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CMS Private Placement Guide

2017

Content

Introduction

Private placements consist of medium to long-term negotiated financings between listed or unlisted companies and a limited number of institutional investors (such as insurance companies, funds and asset managers) which are negotiated by the investors (either through an arranger or not) and the borrowers.

In such transactions, the absence of rating of the borrower (as is often the case) and the fact that most private placement markets are essentially illiquid (though transferable) are counterbalanced by the additional investor protections which exceed those customarily available on the international bond market (such as change of control clauses, more extensive events of default, tax gross up, etc.). Such additional protections, inspired inter alia by practices developed in the US Private Placement (USPP) market, mainly reflect investors' desire to rank « pari passu » with the other lenders of the borrower and to benefit from the same protections. They often also include negative pledge provisions covering all the indebtedness of the borrower (i.e. bank and note indebtedness), financial covenants (such as a leverage ratio, an interest cover ratio and/or a gearing ratio) and possibly non-financial covenants (such as limitations on disposals of assets and/or the incurrence of new indebtedness). The protections are tailored to the type of transaction, the borrower's situation and the market conditions with the analysis being carried out by the investors and the arranger. Further, various private placement markets have developed robust best practices followed by arrangers and borrowers alike, that help to preserve market standards on the basis of a rather compact documentation.

There are different types of private placements ranging from USPPs, Euro PPs and Schuldschein Loans (Schuldscheindarlehen). Some can be listed either on a regulated market or a multilateral trading facility if investors so require.

Though historically the USPP market used to attract more attention for its role in corporate financing, private placements are increasingly seen as an attractive alternative financing source for corporate borrowers in Europe, with cross-border private placements having particularly increased in recent years. Several initiatives have facilitated this "internationalization" of the market, including:

- the publication in February 2015 and update in October 2016 of the European Corporate Debt Private Placement Market Guide by the International Capital Market Association (ICMA). The initiative, with which CMS was closely involved, seeks to facilitate the development of a pan-European private placement market by building on earlier developments in France, where the Euro PP Charter setting a reference framework and best practices had been published in early 2014 by the Euro PP working group, composed of several professional market organizations under the leadership of Banque de France and the French Treasury; and
- the publication by the European Commission of its Capital Markets Union (CMU) action plan in September 2015, which seeks, in particular, to make it easier for smaller companies to raise debt on the capital markets; and
- the publication of the 2014 and 2016 Schuldscheindarlehen – LMA Product Guide of the Loan Markets Association.

Private placements offer strong business opportunities with smaller and larger companies alike becoming able to finance themselves through diversified financing tools.

Advantages of a private placement

- **Avoiding significant formalities**
  Private placements are less formal than offers to the public. They do not require the preparation of formal and detailed documents which need to be approved by the relevant supervisory body and then published, such as prospectuses and ongoing public disclosure and reporting requirements that accompany public offers generally do not apply to private placements unless such products are listed.
- **Options as to form**
  Most private placements can be structured as a loan or a bond, with similar documentation differing stylistically and substantively only to reflect structural differences. The choice may depend on the borrower's preferred format, with relevant factors including whether it has existing bank debt or bonds and the documentation which it is more familiar with and the regulatory environment to which it is subject, but it is mostly driven by the regulatory environment in which the potential investors operate.
- **Flexibility**
  Private placements are tailor-made products which enable companies to negotiate need-based products either bilaterally or on a syndicate basis. They give small businesses the ability to hand-pick investors with similar goals and interests. The flexibility of the private placement markets means that bespoke solutions can be found for borrowers seeking funding for their businesses across a range of maturities and structures. It allows the financial needs of both borrowers and investors to be met.
- **Alternative solution for small businesses**
  Private placement bonds often do not need to be rated by credit rating agencies.
- **Independence and confidentiality**
  Private placements do not require extensive public disclosure of the borrower's business, financial information and other affairs as the offer is addressed to a small number of investors who are likely to be more familiar with the workings of such business.
- **Documentation standards**
  Drafting documentation for private placements need not be a difficult process. Most of the instruments which are recognised as being private placements have their own established documentation standards (such as standard forms for Euro PPs or market standards for Schuldscheindarlehen). As a result working on private placement transactions are considerably more time-efficient than working on public offerings.
- **Costs**
  Set-up costs and ongoing costs are significantly lower than for listed or publicly offered securities or syndicated loans, in particular because no prospectus, rating or extensive disclosure is required.
- **Access to a broader range of investors**
  Investors in private placements are usually "buy and hold" investors seeking a long term relationship with the borrower with a regular need to invest.

