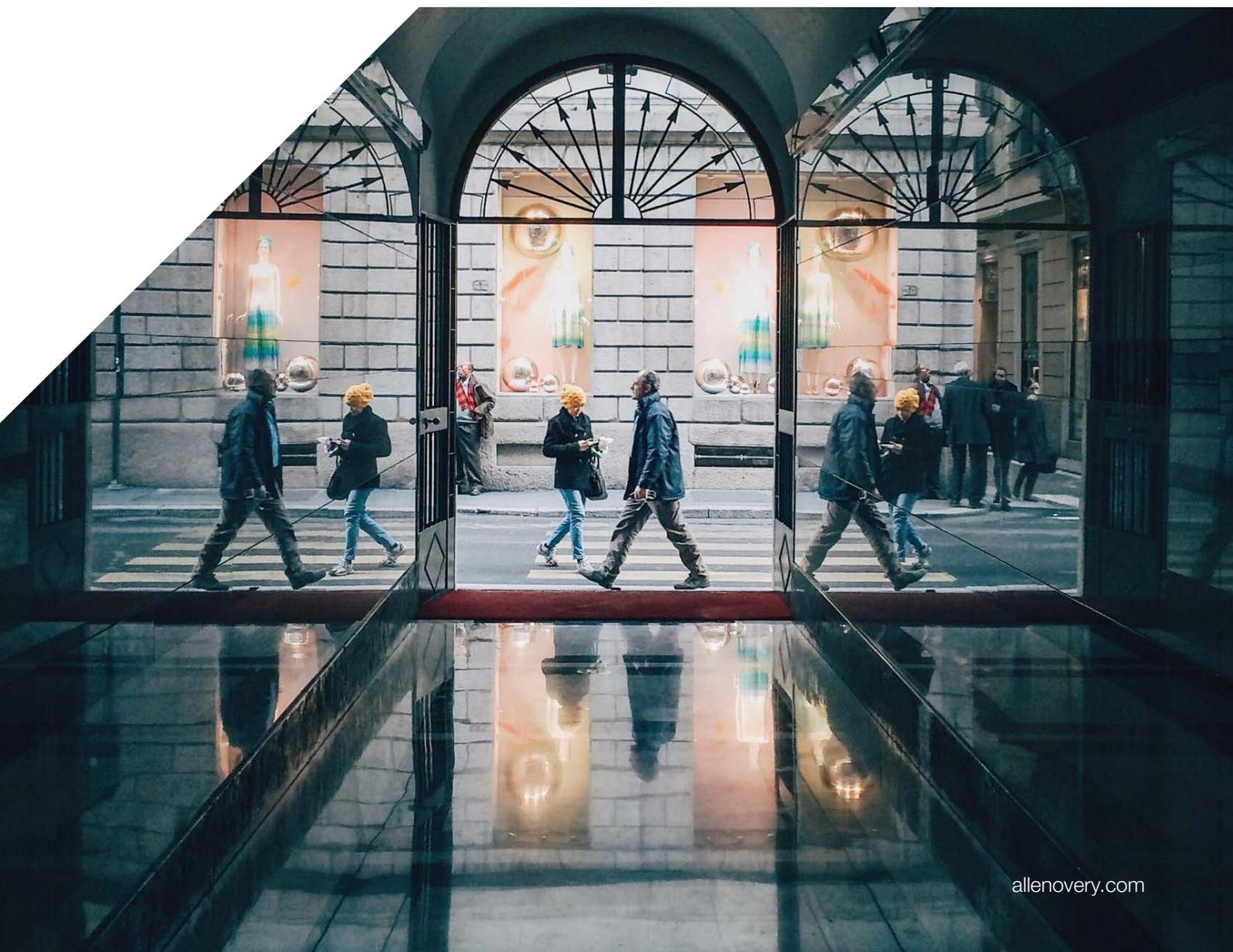


ALLEN & OVERY

# The Luxembourg limited partnership regime



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IFLR 1000



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# 1\_Introduction

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In the context of the implementation of the AIFMD<sup>1</sup>, a number of amendments to the Luxembourg act of 10 August 1915 on commercial companies, as amended (the **Companies Act**) have been introduced to revamp the Luxembourg limited partnership regime. These amendments are aimed at improving the limited partnership, ie the *société en commandite simple* (**SCS**),

and introducing a new limited partnership structure, the special limited partnership (*société en commandite spéciale* or **SCSp**) that has no separate legal personality of its own.

