

# Reserved Alternative Investment Funds (RAIFs)

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# Contents

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<b>1</b>	<b>Introduction</b>	<b>2</b>
<b>2</b>	<b>Key Features</b>	<b>2</b>
<b>3</b>	<b>Service providers</b>	<b>5</b>
<b>4</b>	<b>Marketing and passport</b>	<b>7</b>
<b>5</b>	<b>Tax aspects</b>	<b>7</b>
<b>6</b>	<b>Registration</b>	<b>8</b>

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## 1 Introduction

The Luxembourg law of 23 July 2016 on reserved alternative investment funds (the **RAIF Law**) has created a framework for reserved alternative investment funds (**RAIF**) that can be set up without requiring an approval by the Luxembourg regulator (being the *Commission de Surveillance du Secteur Financier*, **CSSF**).

RAIF can be construed either with the same characteristics as a specialised investment fund (**SIF**)<sup>1</sup> (**SIF-like RAIF**) or with the same characteristics as a risk capital investment company (*société d'investissement en capital à risque* - **SICAR**)<sup>2</sup> (**SICAR-like RAIF**). RAIF must be managed by a so-called alternative investment fund manager (**AIFM**) that is authorized in Luxembourg or in another EU Member State.

The introduction of the RAIF Law followed the implementation of the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (the AIFMD) into Luxembourg law<sup>3</sup>. While the AIFMD aims to regulate AIFMs, it also impacts alternative investment funds by indirectly imposing rules on them, in particular the obligations:

- to appoint a depositary;
- to produce audited annual accounts within six months of every financial year; and
- to provide detailed information to investors in accordance with Article 23 AIFMD.

As a consequence, Luxembourg SIF and SICAR that are alternative investment funds and managed by an authorised AIFM are subject to a double layer of authorisation and supervision by regulators:

- first, indirectly by the regulatory authority of the relevant AIFM; and
- second, directly by the CSSF which supervises the SIF or SICAR.

The Luxembourg legislator has recognized that sophisticated investors may decide that they do not require a double-layer of supervision. RAIFs shall therefore be available as an efficient alternative to SIFs and SICARs.

## 2 Key Features

### 2.1 Eligible investors

In accordance with the rationale of the RAIF Law, shares, units or partnership interests of a RAIF must be reserved to well-informed investors (*investisseurs avertis*).

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<sup>1</sup> Law of 13 February 2007 on specialised investment funds, as amended.

<sup>2</sup> Law of 15 June 2004 on investment companies in risk capital, as amended.

<sup>3</sup> The AIFMD has been transposed into Luxembourg national law by the law of 12 July 2013 on AIFMs (the AIFM Law). RAIF are by definition alternative investment funds in the sense of the AIFM Law and in the sense of the AIFMD.

The concept of a well-informed investor covers the following categories:

- any institutional investor;
- any professional investor; or
- any other investor who stated in writing that he or she adheres to the status of a well-informed investor and
  - who invests at least EUR 125,000.- in a RAIF; or
  - who has been the subject of an assessment by a relevant credit institution, investment firm, or management company, or by an authorised AIFM certifying his or her expertise, experience and knowledge in adequately appraising an investment in the RAIF<sup>4</sup>.

Executives and other management personnel of RAIFs are not subject to the above conditions.

RAIFs must have the means (*moyens nécessaires*) to ensure that they comply with the investors eligibility rules described above.

## 2.2 Structuring

### 2.2.1 Legal forms

RAIFs may be set up as a common fund (*fonds commun de placement – FCP*) or as an investment company with variable share capital (*société d'investissement à capital variable – SICAV*). The RAIF Law also offers the possibility for the initiator of a RAIF to opt for an investment company with fixed share capital (*société d'investissement à capital fixe – SICAF*). As this legal form is less commonly used for funds in Luxembourg today, its specific features shall not be covered within the present brochure. This brochure is instead focused on the legal forms that are most widely used in Luxembourg (i.e. the FCP and the SICAV).

#### (a) FCP

A FCP is a contractual structure which has no legal personality and which, as a result, should be managed by a Luxembourg management company.

Investors in a FCP subscribe for units representing a portion of the FCP. Their liability is limited to the amount they have subscribed to.

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<sup>4</sup> All these entities have to meet certain conditions laid down in the RAIF Law with reference to the applicable EU regulation and directives in order to make such assessment.

