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Luxembourg as a platform for private equity and venture capital investments

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The new law of June 15 2004 on private equity and venture capital companies (sociétés d'investissement en capital à risque – SICARs) (the Law) is to promote the development of investment vehicles that specialize in taking participations by way of debt and equity in private equity and venture capital, which is aimed at start-up companies carrying a high risk of volatility or liquidity in order to sustain their growth and possible initial public offering. On a wider application, the concept covers any form of private equity investment (including, but not limited to, mezzanine finance and buyouts).

The Law does not intend to replace existing structures such as ordinary investment companies or investment funds. The Law is likely to be successful because it creates a flexible legal framework both from a corporate and a tax perspective. In addition, the regulatory constraints are limited and much more flexible in comparison to those that apply to fully fledged regulated investment funds. SICARs can also be listed on, for example, the Luxembourg Stock Exchange.

Corporate flexibility

A SICAR must have legal personality of its own and it must be incorporated as a public limited company (société anonyme), a private limited company (société à responsabilité limitée), a partnership limited by shares (société en commandite par actions), a cooperative society organized as a public limited company (société coopérative organisée comme une société anonyme) or as a limited partnership (société en commandite simple).

The minimum share capital of a SICAR must be at least €1 million (\$1.2 million) and this minimum must be reached within 12 months of the SICAR receiving its licence. Only 5% of the subscribed share capital has to be paid up, giving the directors or, as the case may be, the managers of the SICAR the ability to call a significant amount of capital in addition to the initial paid in capital at any time, to enable the SICAR to undertake its proposed investments.

The Law also provides for the possibility for the SICAR to have variable share capital, giving greater flexibility as to the issuance and redemption of shares. Generally, share redemptions and distributions of dividends in respect of SICARs are not subject to limiting rules, apart from those which may be inserted in the articles of association of the SICAR. Moreover, SICARs are not subject to the rather strict Luxembourg company law provisions regarding the distribution of interim dividends applicable in respect of ordinary companies. Additional flexibility exists as a result of the absence of the legal requirement to create a legal reserve or to prepare consolidated accounts. The assets of a SICAR must be valued in good faith in accordance with their foreseeable realization value.



Tax exemption

Some interesting tax features apply to SICARs, including a limited capital duty of €1,250 (rather than the usual 1% capital duty), the exemption of value-added tax for the management, the absence of dividend withholding tax on distributions to investors (whether resident or not), and the absence of corporation tax on income generated by the qualifying securities held by the SICAR or on capital gains on the disposal of these securities. The exemption from municipal business tax and wealth tax should also be mentioned.

Liquid funds destined to be invested or reinvested in qualifying investment targets are, subject to certain conditions, tax exempt. Luxembourg will grant treaty benefit to the SICARs.

Members of tax transparent limited partnerships (*société en commandité simple*) will be taxed directly on their profit share in the partnership. However, foreign investors should not get taxed in Luxembourg unless they are permanently established there.

Regulatory framework

Like other investment funds, SICARs must be licensed in Luxembourg and they remain under the supervision of the Commission de Surveillance du Secteur Financier (CSSF) throughout their life. The licensing procedure is however more flexible than that of other investment funds. Therefore, only the directors (or managers) of the SICAR must be approved by the CSSF (on the basis of their respectability and professional qualification). However, the promoter and the investment manager do not have to be approved. The justification of this lightened approval procedure is that SICARs are only opened to qualified investors (*investisseurs avertis*), a term that is quite widely defined to include institutional investors, professional investors, and investors investing at least €125,000 in the SICAR or who provide a certificate from a credit institution (or a professional acting in the financial sector) confirming that the investor has the expertise, background and knowledge to adequately appraise risks of private equity and venture capital investments. The CSSF also has to approve a Luxembourg bank, or branch of a foreign bank, to be the custodian of the SICAR, as well as the SICAR's constitutive documents, including the offering memorandum of the SICAR. It is expected that the contents of the offering memorandum/prospectus will be fairly basic. The custodian has to make sure that: (i) the subscription price is received by the SICAR within the time limit set in the constitutive documents of the SICAR; (ii) the consideration (essentially, in the form of securities) the SICAR is to receive in exchange for its investments is received by the SICAR within the customary timelines; and (iii) the revenues of the SICAR are applied in compliance with the constitutive documents of the SICAR.