This brochure describes the main features of Luxembourg limited partnerships (SCS and SCSp).

## 2\_What is a limited partnership?

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A limited partnership – whether an SCS or an SCSp – is a partnership that is established by contract for a limited or unlimited term between one or more unlimited partners (or general partners) with unlimited and joint liability for the obligations of the partnership and one or more limited partners whose liability is limited to the amount committed to the partnership, such amount constituting partnership interests, that may or may not be represented by securities depending on the terms of the partnership agreement.

Unless otherwise provided in the partnership agreement, an unlimited partner may also be a limited partner in the limited partnership, provided that there is at all times one unlimited partner and one limited partner in the limited partnership that are different legal persons.

Limited partnerships are not subject to a specific regulatory status. It is possible to use these structures to set up regulated, as well as unregulated vehicles.<sup>2</sup>

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01\_Directive 2011/61/EU of the European Parliament and the Council of 8 June 2011 on Alternative Investment Fund Managers implemented into Luxembourg laws by the act of 12 July 2013 on Alternative Investment Fund Managers.

02\_For the avoidance of doubt, this brochure describes the main features of unregulated SCS and SCSp and does not cover the specific requirements or other features of limited partnerships that would be subject to certain dedicated regulatory regimes under Luxembourg law. This brochure does also not describe the impact of any limited partnership being an alternative investment fund under the AIFMD. If you have any questions on these specific pieces of legislation, please do not hesitate to contact the persons referred to on page 18.

## 3\_Establishment and registration, legal personality

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A limited partnership must be established either through a notarial deed or a private instrument.

An extract of the notarial deed or private instrument establishing the limited partnership must be lodged with the Luxembourg trade and companies register (*Registre de Commerce et des Sociétés*, the **RCS**) within one month. Such extract must also be published in the Luxembourg official gazette (*Mémorial C, Recueil des Sociétés et Associations*). The extract must contain at least the following information:

- a precise designation of the unlimited partner(s);
- the corporate name, object and the location of the limited partnership's registered office;
- the identity of the manager(s) and their signatory powers; and
- the date on which the limited partnership is formed and, as the case may be, the date on which it terminates.

The SCS acquires its own legal personality separate from that of its partners as from the execution of the notarial deed or private instrument establishing the SCS. The SCSp does not have a separate legal personality (see also Section 14).

## 4\_Denomination

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The denomination or corporate name of a limited partnership may, under the Companies Act, be freely chosen. Such denomination or corporate name may include the name of one or more limited partners and that will not jeopardise the limited liability of such limited partners, as the case may be (see also Section 10).

## 5 Contributions and form of partnership interests issue of debt securities

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Contributions to a limited partnership can be made in cash, in kind or in industry (ie sweat equity contributions). These contributions, and the admission of further partners to the limited partnership, are made in accordance with the terms and conditions of the limited partnership agreement.

Partnership interests, representing contributions to the limited partnership, may or may not be represented by securities. If partnership interests are not securitised, they will be represented by partners' accounts (*comptes d'associés*). Because the terms and conditions applicable to the admission of further partners and the issue of partnership interests can be freely set in the partnership agreement, a limited partnership can have variable capital.

