Luxembourg Limited Partnerships: SCS-SCSp

The Luxembourg Limited Partnerships (Lux LPs):
an attractive and flexible contractual regime for private equity, venture capital and real estate transactions

With the law of 12 July 2013 implementing the European Alternative Investment Fund Managers Directive (AIFMD), the regime of Luxembourg LPs has been deeply amended and modernised into an appealing regime for investment fund managers, allowing a greater legal flexibility as well as full tax transparency and neutrality.

Framework and definition

While transposing the AIFMD into Luxembourg law, The Luxembourg lawmaker took the opportunity to enhance the existing common limited Partnership (SCS), which has a legal personality (similar to the English partnerships model) and to introduce a new special limited partnership (SCSp) without legal personality (similar to the Scottish model) (together referred to as "Lux LPs").

Please note that this publication does not cover the regime of Luxembourg "sociétés en commandite par actions – SCA", which is a type of joint stock company commonly used in Luxembourg.

As for UK models, Lux LPs require one or more general partners (each of whom bears unlimited personal liability, is responsible for management and represents the Lux LP towards third parties) and one or more limited partners, whose liability is limited to their respective contributions in the partnership, under the condition that they do not intervene in the management of the Lux LPs toward third parties (otherwise they are considered to be general partners).

Regulated or unregulated vehicle

A Lux LP may be set up as an unregulated or a regulated vehicle.

If the Lux LP is unregulated, it will be governed by the provisions of the law of 10 August 1915 as amended, on commercial companies (the Companies' Law).

If the regulated structure is retained, it shall be authorised by the Luxembourg supervisory authority of the financial sector (CSSF), as a specialised investment fund (SIF), an investment company in risk capital (SICAR) (with the possibility for both types of structures, to have compartments), or an undertaking for collective investment under part II of the law of 17 December 2010 (Part II UCI). In this case, specific regulations of each of these regulated vehicles shall apply to the Lux LP.

In addition, and if the Lux LP is considered as an Alternative Investment Fund under AIFMD, an AIFM shall be designated (we refer to our publication on AIFMD for more details on this aspect).

Legal personality

Most of the provisions of the Law apply similarly to SCS and SCSp. The main difference is that whereas the SCS has its own legal personality distinct from its partners, the SCSp is a partnership with no legal personality distinct from its partners.

However, and despite of the absence of a legal personality, the SCSp still benefits from main attributes generally attached to a legal personality: i.a. it has its own registered office, assets contributed to the SCSp can be recorded in the name of the SCSp, the SCSp can have its own creditors and may be entitled to borrow for its own account.

Formation – Limited Partnership Agreement

The constitutional document of the Lux LPs is the limited partnership agreement (the LPA), approved and signed by all general and limited partners.

The LPA aims at governing and describing the terms and conditions of the partnership, the rights and duties of partners, the governance rules, the organization and the functioning of the vehicle.

The LPA may be concluded under the form of a notarial deed or under private seal. It can be drafted in English or any other language as agreed by the partners. In case of a notarial deed, a French or German version must be supplied. In case of a regulated Lux LP (SIF, SICAR, Part II UCI), no translation is required.

The essential element of the Lux LPs regime is the contractual freedom which is governed and defined by the LPA. Generally all rules governing the Lux LP may be freely determined in the LPA.

An extract of the LPA must be filed with the Luxembourg Companies' Register published in the Luxembourg Gazette with the following specifications: Lux LP denomination, corporate object, duration and registered office of the Lux LP, designation of the general partner and of the managers together with their powers of signature. Hence the Lux LP regime fully guarantees confidentiality regarding the limited partners and their respective contribution to the Lux LP, as they are not subject to publication.

Partnership interest and capital accounts

Unlike joint stock companies, Lux LPs have no share capital. The partners' contribution in the SCS or SCSp consists in partnership interests which can be represented by securities or can take form of capital accounts, according to the provisions of the LPA.

If the Lux LP is regulated, the contributions to a SIF or a Part II UCI must reach EUR 1.250.000 and those to a SICAR must reach EUR 1.000.000 within 12 months of its authorisation.

In case of capital accounts, the capital account of each partner varies according to their contributions and withdrawals and to the profits or losses of the Lux LP which are allocated to the relevant partner.

Lux LPs can be funded by equity commitments or by a mix of equity and loans and there is no limitation on the proportion of financing provided by equity and by partners' loans.

Applicable rules regarding the redemption, transfer or pledge of partnership interests are covered by the LPA. Unless otherwise provided in the LPA, the transfer of a limited partnership interest requires the consent of the general partner(s) and the transfer of a general partnership interest requires the consent of all partners. In addition a notification of transfer of partnership interests must be provided to the Lux LP.

Governance

Lux LPs are managed by one or more managers designated in the LPA, which can be (but are not required to be) a general partner. When external manager are appointed, the joint and indefinite liability still stays with the general partner(s).

The manager is not required to be domiciled in Luxembourg.

The limited liability of the limited partners implies that they are not allowed to carry out management acts towards third parties (external management), otherwise their joint and unlimited responsibility should incur toward third parties.

However this prohibition does not apply to internal management, as the Companies' Law provides a non-exhaustive list of actions which are not considered as external management.

Are not considered as external management, the provision of advice, the control and supervision of the affairs of the Lux LP, the granting of loans, guarantees and security interests to the Lux LP, the authorizing of managers' acts that exceed their powers as defined by the LPA.

Register

All Lux LPs are required to maintain a partners' register which should be accessible to any partner unless the LPA provides restrictions in that sense.

Annual accounts

The rules applicable to SCS and SCSp are very different.

SCS are legally required to prepare annual accounts, to make them available to partners at the registered office at least 15 days before their approval and the meeting approving the annual accounts must be held within 6 months following the end of financial year under review. The annual accounts must then be filed with the Luxembourg Companies' Register within one month following their approval.

No similar obligations are required for SCSp. The LPA freely determines applicable rules relating to the annual accounts. In addition there is no requirement of publication.

If Lux LPs are regulated, the relevant legal provisions apply. Specifically, the management body shall draft a management report, to be reviewed together with the annual accounts by an independent auditor ("réviseur d'entreprises agréé").

Tax aspects

Lux LPs are tax transparent and tax neutral regarding Luxembourg income tax and net wealth tax. If the Lux LP exercises a business activity it will be subject to Luxembourg municipal business tax.

The Lux LP is deemed to realise a business activity if the general partner is a capital company that owns more than 5% of the Lux LP.

The tax administration specified that a Lux LP which is qualified as AIF shall not be considered to carry out a business activity.

In addition, management services provided to a regulated Lux LP (such as a SIF or SICAR) are exempt from Luxembourg VAT.

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