

Luxembourg

Legal overview

Executive Summary

Luxembourg is the second leading financial centre for investment funds in the world, behind the United States, and is the leading European centre for captive reinsurance and private banking in the Eurozone.

Luxembourg is recognised as being a strong European financial hub, due to its modern legal and statutory framework.

Registered Companies and Partnerships

The two most common ways for a non-Luxembourgish company to establish a presence in Luxembourg are through either creating a Luxembourg subsidiary company or a Luxembourg permanent establishment, such as a branch.

A company incorporated in Luxembourg is automatically Luxembourg tax resident, unless an applicable double tax treaty provides otherwise.

A subsidiary established as Luxembourg company, is legally independent from the parent company and controlled by its parent. This creates (i) a limited liability for the parent company, (ii) required formalities of incorporation and registration of the new company and (iii) a daily management structure.

The incorporation of a branch involves easier formalities of incorporation, registration and daily management than what is required for a subsidiary, but there is an unlimited liability for the parent company.

Classification of Registered Companies

Among the various types of capital companies available in Luxembourg, there are three mainly used types of structures, all governed by the Luxembourg law of August 10, 1915 (as amended) (the "Law"):

Limited liability companies (“société à responsabilité limitée” or “SARL”) have the characteristics of a capital company (liability of the shareholders limited to the amount of their contributions) and those of a partnership (non-transferable company shares).

A SARL is a form of company of particular interest for natural or legal persons wishing to:

- benefit from the limited liability status without having to make a significant initial contribution;
- avoid company audits, unless specific criteria relating to size and/or number of shareholders are met;
- retain control over the circle of shareholders as the company shares are not freely transferable; and/or
- create a relatively simple business structure requiring reduced administrative formalities in Luxembourg.

SARLs are the most widely used form of company, representing around two thirds of companies registered in Luxembourg.

Public limited companies (“société anonyme” or “SA”)

SAs have many advantages, particularly in relation to limitation of liability and regulated access to capital. Owing to its characteristics, an SA is suitable for a wide range of business activities of different sizes, offering legal and natural persons the possibility to promote the development of the business by bringing in new shareholders.

An SA represents the most commonly used form of company when it comes to accessing financial markets in Luxembourg and Europe.

In Luxembourg, an SA is often the legal form of company chosen by large businesses, but it is also a possibility for small and medium companies, as the shares in this type of company can be bearer shares and are therefore more easily transferable.

Shareholders are able to freely decide on the internal structure of the company, so the SA has often been the go-to structure for joint ventures established in Luxembourg. The SA remains a very attractive legal form as it provides anonymity to its shareholders.

Limited partnerships (“société en commandite”)

Luxembourg has launched two types of limited partnerships modelled on the Anglo-Saxon limited partnerships:

- the société en commandite simple (“SCS”), otherwise known as a common limited partnership; and
- the société en commandite spéciale (“SCSp”), otherwise known as a special limited partnership.

Both types of limited partnership are very similar and mostly share a common legal regime. The one major difference between these two vehicles is that a SCSp does not have a separate legal personality whereas a SCS does have its own legal personality. SCSs and SCSPs are often used as onshore fund vehicles, segregated account vehicles, co-investment vehicles and carried interest arrangement vehicles. These vehicles are the go-to choice of many UK based companies wishing to establish a presence in continental Europe.

Memorandum and Articles of Association

The main constitutional document for a company is its articles of association (“Articles”). All registered companies must have Articles.

In the case of SAs and SARLs, these Articles must be registered by notarised deed, whereas SCS and SCSp companies can either be incorporated by notarised or private deed.

Upon publishing the incorporating notarised deed with the Luxembourg Trade and Companies Register, identity numbers are issued.

Share Capital

Share capital is the primary source of financing for Luxembourg companies. Depending on the company’s legal form, share capital may be required to be fully subscribed and paid up at formation or within a specific period following the company’s incorporation.

Contributions to share capital can be in cash, in kind or in the form of services. In most cases, shareholders are liable up to the level of their contributions to the share capital.

