



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Private Wealth 2021

Luxembourg
Peter Adriaansen, Veronica Aroutiunian
and Nelli Kluschin
Loyens & Loeff

practiceguides.chambers.com

LUXEMBOURG

Law and Practice

Contributed by:

Peter Adriaansen, Veronica Aroutiunian and Nelli Kluschin
Loyens & Loeff see p.20



CONTENTS

1. Tax	p.3	6. Roles and Responsibilities of Fiduciaries	p.14
1.1 Tax Regimes	p.3	6.1 Prevalence of Corporate Fiduciaries	p.14
1.2 Stability of the Estate and Transfer Tax Laws	p.5	6.2 Fiduciary Liabilities	p.14
1.3 Transparency and Increased Global Reporting	p.5	6.3 Fiduciary Regulation	p.15
2. Succession	p.5	6.4 Fiduciary Investment	p.16
2.1 Cultural Considerations in Succession Planning	p.5	7. Citizenship and Residency	p.16
2.2 International Planning	p.6	7.1 Requirements for Domicile, Residency and Citizenship	p.16
2.3 Forced Heirship Laws	p.6	7.2 Expeditious Citizenship	p.17
2.4 Marital Property	p.7	8. Planning for Minors, Adults with Disabilities and Elders	p.17
2.5 Transfer of Property	p.7	8.1 Special Planning Mechanisms	p.17
2.6 Transfer of Assets: Vehicle and Planning Mechanisms	p.7	8.2 Appointment of a Guardian	p.17
2.7 Transfer of Assets: Digital Assets	p.7	8.3 Elder Law	p.17
3. Trusts, Foundations and Similar Entities	p.7	9. Planning for Non-traditional Families	p.17
3.1 Types of Trusts, Foundations or Similar Entities	p.7	9.1 Children	p.17
3.2 Recognition of Trusts	p.8	9.2 Same-Sex Marriage	p.18
3.3 Tax Considerations: Fiduciary or Beneficiary Designation	p.8	10. Charitable Planning	p.18
3.4 Exercising Control over Irrevocable Planning Vehicles	p.8	10.1 Charitable Giving	p.18
4. Family Business Planning	p.8	10.2 Common Charitable Structures	p.18
4.1 Asset Protection	p.8		
4.2 Succession Planning	p.14		
4.3 Transfer of Partial Interest	p.14		
5. Wealth Disputes	p.14		
5.1 Trends Driving Disputes	p.14		
5.2 Mechanism for Compensation	p.14		

1. TAX

1.1 Tax Regimes

Concept of Residence/Income Subject to Tax

An individual is considered a tax resident of Luxembourg if they have their tax domicile in Luxembourg (ie, a permanent place of residence in Luxembourg that they actually use and intend to maintain) or their “usual abode” there (a usual abode is deemed to exist after a continuous presence in Luxembourg of six months, which may be spread over two calendar years).

A resident taxpayer is subject to Luxembourg income tax based on their worldwide income (such as employment income, dividends, interest and rental income). A non-resident taxpayer is subject to income tax based on their Luxembourg-source income only.

Tax rates applicable for individuals range from 0% to 45.78% (including the surcharge for the employment fund). Luxembourg does not apply a wealth tax for individuals.

Treatment of Capital Gains

Non-resident shareholders without a Luxembourg permanent establishment to which the shares in a Luxembourg company are allocable are only taxable on the realisation of a capital gain in respect of more than a 10% shareholding in such company if they realise that capital gain within six months after acquisition, or if they became non-resident taxpayers less than five years before the disposal took place and have been resident taxpayers for more than 15 years. However, shareholders resident in a country with which Luxembourg has concluded a tax treaty are generally not taxable on such capital gains.

For Luxembourg-resident shareholders, capital gains on movable assets (such as shares) are only taxable if they are realised within six months following acquisition or (if after six

months) concern a substantial shareholding (>10%). Capital gains realised after six months on substantial shareholdings benefit from a rate reduction of 50%. In addition, the taxable gain may be reduced by an allowance of EUR50,000 (or EUR100,000 jointly).

Capital gains realised on the sale of an individual's principal residence benefit from an exemption. Capital gains realised on real estate within two years after acquisition are taxed as ordinary income (at progressive rates). However, after two years a 50% rate reduction would apply.