Conclusion

Professionals in Luxembourg are confident that the SICAR is a tax efficient and flexible, but nevertheless investor-protective, investment vehicle. As a result, and in combination with the know-how acquired in respect of other types of investment funds, Luxembourg should have all the requisite features to become an attractive – perhaps even the leading – European platform for the establishment of private equity and venture capital funds.

Banking

Recommended firms

Allen & Overy Luxembourg

Arendt & Medernach

Elvinger Hoss & Prussen

Linklaters Loesch

Bonn Schmitt Steichen

Kremer Associés & Clifford Chance

Wildgen & Partners

Baden & Baden

Kleyr Collarini Kerger Grasso

Allen & Overy Luxembourg

With one of the largest legal offices in the country, Allen & Overy Luxembourg has three partners and four associates dedicated to banking work, and this year added an associate to team. A combination of impressive language skills, an international network of expertise and local qualifications and knowledge makes this firm a good choice for both domestic and international clients. Henri Wagner, who is head of the banking and capital markets department, is respected by his peers.

Key matters in the last year include advising DekaBank Deutsche Girozentrale (Luxembourg) as purchaser of the Luxembourg private banking activity of Schmidt Bank, acting for Landesbank Rheinland-Pfalz International in the purchase of the Luxembourg private banking activity of Otdenburger LandesBank, and advising on the merger of Luxembourg Sanpaolo and IMI Bank Luxembourg.

Key contact partners

Marc Feider
André Marc
Henri Wagner

Leading lawyer

Henri Wagner

Arendt & Medernach

Arendt & Medernach is based in Luxembourg and also has offices in Brussels and Amsterdam. The financial services practice of the firm is headed by Philippe Dupont, who is described by his competitors as “an accomplished lawyer, as well as being a nice person,” and Paul Mousel, who specializes in securities law, regulatory issues and advising investment firms.

The banking group consists of three partners and 12 associates and advises an extensive range of clients, including

domestic and foreign banks, investment companies and insurance and reinsurance companies. The firm is recommended for advice setting up companies and for regulatory matters. The team was involved in the first e-banking and e-brokerage projects in Luxembourg, as well as in the creation of Luxembourg's first mortgage banks.

Key contact partners

Philippe Dupont
Paul Mousel

Leading lawyers

Philippe Dupont
Paul Mousel

Elvinger Hoss & Prussen

Elvinger Hoss & Prussen is one of the largest Luxembourg law firms and has chosen to remain independent and non-affiliated, preferring to draw on relationships with other independent firms such as Slaughter and May. A team of around 10 lawyers advises large financial institutions, industrial companies and employers' organizations in Luxembourg, as well as some of the largest international industrial and financial groups and a number of government agencies and regulatory authorities.

Key contact partner

Yves Prussen

Linklaters Loesch

Linklaters Loesch is perceived by competitors to be "building up nicely" in advising clients on banking transactions in domestic and international financings, in a wide range of industrial, financial, commercial and government sectors. The firm also has a structured finance focus, advising on securities issued by Luxembourg special purpose vehicles investing in certain assets or unregulated fund schemes.

The banking team offers advice on the full range of complex financial issues, including acquisition and takeover financing, banking regulation, bilateral and syndicated credit facilities and private banking. Partner Janine Biver is a favourite with banking and finance clients and is also a specialist in capital markets and securities law.

Leading lawyer

Janine Biver

Bonn Schmitt Steichen

As one of the oldest and most established firms in Luxembourg, Bonn Schmitt Steichen has a solid grounding in Luxembourg law and is highly recommended for its banking law advice.

Three partners and six associates are devoted to handling the firm's banking work. The team has been visible on a number of deals over the past year, including advising Mediobanca in the transfer of the Cayman Islands' subsidiary of Mediobanca to Luxembourg, and advising Porte De L'Europe in connection with financing a €100 million (\$124.5 million) real estate project in Luxembourg. Other regular clients of the banking practice include Clearstream, SanPaolo Bank, Fideuram Group, JP Morgan Chase, Banca di Roma, Mediobanca, BNP Paribas, Salomon Smith Barney and Crédit Agricole Indosuez Luxembourg.

Senior partner Alex Schmitt has over 20 years of legal experience, and has an excellent reputation among peers as a "very good lawyer."

