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Luxembourg
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2019

Law and Practice

Contributed by Wildgen SA

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Wildgen SA has been at the heart of law practice in Luxembourg since 1923. It is today, with more than 80 people, one of the best-known and well-respected business law firms in Luxembourg, possessing a strong track record. Wildgen puts the stress on the values of its profession in a modern and demanding world: customer-focused approach, excellence, ethics, proactivity and responsiveness. The firm enjoys a solid reputation in the following practice areas: banking and finance, commercial, litigation and labour law, corporate, data/IP/TMT, investment funds and tax. Its clients include banks and financial institutions, multinational corporations, investment funds, private equity houses, asset managers, insurance and reinsurance companies, and high net worth individuals. While fully independent, the firm boasts a wide-ranging network of experts worldwide, enabling it to select the best advice in each circumstance. In 2018, Wildgen opened a London representative office to guide UK clients through Luxembourg's legal, tax and regulatory framework.

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1. Legal System

1.1 Legal System and Judicial Order

The legal system in Luxembourg is currently a civil law system, which is mainly based on the Napoleonic Code and is influenced to a certain degree by the legislation from neighbouring countries (especially France, Belgium and Germany) and by EU law.

According to the Constitution, the organisation of the justice is composed of three jurisdictional orders.

- The Constitutional Court: the highest authority, which rules on the constitutionality of laws, excluding those that approve treaties.
- The administrative jurisdictions: they are assigned by the Constitution to hear and adjudicate administrative and fiscal disputes. They are composed of the Administrative Tribunal (*Tribunal administratif*), which is the first instance, and the Administrative Court (*Cour administrative*), which hears appeals against the decisions of the Tribunal.
- The judicial jurisdictions: they are in charge of all other disputes that are not within the competence of the Constitutional Court and the administrative jurisdictions, including civil and criminal cases. They are composed of three levels of courts:
  (a) the magistrate's courts (*Justices de paix*);
  (b) the district courts (*Tribunaux d'arrondissement*); and
  (c) the Supreme Court of Justice, including the Court of Cassation (*Cour de Cassation*), the Court of Appeal (*Cour d'appel*) and the Public Prosecutor's Office (*Parquet général*).

2. Restrictions to Foreign Investments

2.1 Approval of Foreign Investments

Foreign investments do not require approval from the authorities.

However, depending on the form that the foreign investment may choose, a commercial activity can be subject to the following administrative formalities and obligations: (i) general administrative formalities for all kinds of commercial activities, such as registration at the Companies' Trade Register (the *Registre de commerce et des sociétés*, Luxembourg), application for a value-added tax (VAT) number, initial declaration at the Direct Taxes Administration, know your customer (KYC) obligations, etc; or (ii) additional formalities for certain specific activities, such as (a) authorisation of establishment for commercial activities, crafts, industrial activities and liberal professions; and (b) prior approval from

the *Commission de Surveillance du Secteur Financier* (CSSF) for banking and payment companies, investment funds, etc.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entities

Luxembourg has a wide range of corporate vehicles – such as companies, partnerships and economic interest groupings – but the most common types are *sociétés anonymes* (public limited liability companies) and *sociétés à responsabilité limitée* (private limited liability companies), which are both regulated by the Luxembourg law dated 10 August 1915 on commercial companies, as amended (the Law of 1915).

All types of companies have key features and differences that make them more or less suitable depending on a wide range of factors: the types of activities to be carried out, the nature of the shareholding, the type of financing sought, etc.

Sociétés anonymes should be considered in cases involving public offerings or the listing of shares, or where control over the management is of prime importance. However, *sociétés à responsabilité limitée* are generally preferred in the case of structuring acquisitions or group reorganisation projects where flexibility is essential.

Société Anonyme

A *société anonyme* is characterised by the fact that its shares are both negotiable and transferable. Its anonymous character regarding the identity of its shareholders, in particular through the issuance of bearer shares, may offer some advantages to investors. Its access to financial markets is facilitated through public or private issuance of bonds or listing on a stock exchange. The management of such a type of company can be organised via a one-tier system (board of directors) or with a two-tier system (management board and supervisory board).

Its main features are as follows:

- minimum share capital – EUR30,000;
- duration – limited or unlimited, as provided in the articles of association;
- types of shares – registered shares, bearer shares or dematerialised shares; and
- number of shareholders – minimum of one shareholder and no maximum limit.

Société à Responsabilité Limitée

The Law of 1915 allows greater flexibility for *sociétés à responsabilité limitée* in their organisation and the structure of their management. Their shareholders may control the transfer of shares to third parties via a specific prior approval procedure. A *société à responsabilité limitée* may not be listed on a stock exchange.

Its main features are as follows:

- minimum share capital – EUR12,000;
- duration – limited or unlimited, as provided in the articles of association;
- types of shares – registered shares only; and
- number of shareholders – a minimum of one shareholder and no more than 100.

3.2 Incorporation Process

The main steps to incorporate a company are the following.