Emigration to Luxembourg/Step-Up in Basis

If you have a substantial interest (>10%) in a company (or shares in your own private or public limited company) and are considering emigrating to Luxembourg (from any country), you can legally claim an increased acquisition price for your substantial interest. This is also called “step-up”.

Under this scheme, the acquisition price of the substantial participation is set at the market value at the time of emigration. As a result, at the time of disposal (for example, if you sell the interest), Luxembourg will not tax capital gains on your substantial interest that accumulated in the period prior to your emigration (deferred tax assets).

Gift Tax

Gift tax is levied when a gift is registered in Luxembourg in a notarial deed. Such registration is not always obligatory (unless the gift concerns Luxembourg real estate) so it may be possible to make a gift without gift tax by means of a gift by hand (*don manuel*).

Inheritance Tax

When a Luxembourg-resident taxpayer dies, there is no inheritance tax to pay in Luxembourg on bequests to direct descendants, providing

that the statutory distribution to each descendant under Luxembourg law has been respected. It does not matter where the direct descendants live. However, if one child receives more than another, Luxembourg levies up to 5% inheritance tax on the difference. Moreover, a surviving spouse is also exempt from inheritance tax under certain conditions.

Income Tax Planning

The principle of the choice of the least taxed option remains valid in Luxembourg – ie, a taxpayer may freely organise their estate or business in the most appropriate and the least costly way from a tax perspective. In this respect, Luxembourg offers a toolbox that is suitable for international wealth structuring. Subject to an analysis of the specific needs that result from the requirements in each relevant jurisdiction, Luxembourg may offer solutions as diverse as the *société de participation financière* (SOPARFI), the family private wealth management company (SPF), the specialised investment fund (SIF), the investment company in risk capital (SICAR) or, to a lesser extent, reserved alternative investment funds (RAIFs). Fiduciary agreements and insurance products are also options.

Real Estate Investments in Luxembourg

Capital gains with respect to real estate located in Luxembourg realised by a non-resident company (ie, an incorporated body enjoying legal personality) are subject to corporate income tax (including the surcharge for the employment fund) at a rate of 18.19% (in 2021), while such gains realised by a non-resident individual are subject to personal income tax at progressive rates.

Furthermore, the sale of real estate through an asset deal is subject to a registration duty of 6%, plus a 1% transcription tax, while commercial property located within the Luxembourg City

municipality is subject to a combined maximum rate of 10%.

As a consequence, Luxembourg real estate investments are typically structured as a share deal whereby the shares of a Luxembourg tax-opaque vehicle holding the real estate assets are transferred. Such transfer is not subject to registration duty since the share deal does not result in a change of the owner of the property. Furthermore, Luxembourg only taxes capital gains of a non-resident investor when there is a disposal of a significant shareholding (ie, more than 10%) in a Luxembourg opaque company within six months of the acquisition of the shareholding (subject to tax treaty protection).

In addition, Luxembourg investment funds are becoming increasingly important on the Luxembourg real estate market. Notably, the SIF and the RAIF offer attractive solutions for structuring Luxembourg real estate.

As of 1 January 2021, certain tax-transparent investment funds (ie, UCIs, SIFs and RAIFs) are subject to a new real estate tax, at a flat rate of 20%. This tax will be levied on an annual basis, on income derived from a real estate asset situated in Luxembourg. Targeted real estate income includes:

- gross rental income realised by the investment vehicle directly, or via a transparent entity or a *Fonds Commun de Placement* (FCP);
- capital gains on Luxembourg real estate assets; and
- capital gains derived upon transfer of interest in transparent entities or FCPs, to the extent these hold real estate assets located in Luxembourg.

1.2 Stability of the Estate and Transfer Tax Laws

Luxembourg is considered one of the most stable jurisdictions in the world, from the legal, political and financial points of view. Luxembourg is thus very attractive for clients wishing to manage their private wealth in the most optimal way possible.

More specifically, rules related to estate and transfer tax laws can be considered very stable since the basic principles have not drastically evolved over the years but have only adapted to the evolving needs of high net worth individuals. For instance, the law on registration fees dates back to December 1798. Current rules are not expected to change due to the COVID-19 crisis.

