

FAQ SICARs

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1. What steps are to be taken to submit an authorisation request for a new SICAR?

A SICAR is a specialised investment company whose exclusive purpose is to invest in risk capital. Where there is doubt whether a SICAR project complies or not with the criteria of risk capital within the meaning of the law of 15 June 2004 relating to the Investment company in risk capital (SICAR), the initiator (i.e. the legal or natural person which started the project) should, prior to submitting an authorisation request, send a *nihil obstat* request relating to the acceptability of the contemplated investment policy to the CSSF.

In order to register a SICAR on the official list of SICARs, the initiator shall himself or, where applicable, *via* a representative, submit a complete application file with the CSSF which includes the following documents and information:

1. the authorisation form for SICARs which may be downloaded from the CSSF website (<http://www.cssf.lu/en/supervision/ivm/sicar/forms/>) with all the information and documents which are required therein including, among others, information on the initiator, a business plan of the SICAR, draft agreements to be signed with its main service providers (central administration, depositary bank, registrar and transfer agent, domiciliation agent, etc.), information on the investment processes and the management of the SICAR's assets, including the last annual accounts of the asset manager and/or investment adviser of the SICAR as well as information on the marketing of the SICAR with a description of the type of investors aimed at;
2. a description of the contemplated investment policy including a rationale supporting the compliance of the contemplated investment policy with the criteria of risk capital;
3. the draft prospectus;
4. the draft articles of incorporation of the SICAR;
5. the draft articles of incorporation of the SICAR's general partner, if the SICAR is a limited partnership;
6. documents that allow assessing whether the directors ("*dirigeants*") of the SICAR are of good repute, namely the declaration of honour which may be downloaded from the CSSF website (<http://www.cssf.lu/en/supervision/ivm/sicar/forms/>), a copy of the ID/passport of the directors, a CV and an extract from the judicial record. Legal persons shall also transmit a copy of their coordinated articles of incorporation, an extract from the trade and companies register and the annual reports (balance sheet and profit and loss account) for the last three years.

Where an existing company is transformed into a SICAR, the initiator of the SICAR is also required to explain the reasons for this transformation and to transmit to the CSSF the annual accounts for the last three years of the company to be transformed into a SICAR.

The above list is not exhaustive and the CSSF reserves the right to request, at any moment, any additional documents or information it deems necessary to fulfil its tasks of prudential supervision of SICARs.

As soon as the complete application file is submitted, the CSSF invites the initiator of the SICAR at a meeting in order to allow the latter to present his project.

2. What criteria shall the directors of a SICAR fulfil?

In order to be authorised, Article 12(3) of the law of 15 June 2004 specifies that the "*directors of the SICAR and of the depositary must be of sufficiently good repute and have sufficient experience for performing their functions. To that end, their identity must be notified to the CSSF. "Directors" shall mean, in the case of limited partnerships, the general partners and in the case of public limited companies and limited companies, the members of the board of directors and the manager(s), respectively.*"

Professional repute shall be assessed on the basis of police records and of any evidence showing that the persons concerned are of good repute and offer every guarantee of irreproachable business. The general requirement of irreproachable business shall, in particular, provide the public with confidence in authorised entities and ensure the Luxembourg financial centre's good repute. The presentation of all the guarantees of irreproachable business shall include all the personal and professional characteristics which allow an individual to correctly manage a professional supervised by the CSSF. The past and present professional activities of a person are substantial elements in order to assess and evaluate the good repute of this person in the perspective of its future activity in the financial sector.

The directors of a SICAR shall have adequate professional experience and sufficient knowledge of the business of the SICAR allowing them to ensure the professional management of the SICAR. In principle, the CSSF requires that the initiator is represented within the management body of the SICAR which shall be composed so as to ensure an adequate management according to the particular investment policy and structure of the SICAR concerned. Where the management functions are delegated, the directors of the SICAR shall have sufficient experience, ability and means to perform an adequate supervision of the delegated functions.

