

## LUXEMBOURG<sup>1</sup>

After a general country overview (I), we will compare the registration process (II), the tax laws (III), the financial transaction laws (IV), the auditing and reporting requirements (V) and the penalties for non-compliance (VI) between not-for-profit (**NFP**) and for-profit organisations.

### **1. OVERVIEW OF LUXEMBOURG**

#### 1.1 Current political framework

Luxembourg is a parliamentary democracy headed by a constitutional monarch, the Grand Duke. The executive power is exercised by the Grand Duke and the cabinet, made up of several ministers. Although the Grand Duke has the power to dissolve the legislature, in which case new elections must be held within three months, since 1919, sovereignty has resided with the nation, exercised by the Grand Duke in accordance with the Luxembourg Constitution (the **Constitution**) and the law.

Legislative power is vested in the Chamber of Deputies (*Chambre des Députés*), a unicameral legislature of sixty members, directly elected to five-year terms from four constituencies. In addition, the Council of State (*Conseil d'État*), composed of twenty-one ordinary citizens appointed by the Grand Duke, advises the Chamber of Deputies in the drafting of legislation.

The Constitutional Court determines the constitutionality of laws.

#### 1.2 Type of legal system

Luxembourg law has been largely inspired by the French and Belgium civil law regimes. In addition to Luxembourg case law and legal literature, French and Belgian case-law and legal literature are still sometimes considered for the interpretation of Luxembourg law.

#### 1.3 General legal environment

The Constitution provides for both the right of assembly and the right of association in articles 25 and 26 of the Constitution.

As per article 25, the Constitution guarantees the right to assemble peacefully and unarmed in compliance with the laws that govern the exercise of this right, without having to be subject to a prior authorization. However, the same article specifies that this provision is not applicable to open-air political, religious or other meetings; these meetings remain entirely subject to the applicable laws and regulations.<sup>2</sup>

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<sup>1</sup> The following memorandum was prepared by pro bono counsel for the ABA Center for Human Rights. It is intended as background information only and should not be relied upon as legal advice on a particular case. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>2</sup> Article 25 of the Luxembourg constitution (the latest available version dated 1 August 2013) in French: <http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Constitution.pdf> and an unofficial English translation: [https://www.constituteproject.org/constitution/Luxembourg\\_2009.pdf](https://www.constituteproject.org/constitution/Luxembourg_2009.pdf).

Article 26 of the Constitution guarantees the right of association, in compliance with the laws that govern the exercise of this right, without having to be subject to a prior authorization.<sup>3</sup>

There are numerous different companies (*société*) and associations (*association*) under Luxembourg law. Companies pursue a profit, whereas associations are those organizations where individuals unite their efforts or resources for a purpose other than to share profits. However, profits may still result from the activities of such associations if the activities are necessary in order for it to achieve its primary goal/corporate object.

Commercial companies are those of which the object is to conduct commercial activities. Such companies are subject to the Luxembourg law on commercial companies dated 10 August 1915, hereafter the **Companies Law**). The Companies Law recognises various commercial companies with legal personality such as (1) the general corporate partnership/unlimited company (*société en nom collectif*), (2) the common limited partnership (*société en commandite simple*), (3) the public company limited by shares (*société anonyme*), (4) the corporate partnership limited by shares (*société en commandite par actions*), (5) the private limited liability company (*société à responsabilité limitée*), (6) the co-operative company (*société coopérative*), and (7) the European company (*société européenne*).

In addition, there are temporary commercial companies (*sociétés commerciales momentanées*), commercial companies by participation (*sociétés commerciales en participation*) and special limited partnerships (*sociétés en commandite spéciale*).

Article 138 of the Companies Law sets out the rules in respect of temporary commercial associations (*association momentanée*). Their object is to undertake one or more specific commercial transactions. The members are jointly and severally liable vis-à-vis the third parties with whom they have dealt with.

Commercial associations by participation (*association en participation*)<sup>4</sup> are associations in relation to which one or more persons take an interest in transactions managed by one or more other persons. The managers are jointly and severally liable vis-à-vis third parties they have dealt with. The members of both commercial associations and of commercial associations by participation agree on the purpose, form, interests and conditions of the association.<sup>5</sup>

Complementary groups (*groupements complémentaires*) are those which serve the interests of their members or founders and which are NFP. A distinction can be drawn between (i) groups of persons, the NFP associations (*association sans but lucratif* - ASBL) and (ii) groups of properties, foundations (*fondation*).<sup>6</sup>

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<sup>3</sup> Article 26 of the Luxembourg constitution (the latest available version dated 1 August 2013) in French: <http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Constitution.pdf> and an unofficial English translation: [https://www.constituteproject.org/constitution/Luxembourg\\_2009.pdf](https://www.constituteproject.org/constitution/Luxembourg_2009.pdf).