- Preliminary steps:
  - (a) checking the availability of the company's name with the *Registre de commerce et des sociétés*, Luxembourg;
  - (b) KYC requirements in order to identify the ultimate beneficial owner(s);
  - (c) opening of a bank account with a Luxembourg bank or a foreign reputable bank (euro currency or any other currency);
  - (d) in the case of a contribution in cash, the required funds must be blocked on the bank account and the bank shall issue a blocking certificate to be sent to the notary;
  - (e) in the case of a contribution in kind, a contribution agreement (having a valuation report attached) shall be tabled to the notary prior to the meeting in order to prove the property of the asset contributed; and
  - (f) acceptance letters of the managers/directors.
- An incorporation deed, which shall include the articles of association of the company, the details on the founders and the members of the management body.
- Powers of attorney to be prepared in order to represent the founder(s) should they/it/him not be present at the meeting with the notary.
- Holding of the meeting with the notary in order to incorporate the company.
- In the case of a contribution in cash, issuance by the notary of a deblocking certificate to be provided to the bank in order to release the funds.
- Execution of the shareholders' register and deposit of it to the registered office of the company.

The timing of incorporating the company is quite straightforward and may be completed in less than a week (depending on the opening of the bank account).

Upon incorporation of the company, the notary will file the incorporation deed with the *Administration de l'Enregistrement et des Domaines* and with the *Registre de commerce et des sociétés*, Luxembourg.

Following the filing with the *Registre de commerce et des sociétés*, Luxembourg, the existence of the company will be enforceable against third parties. However, the company will acquire its legal personality as from the date of execution of

its incorporation deed by the notary and the shareholder(s) regardless of the date of its registration with the *Registre de commerce et des sociétés*, Luxembourg.

3.3 Ongoing Reporting and Disclosure Obligations

Filings with the Registre de Commerce et des Sociétés, Luxembourg

The following changes must be filed with the *Registre de commerce et des sociétés*, Luxembourg:

- change of the members representing the management body;
- change of shareholder, as the case may be;
- appointment/dismissal/revocation of the statutory auditor;
- amendment to the articles of association of the company;
- transfer of registered office of the company;
- merger/demerger of the company; and
- liquidation of the company.

Approval of the Annual Accounts

Each year, the annual general meeting of the shareholders of a Luxembourg company has to approve the annual accounts within six months after the end of each financial year. The annual accounts will then be filed with the *Registre de commerce et des sociétés*, Luxembourg within a month after the approval of the annual accounts by the shareholders of the company.

The *Registre de commerce et des sociétés*, Luxembourg will charge extra costs in the case of a late filing of the annual accounts.

Register of Beneficial Owners

The Luxembourg law dated 13 January 2019 creating a register of beneficial owners entered into force on 1 March 2019. All entities registered with the *Registre de commerce et des sociétés*, Luxembourg, with the exception of individual retailers, have until 31 August 2019 to submit the register of beneficial owners the information about their ultimate beneficial owners listed below:

- name and first name;
- date and place of birth;
- nationality;
- country of residence;
- private or professional address;
- national identification number; and
- nature and extent of the beneficial ownership held.

It is worth mentioning that specific reporting and disclosure obligations may occur for companies having a regulated activity (with the CSSF, the Luxembourg financial regulator, for example).

3.4 Management Structures

Société Anonyme

Sociétés anonymes can opt between a one or two-tier system.

- *Two-tier system:* a management board managing the company, represented by at least two management board members or one in the case of a sole shareholder (being either private persons or legal entities represented by a private person) and a supervisory board supervising the management board, represented by at least three supervisory directors or one in the case of a sole shareholder (being either private persons or legal entities represented by a private person). It must be noted that it is not possible to be a member of both boards at the same time.
- *One-tier system (most usual option)*: the board of directors is represented by at least three directors or one director in the case of a sole shareholder (being either private persons or legal entities represented by a private person) and manages the company. The directors can only be elected for a term up to six years, but may always be re-elected.

Société à Responsabilité Limitée

Sociétés à responsabilité limitée have only a one-tier system and are exclusively managed by a management board called 'board of managers' represented by one or several managers (being either private persons or legal entities represented by a private person), which can be elected for an indefinite time.

3.5 Directors', Officers' and Shareholders' Liability

Liability of the Directors/Managers

They are liable for damages resulting from (i) any misconduct in the management of the company's affairs and (ii) from the violation of the Law of 1915 or the statutory provisions of the company.

Additionally, they must act in the company's best interest and shall perform their duties towards the company as a bonus pater familias with full diligence, care and honesty.

They are financially and criminally liable in the event of, eg, the use, with bad faith, of the assets or the credit of the company that they knew was contrary to the interests of the company or for personal uses.

In the event of insolvency of the company, they may incur a special liability.

Liability of the Shareholders

In limited liability companies, the shareholders will only be held liable for the debts of the company for an amount up to their contributions to the company. The shareholders of *sociétés à responsabilité limitée* may be held liable in the event of mismanagement when acting as a manager of the company.

In unlimited liability companies, the shareholders are indefinitely and personally liable for all the liabilities of the company. Creditors still need to first carry out a direct action against the company in order to get paid before turning to the shareholders.

4. Employment Law

4.1 Nature of Applicable Regulations

The employment relationship is governed by:

- the Labour Code;
- the employment agreement, which is a voluntary agreement between an employer and an employee, and governs a specific work relationship; and
- the collective bargaining agreement, which is an agreement concluded between employers and employees in a company or in a sector of activity and which enables the regulations of the labour laws to be adapted to the needs and specific requirements of a company or a sector of activity (ie, industry, finance, etc).

In addition, case law, consisting of jurisprudential decisions related to labour law in the past, is to be taken into account as it might have effect on the ruling of future cases.

4.2 Characteristics of Employment Contracts

The employment agreement is concluded by a voluntary agreement between an employer and an employee. The employment relationship needs to be completed by a written employment agreement at the latest at the moment of entry into service of the employee.

The duration of the employment agreement is regulated by the law: the unlimited duration employment agreement is the general rule and the use of a limited duration employment agreement must be an exception.