3. What are the CSSF's requirements regarding the prospectus of SICARs?

In application of Article 28 of the law of 15 June 2004 relating to the Investment company in risk capital (SICAR), the SICARs shall submit their prospectus and the relevant amendments to the CSSF. Pursuant to Article 24(1) of the law of 15 June 2004 "*the prospectus must include the information necessary for investors to be able to make an informed judgement on the investment proposed to them and the risks attached thereto*".

Generally, the prospectus shall provide the investor with transparent and adequate information about at least:

- the investment policy, the associated risks and the manner these risks are managed;
- the circumstances in which the SICAR may use leverage, the types of leverage allowed and the associated risks as well as the maximum leverage ratio of the SICAR;
- the management mechanisms for conflicts of interests;
- the decision-making mechanisms of the SICAR;
- the method used for the valuation of the SICAR's assets;

- the capital structure of the SICAR, including information about the fixity or variability of the capital, the rights attached to the different classes of shares, where applicable;
- the existence of possible side letters which directly affect the SICAR (when the prospectus is submitted as well as during the life of the SICAR);
- the rules set in relation to dividend distribution and capital repayment;
- the rules regarding the managers' remuneration;
- the other fees and commissions;
- the possible preferential treatment of some shareholder categories.

Moreover, the main provisions of the prospectus shall be up-to-date when additional securities are issued.

The prospectus shall be submitted to the CSSF in the context of an authorisation request for a new SICAR and any subsequent amendments to the prospectus shall be first notified to the CSSF. It should be noted that the prospectus is drawn up under the responsibility of the SICAR's directors.

4. What does the CSSF require for the central administration of SICARs?

The law of 15 June 2004 relating to the Investment company in risk capital (SICAR) requires that SICARs designate a central administration in Luxembourg. The eligibility of an entity as central administration of a SICAR is assessed by the CSSF on a case-by-case basis and based on the specific characteristics of each file.

As regards the different components of the central administration, it should be noted that the status of registrar agent within the meaning of Article 25 of the law of 5 April 1993 on the financial sector is required in order to professionally exercise the maintaining of the SICAR's register. Furthermore, the entities carrying out the functions of administrative agent within the meaning of Article 29-2 of the law of 5 April 1993 on the financial sector on behalf of the SICAR shall have a PFS authorisation.

SICARs may also perform the tasks linked to their own central administration themselves. In that case, the SICARs shall establish that they have the necessary human and technical resources to properly fulfil this mission.

In any case, copies of supporting documents must be available at the central administration of the SICAR in Luxembourg. These documents include, among others, the contractual documents relating to the acquisitions and disposals of portfolio companies as well as documents relating to valuations.

The CSSF may authorise the outsourcing of certain tasks linked to the function of the central administration located in Luxembourg with an entity located abroad. This outsourcing is subject to the following non-exhaustive conditions:

- The possibility of outsourcing shall be explicitly laid down in the contract of the central administration signed by the Luxembourg service provider and the SICAR. Information on the structure in place shall be communicated to the CSSF and the shareholders of the SICAR.

- The delegation shall be carried out under the coordination of the central administration in Luxembourg which shall supervise the delegated functions.
- The entity designated abroad by the central administration shall have sufficient human and technical means to perform its role.
- The central administration shall always have direct and immediate access to the data processed by the entity abroad and shall oversee the data.
- A system shall be set up to ensure the information flow between the different parties.
- The access for the *réviseur d'entreprises* (statutory auditor) to any information necessary to fulfil its mandate shall be guaranteed.

5. What does the CSSF require for the depositary bank of SICARs?

The law of 15 June 2004 requires the SICARs to entrust the custody of their assets to a depositary bank. The depositary shall have the status of credit institution within the meaning of the law of 5 April 1993 on the financial sector. Moreover, the entity designated as depositary shall have its registered office in Luxembourg or be established in Luxembourg if its registered office is in another country.

The custody regime applicable to the assets of a SICAR may be considered as equivalent to the concept of custody applicable to UCIs and broadly described in Circular IML 91/75. It should however be stressed that the law of 15 June 2004 does not provide for specific oversight duties as those existing for depositaries of UCIs subject to the law of 17 December 2010.