Points to consider

— **Finding "the right one"**
A private placement is made with a limited number of investors. Securities offered through private placements are not advertised on a wide scale or to the public. This may make suitable investors hard to find and require efforts to attract them. It also narrows the range of business partners that the borrowers can reach. Also, such investors will need to meet the borrower's need for funding and be provided with all relevant financial and business information.

— **High compensation in the future**
In private placement transactions, borrowers will frequently (but not always) have to pay a small premium on the applicable interest rate to compensate for the limited liquidity for investors. Borrowers may also have to comply with restrictive covenants to protect investors who take greater risks and assume an illiquid position in the transaction.

Focus of this Guide

This Guide focuses on private placements as they are typically used for corporate finance transactions (either general corporate purposes or (narrower) working capital purposes).

In contrast, this guide does not describe private placements serving other purposes. The use of private placements is growing strongly in the areas of real estate, project and acquisition finance. In those areas, private placements are often secured and combined together with other finance instruments. As a consequence, in such cases further agreements need to be executed in addition to the core financing document, in particular an intercreditor or a security agreement. Notably in the area of project finance, private placements increasingly represent the capital market component of the overall funding structure, thus providing access to new types of investors as a financing source. In addition, institutional investors such as insurers or pension funds use private placements for the purpose of financing structured investments with embedded derivative elements.

Paragon Group EUR 52m cross border PP
CMS France, CMS Germany and CMS UK advised Crédit Agricole CIB acting as lead manager on Grenadier Holding Plc EUR 52m cross border Euro PP in December 2016. The Euro PP of this English issuer is governed by French law and is secured by a guarantee of Paragon Group Limited, a pledge over shares of a German subsidiary and a pledge over shares of a French subsidiary. The Euro PP is listed on the Euro MTF in Luxembourg.

Overview of different products

Schuldschein Loan (Schuldscheindarlehen / SSD) and Namensschuldverschreibung (NSV)

Introduction

The Schuldschein Loan (Schuldscheindarlehen) (“**SSD**”) is a floating rate or fixed rate debt capital markets instrument which is not extensively regulated. Governed by German law, the product and its terms are familiar to the market participants worldwide.
The market for SSDs has grown considerably in recent years. SSDs are attractive instruments, especially for small and medium sized companies requiring medium to long term financing. Typical investors are many regulated entities, such as credit institutions, insurance companies and funds, including pension funds. One main driver for their interest in SSDs is the positive treatment of SSDs (and NSVs, see below) under statutory investment regulations applicable to these investors. Further, – at least under German GAAP – investors may avoid mark-to-market principles for SSDs and NSVs on their balance sheet.

Legal Framework/Documentation

An SSD is a combination of a bilateral **loan agreement** and a **certificate** of indebtedness issued following the disbursement of the loan. The SSD is a very flexible instrument. While the market has developed standards in terms of typical clauses and features, there are only very few legal limitations in terms of structuring and documentation. Typically, an SSD has the following **features**:

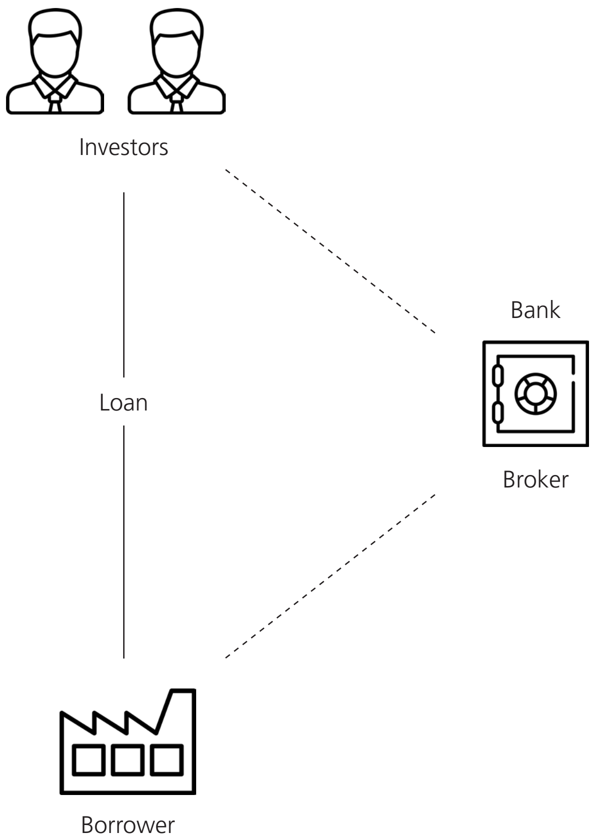
- Volume between EUR 10-200m;
- Term between 2-10 years (longer tenors via NSV, see below);
- Interest rate may be fixed rate or floating rate;
- Set-up takes about 6-10 weeks;
- Documentation of about 20-30 pages;
- Typically, no collateral is provided by the borrower and no external ratings are required;
- In general, more than 30 investors per transaction (but also bilateral or club deals).