The management regulations are the constitutive document of the FCP. They regulate the relationship between the management company and the investors, as well as the rights and obligations of the latter.

Given the absence of legal personality of the FCP, all decisions related to the operations of the FCP are made by the management company on behalf of the FCP.

Investors in a FCP have no voting rights unless the management regulations provide for such rights.

## **(b) SICAV**

From a corporate point of view, a SICAV is a company with its own legal personality.

A SICAV RAIF can be a public limited liability company (*société anonyme*), corporate partnership limited by shares (*société en commandite par actions*), common limited partnership (*société en commandite simple*), special limited partnership (*société en commandite spéciale*), private limited liability company (*société à responsabilité limitée*) or a cooperative company organised as public limited liability company (*société coopérative organisée sous forme de société anonyme*).

A SICAV RAIF is subject to the law of 10 August 1915 on commercial companies, as amended (the **1915 Law**), subject to any derogations provided for in the RAIF Law. The probably most significant derogation from the 1915 Law is that the SICAV's capital is always equal to its net asset value. Hence, the SICAV's capital automatically varies as a consequence of subscriptions and redemptions and/or a consequence of the increase or decrease of the value of its assets. Such capital variation requires no corporate action and the SICAV does not have to publish the variation of its capital in any official legal notice/publication.

### **2.2.2 Sub-funds**

The RAIF Law provides that RAIFs may be set up as so-called umbrella structure, i.e. with one or more sub-funds. Each sub-fund corresponds to a distinct part of the assets and liabilities of the RAIF. Therefore, the rights and obligations of investors and creditors related to a specific sub-fund are limited to the assets of such sub-fund, unless otherwise stated in the constitutive documents of the RAIF.

### **2.2.3 Cross-investment**

The RAIF Law allows cross-investments in a RAIF, meaning that a sub-fund may under certain circumstances invest in another sub-fund of the same RAIF.

It has to be noted in this context that double charging of management fees and master/feeder structures within the same RAIF are not prohibited in the RAIF Law.

Also, interestingly, the possibility of cross-investments and the related conditions do not have to be disclosed in the articles of incorporation of the RAIF but only in its issuing document.

### **2.2.4 Classes**

Within a RAIF or each of its sub-funds, it is possible to create different classes of shares/units. Such classes may have different characteristics with respect to fees, currency or distribution policy.

## **2.3 Eligible Investments**

The flexibility wanted by the legislator for the RAIF is reflected in the types of assets in which a RAIF may invest.

SIF-like RAIFs may directly or indirectly invest in any type of assets with the objective of spreading investment risk. As the RAIF Law does not provide detail about the concept of risk-spreading, the legislator indicates that the SIF-like RAIF should apply the risk-spreading principle as described in the CSSF Circular 07/309, which is applicable to SIFs. This principle entails that a SIF and consequently a SIF-like RAIF may not invest more than 30% of its assets or commitments to subscribe to securities of the same type issued by the same issuer. This limitation does not apply where the RAIF invests in a target fund that is sufficiently diversified. SIF-like RAIF typically apply a ramp-up period, where they may deviate from the 30% restriction.

A SICAR-like RAIF must invest in risk capital. Investment in risk capital means the direct or indirect contribution of assets to entities in view of their launch, development or listing on a stock exchange. See also below “Tax aspects”.

## **3 Service providers**

### **3.1 AIFM & Portfolio management**

The RAIF Law clearly states that a RAIF is an AIF that has to be externally managed by an authorised AIFM. The AIFM is appointed by the RAIF or on behalf of the RAIF. For the time being, the AIFM must be established in Luxembourg or in any other member state of the European Union. The AIFM shall at least be responsible for the portfolio management of the assets and the risk management of the RAIF.

The AIFM can delegate to third parties functions including portfolio management, or appoint one or more investment advisors that have no discretion to make investment

decisions for the RAIF. The delegation of portfolio management requires (i) that the delegated portfolio manager is authorised or registered for the purpose of asset management and subject to supervision and (ii) cooperation between the regulator supervising the AIFM and the home country regulator in the case of a third-country delegated portfolio manager. The appointment of an investment adviser is not considered a delegation of portfolio management.

### 3.2 Depository

For each RAIF, a Luxembourg depository must be appointed. The responsibilities of the depository encompass in particular cash monitoring, the safekeeping of the assets and certain oversight functions.

The depository must either:

- have its registered office in Luxembourg or
- have its registered office in a different Member State and operate via a Luxembourg branch.