<sup>4</sup> Article 139 of the Companies Law.

<sup>5</sup> Article 140 of the Companies Law.

<sup>6</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 128.

The current legal provisions in respect of NFP organisations are contained in the law of 21 April 1928, as amended, on NFP organisations and foundations (the **NFP Law**). Since 2009 there is a new draft law (Bill 6054<sup>7</sup>), which has not yet been approved.

Whereas the above-mentioned entities constitute the principal companies and associations under Luxembourg law, the preceding list is not exhaustive.

## 2. REGISTRATION PROCEDURE

### 2.1 For-Profit Organisations

Most for-profit organisations are incorporated before a Luxembourg notary. However, the common limited partnership (*société en commandite simple*)<sup>8</sup> and the special limited partnership (*société en commandite spéciale*) are established contractually.<sup>9</sup> The incorporation deed is drafted (usually by lawyers), an appointment with the notary is arranged, the founding shareholders/members attend the meeting or are represented by the person(s) empowered in this respect via a power of attorney. The notary is then responsible for (i) registration requirements with the Luxembourg register of commerce and companies (*Registre de Commerce et des Sociétés de Luxembourg* - **RCS**<sup>10</sup>) and (ii) publication requirements. The process from the initial incorporation meeting to publication in the official journal (*Mémorial, Recueil des Sociétés et Associations*) can take several weeks or longer.

Registration with the RCS is an administrative formality required in respect of all commercial companies and for economic interest groupings (*groupement d'intérêt économique*). The notary, requesting person or contractual party make the request for registration. The request is analysed by the RCS, in particular in respect of the availability of the suggested name of the company or grouping<sup>11</sup> (article 5, third indent of the grand ducal regulation dated 23 December 2003).<sup>12</sup> All deeds, including the articles of association, in respect of which the law requires publication in the *Mémorial* must be deposited with the administration of registration (*l'Administration de l'Enregistrement et des Domaines*), together with the fees for publication. Once the request has been analysed and approved, the documents are transferred to the central legislation department of the state ministry for publication. The transfer takes place during the three working days following the request.<sup>13</sup> Registration with the RCS is an important administrative step: when a company is not registered, it cannot take legal action in respect of acts that have as

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<sup>7</sup> <http://www.asti.lu/wp-content/uploads/2010/01/asbl6054-0.pdf>.

<sup>8</sup> Article 16 of the Companies Law.

<sup>9</sup> Article 22-1 of the Companies Law.

<sup>10</sup> <https://www.rcsl.lu/mjrcs/jsp/IndexActionNotSecured.action?time=1426194813316&loop=2>.

<sup>11</sup> Article 5, third indent of the grand ducal regulation dated 23 December 2003 (<http://www.legilux.public.lu/rgl/2003/A/0248/1.pdf>).

<sup>12</sup> <http://www.legilux.public.lu/rgl/2003/A/0248/1.pdf>.

<sup>13</sup> Article 8 of the grand ducal regulation in respect of the enactment of the law of 19 December 2002 regarding the RCS, accounting and the annual accounts of companies ([https://www.rcsl.lu/mjrcs/jsp/webapp/static/mjrcs/fr/mjrcs/pdf/rgd\\_2003\\_01\\_23.pdf?time=1426245631664](https://www.rcsl.lu/mjrcs/jsp/webapp/static/mjrcs/fr/mjrcs/pdf/rgd_2003_01_23.pdf?time=1426245631664)).

their cause a commercial activity (example of case law: Court case dated 28 April 1992, N. 13 265: the cause of the payment of a cheque is not a commercial activity. A company can therefore take legal action, despite non-registration.)<sup>14</sup>

There may be several reasons for a company's dissolution. For instance, the shareholders can foresee in the articles of association under which circumstances the company will be dissolved. The law foresees certain causes for dissolution, such as the end of the term foreseen in the articles of association, the realisation of the company's object or the liquidation of the company. Alternatively the dissolution can be judicially imposed, for instance in case of a serious violation of the law.<sup>15</sup> The causes for dissolution are varied and numerous and the preceding examples do not constitute an exhaustive list.

When a company is liquidated it must be removed from the RCS within one month.<sup>16</sup> For liquidation purposes only, the liquidated company continues to exist for a period of five years in respect of claims of creditors. After it has been liquidated, the Company can no longer act as plaintiff.