Schuldschein transactions usually provide for several tranches, which deviate as to tenor and interest basis. This allows to accommodate for deviating investor interests in the same deal.

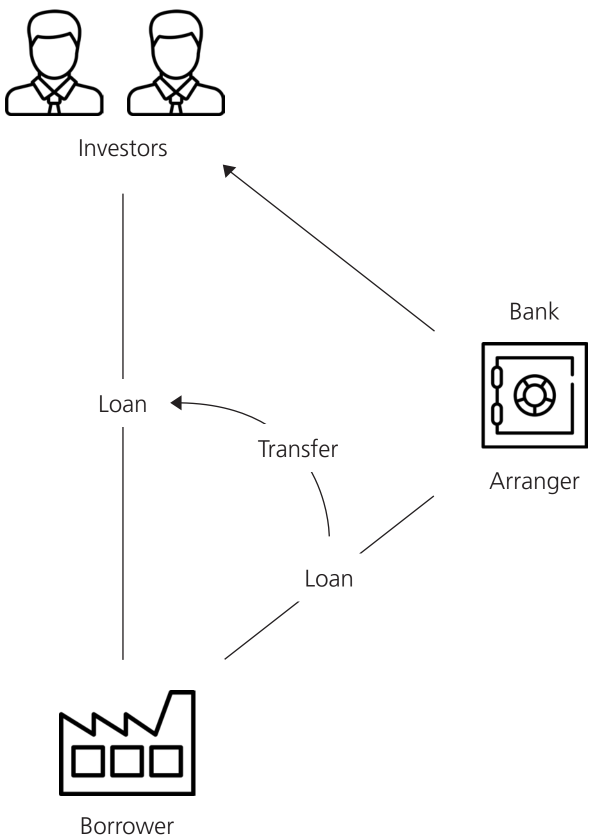
As a matter of German law and market practice, **for tenors of more than 10 years** the parties regularly use a so-called **Namensschuldverschreibung** (German law registered bonds, “**NSV**”). This instrument is very similar to the Schuldschein in most respects.

SSDs (and NSV) may be placed either by way of a “direct” method or an “indirect” method.

Under the **direct method**, the loan agreement will directly be concluded between the borrower and the investor(s). The arranger (e.g. a bank) simply acts as a broker between the investor and the borrower.



In practice, however, the so-called **indirect method** is more commonly used. Under this structure the loan is concluded (or the NSV is issued, respectively) between the borrower and the arranger (usually a bank) in the first phase, with the loan amount (SSD) or issue proceeds (NSV) being disbursed by the arranger. In the second phase, the arranger sells and transfers positions in the SSD / NSV to the investor(s). As a result, the investor(s) will hold direct contractual rights vis-a-vis the borrower.



As **SSDs are not securities**, they may not be listed on an exchange or settled via a clearing system (like Clearstream or Euroclear). Unlike securities, any **transfer** may be either executed by way of assumption of contract or by assignment. However, in practice, the borrower's consent to any such assignment or assumption of contract is given in advance, subject to certain limitations, and pro forma transfer agreements are usually provided for in the documentation package. Thus, secondary transfers are considerably simplified, making the SSDs more akin to a capital market instrument than a "normal" bilateral loan. However, in practice, most investors in this instrument are typical "buy and hold" investors. Hence, there is usually no active trading market in SSDs. While NSVs are in fact securities, their particular format results in characteristics and market practices very much akin to those as described for the SSDs above.

Depending on the identities and role of the parties, the features of the SSD/NSV and the specific transaction set-up, a banking license (e.g. pursuant to German Banking Act, Kreditwesengesetz) may be required for the borrower and/or the arranger, in order to enter into a related transaction.

Investors may require a permit or license for lending activities under German law. However, according to a long-standing practice of the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, "BaFin") on what constitutes lending activities, a permit or license is generally not required if the investor only acquires a claim to repayment under an SSD (or NSV) that had been already fully disbursed (like in the "indirect method" as described above). If, however, an investor disburses the loan directly to the borrower (like in the "direct method as described above), as a rule this would require a permit or license to engage in such lending activities, unless the transaction falls under certain exceptions.

