

NEW SICAR LEGISLATION NOW IN FORCE

GO AHEAD FOR MULTIPLE COMPARTMENTS

Luxembourg Law voted on October 15, 2008 (adopting bill 5842) amends the law on SICAR (*société d'investissement en capital à risque*, i.e. investment company in risk capital) dated June 15, 2004 and introduces a number of improvements to the SICAR regime capitalising on the experience gained since its launch. To date, over 200 registered SICARs have been launched in Luxembourg so far.

To follow are the key changes.

- The most significant concerns the new possibility of creating multiple 'compartments' within a SICAR. In practice, this amendment should allow:
 - The creation of umbrella funds with multiple investment compartments, with specific investment policies and possibly securities of a different par value or no nominal value.
 - The segregation of assets and liabilities of each compartment.
 - The combination of different investment policies within the same legal entity.
 - The treatment of a compartment as a separate entity, thus presenting the possibility to liquidate a compartment separately without liquidating the others - bearing in mind that only the liquidation of the final compartment will trigger the SICAR's liquidation.
 - The limitation of creditors' and investors' rights relating to a specific compartment, its creation, functioning and liquidation, to that specific compartment, unless otherwise provided in the constitutive documents of the SICAR (i.e. bankruptcy remoteness).
 - The possibility to link the assets of a specific compartment exclusively to the rights of investors pertaining to such compartment and to creditors whose claim arose in connection with the creation, operation or liquidation of such compartment, unless otherwise provided in the constitutive documents of the SICAR.

Importantly, the constitutive documents of the SICAR must expressly foresee the creation of different compartments and set forth the operational rules for each of them. The SICAR's prospectus must describe the investment policy specific to each individual compartment.

Other notable amendments can be summarised as follows.

- Exemption from the obligation to comply with the conditions of 'well-informed investor' for persons involved in the management of the SICAR.

- Additional flexibility in the achievement of the minimum required subscribed capital of the SICAR. Share premium is now included in the computation of the minimum EUR 1,000,000 required capital for a SICAR.
- Increased attractiveness of the SICAR incorporated under the company form of a limited partnership (*société en commandite simple* (SCS)), with:
 - The possibility to have a variable capital structure in the SCS.
 - An exemption from the legal obligation to lodge with the Luxembourg Trade and Companies Register, and to publish the precise designation of the limited members (*associés commanditaires*) of the SCS and their commitments towards the SCS.
 - An exemption from the legal obligation for a limited member, at the request of a third party, to repay any received interest and dividend not paid out of real profits of the SCS (...).
- Clarification of the terminology relating to the asset valuation method: a valuation of the assets of a SICAR may now be made at 'fair value' (*juste valeur*) instead of the 'value of realisation estimated in good faith'.
- Removal of the monitoring duties of the Custodian over the SICAR and bringing its duties in line with those performed for the SIF (specialised investment fund).
- Removal of the obligation to inform investors in the SICAR at least once every six months of the net asset value of their shares/units in the SICAR.
- Removal of the obligation to publish the annual report: the only requirement now is to make it available to investors within six months following the end of the period to which it relates, together with a certification from the auditor (*réviseur d'entreprise*).

Continued tax neutrality

The SICAR will continue to operate as a fully tax neutral vehicle, regardless of the number of compartment it includes.

It would be expected that the move of assets from one compartment to another would be considered as a deemed transfer for income tax purposes. Likewise, an investor which exits one compartment and enters another within the SICAR would be deemed for income tax purposes to have alienated its rights in that compartment and acquired new rights in the new one. Such movement of assets or investors from one compartment to another would, however, be tax neutral due to the specific exemption of the SICAR as a whole from corporate income tax - with respect to its risk investment income and gains and to the absence of withholding tax on outbound distributions.

In addition, as a matter of principle, capital gains realised or deemed to be realised by non-resident investors on shares held in a SICAR (formed as a capital company) or in a specific compartment thereof are fully income tax exempt under specific provisions of Luxembourg tax law, regardless of the type and tax residence of the investor.

Nothing in the new law should restrict the full tax neutral treatment of the SICAR for capital tax and VAT purposes.

The combination of the full direct and indirect tax neutrality of the SICAR and its potential excess to the benefits of Luxembourg's double tax treaty network and EU tax directives (mainly the Parent-Subsidiary Directive 90/435/EEC), on the one hand, and its increasingly flexible yet stable legal and regulatory regime, on the other, should enhance its efficiency as a major tool in the international capital markets and more specifically in cross-border M&A transactions structured through Luxembourg.



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