Nevertheless, in the case of SCSs and SCSps, two kinds of partner coexist. There are the unlimited partners, who will manage the company, with unlimited, joint and several liability for all the obligations of the partnership. There are also limited partners, who cannot take part in the management of the company and whose liability will be limited to their contribution as specified in the partnership agreements.

Changes in share capital are traditionally made through general meeting decisions. In a bid to create more flexibility and limit formalities, however, recent legislative implementations have allowed the board of directors to increase or decrease the corporate share capital within limits set by the shareholders in the Articles.

Public Offer of Shares

Public offerings on the Luxembourg territory and admissions to trade on the Luxembourg regulated market of securities (the “Luxembourg Stock Exchange” or “LuxSE”) are governed by the Luxembourg prospectus law.

The Commission for Oversight of the Finance Sector (“Commission de Surveillance du Secteur Financier” or “CSSF”) is the authority responsible for the supervision of the securities markets and their operators in Luxembourg.

A Prospectus Directive-compliant prospectus is typically required for a company to access these markets.

The Prospectus Law of 10 July 2005 (the “Prospectus Law”) sets out three different prospectus regimes:

- the first regime applies to admissions of securities and their trading on a regulated market;
- the second regime provides for a simplified prospectus regime applying to securities and other comparable instruments falling outside the scope of the Prospectus Directive; and
- the third and final, Luxembourg-specific, regime applies to prospectuses drawn up in connection with the listing and admission of securities to trading on a Luxembourg market that are not included in the list of regulated markets published by the European Securities and Markets Authority (ESMA). To date, the Luxembourg Euro MTF market is the biggest secondary market in Europe. The rules applying to prospectuses drawn up in connection with the listing and admission of se-

curities to trading on the Euro MTF market are set out in the Rules and Regulations of the LuxSE.

General Meetings

Rules governing shareholder meetings vary from one legal form to another.

The Law offers a lot of flexibility on this matter, allowing the shareholders to determine by themselves, through the Articles, the procedures they deem fit to hold such general meetings of shareholders.

However, some important decisions, for example amending the Articles, do need a particular formalism set out in the Law.

Although shareholders are not active in the day-to-day management of the company, they do have some duties and powers exclusively reserved to them.

For example, only shareholders can approve the company's annual accounts or appoint board members.

Directors

There are two systems for administering an SA, (i) the traditional (monistic) system with a board of directors and (ii) the dual system, consisting of a management board responsible for day-to-day management of the company and a supervisory board whose duty is to monitor the management board.

These managers can carry out any operation, which is necessary with the exception of those reserved for the shareholders as provided for by law or by the Articles.

The day-to-day management (as well as the representation of the business) can be delegated to one or more business managers, directors and other agents, shareholder or not, acting alone or jointly.

There are no restrictions regarding the nationality and residency of the directors or managers. Legal entities can also be appointed as directors or managers of a company. In this case, a real person representative of the legal entity must also be appointed to act on behalf of the legal entity

Financing of a Company

The company can be financed by:

- Capital contribution in cash and/or in kind from shareholders with or without the issuance of shares;
- Loan, debt and bank finance;
- Equity investment from private equity funds.

Commencement of business

Commencing business in Luxembourg only requires simple formalities.

Recording of the Articles through a notary and opening of a bank account are the main requirements to be fulfilled. This will generally take a couple of days.

Additionally, the company may have to apply for a business permit and for a VAT number.

Tax registration will occur automatically once the company is set up through notification by the competent tax office.

Overall, it can take between 2 weeks and 3 weeks for a new company to be ready to trade.

Mergers and acquisitions

Business combination can take place through legal mergers, purchases of shares or purchases of business. While applicable provisions differ depending on the chosen solution, the economic effects are quite similar. Purchasing only the business may prove useful to leave liabilities with the target corporate entity.

A takeover through the public offers of shares is governed by specific provisions.

As long as the merger does not involve any public offering, the legal requirements are not too onerous.

It should also be noted that the Luxembourg tax law facilitates such combinations by granting neutrality of transactions in most cases.

Corporate insolvency

Luxembourg is considered as a creditor-friendly jurisdiction, especially for secured creditors.

Secured creditors are considered to fall outside the scope of bankruptcy, which means that they can enforce their claims and do not have to wait for the distribution of the proceeds by the bankruptcy trustee.