## 2.2 Not-For Profit Organisations

### 2.2.1 Associations

Two or more persons bring together their know-how or activities via a NFP association. The main difference between NFP associations and commercial companies is that members of NFP associations do not aim to make a profit which will be distributed amongst the members. Instead of providing industrial or commercial operations or services, the NFP association pursues civil acts. The description of the object of the entity in the articles of association of companies or NFP associations will clarify whether the purpose of the entity is to make and distribute profits, as is the case in respect of commercial companies, or whether it has an alternative aim, in which case the entity may qualify as a NFP association. Nonetheless, associations may pursue a commercial activity if (i) it is quantitatively less important than the non commercial activities in respect of the means used, (ii) it enhances the NFP activities of the association and (iii) if the product of the commercial activity is used for the realization of the NFP purpose of the association.<sup>17</sup>

NFP associations which serve the public interest by their philanthropic, religious, scientific, artistic, educational, social, sport or tourism-related object can be recognised to be of public interest (*d'utilité publique*)<sup>18</sup> and constitute an establishment of the public interest (*établissement d'utilité publique*).<sup>19</sup>

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<sup>14</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 171, paragraph 184.

<sup>15</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 445.

<sup>16</sup> Article 9 of the Companies Law foresees that the publication of legal instruments or extracts of such instruments in respect of which publication is required, must be lodged with the RCS within one month after the date of the finalised instrument.

<sup>17</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, pages 128 -130.

<sup>18</sup> By virtue of the grand-ducal decision (*arrêté grand ducal*) article 26-2 of the NFP Law.

<sup>19</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 130, paragraph 132.

The dissolution of the association can either be judicial or voluntary. Regarding the judicial dissolution, when, for instance, the association has become insolvent, the court can pronounce the dissolution of the association at the request of one of its members, an interested third party or the public prosecutor. The voluntary dissolution is freely voted by the members of the association.<sup>20</sup> The general assembly can only pronounce the dissolution if two thirds of the members are present. If this condition is not fulfilled, a second meeting can be convened and can validly deliberate regardless of the number of members present, subject however to a certification of the civil tribunal. The dissolution is only valid if a two-thirds majority of the members present vote in favour.<sup>21</sup>

### 2.2.2 Foundations

Foundations are establishments (i) which are not constituted for the purpose of making a material gain and (ii) which pursue activities of general interest. Unlike an association, which is a group of persons, a foundation is related to property - a foundation manages a determined pool of assets in the pursuance of a common interest.<sup>22</sup>

Foundations are established through the unilateral intention of their founder(s), in a notarial deed or testament. The articles of association of a foundation need to mention the object of the foundation, its registered address in Luxembourg, its administrators and the destination of the goods in case the foundation is dissolved.<sup>23</sup> The articles of association are communicated to the ministry of justice for approval<sup>24</sup> and the foundation acquires legal personality as soon as the articles of association have been approved by a Grand-Ducal decision.<sup>25</sup> The purpose of the administrative authorization is to limit the status of “foundation” to those entities which pursue purposes other than economic interests. The articles of association and subsequent amendments are published in the official journal (*Mémorial C*).<sup>26</sup>

If the foundation cannot ensure the continuation of the object for which it has been constituted, it will be judicially dissolved. The dissolution is pronounced at the demand of one of its administrators, an interested third party or the public prosecutor. The court will name one or several liquidators, whose mission will consist of managing the foundation’s liabilities and to arrange for the remaining assets to be disposed of in accordance with the articles or association of the foundation.<sup>27</sup>

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<sup>20</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 137, paragraphs 143 and 144.

<sup>21</sup> Article 20 of the NFP Law.

<sup>22</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 138, paragraph 146.

<sup>23</sup> Article 30 of the NFP Law.

<sup>24</sup> Article 28 of the NFP Law.

<sup>25</sup> Article 29 of the NFP Law.

<sup>26</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 138, paragraph 147.

<sup>27</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 140, paragraph 151.

### **3. TAX LAWS**

Unlike the general company law, tax law is not only influenced by French and Belgian law but also by the law of neighbouring Germany. Indeed, German tax laws, regulations and case law introduced during the occupation are still enforceable. This is why German legal literature and commentaries are of an utmost importance when interpreting Luxembourg tax law.

#### **3.1 For-Profit Organizations**

Resident Luxembourg companies are subject to taxes on their worldwide income. The corporate income tax rate is 21% with a surcharge on the tax of 7% (for the employment fund) and a local municipality tax with an average rate of 7.5%.