The capital account of a partner varies according to: (i) contributions and withdrawals of capital by the relevant partner; and (ii) profits or losses of the limited partnership allocated to the partner pursuant to the rules set out in the partnership agreement (see also Section 8). Securitised partnership interests will typically be "unitised" through the issue of classes of securitised partnership interests in respect of which the financial (and other) rights of partners holding the same type of securitised partnership interests will normally be identical. Therefore, from a structuring perspective, securitised limited partnership interests may not allow dedicated and individualised partner-by-partner arrangements (as compared to the use of individualised partners' capital accounts).

A limited partnership can issue debt securities.



## 6\_Management

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The management of a limited partnership must be entrusted to one or more managers, who may or may not be unlimited partners, appointed pursuant to the terms of the partnership agreement. The identity of the manager(s) must be published (see Section 3, paragraph two).

Control over the management of the limited partnership is generally seen as a corollary of the unlimited liability of the unlimited partner(s). However, being in charge of the management of the limited partnership is a right rather than an obligation for unlimited partner(s). The unlimited partner(s) may agree to the appointment of one or more other persons as managers of the limited partnership.

A manager that is not an unlimited partner of the limited partnership will be liable in accordance with the terms of article 59 of the Companies Act governing the liability of the members of the board of directors of a Luxembourg public limited liability Company. This means that in substance, the manager of a limited partnership will be: (i) responsible for the performance of its mandate as an agent of the limited partnership and for any misconduct in the management of the partnership's affairs; and (ii) jointly and severally liable towards the partnership and any third parties for damages resulting from violation of the Companies Act or the terms of the partnership agreement. A manager of a limited partnership may also incur liability in tort based on general principles of Luxembourg law.

A manager may delegate its powers to one or more agents, subject to the terms of the partnership agreement. These agents will only be liable for the performance of their mandate.

Unless otherwise set out in the partnership agreement, each manager has the power to take any action necessary or useful to conduct the business of the limited partnership. Any limitations to the powers of the manager(s) under the partnership agreement (for instance, a provision under the partnership agreement according to which certain decisions of the manager(s) would be subject to specific internal approval) are not effective vis-à-vis third parties, even if they are published. However, the partnership agreement may authorise one or more managers (acting individually or jointly) to represent the limited partnership toward third parties. This authorisation will be enforceable vis-à-vis third parties if it is duly published.

In order to protect third parties dealing with a limited partnership, the limited partnership is bound by any acts of its manager(s), even if such acts exceed its object, unless it proves that the third party knew that the act exceeded the corporate object or could not, in view of the circumstances, have been unaware of this.

## 7\_Partners' voting rights

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The voting rights of partners can be freely organised under the partnership agreement (and, for instance, certain partnership interests may have multiple, limited or no voting rights with respect to one or more specific decisions, voting “per head” may be used, etc). If the partnership agreement is silent, the voting rights of each partner are proportional to its partnership interests. The partnership agreement may also confer on unlimited partners a right of veto over decisions to be taken for the account of the limited partnership.

Any amendment to the object or the nationality of the limited partnership and any change of corporate form or liquidation of the partnership as well as, in respect of an SCS only, the annual accounts (see Section 13) must be subject to a partners' vote. The partnership agreement must determine which other decisions or matters are not subject to a partners' vote.

The formalities and conditions (eg quorum and majority requirements) of any partners' resolution can be freely set in the partnership agreement. In the absence of specific provisions in the partnership agreement, the decision-making process will be the following:

- decisions of partners are adopted at general meetings or by way of written resolutions. In the latter case, each partner must receive the precise wording of the text of the resolutions or decisions to be adopted and will vote in writing;
- decisions are validly adopted at the majority of the votes cast, regardless of the portion of partnership interests represented, except for decisions relating to the amendments of the corporate object, change of nationality, change of corporate form or liquidation, which must be carried by partners representing at least three-quarters of the partnership interests and, in all circumstances, with the consent of all unlimited partners.
- general meetings may be convened, and written resolutions may be initiated, by the manager or managers or by partners representing more than half of the partnership interests.



