

Legal Guide to Forming a Corporation in Luxembourg

Business in the Grand-Duchy of Luxembourg (the "GDL") may be carried out by individual trader(s) or by way of forming a corporate entity, whereby a separation of personal and corporate assets may be ensured by lodging such assets in the separate legal entity.

1. FORMATION PRINCIPLES

1.1. Commercial and civil corporations:

Six types of commercial corporations are commonly regulated under Luxembourg law on commercial companies dated 15 August 1915, as amended from time to time (the "Companies Law"):

- *Société Anonyme* or S.A (equivalent to a public limited liability company);
- *Société à Responsabilité Limitée* or S.à r.l. (equivalent to a private limited liability company);
- *Société en Nom Collectif* or S.e.N.C (equivalent to a general corporate partnership);
- *Société en Commandite Simple* or S.e.C.S. (equivalent to a limited corporate partnership);
- *Société en Commandite par Actions* or S.e.C.A (equivalent to a corporate partnership limited by shares); and
- *Société Coopérative* or S.C. (equivalent to a co-operative company).

While commercial companies may carry out any activity, civil or commercial. The *Société Civile* (regulated under Luxembourg Civil Code) can only carry out civil activities.

In addition, Luxembourg law also recognizes specific vehicles for joint venture activities, i.e. contractual partnership without legal personality (*Associations momentanées, Associations en participations*).

In addition, the GDL has become for several years a major location for the implementation of EU and non EU company branches, due to tax and finance facilities provided under the Luxembourg laws.

I.1.1. Commercial corporations are subject to mandatory formalities under the Companies Law, notably in respect of their organisation, registration, publication and accounting.

During the last five years, the Luxembourg Government has implemented major legal reforms with the aim of permitting greater flexibility and to meet the needs of international investors.

The Luxembourg Government now intends to amend the Companies Law, among other law reforms, for instance, concerning the issuance of bonds and the maximum number of shareholders for a *Société à Responsabilité Limitée*, as well as the division of responsibilities in management and control by implementing management and control boards for the *Société Anonyme*. It also intends to introduce the *Société par Actions Simplifiée* (equivalent to the simplified public limited company), a new form of company with very flexible articles of association, inspired from French company law.

I.1.2. The rules applicable to civil companies are less detailed and principally relate to the validity of the formation of such companies.

I.2. Legal personality and nationality of a corporation:

In Luxembourg, the legal personality of a corporation exists as from the execution of its incorporation deed, regardless of the date of its registration with the Luxembourg trade register and of the date of its publication in the official gazette. Therefore, the Company may contract as of day one. The existence of a new corporation will be however enforceable ("*opposable*") towards third parties only as from the publication of the incorporation deed of the corporation in the official gazette.

Any corporation having its principal establishment (i.e. the place where the management, business and financial decisions are actually taken, being a question of fact) located in the GDL will be considered as having the Luxembourg nationality and subject to Luxembourg laws. Unless evidence to the contrary is demonstrated, the principal establishment of a company is deemed to coincide with the place where its registered office is located. It is thus essential for a Luxembourg company to maintain appropriate management substance in the GDL. This should ensure it maintains its Luxembourg nationality and is able to benefit from the provisions of Luxembourg laws.

I.3. Incorporation procedure for commercial companies:

I.3.1. Generally the incorporation deed of a commercial corporation, including its articles of association must be submitted to a notary who ensures that all legal requirements are met. Such deed and articles of association may be drafted in Luxembourgish, French, German or English versions. In the later case, a Luxembourgish, French or German translation shall be enclosed. A certificate stating the names of the ultimate beneficial owner(s) of the corporation is also required by the notary.

The incorporation deed and articles of association of a commercial company shall in principle mention (compulsory for S.A., S.à r.l., S.E. and S.e.C.A) the following main information (not exhaustive):

- the identity of the natural or legal person or persons by whom or on whose behalf the incorporation deed has been signed;
- the legal form and denomination of the company;
- the registered office and corporate object;
- the amount of subscribed capital and the amount of the authorised capital (when applicable); the amount of subscribed capital initially paid-up;
- if any, the classes of shares and the attached rights to each class, the number of shares subscribed to and, in case of an authorized capital, the shares to be issued in each class with attached rights as well as the number of shares with their nominal value (when specified) and any condition restricting the transfer of shares;
- whether shares are in registered or bearer form (when applicable);
- particulars for each contribution made otherwise than in cash and establishment of a valuation report from an independent qualified auditor ("*réviseur d'entreprises*") (when applicable);
- the number of securities or units not representing the share capital and rights attaching thereto, (in particular the voting right at general meetings) (when applicable);
- the rules determining the number and method of appointment of the members of corporate bodies insofar as they are not provided for by law;
- the duration of the company; and
- the approximate amount of the costs in relation to the formation of the company.

At the incorporation, the articles of association shall be signed by the shareholders and the notary. Shareholders may sign a proxy to be represented at such incorporation in the GDL, which may be granted to lawyers. The newly created corporation may then begin its activities.