In addition, the employment agreement must contain the following mandatory clauses:

- identity of the parties;
- date of beginning of the execution of the employment agreement;
- workplace;
- nature of the employment;
- duration of the daily or weekly work;
- normal working hours;
- base remuneration;
- duration of paid holidays;
- duration of the notice period to be respected by the employer and the employee in the event of termination of the employment contract;
- duration of the probation period, if any;
- as the case may be, the mention of the collective agreements applicable; and
- as the case may be, the existence and nature of any supplementary pension scheme.

4.3 Working Time

There is a maximum working time applicable to salaried employees, which is eight hours per day and 40 hours per week.

Overtime hours are limited to two hours per day and ten hours a week. Therefore, the maximum work hours cannot exceed ten hours per day, or 48 hours per week in either case. In addition, in the case of overtime, the employer must also grant minimum rest periods to his employees, which are 11 consecutive hours within each 24-hour timeframe and 44 consecutive hours within each seven-day period. According to case law, if the employer does not respect the minimum rest periods, the employee may get supplementary days off work.

4.4 Termination of Employment Contracts

Termination of Individual Employment Contracts

A written contract is required in Luxembourg as the proof of the existence of the employment relationship.

Although the employment relationship can also be proved in other ways, it is strongly recommended to conclude a contract in writing regarding the burden of proof. Depending on the type of the employment agreement (permanent employment agreement or fixed-term employment agreement), the termination formalities may be different.

A fixed-term employment agreement can only be terminated in the following cases:

- during the trial period by either the employer or the employee provided they comply with the notice period;
- in the event of serious misconduct on the part of the employer or the employee; or
- in the case of a mutual agreement between the employer and employee.

A permanent employment agreement can be terminated through the following ways:

- dismissal by the employer – dismissal with notice and dismissal with immediate effect;
- resignation by the employee; or
- termination by a common agreement of the parties.

In the case of dismissal with notice, the employer must pay severance to any dismissed employee with at least five years of service in the company. The severance must be paid out at the end of the notice period and the amount will depend

on the employee's length of service on the last day of the notice period.

For companies employing fewer than 20 employees, they also have the option of extending the notice period of the dismissed employee instead of the severance pay.

Collective Redundancies
In the event that an employer intends to dismiss at least seven employees over a period of 30 days or at least 15 employees over a period of 90 days, he must apply a collective redundancy procedure if the reason for dismissal is not inherent to the employees.

The collective redundancy procedure includes five main steps:

- inform the employee representatives or the employees directly if the business regularly employs fewer than 15 persons;
- inform the National Employment Agency (*Agence pour le développement de l'emploi*, ADEM);
- negotiate a redundancy plan;
- implement the redundancy plan; and
- request tax exemption for voluntary departure or severance pay, if applicable.

4.5 Employee Representations
It is mandatory for employees to be represented, informed or consulted by management.

The Election of Employee Representatives
Except for the smallest companies, those with fewer than 15 employees under an employment contract during the twelve months prior to the posting of the announcement of elections, it is mandatory for any company to have an employee delegation at work. The employee delegation is made up of employee representatives, who are directly elected by all employees.

The representatives are elected through a social election that takes place every five years and the employer should be in charge of the organisation and the lead of the social election in order to set up a single employee delegation for all employees, by means of a single ballot. Depending on the scale of the company, the elections are conducted in accordance with the system of relative majority in businesses with fewer than 100 employees, or in accordance with the system of proportional representation for companies with at least 100 employees.

Once the results are announced, the new delegation must be set up.

The Role of Employee Representatives
Once employee representatives are elected, they have several roles within the business and towards all the employees.

The general role of employee representatives is to protect employees' interests with regard to working conditions, job security and employment status. It is also required that they are informed of any business operation and its activity (including recent and likely changes in its business activities, and financial position).

In addition, it is the responsibility of the employee delegation to ensure proper enforcement of laws, regulations and collective agreements, and strict enforcement of equal treatment of the business's employees, and to act as a mediator between the employer and the employees to prevent and settle individual or collective disputes between them.

For companies with more than 150 employees, relevant information should be communicated to the employee delegation by the head of the company monthly or at the delegation's request. For other companies, relevant information should be communicated to the delegation during the three compulsory meetings that the delegation must hold every year with the business's management.

If the employee delegation believes that the information provided is not sufficient, it may request additional information.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers
A Luxembourg employee is in principle subject to Luxembourg income tax withheld at source. For this purpose, individuals are attributed a tax class (1, 1a or 2) that depends on their personal situation (resident or not, with or without children, aged at least 65 years or not, married or separated, etc).

Income tax for individual taxpayers is calculated according to progressive tax rates, ranging from 0% to 42% depending on the amount of taxable income. A solidarity surcharge amounting to 7% is also due (majored to 9% for single individuals earning more than EUR150,000, or more than EUR300,000 for joint taxpayers in class 2). The highest tax rate including surcharge is 45.78% (corresponding to a salary exceeding EUR200,004). For taxpayers taxed jointly, the marginal tax rate applies from the threshold of EUR400,008.

It is also to be noted that:

- each taxpayer benefits from a lump-sum deduction of EUR540 per year for his or her income-related expenses, except if he or she can evidence that a higher expenses amount has been incurred during the year;

- the repayment of business trips is tax free up to EUR0.30 per kilometre; and
- there is a limitation provided by law of EUR2,574 per year of commuting expenses.

In addition to these taxes, employees and employers are subject to the payment of social security contributions.