1.3 Transparency and Increased Global Reporting

As an EU Member State, Luxembourg is committed to participating in European and international initiatives that aim to combat money laundering and terrorism financing through increased transparency and exchange of information between tax authorities. Luxembourg has notably adopted legislation to implement the Common Reporting Standard (CRS) and the US Foreign Account Tax Compliance Act (FATCA). In accordance with the EU anti-money laundering directives, it has set up a national register of the ultimate beneficial owners (UBOs) of companies and other legal entities that are registered with the Luxembourg register of trade and companies, and a separate national UBO register for trusts and *fiducies*.

The UBO register for companies is publicly available but there are some safeguards to preserve the UBO's right to privacy.

Luxembourg has also implemented Directive 2011/16/EU (DAC 6) requiring intermediaries to report potentially aggressive tax planning arrangements with a cross-border dimension, as well as arrangements designed to circum-

vent reporting requirements like CRS and UBO reporting. According to the Luxembourg law implementing DAC 6, lawyers, accountants and auditors acting within the boundaries of their profession and subject to the Luxembourg laws governing these professions are excused from the reporting obligation.

2. SUCCESSION

2.1 Cultural Considerations in Succession Planning

Inheritance

Luxembourg applies the *situs* principle, which means that the inheritance is opened in the last state of residence of the deceased person for Luxembourg tax consideration. However, Luxembourg also levies duties on the transfer of real estate located in Luxembourg upon death.

The inheritance duties in Luxembourg are, in principle, levied at a rate of 0% in direct ascending line and between spouse and partners (for the part inherited corresponding to the heirship law). The base rate applicable to other heirs can vary up to a maximum 15%, notwithstanding possible surcharges.

Duty on Gifts

Luxembourg only levies a duty on gifts to the extent that the gift is registered in Luxembourg. The rate varies between 1.8% and 14.4%. Following this principle, gifts that are not effected before a notary should not be subject to this duty.

Luxembourg also does not levy gift tax on real estate located abroad, regardless of whether or not the act was registered in Luxembourg. Luxembourg gift and inheritance tax are levied on the fair market value of the assets.

In Luxembourg, gifts are not often used to anticipate inheritance because of the existence of gift tax even in direct line, whereas inheritance in direct line is exempted from inheritance tax.

2.2 International Planning

Luxembourg has not signed any double tax treaty regarding inheritance tax. However, as mentioned in **2.1 Cultural Considerations in Succession Planning**, the ascending direct line and inheritance between spouses and partners are subject to a 0% rate, so there is no risk of double taxation in such situations.

Concerning the civil law applicable to the inheritance, Luxembourg must apply the European regulation on inheritance, which simplifies European cross-border inheritance (except for the United Kingdom, Ireland and Denmark). In principle, the applicable law will be the law of the last state of residence, unless the deceased opts for the law of the state of his or one of his nationalities. The European Commission provides some recommendations in order to head for the unilateral relief measures of the Member States to avoid double taxation upon inheritance.

2.3 Forced Heirship Laws

There are four categories of heirs:

- descendants;
- the surviving spouse;
- ascendants; and
- collateral heirs.

Descendants

The descendants are the deceased's privileged heirs. They supersede all other heirs except for the surviving spouse.

The deceased can freely dispose (via a testamentary provision) of a portion of their estate (the disposable portion) despite the protection of the descendants' inheritance rights. The rate of

the disposable portion depends on the number of children left by the deceased or represented in their estate. If the deceased has:

- one child (alive or represented), the disposable portion is one half of his or her estate;
- two children, the disposable portion is one third of his or her estate; and
- three children or more, the disposable portion is one quarter of his or her estate.

In the absence of testamentary provisions, the estate is devolved equally (division per capita) among the closest relatives.

Surviving Spouse

If the deceased leaves descendants, the surviving spouse can choose between a share equal to that of the legitimate child who receives the smallest share (which may not be lower than a quarter of the estate), and the usufruct of the matrimonial home and the related furniture, provided that said building belonged to the deceased in its entirety or together with the surviving spouse.

The descendants' due portion of inheritance is reduced in proportion to the rights of the surviving spouse.