Similarly, borrowers need to be aware of the fact that their activities may constitute deposit taking services which also require a permit or license under German law. The most notable exceptions to this are found where, instead of raising funds from the "public", the borrower raises funds from certain institutional investors. Pursuant to a long-standing practice of BaFin, this is, inter alia, usually the case when using the "indirect method".

Soufflet Group Schuldschein
CMS Germany and CMS France advised the Soufflet Group on its inaugural SSD in March 2016. The Soufflet Group is a French major player in the food industry and the biggest private buyer of cereals in Europe. The Soufflet Group raised EUR 100m with its first Schuldschein loan, divided into five tranches with maturities of 5 to 7 years.

Specific advantages

Besides the advantages described in general at the beginning of this paper, the following additional points could be added:

— **Low issuance volumes possible** as SSDs/NSV may in practice be issued from as little as EUR 10m
— **Great flexibility in structuring the interest** (fixed or floating)
— **Security**: If the borrower (SSD) / Issuer (NSV) is a credit institution or a private bank, creditors of SSDs/NSV may benefit from deposit protection schemes/funds. E.g. the deposit protection fund (Einlagensicherungsfonds) of the German (private) Banks Association for the time being also covers claims of non-bank creditors under SSDs and NSVs.
— **Provides balance sheet advantages** as buy and mark-to-market adjustments usually do not apply
— **Possibility to have structured SSDs/NSVs** (e.g. derivative elements, secured transactions or securitization techniques – while unusual in the corporate finance space, this is increasingly used in other areas, see page [10], “Focus of this Guide”)

European private placements

Introduction

European private placements are based on deal-specific documentation negotiated between the borrower and the investors, generally with the participation of an arranger.They can take the form of bonds or a loan (secured or unsecured), which are illiquid and essentially reserved to buy-and-hold institutional investors, although the bonds can be listed if required to satisfy investors’ criteria.

European private placements generally rank pari passu with the company’s existing bank debt.

The Euro PP market emerged in France in 2012 to provide access to the bond market to unrated mid-cap borrowers with limited financing needs, in a context where more and more mid-sized companies sought to diversify their funding sources to recover from the credit crunch. It has grown significantly since its apparition, from being virtually non-existent prior to 2012 to becoming an important additional financing tool for companies today. There have been more and more Euro PP transactions of smaller size over the past four years, which reflects a progressive opening of the Euro PP market towards smaller size borrowers. Over the years, volumes of the individual transactions have tended to vary between EUR 5m and 250m, with average maturities of between 5 and 7 years, although transactions of bigger sizes and longer maturities have been entered into.

Euro PP transactions have also expanded to various sectors (including the food industry, distribution, real estate, construction, transport, human resources, energy, technology, media and communication) and diversified over recent years, also for corporates of various jurisdictions.

Akuo Energy Green Euro PPs
CMS advised Natixis and Octo Finances on five green Euro PPs of Akuo Energy in 2015 and 2016. Akuo Energy was the first French independent energy producer to issue Green Euro PPs in accordance with the Green Bond Principles.

Legal Framework/Documentation

The development of European private placements has been facilitated by the publication of the following market standards:

- the "Euro PP Charter for private placements", which was published in March 2014 to enhance the development of private placements in France and provides a non-binding framework of best practice and recommendations elaborated by a market group consisting of ten market professional associations with the support of public sector institutions including Banque de France, the French Treasury and the Paris Chamber of Commerce and Industry and three law firms, including CMS.
- the Euro PP templates, comprising a form of loan agreement for private placements in the form of a loan and a form of subscription agreement and terms and conditions for private placements in the form of bonds, which were drafted by three law firms including CMS to follow on the Euro PP Charter in January 2015. The initial templates are governed by French law. These are available, free of charge, in English, French and Italian on www.euro-privateplacement.com.
- the LMA PEPP template documentation, which was published in January 2015 by the Loan Market Association (the "LMA") and has been implemented in order to remove some of the barriers to the development of a unified European Private Placement market across Europe and to sustain the momentum behind the growing private placement market. This documentation is based on the LMA standard form investment grade syndicated loan agreement, a financing document familiar to borrowers and lenders across industries and jurisdictions. The initial templates are governed by English law.

As template documents, these standards are designed to be adapted to reflect negotiations between the borrower and the investors based on the profile of the borrower, characteristics of the transaction and market conditions.

