

Luxembourg SICAR



A vehicle for venture capital investments

The undertaking for collective venture capital investments (Société d'investissement en capital à risque or SICAR), a semi-regulated venture capital/private equity vehicle, was introduced in Luxembourg in 2004.

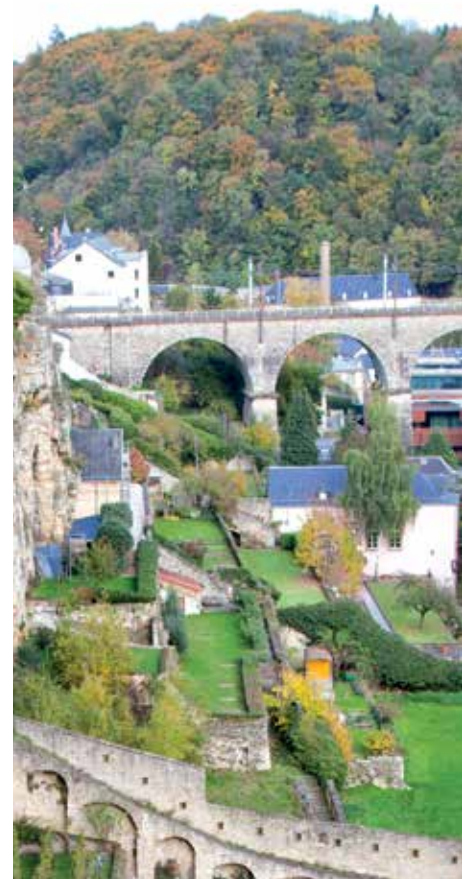
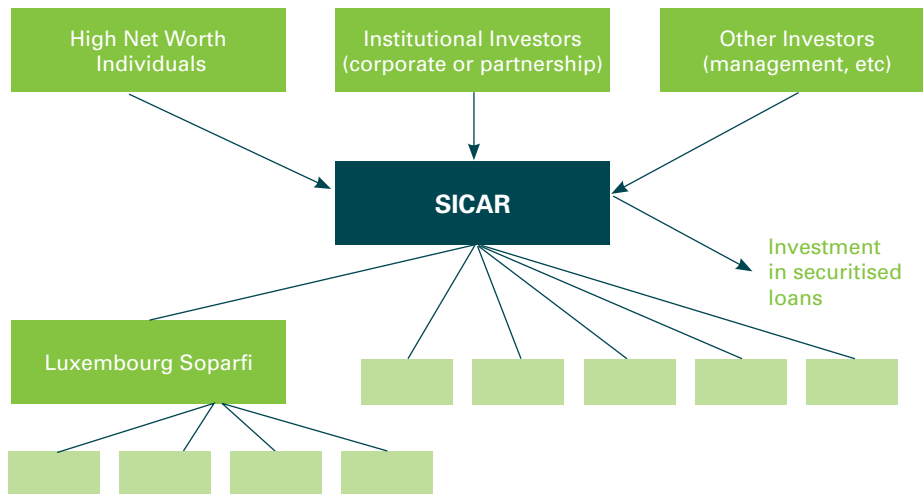
The purpose of the amended SICAR law of 15 June 2004 ("the Law") was to facilitate fund-raising and investment in risk-bearing capital. SICARs are mainly used as vehicles for private equity or venture capital, even if investments in quoted companies or real estate are also possible under certain strict conditions. The shares of a SICAR may, under certain conditions, be listed on a Stock Exchange.

The SICAR fills the gap between publicly financed vehicles qualifying as UCITS under the amended law of 20 December 2002 (which are strictly regulated) and the unregulated standard taxable companies investing in shares or financing (so called "SOPARFIs") often used as private equity investments vehicles. Limited regulatory supervision and favorable tax rules aim at attracting venture capital investors.

In 2008, the Luxembourg Government significantly modernized the Law to make it even more attractive by introducing the possibility to structure SICARs as an umbrella with multiple sub funds and to set up a SICAR in

the form of a SCS with variable capital (Société en Commandite Simple à capital variable). As at February 2014, 276 SICARs have been set up with total assets amounting to approximately € 32.91 billion, which proves that the vehicle fully meets the needs and requirements of the market.

Most typical use of a SICAR



Definition of a SICAR

General

A SICAR is a vehicle with the principal object of investing in risk-bearing assets to the benefit of qualified investors.