## 8\_Participation in profits and losses, distributions

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Entitlements of partners to the profits and losses of the limited partnership may be freely organised in the partnership agreement. If this is not covered in the partnership agreement, each partner participates in the profits and losses in proportion to its partnership interests.

There are no statutory restrictions on distributions to partners, whether under the form of a distribution of profits or a reimbursement of partnership interests. Distributions, as well as the circumstances in which distributed amounts may be subject to a claw back by the partnership, may be freely organised in the partnership agreement. The partnership agreement may organise reimbursements of partnership interests whether at the request of a partner, or upon the decision of the manager(s) (or partners) in the context of a compulsory redemption. A limited partnership may therefore function as an open-ended vehicle where partners have the right to request from time to time the redemption of their partnership interests in accordance with the terms of the partnership agreement.

Capital returned to partners by way of distribution of dividends or reimbursement of partnership interests cannot be recalled, unless otherwise provided for in the partnership agreement. Limited partners' commitments in a Luxembourg limited partnership may be structured by way of a combination of loans and capital. However, as there is no prohibition on return of capital to limited partners, their commitment may also be structured by way of a 100% capital contribution.



## 9\_ Transfers of partnership interests – listing

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The rules governing the transfers of partnership interests may be freely determined in the partnership agreement. If the partnership agreement remains silent on transfers<sup>3</sup> of partnership interests:

- any transfer of a limited partner's partnership interests (other than a transfer upon death) requires the consent of the unlimited partner(s); and
- any transfer of an unlimited partners' partnership interests (other than a transfer upon death) requires the consent of the partners under the conditions set out for amendments of the partnership agreement.

A transfer in breach of the terms of the partnership agreement (or the rules applicable in the event of silence of the partnership agreement) will be null and void.

A transfer by an unlimited partner of all its unlimited partner's partnership interests is tantamount to a resignation by the unlimited partner.

Unless otherwise provided for in the partnership agreement, the death of a partner (whether unlimited or limited) does not lead to the dissolution of the limited partnership. If the partnership agreement remains silent as to transfers upon death, the partnership interests of the deceased partner, and all rights and obligations attached thereto, will be transferred to his or her heirs.

Transfers are only enforceable vis-à-vis the limited partnership and third parties when they have been notified to the limited partnership or accepted by it. A transfer of an unlimited partner's unlimited partnership interest will only become enforceable vis-à-vis third parties with respect to the partnership's obligations pre-existing such transfer as from the date of publication of such transfer in the Luxembourg official gazette, unless the third party knew of such transfer or could not in view of the circumstances have been unaware of the transfer.

Based on the preparatory parliamentary work relating to the amendments to the Companies Act designed to revamp the limited partnership regime, securities issued by a limited partnership may be listed on a stock exchange or regulated market but cannot be the subject of an offer to the public (as opposed to a private placement). This prohibition for limited partnerships to make an offer to the public (which is however not explicitly stated in the statutory provision as such) and the required formalities in respect of partnership interest transfers (notification to, or acceptance by, the partnership) should prevent the development of an active secondary market. Therefore, the listing of securities issued by a limited partnership should be a technical listing only.

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<sup>3</sup>The rules applicable to transfers of partnership interests apply mutatis mutandis to the creation of a pledge/charge over partnership interests or the subdivision of ownership rights relating to partnership interests.

## 10\_Partners' liability

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The unlimited partner(s) has/have unlimited and joint liability for the obligations of the partnership.

The liability of a limited partner is limited to the amount of its contribution to the limited partnership. For the avoidance of doubt, a limited partner may enter into any type of transaction with the limited partnership and become a secured or unsecured creditor of the limited partnership and such limited partner's status as unsecured or secured creditor will not be affected by the mere fact that such creditor is at the same time a limited partner of the limited partnership. For instance, a limited partner lending money to the limited partnership will rank in respect of such loan as a creditor of the limited partnership *pari passu* with external creditors.