Tax incentives include exemptions on royalties and capital gains for some intellectual property as well as investment tax credits. The tax situation applicable to investment funds is very favourable. Regulated investment funds are exempt from corporate income tax, municipal business tax and net worth tax and are only subject to a 0.01% to 0.05% subscription tax rate.<sup>28</sup> It should be noted, however, that investors in these funds are fully subject to all taxes applicable in their home jurisdictions.

#### **3.2 Not-For Profit Organizations**

If the NFP organization does not have a commercial or industrial activity, it is exempt from corporate income tax. NFPs that own property are subject to a tax of 12% on the value of their property, per article 45 of the NFP Law.

Tax law is of importance for NFPs, not only for themselves but also for their (potential) donors. A donation in cash might be tax deductible if given to an NFP which has been recognized by the Ministry of Justice as being in the public interest. Luxembourg requires donations to be of a minimum of EUR 120 and a maximum of 20% of the total net income of the donor with an absolute maximum of EUR 1,000,000. There are special regulations for a donation in kind which need to be made through the national cultural fund (*fonds culturel national*) or the national fund for the support of audio-visual-productions (*fonds national de soutien à la production audiovisuelle*).

#### **3.3 Analytical comparison**

The difference in relation to the imposition of taxes in Luxembourg does not lie in the distinction between for-profit organisations and NFPs but in the criterion of the activity which has to be commercial for taxes to be imposed. On the contrary, NFPs are treated more favourably and this (politically desired) better treatment extends to their donors. NFPs which do not further cultural or audio-visual interests cannot profit from the favourable regulations in relation to a contribution in kind.

### **4. FINANCIAL TRANSACTION LAWS**

#### **4.1 Foreign Investment/Foreign Funding Laws**

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<sup>28</sup> This includes both specialised investment funds and UCITS although the latter profit from a favourable tax regime throughout Europe.

Access to the Luxembourg market through direct or indirect investment by foreigners is regulated by the same laws and regulations than the same activities conducted by locals. This is probably one of the main reasons – along with the favourable taxation – that Luxembourg is number 15 on the list of countries with the highest foreign direct investment inflow.<sup>29</sup>

#### 4.1.1 For profit organisation

Foreign investment profits benefit from the same subsidies and advantages as local investment – notably in the form of subsidies granted to small and medium enterprises through the *Société Nationale de Crédit et d'Investissement* (SNCI). The SNCI grants loans to start-ups, direct loans for research, development and innovation, loans for innovative enterprises and equipment loans. In addition, the SNCI finances foreign investment, by Luxembourgish companies, if they are small or medium sized. There are no limits to the size or percentage of foreign investment.

It may be considered that some of the local laws are an indirect restriction of access, such as the necessity to draw up deeds for an incorporation in one of the local languages or the addition of a translation if using English. However, these restrictions are negligible and defensible.

#### 4.1.2 Non-for profit organisation

The same reasoning and laws apply to NFP. In addition, donations from foreign sources are not restricted in general. Donations to a foreign organisation profit from the same tax discounts as apply to local organisations, as shown in section 3.2.

### 4.2 Political Contribution Laws

Party financing is regulated by the law of 21 December 2007 regarding the financing of political parties (the **Party Financing Law**). Political parties are obliged to publish their statutes, a list of their leaders on a national level, a list of their donors and their donations as well as their yearly accounting, per article 6 of the Party Financing Law.

During an election year parties receive compensation of their expenses in an amount of EUR 100,000 plus an amount of EUR 11,500 for each percentage point reached in the election.<sup>30</sup> Parties who receive less than 2% of the votes are, however, excluded. A further, and possibly indirect, restriction for newly formed parties or those which did not reach 2% in the previous election, is that they do not profit from the advance financing benefitting parties who have already received 2% of the votes in previous elections.

Only an individual may donate to a political party; those given by a legal entity, association or group are not permitted.<sup>31</sup>

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<sup>29</sup> Luxembourg had an inflow of 196 billion USD in 2013 – *UNCTAD*, Global Investment Trend Monitor, No. 15, 28 January 2014, page 6.

<sup>30</sup> Article 2 of the Party Financing Law.

<sup>31</sup> Article 8 of the Party Financing Law.

