

New Legislation Modernizes Luxembourg Company Law

A Legal Update from Dechert's Financial Services Practice

July 2016

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The Luxembourg Parliament adopted two new laws¹ on 18 July 2016 (the “New Laws”), which update key features of some of Luxembourg’s long-established and most frequently used corporate structures and introduce new structures. The New Laws, which amend the Luxembourg company law² (the “Company Law”), are expected to enter into force in August 2016 and January 2017, respectively.

This significant reform of the Company Law is an integral part of Luxembourg’s continued efforts to enhance its attractiveness as a jurisdiction of choice for setting up corporate and investment fund structures in Europe. The New Laws amend the Company Law to provide greater flexibility for boards and shareholders and increase legal certainty by codifying established market practices.

A grandfathering clause provides for a 24 month transitional period (running from the effective date of the changes to the Company Law) within which existing companies must amend their articles of incorporation in accordance with the amended Company Law.³

As the New Laws will result in a large number of changes to the Company Law, this OnPoint summarizes some of the key changes to existing company structures and the main features of the newly introduced structures. It can be noted that some of the changes will impact the organization and structuring of investment funds.

Key changes to the *Société Anonyme* (public company limited by shares or “SA”)

Capitalization

- ▶ *Minimum share capital.* The minimum capitalization will be rounded down to EUR 30,000 (from EUR 30,986.69).
- ▶ *Nominal values and free shares.* Shares may be issued with different nominal values (with related pro rata voting rights) and, in certain circumstances, below par value. The Company Law will permit the granting of shares for free to employees or officers of the SA and its affiliates.
- ▶ *Non-voting shares.* The maximum amount of non-voting shares that may be issued by a SA is determined at a general meeting of shareholders and may exceed 50% of the share capital.
- ▶ *Transferability.* The Company Law will include provisions regarding restrictions on the transferability of shares or other securities.
- ▶ *Article 100.* If the net asset value of the company falls below 50% of the share capital, management will be required to issue a special explanatory report that includes proposals regarding whether or not to continue the company’s activities.

¹ The law transposing bill of law no. 5730 modernizing the law on commercial companies of 10 August 1915 and amending (among others) certain relevant articles of the Luxembourg Civil Code, and the law transposing bill of law no. 6777 establishing the simplified private limited liability company.

² The Luxembourg law of 10 August 1915 on commercial companies (as amended).

³ A company’s relevant management body will be authorized to implement any amendment to the articles of incorporation that reflects a deletion as a result of a repealed provision of the Company Law, a change of cross-reference or a renumbering.

Shareholders

- ▶ *Voting rights.* Shareholders will be expressly permitted to enter into agreements pertaining to voting rights, in certain circumstances. Shareholders will also be permitted to waive the exercise of their voting rights, temporarily or permanently. If provided for in the articles of incorporation, the board of directors will be authorized to suspend voting rights of shareholders who are in breach of their obligations under the articles of incorporation or their subscription commitments.
- ▶ *Approval of certain corporate changes.* Change of nationality of the SA will no longer require the unanimous approval of shareholders and can be decided with quorum and majority applicable to the amendments to the articles of incorporation. Amendment of the corporate object of the company will no longer require approval at a meeting of bondholders.
- ▶ *Meetings.* Further means of communication (notably email) can be used to convene meetings. In certain instances, there will be a reduction (from 15 days to 8 days) in the advance notice periods required to convene a meeting and to make documents available for review prior to the meeting. Adjournment of a meeting of shareholders may be requested by shareholders representing 10% (previously 20%) of the share capital.

Board

- ▶ *CEO and committees.* The board will be permitted to appoint a CEO and to create an executive committee and other types of committees.
- ▶ *Chairman of the board.* The appointment of a chairman of the board is now optional.
- ▶ *Board resolutions.* Board resolutions through unanimous written consent of directors are expressly allowed.
- ▶ *Registered office.* The board will be expressly authorized to transfer the registered office anywhere within the Grand Duchy of Luxembourg.

Key changes to the *Société à Responsabilité Limitée* (private limited liability company or “SARL”)

Most of the changes to the SARL structure align it more closely with the SA. The key remaining distinction is that the SARL is an “*intuitu personae*”⁴ company, which has a limited number of shareholders and cannot be publicly listed.

Capitalization

- ▶ *Minimum share capital.* The minimum capitalization will be rounded down to EUR 12,000 (from EUR 12,394.68).
- ▶ *Issuance of additional shares.* The board will be permitted to issue new shares to existing shareholders and pre-approved subscribers through a mechanism of “authorized share capital”.⁵

⁴ As opposed to a joint stock company, the SARL is a company where the identity of the shareholders is an important element and any transfer of shares to a non-shareholder must be preapproved by the existing shareholders.

