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client alert

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FRANCE'S NEW INVESTMENT VEHICLE

French laws and regulations relating to the asset management industry have been modernized over the past several years, partly as a result of the implementation of European Union directives including Directive 2009/65/EU ("**UCITS IV**") and Directive 2011/61/EU (the "**AIFMD**"). Nevertheless, and although global investors have over the past decades certainly invested in French private investment funds, the perception remained that the local fund vehicle did not offer the same flexibility as competing fund vehicles in other countries, such as the limited partnership in the United States and the United Kingdom, or the new Luxembourg special limited partnership (the *société en commandite spéciale*).

Almost six months ago, the *société de libre partenariat*, most often referred to by its easier acronym, the SLP, was born. The provisions relating to the SLP were set forth in Law No. 2015-990, dated 6 August 2015. The implementing decree and the modifications to the relevant regulations have now been approved. A smooth take-off for the SLP can be expected.

The name in French includes "free" and "partnership", two of the key concepts intended to characterise the SLP. With the introduction of this new fund vehicle, crafted from an existing corporate form to fit the current regulatory framework, France aims to offer a competitive and flexible fund vehicle to global investors.

The SLP is an alternative investment fund ("AIF") within the meaning of the AIFMD, which must be managed by a regulated portfolio management company ("**AIFM**"). The SLP takes the form of a *société en commandite simple,* a form of limited partnership which, although popular in France in the XIXth century, had since become infrequently used. Interestingly, during the time that France owned Louisiana, it implemented the civil law system in that territory, thereby importing the *société en commandite*. Following the acquisition of Louisiana from France, and inspired by the civil law *société en commandite*, U.S. lawmakers in turn conceived of limited partnerships, which, over time, became the preferred vehicle for U.S. private investment funds. And today, to better compete with the limited partnerships prevalent in the anglo-saxon jurisdictions, France has revived its *société en commandite simple* specifically for use as an alternative investment fund vehicle for professional investors.

A SIMPLIFIED VEHICLE STRUCTURED ALONG INTERNATIONAL STANDARDS

A structure similar to a U.S.-style limited partnership

As noted above, an SLP is a *société en commandite simple* (a form of company that is set forth in the French Commercial Code) that has been given a special status pursuant to new provisions in the French Monetary and Financial Code. The SLP is included in the category of *fonds professionnels spécialisés*, which are funds that do not require prior authorization from the French Financial Markets Authority (the *Autorité des Marchés Financiers* - "AMF"), but are required to be managed by an AIFM, and are reserved to professional investors.

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The SLP, being a company, must be registered with the Registry of Companies (see below), and has legal personality. Similar to a U.S.-style limited partnership, the SLP has two types of shareholders or partners:

- the *associé commandité*, who has unlimited liability (i.e., the general partner); and
- the *associés commanditaires*, whose liability is limited to the amount invested (i.e., the limited partners).

The *associé commandité* can be either an individual or a legal entity, or any entity otherwise provided in the By-Laws of the SLP. The *associés commanditaires* must be professional investors (see below).

Management of the SLP

A distinction is made between, on the one hand, the day-to-day management of the SLP, and, on the other hand, portfolio and risk management pursuant to the AIFMD.

The day-to-day management is ensured by a manager (*gérant*), who can be either a shareholder (*commandité* or *commanditaire*) or a third party, and who must be designated in the By-Laws. This means that, for example a cornerstone investor, who wishes to have a more active role than that of a passive investor, could take on the role of *gérant non-commandité*, with a management role alongside the AIFM, but without the unlimited liability of the *commandité*.

The SLP's portfolio and risk management must be performed by an AIFM.

The SLP may be self-managed, with its manager (*gérant*), which must then also be an AIFM, performing both the day-to-day management and the portfolio and risk management functions.

The Monetary and Financial Code provides specifically that any limited partner who is not the manager (*gérant*) can nevertheless perform certain actions that will not be considered participating in external management, such as exercising its shareholder rights, providing advice to the SLP or its affiliates, performing acts of control or supervision, granting loans or guaranties, or providing any other assistance to the SLP or its affiliates.

In line with European post-AIFMD requirements and standards, the SLP will need to appoint a depositary.

Formation of the SLP

As noted above, SLPs are specialized professional funds (*fonds professionnels spécialisés*), which need only to be declared to the AMF within one month after their date of formation. Consequently, no or limited oversight by the AMF of the By-Laws is to be expected. Although the By-Laws will be filed with the AMF, the By-Laws are not publicly available, thus ensuring the confidentiality of the terms of the SLP.

In addition, while a French company is required to file its complete by-laws with the relevant Registry of Companies, an SLP is required to file only an extract thereof. The extract includes the following limited information: the corporate name and purpose of the SLP; regarding the general partner: name and address, place and date of birth (for individuals), or head office address and corporate purpose (for entities); the designation of managers having the power to represent the SLP; the date of formation and the duration of the SLP; the conditions for shareholder decisions including for amendments to the By-Laws; and the conditions for share transfers. Neither the names of the limited partners or other key economic or governance provisions of the By-Laws are required to be included in the extract.

