

THE SPECIAL LIMITED PARTNERSHIP

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Xavier Le Sourne's practice concentrates on collective asset management and investment funds. He advises a number of investment fund promoters and other financial institutions in relation to the set-up and structuring of their Luxembourg investment fund operations.

Luxembourg seized upon the implementation of the Alternative Investment Fund Managers Directive (AIFMD) in 2013 to increase its attractiveness as a leading jurisdiction for setting up private equity, real estate and hedge funds. Indeed, in addition to the corporate partnership limited by shares (*société en commandite par actions* or SCA), Luxembourg revamped the *société en commandite simple* (common limited partnership or CLS) and also created the *société en commandite spéciale* (special limited partnership or SLP).

The SLP has been designed in the law of 12 July 2013 implementing the AIFMD (the 2013 Law) to compete with its Anglo-Saxon counterparts while benefiting from a competitive tax environment. Luxembourg currently counts approximately 450 SLPs and this figure follows a fast growing curve. Among others, SLPs have been used to date to serve as carry and co-investing vehicles but most importantly as regulated and unregulated investment funds replicating various types of alternative strategies.

ESTABLISHMENT

SLPs are established by way of a notarial deed or by way of a private instrument signed by all partners. The SLP must be registered with the Luxembourg trade and companies register but only an excerpt of the limited partnership agreement (LPA) must be published. In particular, the

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name of the limited partners (LPs) and their contribution is not subject to publication.

It should be noted that an SLP does not constitute a legal person distinct from its partners and is fully transparent from a tax perspective (*see below Tax*).

STATUS OF THE GENERAL PARTNER AND LIMITED PARTNERS

As for traditional limited partnerships, an SLP must be constituted by at least one general partner (GP) jointly and severally liable for the SLP's obligations and one LP whose liability is limited to its contributions.

Luxembourg law has introduced new provisions which aim to specify the relationship LPs may have with the SLP without jeopardising their limited liability. It firstly confirms that LPs may not take any management decision to-

wards third parties and confirms the additional liability if they do so. Luxembourg law has further introduced a list of actions that may be undertaken by LPs which shall not be considered as management actions such as (but not limited to): (i) the exercise of their rights as LPs, (ii) the advice or opinions given to the SLP, its affiliates or their managers, (iii) any control or supervision actions, (iv) the granting of loans, guarantees or security or any other assistance to the SLP or its affiliates or (v) authorisations given to the managers in accordance with the provisions of the LPA for actions exceeding their powers.

Finally, the 2013 Law gives LPs the right to take up certain functions in an SLP such as being a director or agent (mandataire) of a manager of the GP. This is an important feature in the context of alternative investment funds (AIF) where employees of the managers themselves are very often employed by or involved in the GP while at the same time holding LPs' interests in order to receive their carried interest.

PARTNERSHIP INTEREST AND CAPITAL ACCOUNTS

Unlike the SCA which is a company with capital represented by shares, the SLP has no share capital. The partners' contribution in the SLP consists of partnership interests which may (but need not) be represented by securities. Where no securities are issued, the partners' interests (and their related contributions, withdrawal, distributions, etc) can take the form of capital accounts. Capital accounts can be particularly relevant where complex distribution mechanisms are contemplated or LPs are subject to a multiple fee structure or if opt out rights on certain investments are granted to LPs.



IF REGULATED, AN SLP MAY BE SET UP AS AN UMBRELLA VEHICLE WITH MULTIPLE DISTINCT AND SEGREGATED PORTFOLIOS OF ASSETS, EACH SUCH PORTFOLIO CONSTITUTING A SEPARATE SUB-FUND OR COMPARTMENT



PREDOMINANCE OF THE LPA

Subject to few mandatory rules, the SLP will be ruled by the LPA, which will set (among other things):

- Whether the interests issued by the SLP will be represented by securities or by capital accounts, the features of such interests (including whether interests are issued with or without voting rights, with multiple voting rights or veto rights) and the conditions of transfer of interests;
- The rules relating to contributions and admissions of new partners;



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- The rules governing distributions and reimbursement to partners and the circumstances in which claw-backs from partners may occur;
- The conditions under which partners may be excluded from distributions of profits or participation to the losses (subject to certain limits);
- Limited partners matters and type of decisions to be taken by the partners and the form and conditions for taking such decisions (e.g. through participation to internal advisory committees);
- The type and extent of information to be given to LPs (subject to certain minimum information if the SLP is regulated or, if unregulated and as further described below, managed by a fully authorised AIFM);
- Whether and under which conditions partnership interests may be reduced and redeemed (at the request or not of the partners and thus also in the case of defaulting partners); and
- The conditions for replacing unlimited partners and designating/replacing the manager.

REGULATION STATUS – UMBRELLA STRUCTURE

An SLP may be set up as unregulated vehicle or be regulated by the Luxembourg financial regulator (CSSF), notably as specialised investment fund (Sif) or as investment company in risk capital (SICAR).

If regulated, an SLP may be set up as an umbrella vehicle with multiple distinct and segregated portfolios of assets, each such portfolio constituting a separate sub-fund or compartment.

Should they qualify as an alternative investment fund, SLPs shall also be subject to the relevant provisions of the AIFMD.

This qualification of AIF may also benefit an SLP and its manager, which although unregulated under one of the Luxembourg regimes provided for hereof, can be managed by a fully authorised AIFM. This structure of management may indeed give some comfort to the LPs through the provisions of the AIFMD that guarantee a certain level of protection to the investors while avoiding the AIFM to support a double layer of regulation at the level of its AIF.

TAX

An SLP is tax transparent for Luxembourg income and net wealth tax purposes.

Tax Circular L.I.R. n° 14/4 of 9 January 2015 (Circular) has also definitely ruled out the application to SLPs of the municipal business tax (in Luxembourg City, at a rate of 6.75%) when the SLP qualifies as an AIF on the basis that they are never deemed to carry on any trade or business (to the extent that the GP holds an interest of less than 5% in the SLP as provided for in the 2013 Law). In addition, SLPs regulated as a Sif or SICAR will also (but for different reasons) not be regarded as carrying out a commercial activity and therefore not be subject to the municipal business tax either. More specifically, SLPs regulated as Sifs are subject to subscription tax (0.01% of their net assets for a Sif).

Management services rendered to a regulated SLP (such as a Sif or a SICAR) or to an SLP which qualifies as an AIF are exempt from Luxembourg VAT. ■