Unlike the amended law of 20 December 2002 on investment funds, SICARs are not subject to risk spreading obligations. As a result, a SICAR may invest all of its funds or acquire the majority of voting power in a single company. One reason for this flexibility is the limitation on investors discussed under the heading 'qualified investors' below. Qualified investors are assumed to be aware of the risks of their investments and to accept the SICAR's proposed investment policy from the outset.

Risk-bearing assets

The key qualification for gaining SICAR status is that the capital of a SICAR is invested in assets 'at risk'. The interpretation of authorized investments

is very broad. There is no clear definition of assets 'at risk'. However the supervisory authority of the Luxembourg financial sector (Commission de Surveillance du Secteur Financier - CSSF) has stated that it looks at two main criteria¹:

- Investment risk (i.e. the risk of the investment is higher than normal business risk); and
- Intention to realise the investment (i.e. clear intention to develop and then realise the investment, for instance by onward sale or by an initial public offer).

Classic venture capital (e.g. biotechnology and information technology start-ups) and private equity targets are naturally included. Mezzanine financing, distressed debt and real estate investments may also qualify under certain conditions and subject to a case-by-case confirmation from the CSSF.

Qualified Investors

The shares/units of a SICAR may only be issued/offered to investors with a high level of expertise (qualified investors), such as professional investors and institutional investors. Directors and managers of a SICAR are deemed to be qualified investors in the meaning of the Law.

Other investors will have to declare in writing that they are aware of the risks and must invest at least €125,000 or obtain confirmation from a financial institution that they have sufficient experience to understand the risks involved and to take adequate investment decisions.

SICARs are open to individual as well as corporate investors.

Elective

The Law only applies to companies that elect in their bylaws to be governed by the SICAR law.

¹ CSSF circular 06/241 of 5 April 2006 on the notion of risk capital for the purposes of the Law.

Legal aspects and supervision

Legal forms

A SICAR can be established in any of the following legal forms:

- A public limited company (société anonyme – S.A.);
- A private limited liability company (société à responsabilité limitée – S.à r.l.);
- A partnership limited by shares (société en commandite par action – S.C.A.);
- A cooperative company organised as a public limited liability company (société coopérative organisée comme une S.A.);
- Limited partnership (société en commandite simple - S.C.S. and société en commandite simple à capital variable – S.C.S. à capital variable).

The statutory seat and central administration of the entity need to be located in Luxembourg.

There are no requirements with respect to the number of investors or the transferability of SICAR shares.

Capital requirements

The minimum subscribed share capital of a SICAR is € 1 million (share capital and share premium), which must be reached within 12 months of the company being authorised. The share capital must be fully subscribed and each share must be paid up to at least 5%. This facilitates successive drawing down of subscriptions once satisfactory investments are identified.

No debt-to-equity ratio applies.

There are no legislative restrictions on capital repayments, share redemptions, dividends or interim dividends. The only restrictions are those found in the SICAR's articles of association. A SICAR is not obliged to maintain a legal reserve.

Authorization and supervision

A SICAR must be authorised by the Luxembourg supervisory authority for the financial sector (CSSF) prior to commencing its operations. The CSSF is the relevant supervisory body for SICARs.

In line with the semi-regulated nature of SICARs, the conditions for authorisation are less stringent than for regulated investment funds (such as UCITS). There are no restrictions on the SICAR's investment policy. However, the CSSF must approve:

- The SICAR's incorporation documents;
- Its directors; and
- The regulated financial institution that will act as the local asset custodian.

The official list of approved SICARs is published in the Official Luxembourg Gazette (Mémorial).

Similarly, CSSF supervision of compliance by the SICAR and its directors with their legal and contractual obligations is undertaken on a simplified basis.

Umbrella structures

A SICAR can be set up in the form of an umbrella fund with multiple segregated compartments. Each compartment forms a distinct part of the SICAR's patrimony and the prospectus has to state the investment policy of each compartment.

The rights of investors/creditors are limited to a specific compartment in which they hold securities. It is possible to liquidate a compartment separately without liquidating the others (only the liquidation of the final compartment triggers the SICAR's liquidation).

Umbrella structures could therefore potentially be useful to introduce several investment strategies and hence meet various needs of several investors in the same SICAR. They could also potentially help to reduce set up costs and achieve economies of scale.

Publication of prospectus and annual reports

The SICAR is required to prepare a prospectus and an annual report for each financial year. The annual report must be audited by a Luxembourg independent qualified auditor ("réviseur d'entreprises"). The audited annual report must be made available to the investors within six months following the end of the financial period to which it relates.