## 5. AUDITING/REPORTING REQUIREMENTS

### 5.1 For-Profit Organizations

Title II of the law of 19 December 2002 on the register of commerce and companies and the annual accounts of undertakings (the **Accounting Law**) sets out provisions “on accounting books and annual accounts of undertakings” and includes precise indications on content and layout requirements. The law foresees that, amongst others, individuals who are business persons, commercial companies vested with legal personality, European economic interest groupings and economic interest groupings (collectively referred to as **Undertaking(s)**)<sup>32</sup> must keep accounts which are appropriate to the nature and extent of its activities and comply with the specific legal provisions which are relevant for those activities.<sup>33</sup>

The accounts of legal entities should take into account all transactions, assets and rights of any kind, as well as all liabilities, obligations and commitments. The accounts of business persons who are individuals should take into account the same items where they relate to the business activity of such individuals and state the equity allocated to the business activity separately.<sup>34</sup>

Once a year, every Undertaking should draw up a complete inventory of its assets and rights of any kind, as well as its liabilities, obligations and commitments. The accounts should be summarised in a descriptive document.<sup>35</sup>

Audit and reporting requirements apply in respect of regulated entities which are subject to the supervision of the Luxembourg supervisory authority, the *Commission de Surveillance du Secteur Financier* (CSSF). For example, CSSF-supervised entities need to provide the CSSF with a copy of their annual audited accounts, need to report to the CSSF on a regular basis and need to inform the CSSF in relation to changes to the board members or amendments to the constitutional documents.

### 5.2 Not-For Profit Organizations

#### 5.2.1 Association

Every year the managers of the association must submit to the general assembly (i) the accounts of the preceding financial year of the association and (ii) the budget of the following financial year.<sup>36</sup> In accordance with the preparatory works of the NFP Law, “account” should not be understood as the annual accounts of companies (a balance sheet does not need to be produced/provided in respect of NFP associations), but rather as a reflection of the cash accounts

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<sup>32</sup> Accounting Law, Title II, chapter I, article 24 amends title II, book I of the commercial code, article 8 as indicated.

<sup>33</sup> Accounting Law, Title II, chapter I, article 24 amends title II, book I of the commercial code, article 9 as indicated.

<sup>34</sup> Accounting Law, Title II, chapter I, article 24 amends title II, book I of the commercial code, article 10 as indicated.

<sup>35</sup> Accounting Law, Title II, chapter I, article 24 amends title II, book I of the commercial code, article 15 as indicated.

<sup>36</sup> Article 4 of the NFP Law.



of the association. The budget refers to the estimated income and expenditure accounts, *ie* an estimate of the contribution of the following year.<sup>37</sup>

#### 5.2.2 Foundation

Because the foundation does not have any members, it is controlled by the minister of justice. The minister of justice verifies that (i) the properties of the foundation are used for the purpose for which the foundation has been created<sup>38</sup> and that (ii) every year the administrators communicate the accounts of the foundation and the budget of the following financial year to the minister of justice.<sup>39</sup>

## 6. PENALTIES FOR NON-COMPLIANCE

### 6.1 For-Profit Organizations

The non-registration of a company incurs a fine of 0.1% of the company's capital but not less than EUR 25 or more than EUR 250, per article 10 of the Companies Law. The party liable for this fine is either the notary (in case of a notarized deed of incorporation) or the founders of the company (in case of a private incorporation).

The law sanctions a non-declaration or a non-payment of taxes as tax avoidance with fines of four times the taxable amount, article 396(1) of the law of 22 may 1931 on general taxes (**Tax Law**). Those acts that constitute tax fraud are punishable by one month to five years in prison, per article 396(5) Tax Law.

Managers who do not present the annual accounts within six months after the end of the accounting year or do not publish the accounts as stipulated are punishable by a fine of EUR 500 to EUR 25,000, per articles 163 no.2, 162 of the Companies Law.

Political parties that do not comply with the Party Financing Law do not receive funding.

### 6.2 Not-For Profit Organizations

If the NFP, in the sense of the NFP Law, does not publish the documents it is obliged to publish it will forfeit its legal personality, per articles 26, 43 of the NFP Law and can no longer operate.

A non declaration and/or non-payment of the property tax for NFP incurs a fine of 10% of the taxes due, per article 48(1) NFP Law. An omission in the declaration of property incurs a fine of half of the tax due, the whole amount is due as an additional fine if proceedings have begun, per article 48(2) NFP Law.

### 6.3 Analytical comparison

The obvious non-conforming behaviours such as non-registration or tax avoidance are penalized for both groups. However, while for profit organisations and their managers face

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<sup>37</sup> Steichen, Précis de droit des sociétés, 4th edition, 2014, page 134, paragraph 138.

<sup>38</sup> Article 40 of the NFP Law.

<sup>39</sup> Article 34 of the NFP Law.

harsh penalties, those applying in relation to non-profit organisations are light in comparison.

Sanctions against NFPs shown above do not profit from a right of redress. Those sanctions that are of a criminal nature follow the criminal court system.