A limited partner cannot carry out acts of management *vis-à-vis* third parties. A limited partner that carries out acts of management *vis-à-vis* third parties has unlimited and joint liability with the limited partnership for:

- the commitments or obligations of the limited partnership in which such limited partner has participated, provided such limited partner does not carry out acts of management *vis-à-vis* third parties habitually;
- all commitments and obligations of the limited partnership, including those in which the limited partner did not participate, if such limited partner habitually carried out acts of management *vis-à-vis* third parties.

A violation of the prohibition on a limited partner carrying out acts of external management triggers the joint liability of the limited partner *vis-à-vis* third parties only. Other partners have no recourse against the relevant limited partner.

The prohibition for limited partners to interfere in the management of the limited partnership relates to acts of external management only, ie acts performed for the account of the limited partnership with third parties. This prohibition does not apply to acts which are internal to the limited partnership and the Companies Act includes a list of actions that do not constitute a participation in the external management of a limited partnership.

Pursuant to the Companies Act, a limited partner will not be deemed to have performed a prohibited act of external management by:

- exercising rights attached to the status of a partner in the limited partnership;
- providing advice or consultation to the limited partnership, its affiliated entities or their managers;
- performing acts of control and supervision over the business of the limited partnership;
- granting loans, guarantees or security or any other form of assistance to the limited partnership or its affiliated entities; or
- giving authorisations to the managers in the circumstances provided for in the partnership agreement for acts beyond their powers.

For instance, limited partners would not lose the benefit of their limited liability by:

- voting on any issues which may be subject to their consent under the partnership agreement such as amendments of the partnership agreement, extension of the limited partnership's life, winding-up of the limited partnership or removal of a manager; or
- serving, or being represented, on any internal committee of the limited partnership (eg investment committee or advisory board), even if such committee has to propose, approve, consent to or disapprove of any action to be taken for the account of the limited partnership.

In addition, the Companies Act also provides that a limited partner may, without losing the benefit of its limited liability:

- act as a member of the management body or agent of a manager of the limited partnership, even if such manager is an unlimited partner; or
- sign on behalf of a manager of the limited partnership, even in representation of the limited partnership, provided however that the capacity in which the limited partner so acts be clearly indicated.

## 11\_Register

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Each limited partnership must keep a register containing:

- a full and up-to-date copy of the partnership agreement;
- a list of all partners, including their first and last names, occupations and private or professional addresses or, for legal entities, their corporate denomination or name, legal form, precise address and (if relevant) number of registration with the trade and companies register and the partnership interests held by each partner;

- a record of transfers of partnership interests and the date of service or acceptance thereof.

Each partner may access the register of the limited partnership, unless otherwise provided for in the partnership agreement.

## 12\_Termination of limited partnerships

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A limited partnership may be declared void only in the following cases:

- if the partnership agreement does not state the name or corporate denomination of the limited partnership or its corporate object;
- if the corporate object of the limited partnership is unlawful or contrary to public order;
- if the limited partnership does not include at least one unlimited partner and one limited partner validly committed to the limited partnership.

The conditions and procedure for the liquidation of a limited partnership may be freely determined in the partnership agreement. A partnership agreement typically includes a list of events which will trigger the liquidation of the limited partnership. If this is not covered in the partnership agreement, the rules set out in Section 7, paragraph 3 apply.

In the event of the incapacity of an unlimited partner (whether as a result of death, dissolution, legal incapacity, removal, resignation, bankruptcy or any other form of collective proceedings or otherwise), and if there was only one unlimited partner and the partnership agreement provides that the limited partnership will continue to exist notwithstanding the incapacity of the sole unlimited partner, the incapacitated unlimited partner must be replaced pursuant to the terms of the partnership agreement.

If the partnership agreement is silent on the replacement of the incapacitated sole unlimited partner,<sup>4</sup> the judge presiding over the chamber of the *Tribunal d'Arrondissement* dealing with commercial matters may, at the request of any interested party, appoint a partner or any other person as temporary administrator of the limited partnership. The temporary administrator will be the only person entitled to take all urgent and purely administrative measures until the holding of the partners' meeting that must be convened by the temporary administrator as soon as reasonably practicable.