Representation allows descendants of different degrees of kinship to compete for the estate, insofar as it allows representatives to take the place and degree of, and to be entitled to the rights of, the represented person who had a title to inheritance but who died before the deceased. If there are no descendants, the surviving spouse inherits and comes to own the freehold estate.

Ascendants and Collateral Heirs

Ascendants and collateral heirs only have inheritance rights where there are no descendants and no surviving spouse. The surviving spouse, as well as ascendants or collateral heirs, can be

disinherited by the deceased through his or her will.

2.4 Marital Property

Preuptial and Postnuptial Agreements

Luxembourg allows for matrimonial agreements, under which the future spouses choose their matrimonial regime and any other advantages (it being understood that some elements are subject to public order rules, such as maintenance obligations or any compensatory benefits). If there is an international element (for example, if at least one of the spouses is a foreign national), the matrimonial agreements may be subject to foreign law. For that purpose, the agreements must be in writing, they must be dated and signed by the spouses, and they must comply with the form prescribed for marriage contracts, either by the law chosen by the spouses or by the law of the place where they were entered into.

Matrimonial Regimes

The Luxembourg Civil Code distinguishes between the primary and the secondary regime.

The primary regime sets forth rules of public order, such as the prohibition of the sale of the common residence even if it is part of the personal patrimony of one of the spouses, or the duty to contribute to the needs of the household. Those obligations may not be derogated from.

The secondary regime provides supplementary rules on marital assets. It provides for three community regimes:

- the community property regime, where the spouses each have a patrimony and, in addition, a common patrimony composed essentially of their professional revenues as well as all the property acquired with said revenues;
- the separation of property regime; and

- the joint ownership of acquired properties regime, which provides for a kind of equal distribution of the assets at the time of the dissolution of the marriage.

These matrimonial regimes can be modified by the spouses as they see fit.

2.5 Transfer of Property

In principle, for direct tax purposes, the transfer of property upon death or gift is valued at the historical acquisition costs for subsequent disposal. However, there is an exemption for substantial participation (more than 10% held for more than 12 months), which is considered to be a realisation even without consideration.

2.6 Transfer of Assets: Vehicle and Planning Mechanisms

Luxembourg inheritance taxes are limited and do not require specific structuring in the case of traditional inheritance to the spouse or children. In any case, good planning can consist in using the manual gift, which is not taxed in Luxembourg for assets potentially allowed to be transferred without notarial deed (ie, not for real estate, for example).

2.7 Transfer of Assets: Digital Assets

Luxembourg inheritance law does not include any special provision for digital assets, which are considered as movable and intangible properties for the purposes of tax and succession.

3. TRUSTS, FOUNDATIONS AND SIMILAR ENTITIES

3.1 Types of Trusts, Foundations or Similar Entities

There is no such thing as a Luxembourg trust, since the legislator has never introduced that type of structure. However, Luxembourg recognises foreign trusts (see **3.2 Recognition of**

Trusts), which still makes the country attractive for investment structures involving a trust.

A new bill introducing a private foundation (*fondation patrimoniale*) in Luxembourg legislation was drafted in 2013 and was about to be voted on by the Parliament in November 2014. However, the legislative process was suddenly stopped and has not since been relaunched. There is currently no sign that the bill is about to be voted on.

However, foreign forms of private foundations such as the *fondation privée* in Belgium can be used in combination with a Luxembourg company for private wealth purposes.

3.2 Recognition of Trusts

Trusts are recognised in Luxembourg, as the country has ratified the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition through a law of 27 July 2003 (the 2003 Law). That ratification facilitates the use of all forms of trusts governed by foreign jurisdictions.

3.3 Tax Considerations: Fiduciary or Beneficiary Designation

Based on the general Luxembourg tax law (*Steu-
eranpassungsgesetz*), taxation follows economic ownership rather than legal ownership. As such, if a foreign trust or foundation owns assets on behalf of a Luxembourg individual, the proceeds from such assets would be allocable to the individual and taxed accordingly. The analysis may be different for certain discretionary and irrevocable trusts whereby no clear beneficiaries can be identified. In other words, the characteristics of a foreign trust or foundation would need to be analysed on a case-by-case basis.

