

INVESTMENTS ABROAD BY BRAZILIAN INVESTMENT FUNDS

According to new Rulings issued by Brazilian Securities Commission (CVM) – Ruling 450, of March 30, 2007, and Ruling 465, of February 20, 2008 – Brazilian funds were authorized to invest in assets traded abroad.

We understand that the Brazilian Funds may hold quotas of Foreign Funds. Taking this into account, Brazilian Funds could consider investing in the following listed Dutch and Luxembourg Funds. We suggest to discuss this further with you.

I. The Netherlands

(i) VBI

Introduction

The VBI (*vrijgestelde beleggingsinstelling* or 'VBI') is an entity which is not liable to Dutch corporate income tax, whilst distributions of profits by the VBI are not liable to Dutch dividend withholding tax. In addition, the VBI regime does not impose any conditions as to the composition of its shareholders, its level of debt financing or its profit distribution policy.

Main conditions

Legal structure

In order to comply with the Brazilian requirements, a VBI must be structured as a Dutch public limited company (*naamloze vennootschap* or 'NV')¹.

Eligible investors and regulatory supervision

The VBI must qualify as an investment institution within the meaning of the Dutch Act on Financial Supervision (*Wet op het financieel toezicht* or 'Wft'). **This requirement is generally satisfied if the VBI has at least two investors.** The fact that the VBI regime is only eligible for funds that qualify as investment institution within the meaning of the Wft does not mean that such fund should at all times be regulated. Exemptions from the Wft licensing requirement are available, for instance, if the rights of participations in the VBI have a nominal value of at least EUR 50,000, or if they are offered for a consideration payable of at least EUR 50,000, or if they are marketed to a group of not more than 100 individual investors. The VBI must provide for (semi) open-ended status.

Investment policy

The VBI must pursue a risk diversification policy, although in practice this requirement should not be perceived as a restriction. The VBI is permitted to make passive investments in financial instruments, such as marketable shares, bonds, other securities including

¹ However, according to the Dutch law, a VBI can also be structured as a contractual arrangement that is qualified as a separate entity for Dutch tax purposes (*fonds voor gemene rekening* or 'FGR').

interests in investment funds, instruments commonly traded through an exchange, commodity derivatives, forward contracts, swaps, contracts for differences and options on the aforementioned instruments. Although the VBI is not permitted to make direct investments in Dutch real estate and (mortgage) loans, an exception has been made for indirect investments in foreign real estate.

Taxation

The VBI is not liable to Dutch corporate income tax. As a consequence, the VBI will not be considered to be a resident of the Netherlands for tax treaty purposes (the VBI should generally not expect to be eligible to a reduction of foreign withholding tax that it has suffered in respect of its interest and dividend income). The same applies with respect to Dutch dividend withholding tax incurred by the VBI which will not be recoverable (through a refund or a credit).

Distributions by the VBI are not liable to Dutch dividend withholding tax. Foreign corporate investors in a VBI are not liable to Dutch corporate income tax as a non-resident taxpayer² in respect of their investment in a VBI, provided such investment is not attributable to a Dutch permanent establishment or representative.

Application of the regime must be formally requested to the competent tax inspector not later than by the end of the financial year in respect of which the VBI regime is intended to apply.

(ii) FBI

Introduction

The FBI is widely used as an investment fund for investments in securities and real property (in the latter case, the FBI is being referred to as the 'Dutch REIT'). Although initially used as a public investment fund as a result of its shareholder's restrictions, legislative relaxations to these restrictions have now made the FBI an attractive investment fund vehicle for the private investment fund market as well.

Main conditions

Legal structure

In order to meet the Brazilian requirements, an FBI may be structured as a Dutch public limited company (*naamloze vennootschap* or 'NV')³.

