

Societas Europea in Luxembourg

1. Luxembourg Legislation

On 25th August 2006 Luxembourg transposed Council Directive n° 2001/ 86 dated 8th October 2001 relating to the involvement of employees within the framework of a European Company (“**SE**”) into its internal legal order (the “**Labour Act**”).

In addition, the provisions with respect to the application of the Council Regulation n° 2157/2001 dated 8th October 2001 have also been adopted through a law dated 25th August 2006 with respect to the SE, public companies limited by shares managed by a directorate and by a supervisory board and public companies limited by shares with one sole shareholder (the “**Corporate Act**”).

2. General overview of the Amended Luxembourg legislation

2.1. Corporate law aspects

This Corporate Act amended the law dated 10 August 1915 concerning commercial companies (the “**Law**”) which is the primary authority under Luxembourg corporate law in order (i) to cover the incorporation and functioning of the SE and, at the same time, (ii) to introduce a certain number of changes to the rules applicable to public companies limited by shares (*société anonyme* “**SA**”). For example, it is now possible, for both an SA and an SE, to have only one shareholder (previously at least two shareholders were required) and to choose a two-tier system of management with a supervisory board (“*Conseil de Surveillance*”) and a directorate (“*Directoire*”) (as opposed to the traditional one-tier system of management existing in Luxembourg with one sole decision making body, the board of directors).

Therefore, the introduction of the SE under Luxembourg law has notably given the legislator the opportunity to harmonize the rules applicable to both the SE and the SA. From a practical and logical standpoint as the SE is a special type of SA, the existing provisions relating to the SE have been integrated in the Luxembourg legal SA corporate structure.

To a great extent, the Law is an accurate transposition of the Council Regulation and we will outline hereafter the main provisions of the Law and the manner in which an SE can be established or constituted:

- Place of Management

A Luxembourg SE needs to have its registered office and place of effective management in the Grand-Duchy of Luxembourg (but not necessarily in the same place) and acquires the legal personality on the day of its registration with the Luxembourg Trade and Companies Register (“**RCS**”). These provisions entail a major difference with other forms of Luxembourg companies who acquire their legal personality on the day of their incorporation.

- Constitution and Establishment of an SE

An SE can be constituted by way of a merger which procedure notably involves: the intervention of a statutory auditor (“*réviseurs d’entreprise*”), the approval at a two-third voting majority of the shareholders of the Luxembourg promoting company (if any), the publication of a proposition relating to the merger in the Luxembourg official gazette (the “*Memorial*”) and the verification and certification by a Public Notary that the merger was conducted in conformity with the Law, prior to the registration with the RCS.

In order to form a Holding SE, the shareholders of the promoting companies must contribute to the SE in the process of incorporation a proportion of shares conferring more than 50% of the voting rights. The procedure regarding the incorporation of such a Holding SE is similar to the above merger procedure with the exception that the companies promoting the formation of a Holding SE will continue to exist.

A Subsidiary SE is formed according to the provisions relating to the incorporation of an SA under Luxembourg law and this shall consequently require a notarial deed of incorporation as well as the registration with the RCS of the new Subsidiary SE.

A Luxembourg SA that has a subsidiary, governed by the law of another Member State, for at least two years may further be converted into a SE. Such conversion does not involve any winding-up or creation of a new legal personality, it simply involves the

carrying out a formal procedure including: a description of the proposed project, the intervention of a *réviseur d'entreprise*, the final approval of the conversion and the amendment of the articles of the SA by the shareholders by way of a two-third voting majority.

With respect to the transfer of the registered office of an SE from Luxembourg to another Member State, the legislator has focused its attention to the protection of the interests of creditors and holders of other rights. As one illustration of such approach, the creditors of the SE can request, before a court, for the guarantee of any outstanding debts and where the SE does not provide for such a guarantee then the debts will become immediately payable. As regards the holders of rights other than shares in the SE, in case a meeting of such holders is provided for and that subsequently it is not convened or it does not approve the transfer, the SE, at a price evaluated by an expert, repays their entitlements. In any case, any holder of rights against the SE cannot be prejudiced by the transfer of the registered office of an SE. In addition, an SE concerned by any legal dispute arising before its transfer shall be deemed, for the purpose of such litigation, to have maintained its registered office in the Member State from which it has departed.