Luxembourg applicable social security contributions may be summarised as follows, on 1 January 2019.

- Sickness: employer's part – 2.8% or 3.05%; employee's part – 2.8% or 3.05%; self-employed's part – 5.6% or 6.10%.
- Pension1: 8%; 8%; 8%.
- Mutual insurance1: 0.41%, 1.07%, 1.63% or 2.79%; –; 0.41%, 1.07%, 1.63% or 2.79%.
- Accident1: 0.72% to 1.20%; –; –.
- Health at work1: 0.11%; –; –.
- Dependence insurance: –; 1.4%; 1.4%.
- Total: 12.04% to 15.15%; 12.20% to 12.45%; 24.13% to 27.49%.

5.2 Taxes Applicable to Businesses

A Luxembourg tax resident company doing business in Luxembourg is subject to the following taxes.

Corporate Income Tax

Luxembourg levies an annual corporate income tax (*impôt sur le revenue des collectivités*, or CIT) on the net worldwide profits (subject to double tax treaties) of Luxembourg companies. In 2019, the CIT rates are as follows.

- Taxable income < EUR175,000: 15% CIT rate.
- > EUR175,000 and < EUR200,000: EUR26,250 + 31% of the net profits ranging between EUR175,000 and EUR200,000.
- > EUR200,000: 17%.

A solidarity surcharge (*contribution au fonds pour l'emploi*) of 7% applies, leading to an effective maximum CIT rate of 18.19%.

In addition, Luxembourg levies an annual municipal business tax (*impôt commercial communal*, or MBT) on the net profits realised by Luxembourg companies. In 2019, the MBT rate is 6.75% in Luxembourg City.

Therefore, the global rate of Luxembourg's corporate income tax is the sum of the following:

- actual CIT at a rate of 17% for the tax year 2019;
- solidarity surtax of 7% calculated on the CIT; and
- MBT at a rate of 6.75% for a company established in Luxembourg City.

The 2019 global income tax is 24.94% for a company established in Luxembourg City.

Net Wealth Tax

As for the net wealth tax (NWT), a Luxembourg tax resident company is in principle subject to a rate of 0.5% assessed on January 1st of each year on the basis of the estimated realised value of its (worldwide) net assets. The unitary value is usually determined based on the entity balance sheet as at December 31st of the preceding year. When the net asset value of the entity exceeds EUR500 million, the NWT is levied at a rate of 0.05% calculated on the taxable amount exceeding EUR500 million

A Luxembourg tax resident company can also be subject on an annual basis to a minimum NWT determined as follows.

- Total balance sheet of the Soparfi up to EUR350,000: minimum NWT of EUR535.
- From EUR350,001 up to EUR2,000,000: EUR1,605.
- From EUR2,000,001 up to EUR10,000,000: EUR5,350.
- From EUR10,000,001 up to EUR15,000,000: EUR10,700.
- From EUR15,000,001 up to EUR20,000,000: EUR16,050.
- From EUR20,000,001 up to EUR30,000,000: EUR21,400.
- From EUR30,000,000: EUR32,100.

If the fixed financial assets, intercompany loans, transferable securities and cash at bank exceed 90% of the gross assets of the company and EUR350,000 then the minimum NWT will amount to EUR4,815.

The NWT finally due will be the higher of the NWT calculated on the unitary value and the minimum NWT calculated on the balance sheet total.

The tax due shall be the higher of the minimum NWT and the application rate over the unitary value.

Tax Registration Fee

A fixed registration duty of EUR75 is generally levied upon the incorporation of a Luxembourg entity or the amendment of its articles of association.

VAT and VAT Numbers in Luxembourg

Luxembourg entities pay VAT in Luxembourg based on their overall turnover. VAT registration in Luxembourg is compulsory for businesses and self-employed traders with an annual turnover of more than EUR30,000. In this respect, a Luxembourg VAT number will be needed. Those with a turnover of less than EUR30,000 can opt to register for VAT if they wish. It is to be noted that Soparfis are in principle exempted from the VAT registration. Once businesses have registered, Luxembourg entities will receive a VAT number in Luxembourg that can be used for trade purposes.

There are four VAT rates in Luxembourg:

- a normal rate of 17%;
- an intermediary rate of 14% on alcohol, fuel and petrol;
- a reduced rate of 8% on heating, lighting, clothes, hairdressing, bicycles and cleaning related to private households;
- a super-reduced rate of 3% on food, soft drinks, children's clothes, books, medical products, water and rental costs.

VAT in Luxembourg is paid monthly, quarterly or annually, depending on turnover. If annual turnover is less than EUR112,000 then returns are filed annually. The deadline for filing a VAT return in Luxembourg annually is March 1st. Monthly and quarterly returns need to be submitted by the 15th of the month.

Withholding Taxes

- *Dividends:* dividends distributed by a Luxembourg company to its shareholders are, as a rule, subject to a withholding tax at the rate of 15%, or 17.65% if the tax is borne by the distributing company, unless specific exemptions apply.
- *Interest:* arm's-length interest paid by a Luxembourg company is generally not subject to withholding tax.
- *Liquidation proceeds:* proceeds derived from a complete or partial liquidation paid by a Luxembourg company are not subject to withholding tax in Luxembourg.
- *Royalties:* royalties paid by a Luxembourg company are generally not subject to withholding tax in Luxembourg.
- *Directors' fees:* fees paid to directors are subject to a withholding tax levied at the rate of 20% on the gross amount paid (25% if the withholding tax is borne by the payer).