6. What is the procedure in case of replacement of a director or service provider?

Article 12(4) of the law of 15 June 2004 relating to the Investment company in risk capital (SICAR) sets out that "*the replacement of the depositary or of a director and the amendment of the constitutional documents of the SICAR are subject to the approval by the CSSF*". Thus, the above-mentioned replacements and amendments must be approved by the CSSF and an approval request shall be submitted to the CSSF before such change is made.

As the CSSF also approves the choice of the central administration and of the *réviseur d'entreprises* of the SICAR, any replacement of these service providers is also subject to the above procedure.

In addition, the CSSF requests to be informed in case of changes of asset managers or investment advisers of SICARs, insofar as this information is included in the prospectus of the SICAR.

7. Which requirements regarding prudential reporting does the SICAR have to comply with?

SICARs shall communicate to the CSSF a set of financial information which the CSSF will use for its prudential supervision of SICARs as well as for statistical purposes.

The prudential reporting regarding SICARs includes the communication of standardised half-yearly information and financial information provided on a yearly basis.

The half-yearly financial information relating to SICARs shall be drawn up, if applicable, per compartment, in accordance with table K 3.1, which is available on the CSSF website.

The half-yearly financial information to be provided by SICARs may be drawn up, if necessary, based on provisional figures regarding the valuation of investments in risk capital. The CSSF requires that a reporting with final financial data (reflecting the figures of the annual report) be submitted at the end of the financial year once the SICAR's audit has been completed.

In accordance with Article 28 of the law of 15 June 2004, any SICAR shall also submit to the CSSF a copy of its audited annual report as soon as it is available and in any event within six months from the end of the period to which the report relates. In this context, the management letter from the *réviseur d'entreprises* relating to the audit of the annual accounts of the SICAR or, failing that, a written declaration by the *réviseur d'entreprises* stating that no such letter was issued, shall also be sent to the CSSF.

For further details, please refer to Circular CSSF 08/376 regarding the financial information to be submitted to the CSSF by investment companies in risk capital (SICARs).

8. What are the obligations for SICARs as regards information to be submitted to the investors and the dissemination method?

For prudential purposes, the CSSF would like to receive information on the composition of the SICARs' shareholders including:

- the number of shareholders broken down according to the categories of investors eligible under the law of 15 June 2004, i.e. institutional and professional investors and/or other investors in accordance with Article 2(1) and (2) of the law of 15 June 2004 and/or other investors in accordance with Article 2(1) and (3) of the law of 15 June 2004.

This information is required for the SICARs' half-yearly prudential reporting and shall be communicated even in case there is a nominee, irrespective of the legal relation between the nominee and its client and notwithstanding any professional secret the nominee might be subject to.

9. Which requirements are the SICARs subject to as regards the drawing-up, approval, statutory audit and publication of annual accounts?

Pursuant to the law of 15 June 2004 relating to the Investment company in risk capital (SICAR), any SICAR shall draw up an annual report. The annual report, together with the report of the *réviseur d'entreprises agréé* (approved statutory auditor) on the accounting data included in the annual report, shall be made available to the investors within six months as from the end of the period this report refers to.

The annual report shall include:

- a balance sheet or a statement of assets and liabilities, an income and expenditure account for the financial year and notes in the annexe;
- a report on the activities of the past financial year;
- any important information enabling investor to make an informed judgment on the development of the activities and the results of the SICAR, including the investment portfolio line-by-line.

In order to observe the principle of true and fair view and in a perspective of transparent information for investors, the annual report of SICARs shall include any important

information. This implies that a “look through” shall be applied for intermediary companies, insofar as the investments were made through subsidiaries whose only purpose is to facilitate the investment by the SICAR in the portfolio company (such as special purpose vehicles).

The accounting data included in the annual report shall be approved by the SICAR's shareholders in accordance with the provisions of the company law.

Pursuant to Article 79 of the law concerning the trade and companies register, the SICARs shall deposit the duly approved annual accounts within the month as from the approval and at the latest seven months after the end of the financial year with the trade and companies register. In accordance with this legal provision, the SICARs deposit their accounting data included in the annual report with the trade and companies register. This accounting data represents the annual accounts.

In this context, it is common practice that SICARs deposit and publish an audited summary of the annual report and that these published accounts only include the aggregated information on the investment portfolio. However, it is reminded that SICARs shall draw up a complete and audited annual report including the investment portfolio line-by-line for the investors and the CSSF.