Eligible investors

In principle, at least 75% of the investors should comprise of individuals, exempt corporate investors or other (foreign) FBIs. However, more lenient conditions apply if the shares of the FBI are either listed on a market in financial instruments or if the FBI or its manager is either subject to Dutch regulatory supervision or exempt from such Dutch regulatory

² *In that case we must evaluate whether the Brazilian Fund is a transparent or non-transparent entity for Dutch tax purposes.*

³ *The FBI Fund can also be structured as Dutch limited liability company (besloten vennootschap or 'BV') or FGR, but these kind of legal structures cannot be registered in stock exchange.*

supervision because it is regulated as an undertaking for collective investment in securities (UCITS) abroad. We need to discuss this further in case this Fund seems attractive to you.

Taxation

An FBI is liable to Dutch corporate income tax levied at a special rate of 0%, provided that certain requirements are met. As the FBI is liable to Dutch corporate income tax, it is generally able to claim tax treaty benefits in respect of, for example, dividends and interest it has received.

An FBI is required to withhold and remit 15% Dutch dividend withholding tax on its distributions of profits to its shareholders unless a treaty or domestic law provides for a reduction. In addition, an FBI is granted a rebate on its remittance obligation for Dutch and (in part) foreign withholding tax incurred by the FBI.

Compulsory dividend distribution

No amendments have been made to the compulsory annual distribution of the FBI's net taxable profits within eight months following the end of the relevant financial year. The FBI can elect to exclude the balance of realised capital gains and revaluation gains in respect of investments in securities from the determination of its net taxable profits. Dividend distributions are subject to 15% dividend withholding tax as further summarised above, except for distributions of the balance of realised capital gains/revaluation gains in respect of investments in securities if the FBI has elected to exclude these from its taxable profits. Distribution of such gains continues to be exempt from Dutch dividend withholding tax under domestic law.

II. Luxembourg

(iii) SIF

Introduction

In February 2007 Luxembourg enacted the law on specialised investment funds (the 'SIF Law'). The SIF Law replaces the 1991 law on undertakings for collective investment ('UCIs'), commonly referred to as institutional investor funds, the securities of which are not intended to be offered to the public. The result is a lightly regulated, operationally flexible and tax-efficient investment fund regime for an internationally qualified investor base.

Main conditions

Legal structure

The SIF regime may be applied to any entity formed under Luxembourg entity including the FCP and SICAV. In summary, the SIF regime can be applied to:

- A tax-transparent common fund established by a contractual arrangement (*fonds commun de placement*), managed by a Luxembourg management company (a 'FCPSIF');
- An investment company with variable capital ('SICAV') in the corporate form of a public limited liability company (*société anonyme* or 'SA'), partnership limited by shares (*société*

en commandite par actions or 'SCA') or cooperative company in the form of a public limited liability company (a 'SICAV-SIF')⁴.

Eligible investors

Any institutional, professional or 'well-informed' investor may invest in, but also initiate or launch, a SIF. The 'well-informed' investor status basically entails that an investor invests at least EUR 125,000 in the fund, or in the case of a smaller investment, obtains an appraisal from a credit institution, a qualifying investment enterprise, or a management company certifying the investor's expertise, experience and knowledge justifying his adequate appraisal of an investment in the relevant SIF. It is thus not the SIF itself that is 'specialised', but it is the investor base which must be 'specialised'.

Supervision

Establishing a SIF does not require prior authorisation by the Luxembourg regulatory authority for the financial sector (*Commission de Surveillance du Secteur Financier* or 'CSSF'). However, the constitutional documents of the relevant SIF must be filed with the CSSF within one month following the establishment of the SIF. Although the CSSF will verify that the relevant SIF and its directors have complied with the applicable laws and regulations prior to admitting the SIF to the official SIF list, pending such admittance the SIF may in principle launch its activities once it has been established.