⁵ Previously the Company Law did not expressly authorize the use of “authorized share capital” in a SARL.

- ▶ *Shares.* Classes of shares, redeemable shares and beneficiary shares (*parts bénéficiaires*⁶) may be created. New provisions specifically address the repurchase by a SARL of its own shares⁷.
- ▶ *Transferability.* New rules will permit the transfer of shares to non-shareholders to be approved by 50% (rather than 75%) of the company's outstanding shares.
- ▶ *Capitalization is no longer required to be set forth in the documentation of the SARL.*

Shareholders

- ▶ *Number.* The maximum number of shareholders will be increased to 100 (from 40).
- ▶ *Voting rights.* Shareholders will be permitted to enter into agreements pertaining to voting rights, in certain circumstances. Shareholders will also be permitted to waive the exercise of their voting rights, temporarily or permanently. If provided for in the articles of incorporation, the board of managers will be authorized to suspend voting rights of shareholders who are in breach of their obligations under the articles of incorporation or their subscription commitments.
- ▶ *Changes to the articles.* Shareholders representing three-quarters of the share capital can amend the articles of incorporation.⁸
- ▶ *Meetings.* At least one general meeting must be held each year when there are more than 60 (previously 25) shareholders. In instances where the number of shareholders does not exceed 60 (previously 25) and the resolutions to be adopted do not pertain to amendments to the articles of incorporation, video and teleconference meetings will be permitted in lieu of in-person meetings, as will voting via forms and written shareholder resolutions.

Board

- ▶ *Delegation.* Delegation by the board of the daily management of the SARL to one or more managers, directors (*directeurs*) and other agents, who need not be shareholders will be expressly permitted.⁹
- ▶ *Board action.* As an alternative to holding meetings, boards may act pursuant to the unanimous written consent of managers. Video and teleconference meetings will be permitted in lieu of in-person meetings. The Company Law provides that board actions taken by such means are deemed taken at the registered office.
- ▶ *Dividends.* If provided for in the articles of incorporation, the board is expressly permitted to make interim dividend distributions.

Luxembourg's new company structures

Two new corporate forms have been introduced:

- ▶ ***Société par Actions Simplifiée (simplified stock company or "SAS")***

Although it is to some degree inspired by the SA structure, the SAS can be distinguished by the relatively enhanced contractual freedom it offers to shareholders. Corporate governance rules pertaining

⁶ Beneficiary shares are shares which are not comprised in the share capital.

⁷ Previously the Company Law did not expressly authorize the repurchase by a SARL of its own shares.

⁸ Currently changes to the articles of incorporation need to be resolved upon by a majority of shareholders (in number) representing three-quarters of the share capital.

⁹ Previously the Company Law did not expressly authorize the appointment of a day-to-day manager in a SARL.

to both management and shareholders can in large part be determined by the shareholders in the articles of incorporation of an SAS. For example, the relevant sections of the amended Company Law will not impose quorum or majority thresholds for shareholder decisions. Nor will the amended Company Law impose requirements with respect to share transfers. Unlike the SA, however, shares in the SAS may not be listed or offered to the public.

▶ ***Société à Responsabilité Limitée Simplifiée* (simplified private limited liability company or “SARL-S”)**

The SARL-S is intended to facilitate entrepreneurship by allowing individuals (corporate entities cannot be shareholders) to form a limited liability entity with a minimal amount of share capital (as low as one euro). The corporate object of the SARL-S must, however, be limited to activities that require a business license (*autorisation de commerce*), such as skilled trades, commercial activities, manufacturing and certain professions. This new structure will be available from 16 January 2017.

Other changes

Additional changes introduced by the New Laws include the following:

- ▶ *Tracking Shares*. Shares, the economic rights of which are linked to the performance of a specific underlying asset(s), are permitted.
- ▶ *Bonds*. All types of Luxembourg companies will be able to issue bonds (*obligations*)¹⁰.
- ▶ Circumstances in which the existence of Luxembourg companies with legal personality may be declared void are harmonized, and new provisions are introduced which are applicable to voiding decisions taken by shareholders at all general meetings.
- ▶ *Change of structure*. The amended Company Law will introduce new provisions regarding procedures for the conversion of companies from one corporate form to another.
- ▶ *Companies with a sole shareholder may be liquidated through a simplified procedure*.

Conclusion

By emphasizing contractual freedom, the amendments to Luxembourg’s principal company law are in line with investors’ expectations and evolving corporate practices in the 21st century. Dechert (Luxembourg) LLP remains available to assist clients with their corporate structuring needs in light of these changes.

¹⁰ Certain restrictions apply to the issuance of convertible bonds, depending on the corporate form of the vehicle issuing them.

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