10. To which particular requirements as regards the drawing-up, approval, audit and publication of the annual accounts are SICARs with multiple compartments subject?

The principles set out in question 9 apply *mutatis mutandis*.

In practice, SICARs with multiple compartments are required to draw up an annual report of the legal entity which includes:

- a balance sheet or a statement of assets and liabilities, an income and expenditure account for the financial year and notes in the annexe for the legal entity, representing the aggregation of the data of each compartment;
- a balance sheet or a statement of assets and liabilities, an income and expenditure account for the financial year and notes in the annexe for each compartment;
- a report on the activities of the previous financial year of the legal entity and its compartments;
- any important information enabling investors who invested in a compartment to make an informed judgment on the development of the activities and the results of that compartment and of the SICAR as the legal entity, including the investment portfolio line-by-line.

The SICAR with multiple compartments may choose to draw up one single annual report the content of which complies with the points listed above. The joint drawing-up of an annual report which includes the aggregated data of the legal entity and of separate annual reports per compartment is also possible.

The accounting data included in the annual report of the legal entity, including the compartments, are subject to a statutory audit by a *réviseur d'entreprises agréé*. The report of the *réviseur d'entreprises agréé* concerns the legal entity and all its compartments.

The accounting data included in the annual report of the legal entity and, where applicable, the different compartments shall be approved by the shareholders of the SICAR in accordance with the provisions of the company law.

11. Which general characteristics shall investment policies of SICARs present?

Pursuant to Article 1 of the law of 15 June 2004, the business purpose of the SICAR is to "*invest its assets in securities representing risk capital in order to ensure for its investors the benefit of the result of the management of its assets in consideration for the risk which they incur*".

Investment in risk capital is defined by the SICAR law as "*the direct or indirect contribution of assets to entities in view of their launch, development or listing on a stock exchange*".

Any authorisation request shall first include a detailed description of the strategy of investment in risk capital. In this context, it shall also be indicated if the investments aim at a specific activity sector or a given geographical area and if there are accessory investment policies.

The acceptability of an investment policy is assessed according to the following elements:

A. "Development" criterion

The application file shall describe the steps undertaken by the SICAR as regards the development of the portfolio companies. Thus, it is notably required that the SICAR explains by which means it will generate added value in the portfolio companies.

The role of the SICAR as investor shall not be limited to a passive holding of the participations but shall, in principle, involve the active management of the portfolio companies notably *via* an advisory activity or a representation in the managing bodies of the portfolio company. In this context, it is necessary to describe the restructuring, modernisation or other measures taken with the aim to lead to a better distribution of the portfolio companies' resources. Where the SICAR invests into a sole portfolio company, the active management element is particularly important.

Where the SICAR invests in one or several target fund(s), the development element shall be present at the level of this or these target fund(s).

For further explanations concerning the "development" criterion, please refer also to Circular CSSF 06/241 specifying the concept of risk capital.

B. "Risk" criterion

The file submitted to the CSSF shall include a description of the general risk linked to the investment in risk capital as well as a description of the particular risk linked with the development project.

The parliamentary works specify that the concept of "*risk capital*" notably refers to venture capital and private equity financings. Venture capital usually refers to capital contributed to small and often newly launched undertakings (start up) or entities active in sectors with high development potential. The concept of private equity is to be construed in the broad sense. Private equity bears an inherent risk which is notably the risk due to lack of liquidity.

The "risk" criterion is also detailed in Circular CSSF 06/241 specifying the concept of risk capital.

C. Exit strategy

The SICAR's declared intention shall be to acquire financial assets in order to sell them with a profit, as opposed to a holding company which acquires to hold. In this respect, the holding duration is an important criterion to determine whether an investment policy is acceptable or not.

The prospectus shall include information on the exit strategy of the SICAR in the framework of its investments and show a non-exhaustive list of the possibilities by which the SICAR contemplates to divest from its underlying and by indicating a predictable holding period.