Investment policy

Although the SIF Law imposes the condition that the SIF adheres to a policy of risk diversification, the law does not elaborate on any quantitative, qualitative, geographical or other type of investment restrictions. In order to speed up the regulatory approval process, the CSSF has published a Circular (07/309) which provides additional guidance as to this risk diversification principle. Pursuant to this Circular, a SIF should generally not invest more than 30% of its assets or commitments in securities of the same kind issued by the same issuer. However, exemptions may apply to investments in securities issued or certified by an OECD Member State or by its territorial public communities, including international or local institutions and supranational bodies, and investments in other undertakings for collective investment that are subject to risk diversification requirements which in purpose and nature are at least comparable to the requirements imposed on SIFs.

The SIF is not permitted to be in a short position with respect to similar securities issued by the same issuer for more than 30% of the SIF's assets. If the SIF invests in derivative financial instruments, it must ensure, through a diversification of its underlying assets, a comparable risk diversification policy.

In addition, depending on the investment policy, the CSSF may require the relevant SIFs to adopt additional investment limitations. A second Circular (07/310) provides detailed information on the financial reporting obligations that must be adopted by SIFs.

⁴ *The SIF Fund can also be structured as SARL (société à responsabilité limitée), SCSA (société coopérative sous forme de société anonyme) or SCS (société en commandite simple), but these kind of legal structures cannot be registered in stock exchange.*

Taxation

Regardless whether the SIF is organised with or without legal personality, it is not liable to tax on its income or capital gains. Upon its establishment, a one-off lump-sum capital duty charge of EUR 1,250 is due.

The SIF is subject to an annual subscription tax (taxe d'abonnement) of 0.01% assessed on the total of its net assets. There are certain exemptions to this annual subscription tax with respect to investments in other undertakings for collective investment that have already been subject to an annual subscription tax, and for SIFs that invest in certain money market instruments or that implement pension pooling schemes.

SICAV-SIFs will be eligible for the benefits of a selection of double tax treaties concluded by Luxembourg with other jurisdictions.

(iv) SICAR

Introduction

As for existing corporate investment funds (i.e., Sicav or Sicaif), investment companies in risk capital are subject to the prior authorisation and ongoing prudential supervision of the *Commission de Surveillance du Secteur Financier* (CSSF), the Luxembourg supervisory authority of the financial sector. The admission process as well as the monitoring obligations though have been substantially reduced when compared to traditional Sicavs or Sicaifs.

Application and Supervision

The Fund may be organised as a SICAR upon formal election and is subject to the prior approval by the CSSF. In order to qualify as a SICAR, the CSSF will merely verify that the SICAR and its representatives (i.e., its managers or directors) comply with the applicable legal provisions (i.e., in terms of organisation and operation).

The CSSF license is further conditioned by a show of evidence that the central administration of the investment company is located in Luxembourg. The applicant thus needs to ensure that the various core activities (e.g., management, accounting, keeping of shareholder records, redemptions and subscriptions, etc.) are carried out in and from Luxembourg. Typically these services may be organised by the SICAR itself or delegated to local specialised service providers. The substance question may thus be addressed in a flexible fashion on a case by case basis.

Investment Restrictions

A SICAR may solely invest in risk bearing values. This potentially includes any type of investment in an unquoted/private enterprise/company whether in the form of equity or debt securities (see tax aspects below). The SICAR is furthermore not subject to any risk diversification rules or geographical restrictions. The CSSF has furthermore confirmed that the SICAR qualifies for private equity, real estate and infrastructure investments, though a SICAR may not directly hold or own any real estate assets. Instead the SICAR may invest in real estate special purpose vehicles pursuing an opportunistic investment strategy. Core-plus and/or infrastructure investment strategies may qualify on a case by case basis. Equally, whereas carbon credits, green certificates and other energy-related instruments

may in principle qualify under the SICAR regime, it is recommended to obtain a prior confirmation from the CSSF in this respect.

Legal structure

The Fund is to be formed as a corporate entity. As such it may adopt any of the following well known company forms :

- (i) a public limited company (société anonyme); or
- (ii) a partnership limited by shares (société en commandite par actions)⁵.