SICARs typically report under Luxembourg Generally Accepted Accounting Principles (Luxembourg GAAP) and may use International Financial Reporting Standards (IFRS) upon agreement with the CSSF and in particular if the SICAR is listed in accordance with EU regulation.

Latest developments

On 10 July 2013, a new law on Alternative Investment Fund Managers ("the AIFMD law") was adopted by the Luxembourg Parliament and introduced some amendments to the Law of 15 June 2004.

According to the new AIFMD law, SICARs may now be classified into two categories:

- SICARs qualifying as an alternative investment fund ("AIF") and required to appoint an alternative investment manager ("AIFM") and;
- SICARs not qualifying as an AIF.

SICARs qualifying as AIFs and managed by an AIFM are impacted by the changes introduced by the new AIFMD law. The following main provisions have been included in the Law:

- Depositary rules;
- Delegation of functions;
- Valuation rules and the information to be communicated.
- Transparency rules.

These new provisions are not applicable for SICARs not qualifying as AIF.



Taxation of the SICAR

Income taxation

SICARs are resident companies fully liable to corporate and municipal business tax at an aggregate tax rate of 29.22% (for Luxembourg City in 2014).

Income derived from securities (see below for definition) held by a SICAR as well as income resulting from the transfer, the contribution or liquidation of such assets is exempt from Luxembourg income tax.

Income on cash held by a SICAR for the purpose of a future investment is also tax exempt for a period of 12 months, provided it can be proved that these funds have been invested in risk bearing assets.

Other income of a SICAR that is not connected with investments in risk-bearing capital (e.g. interest earned after 12 months, management fees, etc.) is subject to normal income tax.

Expenses and charges related to investments generating tax exempt income may not be offset against taxable income. Foreign exchange gains and losses on such exempt investments follow the same regime.

In 2011, a minimum corporate income tax was introduced in Luxembourg, the scope of which was amended in 2013.

As from 2013, SICARs which have a total balance sheet consisting of more than 90% of financial assets, transferable securities (including receivables against related parties in which the SICAR holds a participation and shares units held in a tax transparent entity) and bank deposits should be subject to a minimum flat tax amounting to € 3,000 (€ 3,210 including a 7% unemployment surcharge or "solidarity tax"). If the 90% threshold is not met (which is not expected to be the case for a SICAR), a minimum tax ranging between € 500 (€ 535 including

a 7% unemployment surcharge or "solidarity tax") and € 20,000 (€ 21,400 including a 7% unemployment surcharge or "solidarity tax") may apply depending on the total balance sheet of the SICAR.

A SICAR established in the form of a limited partnership will be treated as tax transparent entity for Luxembourg tax purposes. These SICARs are not considered to have a commercial activity and consequently are not subject to municipal business tax even if the unlimited partner or the majority of the limited partners are share capital companies.

The Luxembourg fiscal consolidation rules do not apply to SICARs.

Definition of a security

The term "security" is not defined in the Law. However, parliamentary documents on the Law clearly state that the term securities is "to be considered in a larger sense, to include shares, bonds and other debt instruments, as well as any other negotiable instruments that give right to require any of the above-mentioned securities"².

Withholding tax

The Law provides a withholding tax exemption on dividends distributed by a corporate SICAR, irrespective of the residence and tax status of its shareholders.

Interest payments made by SICARs are not subject to domestic withholding tax (except where required by EU Savings Directive or by Luxembourg Relibi Law).

Under Luxembourg domestic tax law, the liquidation of a SICAR, regardless of its legal form, does not trigger any withholding tax at the level of the SICAR.

² Projet de loi N°5201, p21

Double tax treaty protection and access to EU Parent-Subsidiary Directive

SICARs do, from a Luxembourg perspective, benefit from the EU Parent-Subsidiary Directive and the double tax treaties concluded by Luxembourg as they are fully taxable corporations. The Luxembourg Tax Authorities issue on request certificates of Luxembourg tax residency for SICARs.

Indirect taxes

As of 1 January 2009, Luxembourg capital duty has been abolished. Therefore, as of this date, only the fixed registration duty of € 75 will be due on incorporation or modification of the bylaws of a SICAR.

Luxembourg SICARs qualify as taxable persons for VAT purposes. It needs to be analysed on a case-by-case basis whether this status should also result in the registration for VAT.

Management services rendered to a SICAR within the scope of the Law are in principle VAT exempt.

Net wealth tax

SICARs are exempt from the annual 0.5% net wealth tax.

Capital gains realized by non-residents

Non-residents are exempt from Luxembourg income tax on capital gains realised on the disposal of shares of a SICAR.



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