Except for the extract, which must be in French, the By-Laws can be in any other language that is commonly used in the financial sector (i.e., English).

An SLP may be formed with several sub-funds or compartments, each of which will be individually considered to be an SLP.

A CONTRACTUAL FUND FOR PROFESSIONAL INVESTORS

A contractual fund

Investment rules

As a *fonds professionnel spécialisé* (or a specialized professional fund), the SLP's investment objective and rules are freely set forth in the By-Laws. An SLP is not subject to the diversification ratios or leverage limitations that apply to other French investment funds, including the limitations that are applicable to other categories of funds open to professional investors such as the *fonds professionnel de capital investissement* ("**FPCI**").

Consequently, an SLP may invest in any type of asset provided that:

- the ownership of such asset is based on an official deed (*acte authentique*) or on an agreement whose probative value is recognized under French law;
- such asset is not backed by any guarantees other than guarantees that are necessary for the achievement of the investment objective of the SLP;
- the valuation of such asset is reliable;
- the liquidity of such asset allows the SLP to comply with its redemption obligations, if any, as may be set forth in the By-Laws.

Thus, the SLP can invest in all types of financial instruments (shares, debt and convertible debt, warrants, interests or units in funds), receivables and shareholder loans, as well as any type of asset (real estate, agricultural land, forests, etc…).

Operational rules

Subject to a limited number of decisions that require prior approval of the limited partners and the general partner (modification of the corporate purpose, merger, absorption, transformation or winding up of the SLP), the By-Laws can otherwise freely set forth those matters that may require a vote of the limited partners and specify how such votes are taken.

Subject to any additional requirements as may be set forth in the By-Laws, reporting to the investors is streamlined. The manager must provide the investors at least yearly with a report pertaining to the management of the SLP, with the conditions of such reporting to be specified in the By-Laws. Nonetheless, SLPs are also subject to requirements applicable to any French regulated AIF and are therefore required to draw up annual and half-yearly reports.

Shares held by limited partners are freely negotiable, although the By-Laws can provide for typical restrictions on transfer, such as prior approval by the general partner or a right of first refusal. In contrast, shares held by the general partner are not freely negotiable, as any transfer thereof is subject to certain formalities including the filing of an original or certified copy of the transfer agreement at the head office of the SLP. The SLP's By-Laws can provide for several categories of shares with different financial, economic and voting rights (including therefore a category of shares giving right to the carried interest).

A fund open only to professional clients

The investors, i.e., the *associés commanditaires* or limited partners, must be (i) professional clients, as defined in Directive 2014/65/EU on Markets in Financial Instruments, (ii) the manager, the AIFM or the *associé commandité*, or any company providing services related to the management of the SLP, investing directly or indirectly, as well as such company's managers, employees or any individual or entity acting on their behalf, or (iii) investors whose subscription is at least equal to 100,000 euros.

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TAXATION

From a tax perspective, a SLP is assimilated to a FPCI which is a collective investment vehicle that is not subject to any taxation.

In addition, French corporate and individual investors can benefit from a favourable tax regime if the SLP complies with certain investment and tax quotas, which require that 50% of the assets of the SLP be invested in:

- non-listed companies, having their head office in a Member State of the European Union (the "EU") or in a State which is party to the Agreement of the European Economic (the "EEA") that has concluded with France a tax treaty providing for an administrative assistance clause aimed at avoiding fraud and tax evasion. Such companies must perform an activity listed in Article 34 of the French tax code (commercial, industrial or artisanal activity) and must be subject to corporate income tax,
- shares in listed EU and EEA companies, the market capitalization of which does not exceed €150 million. Shares in such EU and EEA listed companies can be taken into consideration for the determination of the 50% test up to an amount representing 20% of the assets of the SLP.

Distributions from the SLP to non-French investors paid out of capital gains realized on the disposition of shares in French portfolio companies will generally not be subject to French tax (i) unless they are paid to an investor domiciled or organized in a non-cooperative territory, in which case a special tax will be levied at the rate of 75% or (ii) unless the non-French investor owns or has owned at any time over the five years preceding the distribution, more than 25% of the dividend rights in the relevant French portfolio company, in which case the distribution will be taxed at a rate of 45%, reduced by a discount (of 50% if the shares have been held for more than two years or 65% if the shares have been held for more than eight years).

Similarly, non-French investors generally will not be subject to French tax upon the sale or redemption of their interests in the SLP.

Finally, distributions from the SLP to non-French investors paid out of capital gains realized upon the disposition of shares in non-French portfolio companies will not be taxed in France.

Individuals who are tax residents of France and who subscribe to shares in the SLP giving right to the carried interest should be able to benefit from the same favourable tax treatment on any carried interest distributed as individuals who subscribe to carried interest units in FCPIs (provided that the applicable conditions are met, including the obligation to subscribe to carried interest shares an amount equal to at least 1% of the total commitments of the SLP).

It is expected that the French tax authorities will issue further guidelines (in the form of an Instruction) with additional detail on the tax regime applicable to an investment in the SLP.

Please do not hesitate to contact us with any questions.

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