A fiduciary based in Luxembourg would be taxed based on the same principles of economic ownership versus legal ownership – ie, in the opposite way. If the fiduciary is not the economic owner

of the assets, any proceeds derived therefrom would not be taxable for the fiduciary. However, based on the arm's-length principle included in Luxembourg tax law, the fiduciary should earn an arm's-length remuneration for its activities.

Such remuneration could be in the form of a service fee or as part of the return from the assets.

3.4 Exercising Control over Irrevocable Planning Vehicles

In the absence of structures such as Luxembourg trusts, Luxembourg has not taken any step to allow settlors to retain extensive powers over irrevocable planning vehicles.

4. FAMILY BUSINESS PLANNING

4.1 Asset Protection

To structure the transmission of a family business, Luxembourg offers an arsenal of vehicles that ensure asset protection and provide for succession planning; depending on the assets and the amount to be transmitted, family members can choose between transparent arrangements, non-regulated vehicles and regulated vehicles.

Structuring via Transparent Arrangements

Since Luxembourg has not yet devised an instrument comparable to a trust, due to the different legal background dominated by the Civil Code introduced by Napoleon I, it has adopted specific legislation in relation to fiduciary arrangements that deviates slightly from the legislation applicable to the common UK trusts. Aside from the fiduciary agreement, the Luxembourg Civil Code allows the splitting of ownership of assets between the usufruct and the bare ownership.

Fiduciary Agreement

The Luxembourg *fiducie* is a contract whereby a person (the principal or *fiduciant*) agrees with

another person (the agent or *fiduciaire*) that, subject to the obligations set forth by the parties, the *fiduciaire* becomes the owner of assets that shall form a *fiducie* estate. As an agreement, the *fiducie* will be subject to all conditions generally required for the validity of an agreement under Luxembourg law. The *fiducie* contract and the transfer of assets, including receivables, are effective towards third parties from the moment the agreement is entered into.

However, the debtor is validly discharged from its obligations by payment to the *fiduciant* as long as it is not aware of the transfer. No other specific requirement is necessary to make the agreement or the transfer of the underlying assets enforceable against third parties, unless the transfer of assets that are the subject matter of the *fiducie* must be made public in a certain form.

Differences to trusts

A first major difference to a trust is that, from a civil law standpoint, the *fiduciaire* becomes the full owner of the assets that have been assigned, which it operates in its own name under the *fiducie* contract. No division between legal and equitable ownership is thus created and, subject to the personal recourses that are developed below, the *fiduciaire* will have full powers of management, use and divestment that, as a rule, are afforded to owners under Article 544 of the Civil Code.

The second major difference consists of the *fiducie* not being established unilaterally, without the agent's approval. The Luxembourg position and its concepts included in the 2003 Law are nonetheless quite similar to trusts, which will allow the *fiducie* to be recognised as a similar instrument to a trust for the purpose of the Hague Convention.

The fiduciaire

The *fiduciaire* must be a credit institution, an investment firm, an investment company with variable or fixed share capital, a securitisation company, a *fiducie* representative acting in the context of a securitisation transaction, a management company of common funds or of securitisation funds, a pension fund, an insurance or reinsurance undertaking or a national or international public body operating in the financial sector. It is also possible for an agent to be a foreign entity subject to regulatory supervision and located in the EU or the European Economic Area, without the need to operate out of or via a permanent establishment or place of business in Luxembourg.

The fiducie

The *fiducie* entails the creation of a *fiducie* estate (a *patrimoine fiduciaire*), which is separated from the personal estate of the *fiduciaire*, as well as from any other *fiducie* estate managed by the *fiduciaire*. It implies, on the one hand, that its assets may only be seized by creditors whose rights have arisen in connection with this separate *fiducie* estate. On the other hand, in the case of the liquidation or bankruptcy of the *fiduciaire*, or in any other situation of the *fiduciaire* generally affecting the rights of its personal creditors, the assets comprising the *fiducie* estate are not affected by these procedures.

The *fiduciaire* will be obliged to manage the assets in accordance with the rules set forth for the mandate agreement, which are established under Articles 1984 to 2010 of the Civil Code.