5.3 Available Tax Credits/Incentives

Corporate tax payers are taxed on their net profits, which corresponds to the gross turnover of the company minus all deductible expenses. In addition to the business-related expenses that are deductible such as salaries, general and marketing costs, etc, Luxembourg corporate tax payers may also deduct any gifts/donations as well as tax losses from previous years to reduce their taxable income in Luxembourg.

Luxembourg tax law also provides for the following tax credits:

- for venture capital investment certificates;
- for hiring unemployed persons;
- investment in continued professional education;
- incentives for R&D;
- investment tax credit;
- foreign withholding taxes; and
- exemption for new companies and new manufactured products.

5.4 Tax Consolidation

The Luxembourg fiscal unity regime is laid down in Article 164bis of the Luxembourg Income Tax Law dated 4 December 1967, as amended (LITL). This regime allows companies to pool or offset the respective taxable profit of each company in the group and to be taxed on the global amount.

The fiscal unity regime can be applied to Luxembourg-resident fully taxable capital companies having at least 95% of their capital directly or indirectly held by (i) another fully taxable resident capital company (ii) or a local permanent establishment of a non-resident capital company fully subject to a tax corresponding to the Luxembourg corporate income tax.

The Minister of Finance may exceptionally accept the creation of a fiscal unity where the holding percentage lies below the required 95% threshold but reaches at least 75%, provided that (i) the participation at issue is recognised to be particularly important for the promotion and structural development of the national economy, and (ii) at least 75% of the minority shareholders agree to this regime.

In addition, to enjoy the fiscal unity regime, the 95% (or 75%) minimum shareholding must be (i) held without interruption from the beginning of the financial year to which the regime is applied and (ii) the subsidiaries and the consolidating company must begin and end their financial years on the same date.

As a consequence, the parent company in the case of vertical fiscal unity or the chosen sister company in the case of horizontal fiscal unity will be responsible for paying the corporate income tax (MBT and CIT) on the aggregate taxable profit of the consolidated companies.

The *Circulaire* issued by the Luxembourg tax authorities on 27 September 2004 stipulates that the 95% threshold (or 75%) as well as the other requirements must be maintained for at least five accounting years. Under the *Circulaire*, the regime is tacitly prolonged after the expiry of that minimum period, unless the companies concerned end their application or one of the conditions to enjoy the fiscal unity regime is no longer met.

The benefit of the fiscal unity regime may be granted upon submission of a written request before the end of the first financial year for which the application of the regime is being requested.

Finally, it is worth mentioning that the Luxembourg budget law dated 26 April 2019 provides for the option for a taxpayer to apply the interest limitation rules as provided by EU Directive 2016/1164 of 12 July 2016 (ATAD 1) at the level of the tax unity.

5.5 Thin Capitalisation Rules and Other Limitations

Luxembourg tax does not contain such rules but in practice the tax authorities generally use a debt-to-equity ratio of 85:15 for the holding of participations in other entities. Indeed, the debt-to-equity ratio only applies for shareholding activities and not for other activities.

Excessive debt may be considered as equity for NWT purposes by the tax authorities. Interest paid on excessive debt would not be tax deductible and may be re-qualified into (hidden) dividend distribution subject to the 15% dividend withholding tax if paid to a related party (unless an exemption or a reduced rate applies).

5.6 Transfer Pricing

The Luxembourg transfer pricing legislation follows the Organisation for Economic Co-operation and Development (OECD) transfer pricing principles. The legislator has included in the Luxembourg legal system a set of rules, namely Articles 56, 56bis and 164(3) of the LITL and paragraph 171 of the General Tax Law dated 22 May 1931. The tax authorities have issued two circular letters and an internal note that describe in more detail transfer pricing rules and requirements. The most important circular letter is circular letter No 56/1 – 56bis/1 dated 27 December 2016 relating to the transfer pricing rules applicable to companies engaged in intra-group financing transactions.

On an ancillary basis, circular letter No 164/1 dated 23 March 1998 and internal note No 164/1 dated 9 June 1993 relate to the interest rates on shareholders' corporate current accounts and the re-characterisation into hidden profit distribution in this context.

Article 56 LITL provides the basis of the Luxembourg transfer pricing rules. In broad terms, Article 56 LITL provides the arm's-length principle in Luxembourg tax law. Its drafting is in line with Article 9 of the OECD Model Tax Convention and can be translated as follows: when (i) an enterprise participates directly or indirectly in the management, control or capital of another enterprise, or if (ii) the same persons participate directly or indirectly in the management, control or capital of two enterprises, and in either case, the two enterprises are, in their commercial or financial relations, bound by conditions agreed or imposed that differ from those that would be made between independent enterprises, the profits of these enterprises are determined and taxed on the basis of the conditions agreed upon between independent enterprises.

Article 56bis LITL, mainly inspired by the OECD Base Erosion and Profit Shifting Report (BEPS), further provides guidance as to the methodology regarding the application of the arm's-length principle

Accordingly, a taxpayer operating a business in Luxemburg needs to verify that the price used in a transaction between related parties to which it is part of corresponds to the arm's-length principle; ie, said price would have been applied on a comparable transaction within the open market. The taxpayer must therefore proceed to a comparability analysis. A comparability analysis consists of a comparison between the conditions to the transaction between related parties under scrutiny and those applied to a comparable transaction on the open market by the date of the setting up of the transaction under scrutiny.