A SICAR must have (or reach) a minimum subscribed capitalisation of EUR 1 million within 12 months. Once the shares have been subscribed, capital calls may be freely organised with a minimum of 5% (in kind or in cash) due at subscription. A SICAR may furthermore opt for a variable or fixed capital structure. SICAR does not need to maintain a legal reserve allocation. In addition, the dividend or profit repatriation policies (e.g., periodicity, etc.) can be freely determined in the articles of association or the partnership agreement. A SICAR is furthermore not restricted from offering additional securities to (other or new) investors on an ongoing basis. Again, such offering rules may be freely determined in the constitutional documents of the SICAR.

Investor Restrictions

Investments into SICAR are reserved to three investor categories, being institutional, professional⁶ and expert investors. An expert investor shall be any investor who meets the following conditions:

- (a) he has confirmed in writing that he adheres to the status of well-informed investor;
and
- (b) he invests a minimum of EUR 125,000 ; or
- (c) he has obtained an assessment made by a credit institution, another professional of the financial sector⁷, or by a management company⁸, certifying his expertise, his experience and his knowledge in adequately appraising an investment in risk capital.

The following types of investors qualify as institutional investors under Luxembourg laws and regulations:

- (a) Institutional investors *stricto sensu*, such as banks and other professionals of the financial sector, insurance and reinsurance companies, social security institutions and pension funds, industrial, commercial and financial group companies, all subscribing on their own behalf, and the structures which such institutional investors put into place for the management of their own assets.

⁵ The SIF Fund can also be structured as SARL (société à responsabilité limitée), SCSA (société coopérative sous forme de société anonyme) or SCS (société en commandite simple), but these kind of legal structures cannot be registered in stock exchange.

⁶ As defined under Annex II of Directive 2004/39/EC on markets in financial instruments amending Directives 85/611/EC and 93/6/EEC and Directive 2002/12/EC.

⁷ Subject to rules of conduct within the meaning of article 11 of Directive 93/22/CEE.

⁸ Within the meaning of Directive 2001/107/CE.

- (b) Credit institutions and other professionals of the financial sector investing in their own name but on behalf of institutional investors as defined under (a) above.
- (c) Credit institutions or other professionals of the financial sector established in Luxembourg or abroad which invest in their own name but on behalf of their non institutional clients on the basis of a discretionary management mandate.
- (d) Collective investment undertakings established in Luxembourg or abroad, even if its investors may not be regarded as being institutional investors.
- (e) Holding companies or similar entities, whether Luxembourg-based or not, whose unitholders are institutional investors as described under (a) to (d) above.
- (f) Territorial administrative bodies (e.g. regions, provinces, cantons, communes, municipalities), in so far as these invest their own funds.

In addition, the following types of investors could possibly qualify as institutional investors:

- (i) A holding company or company of similar nature, established in Luxembourg or abroad, even if its own unitholders are not institutional investors. It is however required that it is a holding company, or similar company, which has a real substance, and a proper structure and activity in the sense that it holds important financial interests; and
- (ii) A “family” type holding company or company of similar nature, established in Luxembourg or abroad, even if its own unitholders are not institutional investors. It is however required that it is a holding company, or similar company, by which a family or a branch of a family holds important financial interests.

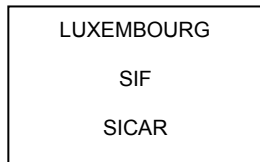
Monitoring and Safekeeping of Assets

The assets of a Sicar must be entrusted to a custodian bank. The custodian bank must either have its registered office in Luxembourg or be established in Luxembourg if its registered office in another Member State of the European Union.

Tax regime of the SICAR

A SICAR can have the form of so called limited liability companies (i.e. S.A., Sàrl, S.e.c.a.) but also of a cooperative or of a limited partnership.

A SICAR is a Luxembourg resident taxable entity (i.e. it is subject to taxes on its worldwide income). It benefits from an objective tax exemption on a specific type of income (on income from securities and interest pending the investment in risk capital).



**This fund requires two investors.*