Usufruct

A common way to structure assets under Luxembourg law is to divide the property of assets between bare ownership and usufruct. Usufruct is the right of a person (the usufructuary) to use and enjoy in its entirety an asset that is owned by another person (the bare owner), and to assume

the obligation to conserve and maintain the asset in its form and substance, in particular to pay the taxes. Upon the usufructuary's death, all rights of the ownership will automatically be consolidated to the person carrying the bare property. In this way, the full property is reconstituted to the bare owner without an actual transfer.

This is often used in a context where the current owner of an asset wants to donate an asset ahead of his or her death but wishes to keep the possibility to enjoy the asset. The value of such a gift results from official tables that estimate the value of the portion of the property depending on the age of the owner of the usufruct.

Structuring via Non-regulated Vehicles *SOPARFI*

Most taxable holding companies in Luxembourg are SOPARFIs, which is the abbreviation for the French *société de participations financières*. A SOPARFI is fully subject to Luxembourg corporate income tax (*impôt sur le revenu des collectivités* or IRC) and municipal business tax (*impôt commercial communal*). There is a surcharge for the employment fund calculated on the IRC. The total combined tax rate (inclusive of surcharge) is therefore 24.94%.

A SOPARFI is also subject to an annual net wealth tax, which is levied at a rate of 0.5% on the company's worldwide net wealth on 1 January. As such, a SOPARFI is entitled to take advantage of the exemption regimes, such as the Parent Subsidiary regime. Dividends (including liquidation proceeds) and capital gains (including currency exchange gains) may thus be exempt from profit taxes. Moreover, as an ordinary commercial company, a SOPARFI benefits from the tax treaties concluded between Luxembourg and other countries, as well as the EU directives.

Common limited partnerships and special limited partnerships

To transfer a family business to the next generation, family members commonly use Luxembourg limited partnerships, of which there are two different kinds.

On the one hand, the common limited partnership (*société en commandite simple* or SCS) is a partnership established by contract, for a limited or unlimited duration, between one or more general partners with unlimited joint and several liability for all obligations of the partnership, and one or more limited partners with limited liability, who commit to contribute a certain amount, constituting partnership interests, represented or not by a security instrument, in accordance with the provisions of the limited partnership agreement. The contractual freedom in this flexible vehicle allows the partners to draw up the contract to assure the best way for the transmission of the heritage. However, more recently, the special limited partnership has been successfully introduced in Luxembourg law (*société en commandite spéciale* or SCSp). The main specificity of the SCSp is that it does not have legal personality, although the assets can be registered in the name of the partnership.

From a Luxembourg perspective, the SCS and SCSp have a similar tax and corporate treatment. They are both characterised by a corporate flexibility that goes beyond the competing forms of Anglo-Saxon limited partnerships (contractual freedom, protection for the anonymity of the limited partners, limited liability, security in the case of distributions, etc) while ensuring legal certainty at the same time. In addition, the vehicles are exempt from Luxembourg corporate income or net worth tax.

Luxembourg resident partners are subject to income and net worth tax on the partnership's income and net worth in proportion to their

partnership interests. That said, some investors would prefer a tax-opaque vehicle with access to double taxation treaties.

SPF

In 2007, Luxembourg decided to introduce a family wealth management company (also known as an SPF, or *société de gestion de patrimoine familial*) with a specific commercial purpose, which consists essentially in acquiring, holding and selling financial assets in the framework of wealth management and without entrepreneurial activity. Being a passive investment vehicle, an SPF is prohibited from undertaking any commercial activities. Consequently, this entity cannot interfere in the management of its participation, meaning that an SPF cannot exercise any function in the governing bodies or render any services the company holds itself, although additional structuring may be implemented to achieve this.

The main interest of using such an entity lies in its very favourable tax regime. SPFs are exempt from Luxembourg corporate income tax, municipal business tax and net wealth tax. In addition, they have the benefit of not being subject to any Luxembourg withholding taxes over dividend distributions to their qualifying shareholders.

However, SPFs are subject to an annual subscription tax of 0.25%, with a minimum annual amount of EUR100 and a maximum amount of EUR125,000. This annual tax is levied on the share capital, grossed-up with the share premium and the component of the debt that is eight times more than the share capital and share premium as of 1 January. In return, because of these exemptions, an SPF cannot generally take advantage of double tax treaties or EU directives.