Article 56bis LITL does not impose any specific transfer pricing method to be used. The OECD methods are acceptable. In practice, the most developed methods in Luxembourg are the compared uncontrolled price method, the transactional profit split method and the transactional net margin method.

5.7 Anti-evasion & Anti-avoidance Rules

On 1 August 2019, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) will enter into force in Luxembourg. The MLI essentially allows the tax-related measures of the OECD/G20 BEPS project to be introduced in the existing double tax treaties (DTTs) of the signatories convention, eliminating the need to renegotiate every bilateral DTT separately.

Luxembourg has decided that all of its DTTs currently in force will fall within the scope of the MLI. Luxembourg mainly implemented the minimum standards to remain BEPS-compliant, including the principal purpose test (PPT).

In this respect, the PPT provides that: "Notwithstanding any provisions of a covered tax agreement, a benefit under the covered tax agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the covered tax agreement."

Furthermore, Luxembourg has transposed the ATAD 1 in Luxembourg internal law through the law of 21 December 2018. The ATAD 1 provides notably for the interest deductibility limitation, general anti-abuse rule, controlled foreign company rules, hybrid mismatches and exit taxation.

Directive 2017/952 amending the ATAD 1 should be transposed in Luxembourg internal law in the course of 2019. The main changes consist in the extension of the scope of

the provisions on hybrids from EU member states to third countries.

6. Competition Law

6.1 Merger Control Notification

Luxembourg is the only EU member state that does not have any specific legal provisions regarding the monitoring of M&A. As a consequence, M&A are not subject to a prior notification or a prior authorisation from the Luxembourg Competition Council (*Conseil de la Concurrence*).

This situation is often explained in view of the small size of the country and its wide openness to foreign countries.

According to an opinion of the Competition Council dated 31 October 2016, the Council stated that it was in favour of the implementation of a flexible system of control of M&A, as it would be beneficial to both consumers and companies. The control would be based on a voluntary notification system with the possibility of a right to object to the decision of the Minister of the Competition Council.

To date, no amendment to Luxembourg law has been foreseen on this specific point.

However, the legislation on European antitrust law may still apply when the concentration resulting from the M&A has a Community dimension according to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

Likewise, M&A may be indirectly controlled through the provisions on the prohibition of the abuse of a dominant position, pursuant to the law of 23 October 2011 concerning competition as amended (the Law of 2011).

6.2 Cartels

The main rules governing anti-competitive agreements and practices are regulated in the Law of 2011, which prohibits all agreements and practices of which the object or effect is the prevention, restriction or distortion of competition in a market. In addition, the Law of 2011 lists a number of agreements that may negatively affect competition in a specific market.

However, such agreements or practices may sometimes still be allowed according to Article 4 of the Law of 2011, when a potential market distortion induced by the agreement or the practice is offset by the beneficial effects of the agreement on the market concerned. An example, among others, is that the agreement/practice contributes to improving the production or the distribution of products, or to promoting technical or economic progress.

In parallel to the application of national law, EU antitrust law should also apply to anti-competitive agreements and practices according to Article 101 of the Treaty on the Functioning of the European Union, provided that they may affect trade between member states.

6.3 Abuse of Dominant Position

Abuse of dominant position is prohibited according to the Law of 2011.

A dominant position is defined as "a situation of economic power held by an undertaking which enables it to behave, to an appreciable extent, independently of its competitors, customers and ultimately consumers". A dominant position is not, as such, prohibited by antitrust law, because such a position may result from a company performing better than its competitors.

Only the misuse of a dominant position in a market is prohibited by adopting a behaviour that would go beyond merit-based competition.

Article 5 of the Law of 2011 provides a non-exhaustive list of behaviours that may be considered as an abuse by the company in a dominant position, such as directly or indirectly imposing unfair purchase or sale prices or other unfair trading conditions

In any case at the European level, the abuse of a dominant position is prohibited according to Article 102 of the Treaty on the Functioning of the European Union, when such abuse may affect trade between member states.

7. Intellectual Property

7.1 Patents

Definition

Patent is one of the IP rights, which grants its holder the right to prevent other people from using an invention without the agreement of the patent owner.

National patents in Luxembourg are under the jurisdiction of the Office of Intellectual Property (OPI) of the Ministry of the Economy and the main legislation for patent is the law of 20 July 1992 on the modifications of patents regime, as amended.

The basic requirements to obtain patent protection are the following:

- the invention must be new;
- the invention must involve an inventive activity; and
- the invention must be capable of being made or used in industry.

Pursuant to the law of 20 July 1992 on the modifications of patents regime, as amended, any invention that meets the requirements mentioned above can be protected by patents, except, among others:

- discoveries, scientific theories and mathematical methods;
- purely aesthetic creations;
- plans, principles and methods in the course of intellectual activities, in the field of games or in the field of economic activities, as well as computer programs;
- information presentations; and
- methods of medical treatment for humans or animals (in contrast to medical products).

Length of Protection
Following the disclosure of the invention, the patent owner will be granted an exclusive operating monopoly on the territory covered by the patent, for a duration of 20 years and upon the payment of fees, each year during the period of 20 years.

Registration
In order to make a national patent application, applicants can file with the Intellectual Property Office of the Ministry of the Economy. Inventors who have filed a patent application in Luxembourg can extend the protection to other member states of the EU by exercising the priority right that they hold for twelve months from the date of filing the national patent.

Applicants may also submit a European patent application to the European Patent Office, covering up to 40 countries of the continent.

In addition, applicants also have the possibility to file an international patent application with the World Intellectual Property Organization under the Patent Cooperation Treaty (PCT). The PCT is a worldwide agreement whose aim is to simplify the procedure for filing patent applications.