The powers of the limited partnership's manager(s) are suspended during the appointment of the temporary administrator.

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<sup>4</sup> According to the comments accompanying the bill of the act of 12 July 2013 on Alternative Investment Fund Managers, the partnership agreement could provide that, if the sole unlimited partner is incapacitated, a limited partner will temporarily, and without forfeiting its limited liability (provided its capacity is clearly indicated to third parties), take urgent and protective measures pending the appointment of a replacement unlimited partner.

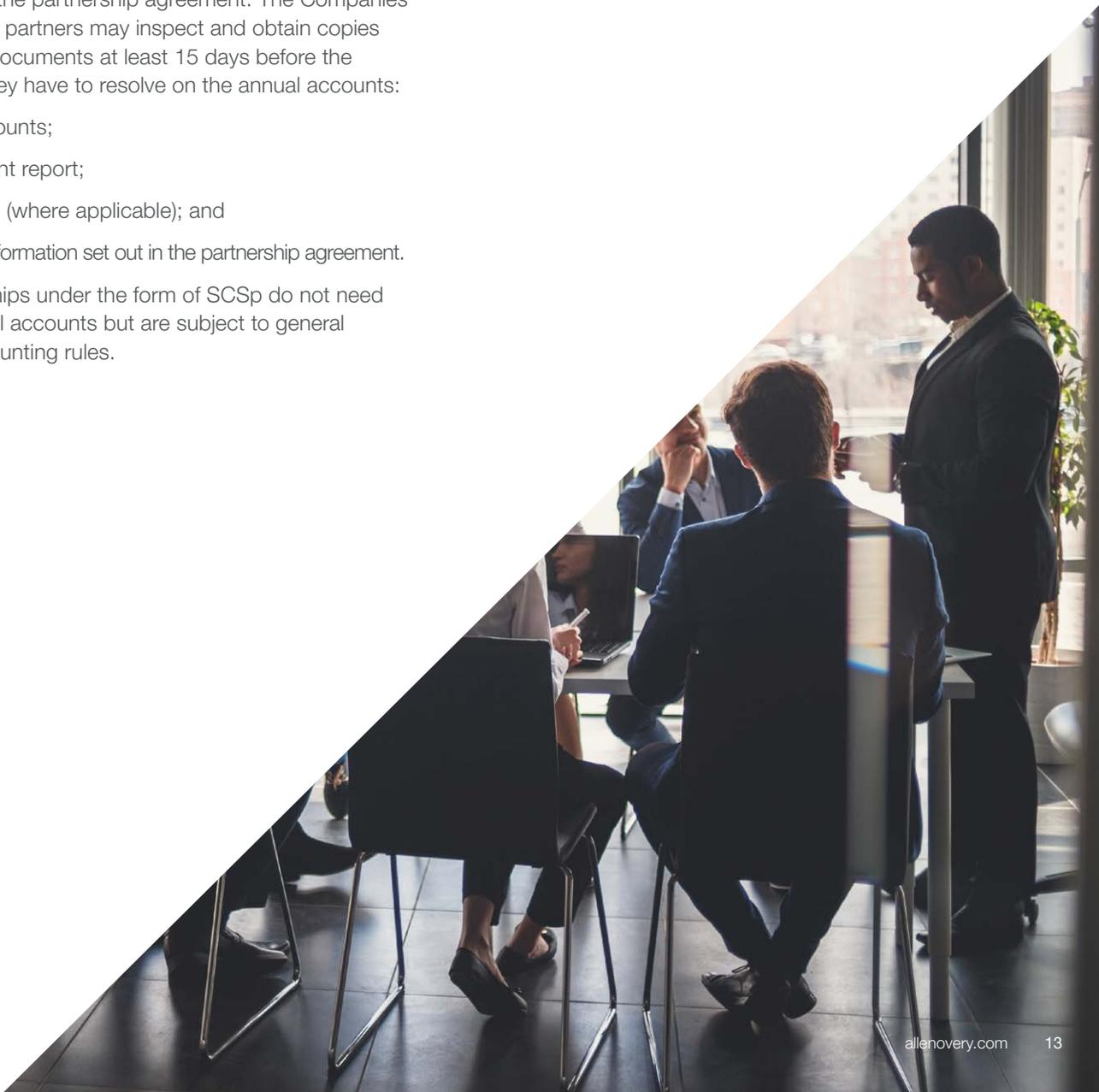
## 13\_Annual accounts

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Limited partnerships under the form of an SCS must prepare annual accounts. Annual accounts must not be audited by an external auditor, unless the SCS exceeds the thresholds set out in article 69 (in combination with article 35) of the act of 19 December 2002 on the trade and companies register and on the accounting and financial accounts of companies. Annual accounts must be submitted for approval by a special vote to partners at least each year, in accordance with the provisions of the partnership agreement, but at least within six months of the closing of the financial year. The first special vote may be held at any time in the 18 months following the incorporation of the limited partnership if provided for in the partnership agreement. The Companies Act provides that partners may inspect and obtain copies of the following documents at least 15 days before the date on which they have to resolve on the annual accounts:

- the annual accounts;
- the management report;
- the audit report (where applicable); and
- any additional information set out in the partnership agreement.

Limited partnerships under the form of SCSp do not need to prepare annual accounts but are subject to general commercial accounting rules.



# 14\_Specific provisions relating to special limited partnerships (SCSp)

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The provisions of the Companies Act dealing with the SCSp replicate to a large extent those applicable to the SCS. However, certain provisions are specific to the SCSp and address, in particular, the issue of their lack of legal personality.