1.3.2. Prior to the formation, it is highly advisable to verify the availability of the name chosen by the founder(s) for the new corporation with the Luxembourg trade register in order to avoid any confusion with any existing company. Within two or three days from a written request, the Luxembourg trade register is able to grant a certificate of free denomination in this respect.

1.3.3. The paid-up capital is blocked in a Luxembourg bank account opened under the name of the corporation to be formed during the process of its formation. This provides confirmation to the notary that the funds have been received, when the shares are subscribed in cash. The setting up of such bank account (including the KYC procedure for the banks) is often the key element in the timing required for the formation of a corporation (one to two weeks are in principle required).

When shares are subscribed in kind, a statement of contribution value or a report from an independent qualified auditor (only for *Société Anonyme* and *Société en Commandite par Actions*) shall be requested and sent to the notary. Since 1 January 2008, the capital duty right on contributions in kind has been reduced from 1% to 0.5%.

The share capital may be expressed in any foreign currency, provided that the amount converted in Euros meets the minimum amounts required by the Companies Law.

1.3.4. The incorporation deed as well as the articles of association must be registered with the Luxembourg capital duty office and then filed with the Luxembourg trade register by the notary subsequent to the notarisation of the deed (within a month in principle as from the incorporation). These must then be published in the Luxembourg official gazette. For corporations which may be formed without the requirement of a notarial deed (e.g. *Société en Commandite Simple*), the articles of association have to be published by extracts in the official gazette.

1.3.5. A company must have a registered office in the GDL through (i) the renting or purchase of premises or (ii) the entering into a domiciliation agreement with a fiduciary company. Such fiduciary may also provide other services (administration, accounting, fiduciary mandates, etc.) related to the company's activities. The domiciliation activity is regulated in the GDL.

I.4. Business regulation:

In the interest of Luxembourg business and commerce, and to allow for the appropriate supervision of commercial activity, legislation sets out conditions for entry into certain professions and for the carrying out of certain trading activity, which are subject to the granting of a business license.

The granting of a business license is not required for corporations, which have as their principal object, the taking of shareholdings in Luxembourg or foreign companies (e.g. Soparfis).

A business license is personal and granted to individuals by the Ministry of Middle Classes after being advised by a committee, which considers the applicant's professional qualifications and respectability.

For companies, the conditions relating to professional qualifications and respectability need to be fulfilled by an individual in charge of the direction or management of the company.

The application procedure, generally takes two months, whereby the following documents are required (translated if necessary into French or German by a certified translator approved as such by the Grand-Ducal authorities):

- the application drawn up on paper or on a special form bearing a stamp duty. The form may be obtained from the Chamber of Commerce or the Ministry of Middle classes. The application shall include a precise description of the company's activity(ies);
- the articles of associations of the company;
- the documentary evidence of the applicant's respectability (production of a clean police record or certificate of good character unlimited in time and scope);
- a certificate of non-bankruptcy, if for any reason such certificate cannot be issued, a statement of solvency under oath before a notary should be provided.;
- the certified copy of the applicant's diplomas;
- the curriculum vitae of the applicant; and
- for non-Luxembourg residents, an EU certificate relating to the activity of the applicant in his country of origin issued by a chamber of commerce or by appropriate Ministry.

Once granted, the business license is normally valid for an indefinite period, unless it is not used within two years of the date of issue, or if trading is voluntarily suspended for more than two years. Any change in the name or type of business, in the legal form of the company or in its registered office, must be notified to the relevant ministry within one month.

The companies having activities within the financial and/or insurance sectors will in principle be subject to supervision by the Financial Sector Supervisory Commission or the Insurance Commission. For the performance of such activities the requisite licenses will need to be granted by the relevant Luxembourg authorities.

2. TYPES OF CORPORATIONS

2.1. Luxembourg commercial corporations:

2.1.1. *Société Anonyme* or S.A. benefits from a regulated legal framework under the Companies Law and is characterized by the fact that its shares are both negotiable and transferable. It is also possible to issue non-voting shares under certain conditions. Its anonymous character as regards the identity of its shareholders, in particular through the issuance of bearer shares, may offer some advantage to investors. Its access to financial markets is facilitated through public or private issuance of bonds or listing on stock exchange.

2.1.2. *Société à Responsabilité Limitée* or S.à r.l. is often used for intercompany restructurings or businesses of any kind of an average size. The Companies Law allows greater flexibility for the S.à r.l. in its organization and the structure of its management. The shareholders may control the transfer of shares to third parties as this is legally restricted. The S.à r.l. may not issued public bonds or be listed on stock exchange. For international business matters, the S.à r.l. fits the American "check the Box" procedure.

2.1.3. *Société en Commandite par Actions* or S.e.C.A. is a hybrid partnership with joint stock company and civil aspects, formed by two classes of shareholders, (i) the general partner(s) with unlimited, joint and several liabilities and (ii) the limited shareholder(s) with limited liability. Its legal regime is quite similar to that of the S.A. but the management is reserved to the general partner. Except provisions in the bylaws providing for the contrary, the veto right granted to the general managing partner allows an effective control over the management of such a company.

This control may be relevant for listed companies by providing for an efficient mechanism against external takeovers.