Enforcement and Remedies
In the event of patent counterfeiting, the Luxembourg District Court is competent for the enforcement and remedies.

The actions against counterfeiting can be taken by the patent owner; under the circumstance that it fails to act, other beneficiaries of an exclusive exploitation right or the patent licence holder can also take actions.

The patent right beneficiary can take a civil action against counterfeiting or a civil action for compensatory damages in front of the competent court, with or without claims for injunction and other appropriate measures.

7.2 Trade Marks

Definition
A trade mark is a distinctive sign on products or services from a specific company. It can be in any form whatsoever, like a figurative sign or a sound sign.

The basic requirements to obtain trade mark protection are the following.

- For the registration of a trade mark, the sign must:
  (a) be distinctive;
  (b) not descriptive;
  (c) not generic; and
  (d) not deceptive.
- Any sign that can be represented graphically and that serves to distinguish the goods or services of a company can be registered.
- The trade mark shall fulfil the condition of availability; that is to say, the trade mark had not been registered before by a third party.

In the Benelux countries, national trade mark no longer exists. Pursuant to the articles of the Benelux Convention on Intellectual Property (trade marks and designs) as amended (the Benelux Convention), the first level of protection consists of a Benelux trade mark, covering the three territories of Belgium, Netherlands and Luxembourg.

The Benelux Office for Intellectual Property (BOIP) is in charge of the supervision of Benelux trade marks.

Pursuant to the Benelux Convention, any sign that can be represented graphically may be registered as a trade mark. A trade mark may therefore consist of one or a combination of characters, letters, words (including slogans) or figures. A trade mark may consist of designs, symbols and three-dimensional signs such as the shape or packaging of the product, sound marks such as musical or vocal sounds, scents or colours.

However, ideas, concepts and scents cannot be registered as trade marks.

Length of Protection
The trade mark register owns an exclusive operating monopoly for a duration of ten years, which is renewable indefinitely. Fees have to be paid for each period of ten years and are determined regarding the number of classes of products and services covered by the registration.

Registration Process
In the Benelux countries, national registration no longer exists, as the protection covers all three countries (Belgium, Netherlands and Luxembourg). The right to the Benelux trade mark is granted upon first registration with the Benelux Office for Intellectual Property.

The applicant can also file an application with the European Union Intellectual Property Office (EUIPO) for the registration of an EU trade mark. EU trade marks enjoy the same protection throughout all member states of the EU.

In addition, the applicant can also file an application with the WIPO. International registration has the same effect in all designated countries as a national procedure undertaken in each individual country. Applications to register an international trade mark may only be made by the person who owns the trade mark or who has at least filed the same application at national level.

The protection for trade marks is granted upon its filing (and not the final registration).

Enforcement and Remedies
In the event of a trade mark infringement, several actions can be taken by the trade mark holder in front of a competent court depending on the circumstances, such as:

- civil action for compensation in front of the court – according to Article 2.21 of the Benelux Convention, the trade mark holder is entitled to claim compensation for any prejudice that he has suffered following the infringement in front of the court;
- civil action for cessation of infringement, recall or definitive removal of goods, disclosure of information related to the infringement in front of the court – according to Articles 2.21 and 2.22 of the Benelux Convention, the trade mark holder is entitled to claim the cessation of infringement, recall or definitive removal of goods, disclosure of information related to the infringement in front of the court; and
- additional claim for an interlocutory injunction – together with the civil action to be taken above, an additional claim for an interlocutory injunction against the alleged infringer or against an intermediary whose services are used by a third party to infringe a trade mark right can also be made in front of the court.

7.3 Industrial Design

Definition
An industrial design is the visual and aesthetic appearance of the whole or part of a product (including any industrial or handicraft item, except computer programs), such as its colour, shape, layout, texture, etc. It can be two-dimensional or three-dimensional.

The basic requirements to obtain design protection are the following: (i) the design must be new, which means no identical design has been made available to the public before the date of filing of the application or the date of priority; and (ii) the design must have individual character, which means the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design that has been made available to the public before the date of filing or the date of priority.

The following shall be excluded from the design protection: (i) the features of appearance of a product that are solely dictated by its technical function and (ii) the features of appearance of a product that must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function.

In the Benelux countries, national registration no longer exists. Pursuant to the articles of the Benelux Convention, the first level of protection consists of a Benelux design, covering the three territories of Belgium, Netherlands and Luxembourg.

The BOIP is in charge of the supervision of the Benelux design.

Length of Protection
Duration of the design rights at the Benelux level is five years, which is renewable four times up to 25 years upon payment of annual fees.

Registration Process
In the Benelux countries, national registration no longer exists, as the protection covers all three countries. The right to the Benelux design is granted upon first registration with the Benelux Office for Intellectual Property.

The applicant can also choose to protect its design in all the countries of the EU by making a registration application with the EUIPO.

In addition, it is also possible to register the design with the WIPO in order to obtain protection outside the EU.

Enforcement and Remedies
In the event of a Benelux-registered design infringement, several actions can be taken by the holder of the exclusive right in the design in front of a competent court depending on the circumstances, such as:

- civil action for compensation in front of the court – according to Article 3.17 of the Benelux Convention, the holder of the exclusive right in the design is entitled to claim compensation for any prejudice that he has suffered following the infringement in front of the court;
- civil action for cessation of infringement, recall or definitive removal of goods, disclosure of information related to the infringement in front of the court – according to Articles 3.17 and 3.18 of the Benelux Convention, the holder of the exclusive right in the design is entitled to

claim the cessation of infringement, recall or definitive removal of goods, disclosure of information related to the infringement in front of the court; and
- additional claim for an interlocutory injunction – together with the litigation to be taken above, an additional claim for an interlocutory injunction against the alleged infringer or against an intermediary whose services are used by a third party to infringe the exclusive right in the design can also be made in front of the court.