The law does not provide for specific cost and time-effective rescue and insolvency proceedings, resulting in the bankruptcy proceeding being most commonly used against insolvent companies.

A liquidator, under the supervision of a judge, leads the insolvency proceeding.

The insolvency procedure ends with assessing the directors' liability. Wilful or gross misconduct in the management or damage caused by their fault or gross negligence may engage their liability and they may eventually have to bear part or all of the company's liability.

In addition, Luxembourg law provides for an array of specific proceedings in respect of certain entities such as regulated financial companies or securitisation vehicles.

Aside from traditional legal actions and attachment, creditors may use set-off procedures to secure unpaid debts, whether it is:

- a contractual set-off whereby parties agree to set off their respective claims;
- a judicial set-off ordered by a court in the framework of legal proceedings between parties with mutual claims; or
- a statutory set-off by operation of law without any specific agreement between the parties being required.

Various mechanisms are also available to creditors to secure their debt and guarantee payment outside of court, such as the use of a retention of title clause, which allows an unpaid seller to retain title to the goods sold (non-fungible movable assets) until the purchaser has paid the purchase price in full; and a right of retention, which allows a creditor to keep the debtor's goods for as long as its due and payable claim remains outstanding.

Winding up of companies

There are three scenarios:

A voluntary procedure of liquidation decided by the general meeting of shareholders.

A liquidation for “sound reasons”, requested by one or more shareholders to the Court. The “sound reasons” are not defined by law but they are left to the judge’s discretion.

Court-ordered liquidation if the company’s activities contravene the Criminal law or severely the Commercial Law.

In addition, a simplified winding-up procedure is available for companies with a sole shareholder, which exempt the company from appointing a liquidator.

Summary of the main characteristics of the Luxembourg companies

	SARL	SCS/SCSp	SA
Required constitutional document	Published notarial deed	notarial or private deed	Published notarial deed
Legal personality	Each capital company has a legal personality, which is distinct from that of its shareholders/partners. As a legal person, it has rights and obligations under commercial, accounting and fiscal law		
Conditions relating to the share capital	Minimum of EUR 12,000 fully subscribed and paid up	No minimum share capital	Minimum of EUR 30,000 fully subscribed with ¼ paid up on formation
Authorized contributions	Contributions in cash or in kind (valuation by a statutory auditor, except for SARLs). Contributions in industry (services or expertise) are not generally considered to form part of the share capital, but they can be recorded in the statutes and benefit from remuneration in the case of an SA or an SARL		
Number of shareholders/partners	Minimum 1 and maximum 100	Minimum 2 (one limited partner and one general partner)	Minimum 1
Financial liability	Liability limited to the amount of contributions	Limited liability for the limited partner but unlimited liability for the general partner	Liability limited to the amount of contributions

	SARL	SCS/SCSp	SA
Decision-making bodies	General meeting + business manager or management board		General meeting + board of directors meeting or general meeting + management board + supervisory board
Monitoring and legal auditing of accounts	Internal auditor or statutory auditor for SARLs with more than 60 shareholders Potential required audit of the company depending on size criteria	No internal auditors Statutory audit by a mandated auditor	Internal auditor or approved statutory auditor Potential required audit of the company depending on size criteria

*Author: Emmanuel Reveillaud, Kaufhold & Reveillaud
e.r@kr-legal.lu*

Contact:

Luxembourg
Kaufold & Reveillaud Avocats
20 Avenue Marie-Therese
Luxembourg
Luxembourg, 2132

Tax overview

Company registration

Every new business, whatever its legal form, must register with the Chamber of Commerce in Luxembourg. The Chamber of Commerce systems are automatically connected with the system of Luxembourg tax authorities, so that registration for tax purposes is automatic, except for wage tax (which applies if the company intends to employ people). This registration has to be done separately with the tax authorities.

Setting-up taxation

There are no setting-up costs in terms of taxation, except for a small fee for registering the company with the Luxembourg Chamber of Commerce.

The cost of a notary depends on the legal form and the capital of the company.

National current benefit taxation

Corporate income tax

The taxable profit of a company is based on the accounting profit, subject to certain adjustments. In addition, there are limited deductions for certain expenses.