## Domicile of an SCSp

The domicile of an SCSp is located at the seat of its central administration. The central administration of the SCSp is

deemed to coincide with the place of its registered office as set out in the partnership agreement.

## Assets

The registrations and other formalities relating to assets contributed to the SCSp or held by the SCSp are made in the name of the SCSp. Notwithstanding the absence of legal personality, the assets owned by the SCSp are registered in the name of the SCSp and not in the name of its partners or managers.

In addition, the assets contributed to the SCSp are exclusively reserved for the creditors whose claims have arisen in connection with the creation, operation or liquidation of the SCSp.

The assets of the SCSp are only available to satisfy the rights of creditors of the SCSp, to the exclusion of personal creditors of partners of the SCSp. The personal creditor of a partner in an SCSp has no direct recourse against the assets of the SCSp. Its sole recourse is against the assets of the relevant partner, including the partnership interests of the relevant partner in the SCSp.

## Capacity to be represented in legal proceedings and to be sued in its own name

An SCSp is represented by its manager(s) vis-à-vis third parties in legal proceedings and writs can be served on

behalf of or upon an SCSp even if made in the name of, or against the SCSp alone.



# 15\_Tax aspects

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## Direct tax treatment of an SCS/SCSp

An unregulated SCS/SCSp<sup>5</sup> is subject to general tax laws. It is transparent for income tax and wealth tax purposes. An unregulated SCS/SCSp may, however, be subject to municipal business tax<sup>6</sup> if it is, or is deemed to be, a business enterprise.

An unregulated SCS/SCSp is deemed to be a business enterprise, regardless of the nature of its activities, if one of its general partners is a Luxembourg joint stock company<sup>7</sup> holding at least 5% of the partnership interests in the SCS/SCSp<sup>8</sup>. This issue can be avoided through proper structuring of the general partner's partnership interests.

