

a sign  
of trust



FOR MORE  
INFORMATION  
CONTACT OUR  
PROFESSIONALS:

Stanislas Bunetel  
Head of Tax

Tel:  
(+352) 269 255-2209

E-mail:

[stanislas.bunetel@experta.lu](mailto:stanislas.bunetel@experta.lu)

Tanja Bernat  
Business Unit Manager

Tel:  
(+352) 269 255-6751

E-mail:

[tanja.bernat@experta.lu](mailto:tanja.bernat@experta.lu)

## Legal & tax aspects of the Luxembourg special limited partnership

### INTRODUCTION

The law dated 12 July, 2013 concerning alternative investment fund managers (the **AIFM Law**) has introduced the legal regime of a new form of limited partnership without legal personality: the special limited partnership (*société en commandite spéciale*).

The tax regime of the special limited partnership (the **SLP**) has been clarified by the AIFM Law and by the circular of the Luxembourg tax authorities dated 9 January 2015 (the **Circular**).

The SLP is a tax transparent entity without legal personality. With this new vehicle, Luxembourg will be able to offer a new solution for private equity funds, hedge funds and real estate funds.

The legal and tax regimes of the SLP come from the Anglo-Saxon Limited Partnership. Indeed, the main features of the Anglo-Saxon Limited Partnership are (i) its flexibility from a legal point of view and (ii) its tax transparency.

## DESCRIPTION OF THE LEGAL REGIME OF THE SLP

The SLP has no legal personality.

Non-regulated vehicles or regulated vehicles (i.e. Special Investment Funds (**SIF**) and *Société d'Investissement à Capital Risque (SICAR)* or a *Part II Société d'Investissement à Capital Fixe (Part II SICAF)*) can be created with the legal form of a SLP.

The SLP is incorporated under a contractual form (i.e. under private seal) without the need of a Luxembourg notary. However, the SLP should be registered with the Luxembourg Trade and Companies Register. The incorporation deed should also be published in the Luxembourg official gazette (the *Mémorial*).

The SLP is considered as legally in existence as from the date of the signature of the incorporation deed. The SLP needs at least one general partner (**GP**) and one limited partner (**LP**).

The confidentiality regarding the identity of the LPs and contributions made by the LPs is guaranteed since those information have not to be published.

A LP does not lose the benefit of the limitation of the responsibility to its contribution if it takes only internal decisions in the SLP. However, if it realizes management actions towards third parties, then it will be considered as becoming jointly liable with the GPs.

The parts in the SLP can take the form of shares or not.

The SLP has no restriction for the payment of a return to investors. This return, either in the form of dividends or in the form of interest in the SLP, cannot be recalled (except if a special provision in the incorporation deed of the SLP allows the recall).

There are no legal restrictions regarding the below features that can be freely organized in the incorporation deed:

- Acceptance of new shareholders and issuance of new shares in the SLP;
- Transfer of the shares in the SLP;
- Distribution to the shareholders (either in the form of distribution of profits or reimbursement of participations in the SLP, which allows to establish a variable share capital or a structure with a variable share capital);
- The right of the shareholders to the profits or losses of the SLP (except leonine clauses);

- The form of the contribution (in cash, in kind or sweat equity);
- Voting rights: the traditional rule that one share gives one vote is not applicable;
- Quorum and majority rules;
- Conditions et process to put the SLP into liquidation.

Given that the SLP has no legal personality, it has in principle no registered office but the AIFM Law has decided that its registered office will be the place of its central administration (which is deemed considered to correspond to its statutory seat in Luxembourg).

The registrations made in relation to the assets which are contributed to the SLP are realized for and on behalf of the SLP itself and not for and on behalf of the GP or LP.

The rights on the assets of the SLP are exclusively for the benefit of the creditors of the SLP. The assets of the SLP are not available for the private creditors of the shareholders of the SLP. The creditors of a shareholder of the SLP have no claims on the shares held by the shareholders of the SLP.

#### **DESCRIPTION OF THE TAX REGIME OF THE SLP**

A SLP is a tax transparent entity for the purpose of the Luxembourg corporate income tax and net wealth tax. However, the profits of the SLP may be subject to municipal business tax (the rate varies from municipality to municipality – the applicable rate in Luxembourg city is 6.75%) if the SLP carries out, or is deemed to carry out, commercial activities.

If the SLP is treated as a commercial undertaking for the purpose of the municipal business tax, non-resident LPs could potentially be considered as having a permanent establishment in Luxembourg, as a result of which that would be subject to personal or corporate income tax on their share of the business profits derived through the SLP (subject to applicable double tax treaties).

A SLP is treated as a commercial undertaking for municipal business tax purposes in the following two circumstances:

- If one of the GPs is a Luxembourg joint stock company holding at least 5% of the interest in the SLP;
- If the SLP carries out commercial activities (as opposed to private wealth management activities).

- Guidelines provided by the Circular for non-regulated SLPs being AIFs

The Circular clarifies that a Luxembourg non-regulated SLP (i.e. a SLP that is neither a SIF, SICAR or a Part II SICAF) that qualifies as an alternative investment fund (AIF) within the meaning of the AIFM Law is never considered as carrying out a commercial activities due to the fact that it will be required to have an investment policy in line with the AIFM Law and the guidelines of the European Securities and Market Authority (ESMA) and by definition, it does therefore have an investment purpose (as opposed to a commercial purpose).

As a consequence, a non-regulated SLP, qualifying as an AIF, is fully tax transparent for Luxembourg tax purposes provided that none of its GPs, having the form of a share capital company, holds more than 5% of the partnership interests in the LP.

- Guidelines provided by the Circular for non-regulated SLPs not being AIFs

The nature of the activities of non-regulated SLPs (not being AIFs) needs to be determined on a case-by-case basis, in particular based on the investment policy of the SLP.

Commercial activities are activities carried out:

- (i) independently;
- (ii) on a permanent basis;
- (iii) with a participation in the general economy;
- (iv) for the purpose of realizing profits.

The activities which do not fulfill these 4 criteria are not considered as business activities but as private wealth management activities (i.e. activities the purpose of which is not primarily to generate profits through trading).

The Circular mentions that neither the volume of the assets of the SLP nor the disposal of certain assets within a short period of time are decisive factors on a standalone basis.

In accordance with the guidelines of the Circular, non-AIF SLPs (other than those set-up as a SIF, SICAR or Part II SICAF) that hold their assets for extended periods of times, as in general the case for private equity investment policies, should under normal circumstances not be treated as carrying out commercial activities. As a consequence, such SLPs should in most circumstances be completely tax transparent in Luxembourg, provided that they have not a GP being a share capital company holding 5% or more of the partnership interests in the SLP.

On the contrary, non-AIF SLP (other than SIF, SICAR or Part II SICAF) with a hedge fund investment policy could potentially be treated as a commercial undertaking for municipal business tax purposes.

### **SERVICES THAT EXPERTA MAY OFFER**

**Experta has already a large experience with the set-up of a Luxembourg SLP and will be able to assist our client in the implementation of such a vehicle and to check whether the full tax transparency of the SLP may be achieved.**

***Disclaimer:***

*This newsletter on legal and tax issues in Luxembourg cannot be regarded as an advice with respect to the law in Luxembourg or abroad.*