Structuring via Regulated or Supervised Entities – the SIF

A frequent vehicle for structuring private assets is the specialised investment fund (SIF).

Eligible investors

The SIF regime is reserved for well-informed investors, meaning institutional investors, professional investors or any other investor that:

- has confirmed in writing that it adheres to the status of well-informed investor; and
- either:
 - (a) invests a minimum of EUR125,000 in the SIF; or
 - (b) has obtained an assessment.

Such an assessment must certify its expertise, experience and knowledge in adequately appraising an investment in the SIF, made by a credit institution within the meaning of Directive 2006/48/EC, by an investment firm within the meaning of Directive 2004/39/EC, or by a management company within the meaning of Directive 2001/107/EC.

A SIF must establish procedures ensuring that its investors are well-informed investors within the meaning of the SIF Law. The managers/directors (*dirigeants*) and other persons who are involved in the management of the SIF, including the management of the assets of the SIF (ie, the personnel of an appointed investment manager or investment adviser), do not need to be certified as “well informed” as a result of their involvement in the management of the SIF or its assets.

Legal forms

A SIF may be structured in several ways:

- as an FCP (*fonds commun de placement* – common fund) governed by a contractual

- arrangement and managed by a (regulated) management company;
- as a SICAV (*société d'investissement à capital variable* – investment company with variable capital) opting for the corporate form of a:
 - (a) private limited liability company (*société à responsabilité limitée*);
 - (b) public limited liability company (*société anonyme*);
 - (c) corporate partnership limited by shares (*société en commandite par actions*); or
 - (d) co-operative company in the form of a public limited liability company (*société coopérative sous forme de société anonyme*); or
 - under any other legal regime available under Luxembourg law, such as a limited partnership (*société en commandite simple*).

A SIF may thus, among other functions, replicate the operational and legal flexibility typically associated with Anglo-Saxon limited partnerships. Depending on the choice of fund vehicle, there will usually be a high degree of structuring flexibility, including for the organisation of subscriptions, redemptions or distributions, the valuation methodology, or the compartmentalisation of assets, liabilities or investors.

The minimum capitalisation of a SIF (share capital and premium included) is EUR1,250,000, which must be reached within 12 months of its approval by the Commission for the Supervision of the Financial Sector (*Commission de Surveillance du Secteur Financier* or CSSF). At least 5% of each share must be paid-up (in cash or in kind) at subscription. A SIF may opt for variable or fixed share capital. The distribution policy is freely determined in the constitutional documents.

Compartments

SIFs may be constituted with multiple compartments, with each compartment corresponding

to a distinct part of the assets and liabilities of the SIF. Some families allow each of their members to personalise the management of their assets. Unless otherwise provided for in the constitutional documents of the SIF, the rights of investors and of creditors relating to a specific compartment or that have arisen in connection with the creation, operation or liquidation of that compartment are limited to the assets of that compartment.

Consequently, the assets of that compartment are exclusively available to satisfy the rights of investors in relation to that compartment and the rights of creditors whose claims have arisen in connection with the creation, operation or liquidation of that compartment.

Unless the constitutional documents provide otherwise, for the purpose of the relationship between investors, each compartment will be deemed to be a separate entity. Compartments may be separately liquidated, and the liquidation of a compartment will not result in the liquidation of any other compartment of the SIF. Likewise, the withdrawal of CSSF authorisation of a compartment has no impact on the other compartments of the same SIF, which remain registered on the official list of SIFs.

A compartment is able to invest in one or more other compartments of the same SIF, subject to:

- a prohibition on reciprocal cross-compartment investments (ie, where the latter, in turn, also holds interests in the former);
- the suspension of voting rights attaching to interests held by the former in the latter compartment; and
- the value of the holding of the interest held by the former in the latter not being taken into account for the purpose of calculating whether the minimum capitalisation required by the SIF Law has been reached.

Management

The CSSF devotes special attention to the qualification of the managers/directors of a SIF. The representatives of a SIF need to submit proof of their professional qualifications and experience, good standing and honourability. The managers/directors are not subject to any residency requirement.

In practice, the appraisal of the CSSF will consider the qualifications and experience of the management team in its entirety.