7.4 Copyright

Definition

Copyright is an IP right granted to the author for his literary or artistic works upon creation.

The main condition to obtain copyright protection is originality. A work of the mind is original when it bears the hallmark of the author's personality.

Another condition to obtain copyright protection is that the work must be concrete. Consequently, ideas, methods of operating, concept or simple information are not protectable.

In Luxembourg, copyright protection is governed by the law of 18 April 2001 on copyright, and the related rights and databases as amended (the Law of 2001).

Length of Protection and Registration Process

Since the mere fact of creation is sufficient for the protection of copyright, there is no need for any registration.

Duration of such a protection lasts during the whole life of the author and 70 years after his death, for the benefit of his heirs and assigns.

Enforcement and Remedies

According to the Law of 2001, in the event of a copyright infringement, the copyright owner can take several actions against the infringer, such as:

- civil action for the compensation of prejudice;
- civil action for cessation of infringement, recall or definitive removal of goods, disclosure of information related to the infringement in front of the court; and
- additional claim for an interlocutory injunction.

In addition, any infringement to the copyright might also be subject to the criminal offence of counterfeiting and thus be sanctioned with criminal penalties.

7.5 Others

Other IP rights include the following.

- Software, which is protected as a program in source code and object code, as well as preparatory design material (files specification, conceptual data model, technical studies, programming files, prototypes, etc). If it fails to fulfil the requirements to be protected as a computer program, it can be protected as a work of mind by copyrights or by patent (under the condition that that software is a component of a patentable invention).
- Databases, which are protected as a work of mind by copyrights.
- Domain names, which are protected as internet counterparts of trade marks.
- Trade secrets, which will be protected by the implementation into law of Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

8. Data Protection

8.1 Applicable Regulations

The main regulations applicable to data protection are as follows:

- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);
- the law of 1 August 2018 on the organisation of the National Commission for Data Protection and the general regime on data protection;
- the law of 1 August 2018 on the protection of individuals with regard to the processing of personal data in criminal and national security matters; and
- the amended law of 30 May 2005 concerning the specific provisions for protection of the individual in respect of the processing of personal data in the electronic communications sector, and amending Articles 88-2 and 88-4 of the Code of Criminal Procedure.

Since the entry into force of the General Data Protection Regulation (GDPR), any processing of personal data should be governed by it. In accordance with the rules provided for in the GDPR, the Luxembourg government has adopted the law of 1 August 2018 on the organisation of the National Commission for Data Protection (*Commission Nationale pour la Protection des Données*, or CNPD) and the general regime on data protection, which aims to complement the GDPR rules with specific national provisions, and to adapt the provisions related to the CNPD's mission, procedure and competence in order to fulfil the roles assigned to it by the GDPR.

In addition, the law of 1 August 2018 on the protection of individuals with regard to the processing of personal data

in criminal and national security matters has been adopted, which provides specific rules concerning the processing of personal data in criminal and national security matters. Regarding the processing of personal data in the electronic communications sector, specific rules are available in the amended law of 30 May 2005 concerning the specific provisions for protection of the individual in respect of the processing of personal data in the electronic communications sector, and amending Articles 88-2 and 88-4 of the Code of Criminal Procedure.

8.2 Geographical Scope

According to Article 3 of the GDPR, the above regulations apply to all personal data processing by controllers or processors established in the EU, as well as to all personal data processing of data subjects that are in the EU under certain circumstances. Consequently, the rules provided for under GDPR are applicable to any foreign company targeting customers in Luxembourg.

As for Luxembourg data protection legislation, most rules provided for in the law of 1 August 2018 on the organisation of the National Commission for Data Protection and the general regime on data protection are applicable to controllers or processors that are established in Luxembourg. Therefore, it might be applicable to a foreign company targeting customers in Luxembourg, depending on the location where the company's main processing activities are.

The law of 1 August 2018 on the protection of individuals with regard to the processing of personal data in criminal and national security matters, and the amended law of 30 May 2005 are not limited to local companies, so they might also be applicable to a foreign company targeting customers in Luxembourg.

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8.3 Role and Authority of the Data Protection Agency

The agency in charge of enforcing data protection rules is the National Commission for Data Protection.

According to the law of 1 August 2018 on the organisation of the National Commission for Data Protection and the general regime on data protection, the CNPD should carry out the following duties:

- to supervise and check the legality of collecting and using the data to be processed and to inform the parties carrying out the processing of the obligations incumbent on them;
- to ensure the observance of personal freedoms and fundamental rights, particularly as regards to privacy, and to inform the public of the personal rights involved;
- to receive and examine complaints and requests for checks on the legality of processing; and
- to advise the government on the subject.

The CNPD is also responsible for the application of the provisions of the amended law of 30 May 2005 on the protection of privacy in the electronic communications sector and of the regulations stemming from that law.

In addition, the CNPD has powers of investigation that allow it to access the data being processed. For this purpose it has direct access to the premises, unless they are residential premises, where the data is processed and to the data being processed, and carries out the necessary checks.

Lastly, the CNPD has the possibility of adopting a number of different disciplinary sanctions.