The depository has to be a credit institution or an investment firm within the meaning of the Luxembourg law of 5 April 1993 on the financial sector, as amended. An investment firm may also act as depository if it fulfils some conditions laid down in the AIFM Law.

In addition, the RAIF Law allows professional depositaries of assets other than financial instruments (as defined in the AIFM Law) to act as depository of a RAIF. This will be possible only for RAIFs which have no exercisable redemption rights for a period of five years following the initial investments and which either:

- do not generally invest in assets that must be kept in custody according to the AIFM Law or
- generally invest in issuers or non-listed companies to prospectively acquire control of such entities according to such AIFM law.
- The missions and liability of a depository of a RAIF are provided in the AIFM Law.

### 3.3 Auditor

The RAIF Law makes it compulsory to have the annual accounts of a RAIF reviewed by an independent auditor (*réviseur d'entreprises agréé*). The independent auditor is appointed and remunerated by the RAIF.

### 3.4 Central administration

The RAIF Law requires RAIFs to have their central administration located in Luxembourg. This means that certain functions must be performed in Luxembourg, and inter alia that the calculation of the net asset and the issues and redemptions. The RAIF may delegate these administrative and accounting functions to a third party established in Luxembourg.

The decisions to invest or disinvest may be made abroad. They can be taken by the AIFM or by the delegated portfolio manager (see above “AIFM & Portfolio management”) who do not have to be located in Luxembourg.

## 4 Marketing and passport

RAIFs units or shares may be marketed on a cross-border basis to professional investors (as defined in the AIFMD) within the EU following a formal notification to the regulator of the AIFM. This allows an easy way to market throughout the EU.

As from 2 August 2021, authorised AIFM will have to inform their home country regulator if they engage in so-called pre-marketing. This has to be done within two weeks of it having begun pre-marketing, via an informal letter, in paper form or by electronic means, stating inter alia the beginning of the pre-marketing and the countries where pre-marketing has been/will be undertaken.<sup>5</sup>

If the RAIF is set up or receives subscriptions within 18 months after the beginning of the pre-marketing, it is deemed that it has been marketed and a formal marketing notification has to be made by the AIFM.

## 5 Tax aspects

### 5.1 SIF-like RAIF

SIF-like RAIF are subject neither to income tax nor to wealth tax in Luxembourg. RAIFs are however subject to a subscription tax (*taxe d'abonnement*) of 0.01% per annum based on the total net assets of the RAIF valued at the end of each quarter.

It has to be noted that the RAIF Law provides several exemptions from subscription tax (*taxe d'abonnement*), for example to the extent that a RAIF invests in other Luxembourg investment funds that are subject to a subscription tax.

### 5.2 SICAR-like RAIF

The tax regime for SIF-like RAIF does not apply to SICAR-like RAIFs. To be a SICAR-like RAIF, the RAIF's constitutive documents must state:

- that the RAIF's exclusive purpose is to invest their funds in risk capital and
- that the RAIF is subject to specific tax provisions of the RAIF Law providing for this other tax regime.

In such case, these RAIFs will be subject to the same tax regime applicable to SICARs and will not have to observe the risk-spreading principle.

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<sup>5</sup> This results from Article 2(2) of Directive (EU) 1160/2019 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings.

The independent auditor of the RAIF shall establish a yearly report stating that during the financial year the SICAR-like RAIF has complied with its investment policy in risk capital. This report must be transmitted to the direct tax administration.

SICAR-like RAIF that are corporate companies (*sociétés de capitaux*) are subject to Luxembourg corporate income tax. However, income derived from securities in risk capital held by a RAIF is exempt from Luxembourg income tax. Likewise, any income derived from the sale, contribution or liquidation of such securities is fully exempt.

## 6 Registration

According to the RAIF Law, the establishment of a RAIF must be confirmed by a notarial deed within five working days of such establishment. A mention of the latter then has to be filed with the Luxembourg Trade and Companies Registry (*Registre de Commerce et des Sociétés*) for the purposes of publication in the Luxembourg central electronic platform of official publication (*Recueil électronique des sociétés et associations*) within fifteen working days after the establishment of the RAIF.

Furthermore, RAIFs will have to be registered in the RAIF list held by the Luxembourg Trade and Companies Registry (*Registre de Commerce et des Sociétés*) within twenty working days of the notarial deed.

## Contact

If you have any queries, please contact



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