemes that are subject to risk diversification requirements equivalent to those applicable to RAIFs.

RAIFs or their sub-funds investing in infrastructure assets will be deemed sufficiently diversified if they have at least two investments and no single investment represents more than 75% of their gross assets or commitments. Funds also benefit from an initial ramp-up period to move into compliance with the minimum risk diversification requirements.

WHAT LEGAL FORMS MAY A RAIF ADOPT?

The RAIF can be structured as a common contractual fund (fonds commun de placement or FCP), which is without legal personality, an open-ended investment company (société d'investissement à capital variable or SICAV), or a closed-ended investment company (société d'investissement à capital fixe or SICAF).

A RAIF that takes the form of an FCP must have a Luxembourg management company, which may be its AIFM if it is authorised as such by the CSSF, otherwise the FCP must appoint a separate AIFM that is authorised in the grand duchy or another EU member state.

A RAIF in the form of a SICAV or SICAF can be established as a public limited 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 or special limited partnership (SCS or SCSp), or co-operative public limited company (société coopérative sous forme de société anonyme or SCoSA).

CAN RAIFS HAVE MULTIPLE COMPARTMENTS AND SHARE CLASSES?

A RAIF can be structured as an umbrella fund with one or more compartments or sub-funds, with the assets and liabilities of each sub-fund legally ring-fenced from those of other sub-funds, unless otherwise provided for in the constitutional documents of the RAIF. Cross-investment between sub-funds is permitted, subject to the same conditions applicable to SIFs. The liquidation of a sub-fund does not entail the liquidation of other sub-funds or of the RAIF as a whole, as long as there are other active sub-funds.

If stipulated in the RAIF's issue document, each sub-fund can have its own distinct investment policy, as well as rules on the issue and redemption of securities or ownership interests can be tailored to each specific sub-fund. A single umbrella structure may combine sub-funds that are open-ended and closed-ended; fully funded sub-funds and compartments with a drawdown capital structure; and in the case of limited partnerships, sub-funds issuing partnership interests in the form of securities as well as those using partnership accounts. Each sub-fund may have its own investment

manager or investment adviser, investment committee or advisory board, but the RAIF must have a single managing body – for instance, the board of directors for a fund established as an SA, the general partner for an limited partnership, or the management company for an FCP – as well as a single depositary, administrator, auditor and AIFM.

In addition, a RAIF or sub-fund may have multiple classes of securities subject to different fee structures, distribution or carried interest structure, or currency hedging policies, and that may be denominated in different currencies. Sub-funds may be reserved for one or more investors or categories of investor.

WHAT CORPORATE RULES APPLY TO A RAIF?

SICAV-RAIFs established as an SA, SCA or Sàrl benefit from corporate rules that are more flexible than those applicable to trading companies or other kinds of corporate structure established under Luxembourg's legislation of August 10, 1915 on commercial companies. There are no constraints on rules regarding issue and redemption of shares, including rules applicable to the issue price, which should be set out in the articles of association, except that at least 5% of each share must be paid up

on issue.

Corporate RAIFs are subject to a minimum capital requirement of €1.25m, which must be reached within 12 months of their incorporation, but which can include subscribed capital and share premium; they do not have to create a statutory reserve. The payment of interim or annual dividends is subject only to minimum capital requirements.

RAIFs that are FCPs are not subject to legal constraints on the issue and redemption of units, including rules applicable to the issue price, which should be set out in the management regulations. As with corporate vehicles, the payment of dividends is subject only to minimum capital requirements.

SICAV-RAIFs that are limited partnerships benefit from additional structuring flexibility. They may issue partnership interests in the form of securities or partners' accounts (comptes d'associés), and they have the freedom to stipulate in the limited partnership agreement voting rights, the entitlements of partners to profits and losses and to distributions, and to set out rules governing the transfers of partnership interests.

WHAT ARE A RAIF'S SERVICING REQUIREMENTS?

A RAIF must entrust the safekeeping of its assets to a Luxembourg depositary, either a Luxembourg-established bank or the Luxembourg branch of a bank established elsewhere in the EU. If the RAIF invests mainly in non-financial instruments and has a lock-up period of at least five years following initial investment, a licensed professional depositary that is not a bank may also be appointed.

As a collective investment scheme, the administration of the RAIF must be conducted in Luxembourg. Administration and transfer agency must be carried out by an administrator and registrar authorised by the CSSF. RAIFs must appoint an authorised AIFM, a depositary subject to the AIFMD liability regime, and an external auditor, which must have appropriate qualifications and experience and be approved by the CSSF as auditor of a Luxembourg UCITS, Part II fund, SIF or SICAR.

While administration can in theory be carried out by the RAIF itself or its AIFM, if established in Luxembourg, as a rule a specialised Luxembourg fund administrator will be appointed, either by the AIFM, subject to AIFMD delegation rules, or directly by the RAIF's management body.

The AIFM may appoint one or more investment managers or advisers to manage the assets of the RAIF or of its sub-funds, subject to article 20 of the AIFMD and article 78 of the European Commission's Level 2 regulation of December 2012. A non-regulated entity may only be appointed as an investment manager or as sub-investment manager of a RAIF subject to prior approval of the AIFM's regulator.