2.1.4. Société en Commandite Simple or S.e.C.S. is a limited partnership having two classes of members like the S.e.C.A. The limited shareholder is legally prohibited from participating in the management of the company. No minimum share capital is required. In principle, shares are not transferable unless the articles of association provide for otherwise. General partners have joint, several, unlimited liability. The S.e.C.S. is in principle fiscally transparent and is frequently used for international tax planning matters.

2.1.5. Société en Nom Collectif or S.e.N.C. is a form of company historically used by small and medium sized family enterprises that are commercial or involve skilled crafts but also used today by group companies. It is subject to simple rules of organization. No minimum share capital is required to form this company. In principle, the shares of a S.e.N.C. may not be transferred, except in the case of unanimous consent of all the shareholders. The partners are jointly and severally liable for all the obligations of the company without limitation. The S.e.N.C. is in principle transparent from a tax perspective.

2.1.6. Société Coopérative or S.C. is a company requiring at least seven members and the transfer of shares to third parties is legally prohibited. No minimum share capital is required to form this company. A main characteristic of the S.C. is in the ability to vary its share capital allowing the frequent change of shareholders. The members may freely determine the extent of their liability in the articles of association, so that such liability may be joint and several, unlimited, or to the contrary, not limited in the amount of their contributions. Such type of company is rarely used in practice.

2.1.7. Main characteristics of most frequent commercial companies in the GDL are hereafter summarized in Exhibit 1

2.2 Civil corporations and partnerships:

2.2.1. Société Civile is a company governed by the provisions of the Luxembourg Civil Code and may be formed by means of a private or notarial deed. It has independent legal personality from its shareholders. No minimum share capital is required to form this company. This form of company may notably be used for the joint practice of professions and the management of real estate ("S.C.I.") and private assets. Shareholders bear unlimited and joint liability.

2.2.2. Associations momentanées is a temporary partnership without a business name and legal personality. Its purpose is to carry out specific commercial transactions. Due to the simplicity and flexibility of relations between partners, such partnerships may be used in any sector for a limited time for specific projects (public market, research, technology, etc). Partners are jointly and severally bound toward business contracting third parties.

2.2.3. Associations en Participation is a partnership where partners are involved in operations which are managed by one or more persons in their own names. No legal personality is granted, and partners are jointly and severally bound toward business contracting third parties.

2.3 Groupement d'Intérêt Economique (GIE or Economic interest grouping) / Groupement d'Intérêt Economique Européen (GIEE or European economic interest grouping (EEIG))

Such groups aim at promoting or developing the activities of their members and are created by means of an agreement for a limited or unlimited term between two or more natural or legal persons. No minimum share capital is required to form these groups.

These groups have a legal personality separate from their members. Members are jointly and severally liable for the grouping's obligations.

2.4 Succursale (branch)

The branches established in the GDL concern either (i) a branch of a Luxembourg company established in the GDL or abroad and (ii) a branch of a foreign company (EU or non EU) established in the GDL. In the latter case, there may be tax advantages in using such a branch to establish a finance branch for an international group of companies. A branch does not have a legal personality separated from its head office.

The branches need to be registered with the Luxembourg trade register using a special application form. The nationality of such a branch (Luxembourg, EU or non EU) shall determine the extent of the information and documentation required for the establishment of a branch in the GDL (e.g. head office's incorporation deed and articles of association). These shall need to be registered and published in the official gazette.

3. ACCOUNTING OBLIGATIONS

Commercial corporations (including GIE, GIEE and branches of foreign countries) are subject to annual accounting obligations. They shall establish annual accounts comprising of a balance sheet, a profit and loss account and an annex, which shall be deposited with the Luxembourg trade register. A mention of such deposit shall be published in the official gazette.

The annual accounts must be submitted to the approval of the shareholders of any commercial company at the annual general meeting and approved by them. Such approval should occur within six months as from the closing of the previous financial year.

When some size criteria are reached, a qualified auditor ("*réviseur d'entreprises*") designated by the general meeting of the shareholders shall audit the annual accounts of the company.

Simplified annual accounts may be established and not subject to the accounting audit provided that they do not exceed two of the following limitations, as at the closing date of the financial year:

- Total balance sheet: not exceeding EUR 3,125,000;
- Total net turnover: not exceeding EUR 6,250,000; and
- Number of full time working employees and average number during the financial period: maximum 50

It is generally admitted in the GDL that Soparfis do not reach the turnover threshold mentioned above, so that no qualified auditor's report is in principle required, unless notably the bylaws of such companies require it or there are more than 25 shareholders in an S.à r.l.

4. DOMESTIC TAXATION REGIME

Corporations are subject to the following taxes:

- 29.63% (including corporate income tax and municipal business taxes) of taxable income for corporations established in the city of Luxembourg; and
- 0.5% of net assets (net wealth tax).

Corporate income tax applies to all resident corporations and to Luxembourg branches of foreign companies. Partnerships are not subject to such tax; instead, each individual partner's share income is subject to income tax. However, the *Société en Commandite par Actions* is subject to corporate income tax.

Marie-Béatrice Noble
Partner

www.mnks.com