Key contact partner

Alex Schmitt

Leading lawyer

Alex Schmitt

Kremer Associés & Clifford Chance

With its extensive international resources, Kremer Associés & Clifford Chance is well placed to advise on complex cross-border transactions. Finance is considered a real strength of the office, with four of the five resident partners specializing in banking and finance law. The finance team works as part of a 30-lawyer office, which offers advice in a broad range of areas including M&A, capital markets, tax, litigation and media funds.

Managing partner Christian Kremer, who is fluent in five languages, is highly regarded in the market for his banking practice, which he combines with expertise in corporate and commercial law.

Leading lawyer

Christian Kremer

Wildgen & Partners

Wildgen & Partners is a long-established Luxembourg firm which dates back to the 1920s. Today the firm boasts around 30 lawyers who advise local clients on aspects of business and financial law. The finance team has a good reputation in the market for advising on banking and finance matters. Albert Wildgen is well regarded the market and also advises on corporate and estate planning.

Key contact partner

Georges Gudenburg

Leading lawyer

Albert Wildgen

Capital markets

Recommended firms

Allen & Overy Luxembourg

Arendt & Medernach

Elvinger Hoss & Prussen

Linklaters Loesch

Bonn Schmitt Steichen

Kremer Associés & Clifford Chance

Allen & Overy Luxembourg

Allen & Overy Luxembourg has bulked up its capital markets team with the addition of two new associates this year.

The team has had a busy year advising, among others, CIBC World Markets on a \$500 million Stanton CDO I debt securities issue, and DZ Bank International on a €10 billion (\$12.5 billion) debt issue. Other deals included advising the Michelin group of companies in connection with a €1.5 billion restructuring, and acting for Deutsche Bank Luxembourg on a \$300 million issue of loan participation notes under a fiduciary structure.

The firm can boast a stellar list of clients, including Deutsche Bank London, Citigroup, Bear Stearns, Merrill Lynch and JP Morgan Chase. Head of the practice Henri Wagner retains his status as a leading lawyer in capital markets.

Key contact partners

Marc Feider
André Marc
Henri Wagner

Leading lawyer

Henri Wagner

Arendt & Medernach

Arendt & Medernach is a highly rated local firm with a “competitive edge,” that can advise on all aspects of capital markets transactions. The firm’s recent deals show it has experience advising on stock exchange listings, initial public offerings, securities clearing and settlement, as well as collateralization and securitization transactions.

The financial services team acts for local and multinational companies, and advises a large number of banks, investment firms, insurance and reinsurance companies in Luxembourg and abroad. Co-head of the group Philippe Dupont is admired by his competitors for his experience working on mortgage-backed bond issues for German banks.

Leading lawyer

Philippe Dupont

Elvinger Hoss & Prussen

This local, deliberately independent firm is considered to be expert in Luxembourg law and has a team of five lawyers dedicated to capital markets, structured finance and securitization work. Philippe Hoss specializes in finance work and is recommended for his high-quality advice.

Leading lawyer

Philippe Hoss

Linklaters Loesch

Linklaters Loesch boasts a capital markets team that is becoming increasingly visible on the big transactions. As a result the market perceives it to be a top-tier firm in this area.

Among the year’s highlights, the team was part of a multinational team of lawyers that advised Sobel on a €250 million (\$311.3 million) multicurrency revolving and term credit facility, arranged by Rabobank International and NIB Capital. The group specializes in advising international clients on cross-border transactions, while a specialist structured finance group focuses on closely linked projects such as securities issued by Luxembourg special purpose vehicles investing in certain assets or unregulated fund schemes.

Bonn Schmitt Steichen

The capital markets team at Bonn Schmitt Steichen has a good reputation and particularly attracts work on securitization and initial public offerings. Recently, for example, the team advised BNP Paribas, Finanziaria Internazionale Securitization Group and MPS Finance Banca Mobiliare on a €460 million (\$572.8 million) synthetic collateralized bond obligation. The team also advised CIBC World Markets in connection with its issue of €250 million limited recourse notes secured by senior secured loans, mezzanine loans, high-yield debt securities and other securities, and provided legal and tax advice to Salomon Smith Barney with respect to three large multi-issuer programmes (the Luxembourg issuers being Seals, Allegro Investment Corporation and Seals Finance).