Specific advantages

Besides the advantages described in general at the beginning of this paper, the following additional points could be added:

- **European private placements can be amended by a defined majority of the bondholders** (contrary to SSDs and, unless provided otherwise, USPPs, which amendments are only binding investors who have agreed to such amendments), which is particularly important for borrowers if the terms of the private placement include covenants that might need to be waived during the life of the transaction;
- **Financing volumes**: European private placements can be raised for smaller amounts than most other private placements (there have been some private placements for EUR 5m or 10m) and also for large transactions (over EUR 500m);
- **Listing**: European private placements in the form of a bond issue may be listed on a market if it is a requirement for an investor.
- **Flexibility in structuring the interest** (fixed or floating)
- **Secured transactions**

NGE Secured Euro PP
CMS advised NGE on its inaugural secured Euro PP in July 2014. This transaction was the first listed secured Euro PP and received the award for the financing of the economy for the best financial innovation of 2014 from Option Finance.

USPP

Introduction

Private placement transactions in the US fall within the exemptions established by the Securities Act of 1933. The offerings are not subject to US Securities and Exchange Commission registration and borrowers are not required to publish a prospectus, nor to comply with the extensive disclosure requirements applicable to public offerings. They are only open to accredited or other sophisticated investors which typically include insurance companies, pension funds, hedge funds and high net worth individuals.

This exemption is the most commonly used by US and European companies of all sizes who wish to realize private placements in the US.

Legal Framework/Documentation

The private placement process begins with an information memorandum which describes the borrower, its activities and its financial condition and is disseminated to potential investors, normally by an investment bank.

Interested investors will then perform due diligence on the borrower, a process which is sometimes more extensive than the one conducted by banks providing loan facilities.

The borrower then enters into bond-purchase agreements bilaterally with each investor. Companies should be aware that private placements will often require a greater amount of resources to be allocated for investor relations since any amendments or consents will have to be sought from each investor. However, bond-purchase agreements will often contain clauses providing for majority-investor decisions akin to those found in intercreditor agreements.

USPP transactions are documented on the basis of the Model X forms drafted by the American College of Investment Counsel which have become the market standard. There are different variants of Model X form depending on whether or not the borrower is a US domestic and the borrower's credit rating.

Although the Model X forms are governed by the law of the state of New-York, another governing law can be chosen by the parties and USPPs have commonly also been governed by English, French or German Law.

Deloitte and Compagnie des Alpes USPPs
CMS advised a US investor on the EUR 40m USPP issued in October 2016 by Deloitte SAS under a master shelf facility agreement providing for the possibility for Deloitte SAS to issue up to EUR 30m other shelf bonds.

CMS also advised a US investor on the EUR 50m 2.13 per cent. bonds due 15 March 2029 issued in March 2017 by Compagnie des Alpes Financement SAS and benefiting from the guarantee of Compagnie des Alpes SA under a master shelf facility agreement providing for the possibility for Compagnie des Alpes Financement SAS to issue up to EUR 50m other shelf bonds.

While a public rating is not required by law, borrowers will often seek to obtain a private rating from the Securities Valuation Office of the National Association of Insurance Commissioners since insurance companies, one of the main categories USPP investors, are permitted to invest only in rated borrowers. Investors typically require borrowers to give representations and warranties which are similar to those found in LMA-type loan agreements. The bond-purchase agreements will sometimes be backed by securities granted by the borrower as well as corporate guarantees provided by the shareholders or other affiliates. Importantly, bond-purchase agreements contain make-whole clauses and covenants which are similar to those found in facility agreements. These provide investors with a greater degree of structural protection than public bonds since their breach may lead to defaults, attract coupon increases or additional investor fees.

Specific advantages

There are a number of key advantages for European corporates carrying out USPPs:

— Borrowers can raise substantial amounts (up to USD 1.5bn) generally denominated in US dollars (seldom in Sterling or Euros);
— USPP offer longer maturities than other private placements (maturities range from 3 to 30 years);
— Notation available for insurance companies; and
— Information can be kept confidential since disclosure is only made to a limited group of investors.

European borrowers should seek external legal advice in order to ensure that the private placement documentation does not deviate from market practice and conforms to their existing loan facilities.