Taxable profits, including capital gains of both companies and branches doing business in Luxembourg are subject to 15% corporate income tax, less than the first EUR 25,000 of profit and 18% over EUR 30,000.

If a Luxembourg resident company holds either a minimum of 10% (or a purchase price of EUR 1,200,000 of the shares in a (foreign) company) or that the company holds or undertakes to hold such participation for an uninterrupted period of at least 12 months, then the Luxembourg company will not be subject to tax on dividends received from its shareholding. This is subject to certain conditions being met.

Subject to certain conditions, Luxembourg has developed a tax exemption of 80% in relation to:

- profits on patents;
- utility models;
- additional certificates of protection of a patent on medicinal products or plant protection products;
- the extension of supplementary protection certificates for a paediatric medicinal products;
- plant variety certificates;
- orphan drug designations; or
- software protected by copyright under national or international provisions.

Trade tax (local profits tax)

There is a municipal tax applied on the accounting profits over EUR 17,500, depending on the municipality, but with a minimum of 6,75%.

Other taxes (VAT, property taxes)

VAT is levied at a standard rate of 17% for most goods. A 3% rate applies to food, books and certain other items. There is a zero rate for the export of goods. Certain medical services, banking services and school education are also exempt from VAT.

VAT is charged on the transaction value. VAT is collected by the business and is paid to the tax authorities together with a tax return, which is filed monthly, quarterly or annually. VAT charged to the business (and paid to other businesses) is deductible from the VAT payable to the tax authorities. Any negative balance of these amounts is refunded. A foreign company may, under certain conditions, reclaim Luxembourg input VAT.

There is a transfer tax in Luxembourg of 7% on real estate. If the property is acquired for the purpose of resale, then the company may benefit from a refund of a portion of the registration fees, if certain conditions are met and that the resale take place less than two or four years after the acquisition. If VAT is charged on the transfer of real estate then often an exemption from transfer tax will also apply.

Treaties for the avoidance of double taxation

General rules

Luxembourg has a wide range of double tax treaties.

Double-taxation treaties networks cover almost all the industrialised countries and many others. Apart from the number of treaties, the rates negotiated for withholding tax rates are often lower than other countries manage to obtain.

Benefit distribution

(national withholding taxes, international tax exemption options)

Luxembourg levies a dividend withholding tax on profit distributions by resident companies. Luxembourg dividend withholding tax rate is 15%. This rate may be reduced, often to 5% on the basis of Luxembourg legislation, double tax treaties or the EU Parent-Subsidiary Directive.

In the case of a liquidation of a Luxembourg company, the liquidation bonus is exempt in Luxembourg if the shareholder is a foreign resident

Tax treatment of losses

Losses may be carried forward for up to seventeen years. Restrictions apply to losses that are classified as holding losses. These losses will be offset with the corresponding dividends and transfer and are also subject to other conditions.

In the case of companies with deferred losses where the shareholding, the corporate object and the managers are changed, then the losses will no longer be deductible.

Employer obligations (salary taxes, social security)

An employer is obliged to withhold wage tax and social security from payments to employees and to pay this to the tax authorities. Withholding and paying over the correct amount of wage tax is the responsibility of the employer.

Wage tax and social security are normally paid on a monthly basis before the end of the month in which the benefit or wages were received.

There are two types of social security contributions in Luxembourg: national insurances (for pensions) and employee insurances which insure employees against the loss of income if they become unemployed, disabled or ill.

Both national insurance and employee insurance contributions

are deducted at source and paid by the employer, on behalf of the employee.

Author: Sébastien Thibal, MS Gestion

Contact:

Luxembourg

FIDUCIAIRE JEAN-MARC FABER
63-65, rue de Merl 2146 LUXEMBOURG
Tél. +352 22 72 40
Fax +352 22 72 41
E-mail : jean-marc.faber@fjmf.lu
Jean-Marc FABER

MS GESTION SàRL
2-8, Rue Julien Vesque 2668 Luxembourg
Tél. +352 27 36 65
Fax + 352 27 36 65 27
Email: s.thibal@tsec.lu
Site web: www.msgestion.lu
Sébastien THIBAL