12. Under which conditions may SICARs carry out real estate investments?

SICARs cannot directly hold real estate. However, the indirect investment *via* entities that hold or invest in real estate assets representing risk capital characteristics (private equity real estate), as well as the contribution of capital to real estate companies, is possible.

The situation of the real estate referred to in this policy shall be such that the indirect investment made by the SICAR contributes to change its existing condition and, thus, increase its value. The value creation may adopt several forms, such as the enhancement of the real estate through renovation, renegotiation of contracts, renewal of tenants or restructuring of the portfolio of the real estate company.

In addition, the real estate objects shall present a particular risk above the normal real estate development risk on a given market. The sole geographical location of a real estate which might present a certain political risk is not sufficient to establish the risk capital characteristics of the investment in the absence of any development element.

For further details on the eligibility of real estate investments for SICARs, please refer to Circular CSSF 06/241 specifying the concept of risk capital.

13. Can SICARs invest in infrastructure projects?

Investment in infrastructure projects may be eligible for a SICAR, provided that the underlying assets represent risk capital within the meaning of the law of 15 June 2004.

14. Can a SICAR have an accessory investment policy which does not comply with the criteria of risk capital?

The investment policy of a SICAR cannot allow the investment in assets which are not representative of risk capital, even to a negligible extent, without prejudice to the specific case described under question 19 below.

15. Can SICARs make indirect investments through intermediary investment vehicles or special purpose vehicles?

A SICAR may make indirect investments through intermediary investment vehicles or special purpose vehicles (SPV).

When the investment is made through intermediary investment vehicles, the latter shall have a policy in line with the investment policy of the SICAR concerned. In order to be eligible, an intermediary investment vehicle shall qualify as private equity or venture capital fund.

The SICARs may also indirectly invest *via* dedicated special purpose vehicles. In this case, these vehicles shall have a policy which guarantees an exclusive investment in assets representing risk capital within the meaning of the law of 15 June 2004 and Circular CSSF 06/241.

16. Can SICARs act as feeder fund in a master-feeder structure?

SICARs may act as a feeder fund in a master-feeder structure. In that case, the usefulness and reason for this construction shall be communicated to the CSSF per separate letter. The "risk" and "development" criteria as well as the exit strategy shall be confirmed at the lowest level (in application of the master policy).

17. Under what conditions may a SICAR invest in securities listed on a stock exchange?

Investment in listed securities is acceptable provided that these listed assets represent investment in risk capital. Securities listed on a stock exchange not complying with the requirements applicable to regulated markets within the meaning of MiFID or securities which, even though they are listed on a regulated market, are issued by an entity representing risk capital within the meaning of the law of 15 June 2004 are likely to fulfil these conditions.

As regards regulated markets, investment in certain securities listed on these markets may notably be eligible when this investment is associated to a particular development project of the portfolio company or aims at a delisting of the securities and thus these securities represent risk capital.

Listed small caps for instance may constitute eligible investments for a SICAR, so the listing of these companies does not necessarily need to put an end to the investment.

18. Under which conditions can a SICAR invest in derivative financial instruments?

SICARs may only use derivative financial instruments for hedging purposes. Investment in derivative financial instruments cannot constitute the object of the investment policy.

In case the prospectus provides for hedging of risks, it shall be mentioned that this hedging only refers to interest rate and foreign exchange risks excluding investment risks.

19. In which manner can a SICAR invest its liquidity awaiting investment and reinvestment in risk capital as well as funds awaiting distribution?

As the investment policy of a SICAR must be centred on risk capital, any other investment can only be temporary. As a consequence, the management of funds awaiting investment, reinvestment and distribution must be made in accordance with the prudent person rule aiming to preserve the capital for the amounts invested on a temporary basis. The awaiting liquidity may only be invested in assets with no market risk; particularly, investment in shares (even blue chip) is prohibited.

20. Can SICARs make investments in commodities?

The acceptability of a policy of investment in commodities is assessed by the CSSF on a case-by-case basis, in particular, based on the criteria developed in Circular CSSF 06/241 as regards real estate investments. The SICAR cannot directly invest in commodities. However, an indirect investment *via* the risk associated to investments in companies exploiting commodities is possible. In any case, the risk and development criteria shall be identifiable at the level of portfolio companies.