- Corporate Governance

With respect to its corporate governance, the SE can choose between the one-tier system or the two tier-system of management which has been implemented in Luxembourg further to the Council Regulation and which is therefore widely inspired by the Council Regulation. Generally speaking, in the two-tier system the directorate is solely responsible for the management of the S.A. and the supervisory board exercises a permanent control over such management without however the power to interfere in its management. Furthermore, the supervisory board has an unlimited right of access to all information concerning all the activities of the company and the articles of association can always provide for certain actions to be approved by the supervisory board. The members of the directorate are appointed and removed by the supervisory board, save in case the articles of association expressly provide for their appointment by the shareholders at a general meeting of the shareholders. Regarding the members of the supervisory board, they are appointed and removed by the general meeting of the

shareholders. All these members are appointed for a maximum of 6 years, which term may be renewed. The same person cannot simultaneously be a member of the directorate and of the supervisory board.

The rules applicable to the general meeting of the shareholders of the SE are the same as those that apply for an SA. Further to the Corporate Act, the Law expressly allows for the use of long distance communication means for the holding of meetings, which is a very interesting modification from a practical standpoint. Indeed, If the articles of association provide for it, the shareholders who participate in the general meetings of the shareholders by way of video conference or by other means of telecommunication, allowing for their identification, will be regarded as being effectively present at these meetings (such participation is also possible for the members who participate at supervisory board meetings or at directors meetings).

2.2. Labour law aspects

The Labour Act enacted provisions relating to the involvement rights of the employees in the SE with respect to information, consultation and participation (the “**Representation Rights**”). It is worthwhile noting that the objective of the Labour Act was to protect the Representation Rights of the employees which they benefited from prior to the creation of the SE. In order to secure employees’ acquired rights and to ensure that they are informed and consulted, certain rules were set forth by the Labour Act. The primary ones are applicable when the registered office of the SE is located in Luxembourg and the secondary ones are applicable to all SE’s, regardless of the location of the registered office, once the employees are working in Luxembourg.

The Labour Act sets forth an obligation for the participating companies to negotiate with their employees their Representations Rights prior to the establishment of the SE. For this purpose, the Labour Act provides for the creation and the regulation of a special negotiation body (“**SNB**”). Such body is required to negotiate with the management of the participating companies the arrangement relating to the involvement of workers in an

SE, e.g by the creation of a permanent representative body (“**RB**”) for the purpose of information to and the consultation with the employees.

The SNB has to be composed of a proportionate representation of employee of each country (depending on the number of employees employed in each Member State by the participating companies and their subsidiaries or establishments), including possible additional seats in the event of an SE formed by way of merger. Only the members of the staff delegations may vote and only employees or representatives of trade unions having a national or sector based representation may be elected. In Luxembourg, the representatives designated for the SNB are elected according to the rules set forth by specific laws, notably the rules set forth by the Labour Code relating to the staff delegation (applicable to private entities, and making a distinction companies having or not a central delegation) and the law of 16 April 1979 (applicable to public entities). Representatives will have the benefit of the specific protection against dismissal under the Luxembourg law.

Except for specific cases stipulated under the Labour Act, in order to render its decision, the SNB is required to have a double majority: (i) a majority of the members of the SNB and (ii) a majority of the employees represented by the SNB members.

The Labour Act provides for the possibility of the SNB using the services of one or more experts consultant for various fields of expertise. Any related expenses to such services will be born by the participating companies (one participating company paying for at least one expert).

In addition, as mentioned above, one of the duties of the SNB is to negotiate on the establishment of a RB of the employees of the constituted SE, to define its scope of intervention and the rules according to which it will represent such employees and ensure their information and consultation rights. In the event that an agreement has not been concluded in the deadline or if the parties so agree the said RB shall be set up in accordance with the subsidiary provisions set forth by the Council’s Directive, as transposed and implemented by each and every Member State. In this respect, the Luxembourg rules state that such RB shall meet at least once a year with the SE’s administrative organ, and/or in an extraordinary manner in cases where the employees’

interests could be considerably affected. Representatives of such a RB will be elected in Luxembourg according to the same rules as the ones applicable for the election of representatives to the SNB, and will enjoy the benefit of the same protection. Regarding the expenses of the RB, the SE will bear the cost of one expert per a minimum of 9 members, it being understood that the expenses related to the RB meeting will also be borne by the SE subject to a maximum of one meeting per year (for meetings scheduled in the absence of the SE management representatives).

Criminal sanctions are stated by the Labour Act in the event of failure to comply with the obligations laid down in the Labour Act. The Labour Inspection ("*Inspection du Travail et des mines*") in Luxembourg will be in charge of the respect of the aforesaid mandatory rules.

Cindy Arces & Rachelle Clitesse