Useful links

Euro PP Committee
— Euro PP Charter for private placements
— Euro PP templates (loan and bonds)
http://www.euro-privateplacement.com/

International Capital Market Association (ICMA):
— European Corporate Debt Private Placement Market Guide
http://www.icmagroup.org/

Loan Market Association
— LMA PEPP template documentation
— Schuldscheindarlehen – LMA Product Guide
http://www.lma.eu.com/

CMS Facts & Figures

CMS at the front of the development of private placements across Europe.

CMS responded proactively to the changing market demands, through its active involvement in the drafting of the European Private Placement Charter, the Euro PP templates of agreements and the ICMA European Corporate Debt Private Placement Market Guide, as well as through its work on actual transactions. We have successfully assisted arrangers, borrowers and investors on more than 120 private placements since 2012 in the UK, France, Germany, Spain, Luxembourg and Belgium, including several cross-border private placements involving several of our offices such as CA Animation (CMS France and Luxembourg), Foncière Oppidum (CMS France and Belgium), Newrest (CMS France and Spain) and Paragon Group (CMS France, Germany and UK).

CMS's Euro PP observatory

We regularly publish an observatory containing information about private placements executed on the French market. This observatory provides issue-specific information such as issue amount, interest rate, maturity and, if public, details on the existence of specific clauses such as negative pledge, fall-away, change of control clauses or financial covenants. It is a popular market tool for all private placement participants.

The observatory can be accessed through the following link: https://cms.law/fr/FRA/Publication/Observatoire-EuroPP

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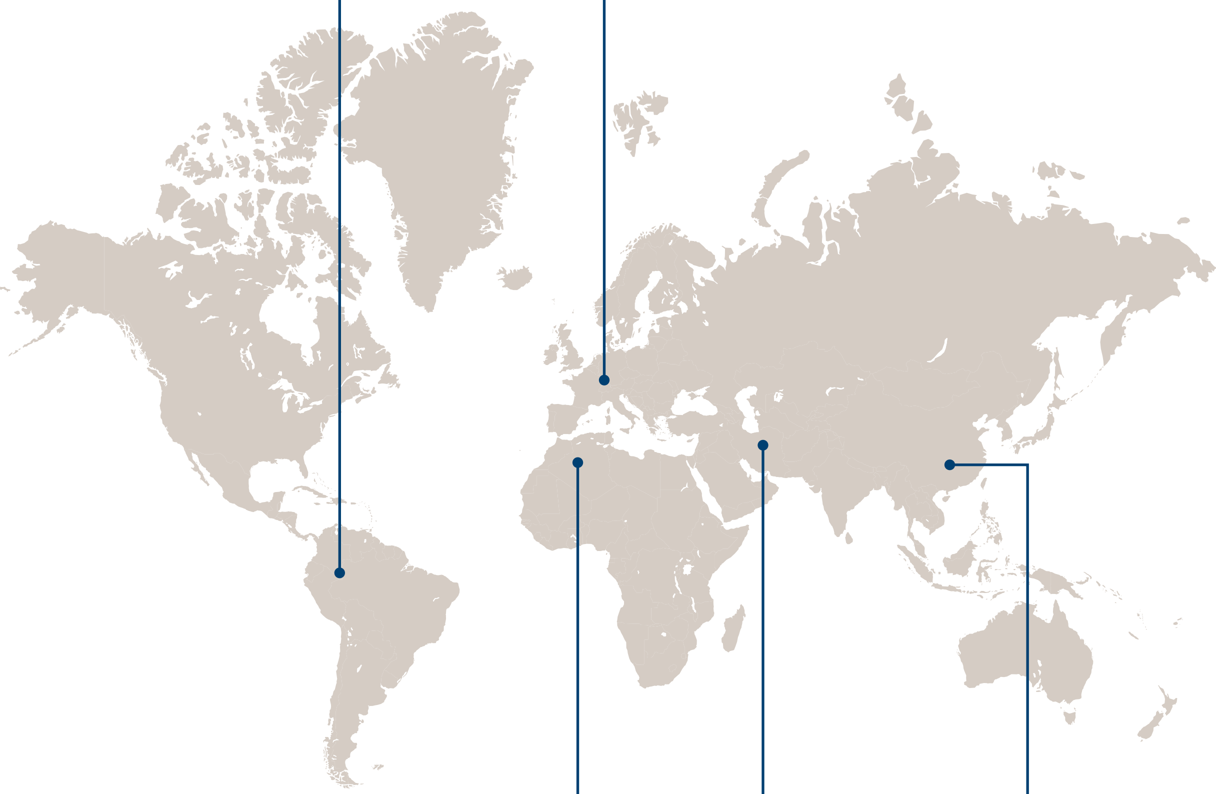

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