An unregulated SCS/SCSp constitutes a business enterprise for municipal business tax purposes if it carries out commercial activities. A distinction needs to be made between limited partnerships that qualify as alternative investment funds (**AIFs**) within the meaning of the Luxembourg act dated 12 July 2013 on alternative investment fund managers (the **AIFM Act**) and those that do not:

- In accordance with a circular issued on 9 January 2015 by the Luxembourg tax administration (the **Circular**), unregulated limited partnerships qualifying as AIFs within the meaning of the AIFM Act do not carry out commercial activities, as they are required to have an investment policy in compliance with the AIFMD Act and the guidelines issued by the European Securities and Markets Authority and, by definition. Therefore, AIFs have an investment purpose rather than a commercial purpose. An unregulated SCS/SCSp that is an AIF is thus completely tax neutral in Luxembourg, provided that none of its general partners are a Luxembourg joint stock company holding 5% or more of the partnership interests.
- For unregulated limited partnerships that do not qualify as AIFs, the nature of their activities needs to be determined on a case-by-case basis in light of all the facts and circumstances, in particular their investment policy. The Circular confirms that the volume of the assets of the limited partnership and the disposal of certain assets within a short period of time are not decisive factors on a standalone basis. In light of the case-law cited in the Circular, a non-AIF limited partnership having a private equity investment policy should, under normal circumstances, not be considered as carrying out commercial activities. Conversely, a non-AIF limited partnership having a hedge fund investment policy could potentially be considered as carrying out commercial activities. The nature of the activities can be confirmed by the tax authorities by way of an advance tax agreement based on the factual background.

An SCS/SCSp, whether regulated or not, does not benefit from the EU direct tax directives (eg the Parent-Subsidiary Directive<sup>9</sup> and the Interest and Royalties Directive<sup>10</sup>) and generally should not have access to the tax treaties entered into by Luxembourg.

## VAT

Management services that are provided to an SCS/SCSp are only exempt from VAT if the vehicle qualifies as an AIF within the meaning of the AIFMD Act. The VAT exemption is also available for sub contracted services. To qualify as VAT exempt management services, the services must, viewed broadly, form a distinct whole and be specific and essential to the activities of the AIF.

The Luxembourg VAT authorities have generally adopted a broad interpretation of the concept of VAT exempt management services. Services that usually qualify as VAT exempt management services are, for instance, portfolio management, investment advice, risk management and assistance in the establishment of the investment policy.

## Tax treatment of non-resident partners of an SCS/SCSp

A non-resident partner of an SCS/SCSp is not subject to Luxembourg income tax, municipal business tax or net wealth tax in Luxembourg as a result of the partnership interests, except if the non-resident partner has a permanent establishment in Luxembourg.<sup>11</sup> However, a non-resident partner of an unregulated SCS/SCSp may, subject to any applicable tax treaties, be liable to income tax and, if applicable, municipal

business tax on Luxembourg-sourced income and capital gains (for instance, income and capital gains related to Luxembourg real estate assets).

Profit distributions made by an SCS/SCSp to a non-resident partner are not subject to withholding tax in Luxembourg.

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05\_For the avoidance of doubt, limited partnerships subject to the act of 13 February 2007 on specialised investment funds, as amended, or the act of 15 June 2004 on the investment company in risk capital, as amended, are subject to specific tax regimes. Brochures on SIFs and SICARs are available upon request.

06\_The rate varies from one municipality to another. Municipal business tax is levied at a rate of 6.75% in Luxembourg-City.

07\_i.e. a public limited company, a private limited company or a partnership limited by shares.

08\_An SCS created prior to 15 July 2013 is deemed a business enterprise subject to municipal business tax if one of its general partners is a Luxembourg joint stock company, regardless of its shareholding in the SCS.

09\_Council Directive of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (2011/96/EU).

10\_Council Directive of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (2003/49/EC).

11\_Subject to any applicable tax treaties, a non-resident partner of an unregulated SCS/SCSp could potentially have a permanent establishment in Luxembourg if the SCS/SCSp carries out or is deemed to carry out commercial activities.

# Key contacts

## Questions relating to regulated vehicles

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