21. Can a SICAR invest in ABS and CDOs?

The CSSF considers that investments in ABS, CDOs and other similar securities are, in principle, not eligible for SICARs.

22. Under which conditions can a SICAR invest in Distressed Debt securities?

The policy which provides for a direct or indirect investment in distressed debt securities is in principle acceptable.

For this type of investment, the activity of the SICAR shall however not be limited to the sole possession of claims, but the investment shall allow the SICAR to intervene in the restructuring of the debt of the issuing companies and to contribute to the development of these companies. To this end, it is essential that the prospectus describes in sufficient detail the type of development projects of portfolio companies as well as the particular risk attached to these investments.

23. What are the SICARs' obligations with respect to risk management?

The starting point of any risk management should be the development of an adequate model for the valuation of investments and identification of the risk categories to which the investments are likely to be exposed. Moreover, SICARs shall implement appropriate risk management procedures according to their investment policy. In this context, the procedures aiming to measure the risk and to develop strategies in order to mitigate the risk are considered as the key element for a sound risk management. In a SICAR, the risk management framework shall allow the directors and managers to monitor the relevant risks during the realisation of investments while taking into account the specific characteristics of the investments.

Information about the risk management policy, in particular as regards the management of financial risks, shall be communicated to investors.

24. What requirements are SICARs subject to regarding due diligence in relation to their investments?

Due diligence means a process whose result allows the SICAR to assess the characteristics and risks of a contemplated transaction. The documented results of the due diligence should disclose if the acquisition of an investment is appropriate for the SICAR according to its investment policy.

The directors of the SICAR shall implement a due diligence process applicable, apart from exceptions, to all investment projects. An adequate due diligence shall cover the following aspects:

- Commercial aspects;
- Legal aspects;
- Tax aspects;
- Review of the historical performance of the target investment, where appropriate, based on audited annual accounts;
- Operational aspects;
- Review of the conditions and details of the contemplated transactions;

- Risk factors;
- Valuation of underlying investments.

In certain cases, independent and experienced professionals such as lawyers, *réviseurs d'entreprises* or valuation experts may be mandated to carry out all or part of the due diligence missions. The SICAR shall indicate in its documentation if it intends to use external consultants to carry out due diligence.

From the beginning, the valuation of the underlying target investments at fair value shall be an integral part of the due diligence process.

25. What requirements are the SICARs subject to regarding management of conflicts of interest?

The SICAR shall be structured and organised so that the risk of conflicts of interest between the SICAR and, where applicable, any person contributing to the activities of the SICAR or any person directly or indirectly linked to the SICAR is minimised and does not harm the interests of investors. In case of possible conflicts of interests, the SICAR shall protect investors' interests.

The CSSF requires that the possible existence of conflicts of interest and the procedure to manage conflicts of interest be appropriately described in the SICAR's prospectus.

26. Obligation of professional secrecy - What are the conditions to comply with in case of data transfer by a central administration or a depositary to another service provider?

In case of data transfer, a service provider (“SP”) acting as central administration or depositary bank (a credit institution, an investment firm or a professional of the financial sector) must obtain consent from its clients, the SICARs, through the management body of the SICAR, for outsourcing the services in scope, the type of information transmitted in the context of the outsourcing and the country of establishment of the entities providing outsourced services, pursuant to Article 41 (2a) of the Law of 5 April 1993 on the financial sector, as amended.

The management body of the SICAR should inform and obtain consent from investors to the transfer of their personal and confidential data through the following means:

- Communication to existing investors (letter explaining the transfer of data with a possibility to object within a reasonable timeframe)
- Immediate change/modification of the subscription form in order to seek consent from future investors
- At the first occasion: modification of the prospectus (disclosing the necessary information regarding the data transfer)

Before outsourcing the services in scope, the SP should also obtain the commitment of the management body of the SICAR, that investors have been informed of and consented to the transfer of their personal and confidential data.

Due to transparency and confidentiality requirements, the same conditions apply to SICARs acting as central administration.

27. Who to contact for further information?

If you have any further questions of a general nature, you can send an email to the following address:

opc@cssf.lu

Luxembourg, 2 September 2019