Finance partner Laurent Lazard is recommended for his capital markets work, particularly in repackagings, and also focuses on structured finance and regulatory issues

Key contact partner

Alex Schmitt

Leading lawyer

Laurent Lazard

Mergers and acquisitions

Recommended firms

Allen & Overy Luxembourg

Arendt & Medernach

Elvinger Hoss & Prussen

Linklaters Loesch

Bonn Schmitt Steichen

Kremer Associés & Clifford Chance

Baden & Baden

Kleyr Collarini Kerger Grasso

Molitor Fisch & Associés

Oostvogels & Pfister

Wagener & Rukavina

Wildgen & Partners

Di Stefano Avocats

Dupong & Spielmann

Jim Penning & Associés

Allen & Overy Luxembourg

The two partners and 11 associates that comprise Allen & Overy Luxembourg's M&A practice have had a busy year and as a result the firm maintains its position in the top tier.

Recent matters include acting for Satlynx on the establishment of Satlynx through a joint venture between SES Astra, Alcatel and Gilat Satellite. The team also acted for SGFQ on the acquisition of a significant stake in Circuit Foil (Arcelor) by Société Générale de Financements du Québec, and advised GeneralRe in connection with its purchase of ColoniaRe from AXA.

Marc Feider heads up the M&A group, and is described as having "a good knowledge of the market". Feider specializes in M&A, securities and stock exchange work, takeovers, joint ventures and general corporate law.

Key contact partner

Marc Feider

Leading lawyer

Marc Feider

Arendt & Medernach

Arendt & Medernach has a well-respected mergers and acquisitions department that spans its corporate, tax and intellectual property practices. The group advises local and international clients on a comprehensive array of corporate finance and company law matters.

Recent matters handled by the firm include structuring major joint ventures, mergers, acquisitions, reorganizations of companies and liquidations. Tax expertise is an integral part of the firm's service, and the firm's tax department helps clients negotiate the 30-plus double taxation treaties that exist in Luxembourg. Corporate and tax advice is supported by expertise in a range of related practice areas, including competition and e-commerce.

Head of the M&A practice Guy Harles advises on international transactions, corporate reorganizations and mergers and acquisitions, and has a good reputation among peers and clients in the market.

Key contact partner

Guy Harles

Leading lawyer

Guy Harles

Elvinger Hoss & Prussen

Elvinger Hoss & Prussen boasts a reliable and respected practice of 10 mergers and acquisitions lawyers that is perceived by competitors to have some "serious young guns" moving up through the ranks. Pit Reckinger was in particular singled out by one rival as a "star in the making".

The team regularly advises large financial institutions, industrial companies and employers' organizations in Luxembourg, some of the largest international industrial and financial groups, and a number of government agencies and regulatory authorities. Elvinger Hoss is the exclusive Luxembourg member of global network Lex Mundi.

Key contact partner

Pit Reckinger

Leading lawyer

Pit Reckinger

Linklaters Loesch

Linklaters Loesch's respected M&A team advises numerous domestic and international clients on corporate and M&A activity across a range of business sectors. The firm has expertise in private M&A, and can offer advice on EU cross-border transactions and venture capital and private equity deals. Rivals say partner Tom Loesch has been "visible on large transactions" and has a wide range of expertise.

Key contact partner

Tom Loesch

Leading lawyer

Tom Loesch

Bonn Schmitt Steichen

Four partners and eight associates advise on mergers and acquisitions matters at Bonn Schmitt Steichen, and the firm is recommended for its solid legal advice in this area.

Recent deals handled by the M&A team include advising Pfizer-Warner Lambert on the integration and \$74 billion restructuring of various companies in Europe and South America through Luxembourg holding companies, acting for Cooper Cameron on an €860 million (\$1.1 billion) corporate restructuring through Luxembourg entities, and representing Timken on an €18 million corporate restructuring through Luxembourg entities. Other key clients include Merck, Bell, Leonardo/Aeroporti di Roma and VP Bank.

Key contact partner

Alex Schmitt

Kremer Associés & Clifford Chance

Kremer Associés & Clifford Chance is well equipped to advise on complex cross-border deals, and is particularly active and respected for its work with lenders and financiers. The office has a total of five partners and 30 assistants who advise domestic and international clients in a range of areas including M&A, tax, litigation, capital markets and banking.

Key contact partner

Christian Kremer