WHO MAY INVEST IN A RAIF?

A RAIF may accept investments only from qualified or 'well-informed' investors, as defined by the SIF and SICAR legislation. These consist of institutional investors (as defined by the CSSF according to established practice), professional investors and other investors that do not qualify as either an institutional nor professional investor, but that invests or commits at least €125,000 in the RAIF and confirm in writing their status as a well-informed investor.

Investments of less than €125,000 may be accepted by such investors subject to certification by a bank, investment firm or management company as to their expertise, experience and capacity to understand and assess an investment in the RAIF. In addition, directors and officers and all other persons involved in its management are authorised to

invest in a RAIF even if they do not fit any of the other categories.

By complying with the AIFMD notification process for passporting, a RAIF may be marketed to professional investors in other EU jurisdictions since it is an EU-domiciled fund with an authorised AIFM. A RAIF's offering document must contain all information necessary for investors to assess their participation in the RAIF. As mentioned above, the cover page of the RAIF's offering document must clearly indicate that it is not subject to the supervision of the CSSF, unlike SIFs or SICARs. The offering document must be updated before new investors are accepted. Sub-funds may have their own offering documents, so long as they make clear that the RAIF contains other sub-funds.

WHAT TAXATION IS A RAIF SUBJECT TO?

In principle, RAIFs, including limited partnerships, are subject to the same tax regime as SIFs. They are exempt from corporate income or other taxes in Luxembourg, apart from an annual subscription tax (*taxe d'abonnement*) of 0.01% of net assets - unless they invest exclusively in risk capital. No subscription tax is due on investments in other Luxembourg funds that are themselves liable to subscription tax, as well as RAIFs whose purpose is to

invest in money market instruments and bank deposits or microfinance, or whose investors are pension funds or similar institutions.

Corporate RAIFs – FCPs are not eligible – whose constitutional documents restrict them to risk capital investments may opt for the same tax regime as SICARs. The concept of risk capital is not defined in the bill, but appended commentary says reference should be made to the guidelines in CSSF Circular 06/241 of April 5, 2006 on the concept of risk capital as applicable to SICARs.

Risk capital RAIFs are fully taxable, which enables them to enjoy double taxation treaty benefits. However, all income or capital gains generated from securities are exempt from the fund's taxable base, and there is no subscription tax liability. Income from risk capital investments is exempted, and RAIFs opting for the special tax regime will also be exempt from net worth tax, apart for the minimum net worth tax applicable to all fully taxable Luxembourg companies, amounting to €4,815 per year for RAIFs largely holding fixed financial assets, securities and cash). RAIFs established as limited partnerships and opting for the special tax regime will be fully tax-transparent and therefore not subject to any Luxembourg direct taxes.

To benefit from the regime, the RAIF's constitutional documents must demonstrate that its exclusive purpose consists of

investment risk capital investment. The special tax regime must apply to the RAIF as a whole; a RAIF sub-fund may not opt to be subject to the subscription tax when another is subject to the SICAR regime. The auditors of a RAIF opting for the special tax regime must certify to the Luxembourg direct tax administration that the fund has indeed invested in risk capital at the end of each financial year.

HOW CAN WE ASSIST YOU?

Our investment management team:

- supports you in finding the suitable investment vehicle to meet your requirements and your goals from a marketing, regulatory, legal and tax perspective.
- introduces you to the suitable service providers to meet your requirements (i.e. custodian bank, AIFM, administrative agent, registrar and transfer agent and auditor).
- provides assistance with the establishment of the fund (i.e. drafting of the PPM, assistance with the incorporation of fund and its general partner).
- provides assistance with respect to the migration of offshore funds into RAIFs.
- provides corporate support services throughout the lifetime of your fund (i.e. amendment of fund documents, restructuring, launching or closing sub-funds, etc.).
- provides assistance with changing of service providers including custodian bank, fund administrator, auditor or registrar and transfer agent).
- provides assistance with the listing of the units of the fund on the Luxembourg Stock Exchange's regulated or EURO MTF markets.
- provides support in the registration of the

fund in other jurisdictions (in co-operation with local service providers).

- provides advice on AIFMD related issues;
- provides advice to fund promoters on local private placement rules for marketing their funds in Luxembourg.
- keeps you up to date on new legal and regulatory developments.



For further information please contact:



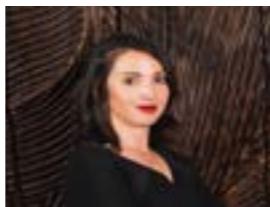
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CHEVALIER & SCIALES
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Our aim is to offer a one-stop shop service to our clients and to provide tailored solutions to meet their needs, responsively and cost-effectively. Our practice areas are structured to ensure a comprehensive understanding of our clients business and markets. We work with recognised tax experts and other service providers to provide you with the assistances and services you require through every aspect of your transactions and business.

Chevalier & Sciales is recommended and listed in the area of investment funds, litigation and dispute resolution and banking and finance.

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