Investment concentration and leverage restrictions

The absence of pre-set or statutory investment restrictions represents another important feature of the SIF regime. Although the principle of risk spreading applies, there are no pre-set quantitative, qualitative or other investment restrictions.

However, a CSSF circular provides for certain “safe harbour” diversification rules. The SIF initiator may thus freely determine the investment policies, architecture (eg, a single or multi-compartment (umbrella) SIF), investment restrictions or limitations, provided that the investment policies are based on the principle of risk spreading.

Where a SIF has been constituted with multiple compartments, the principle of risk spreading applies to each compartment separately. SIFs are furthermore not bound by any pre-set or statutory leverage restrictions.

Depositary

As is the case for all Luxembourg fund vehicles, the assets of a SIF must be safeguarded and/or monitored by a Luxembourg-established depositary bank. However, the SIF Law does not impose specific functions on the depositary bank, thus resulting in fewer constraints for the organisation of the relationship between the SIF and its depositary bank and prime broker.

Supervision

The setting up and launching of a SIF requires the prior authorisation of the CSSF. Such authorisation is granted upon approval by the CSSF of the constitutional documents of the SIF, as well as of the choice of its depository bank and after considering the suitability of the managers/directors of the SIF. A SIF approved by the CSSF must notify the CSSF fully in writing of any change relating to information that the CSSF used to grant its approval, and any such change is subject to the CSSF’s prior approval.

This applies to changes to both the documentation and material information, such as a change of service provider.

Disclosure and reporting obligations

Each SIF must establish an issuing document, which may be labelled as a private placement memorandum, offering memorandum or prospectus. No minimum content is prescribed, but such document must include all information necessary for prospective investors to make an informed investment decision. Any change to the essential elements of the issuing document is subject to CSSF approval.

A SIF is required to produce an annual report following a pre-set reporting template providing for a minimum level of disclosure. This annual report must be provided to investors and the CSSF within six months of the end of the period to which it relates. Due to the COVID-19 crisis, such deadline could be extended on an exceptional basis.

A SIF is not obliged to publish a net asset value.

Taxation

Save for the application of the Savings Tax Directive, a SIF is exempt from income and net wealth taxes. Distributions are generally exempt from withholding tax. A SIF is subject to an annual

subscription tax (*taxe d'abonnement*) of 0.01% assessed on the total net assets of the SIF. The subscription tax does not apply to:

- a SIF that invests in other undertakings for collective investment that have already been subject to an annual subscription tax;
- a SIF that invests in certain money market instruments only; and
- a SIF implementing pension pooling schemes.

More than 80 double tax agreements concluded by Luxembourg are currently in force, some of which do not extend their benefits to Luxembourg undertakings for collective investment (UCI). However, many jurisdictions grant treaty protection to Luxembourg SICAVs/SICARs under the UCI law and may extend it to (corporate) SIFs (application to be confirmed by foreign counsel on a case-by-case basis).

4.2 Succession Planning

The same set of vehicles that ensure asset protection are used to provide for succession planning. The strategies depend on the purpose for which they are developed and on the factual aspects of each family business. See **4.1 Asset Protection**.

4.3 Transfer of Partial Interest

Luxembourg does not levy transfer duties when a partial interest in an entity is transferred.

5. WEALTH DISPUTES

5.1 Trends Driving Disputes

Currently there are no specific trends driving wealth disputes in Luxembourg.

5.2 Mechanism for Compensation

Luxembourg has not developed specific mechanisms for compensating aggrieved parties in

wealth disputes. The general principles of compensation apply – ie, where execution in kind is not possible, the aggrieved party will receive financial compensation that is supposed to make up for the complete damage (material and moral) suffered (*principe de la réparation intégrale*).

6. ROLES AND RESPONSIBILITIES OF FIDUCIARIES

6.1 Prevalence of Corporate Fiduciaries

The 2003 Law limits its application to a limited number of entities so that an individual cannot proceed as agent under the 2003 Law, contrary to common law trusts. Only the following institutions may act as a *fiduciaire*:

- a credit institution;
- an investment firm;
- an investment company with variable or fixed share capital;
- a securitisation company;
- a *fiducie* representative acting in the context of a securitisation transaction;
- a management company of common funds or of securitisation funds;
- a pension fund;
- an insurance or reinsurance undertaking; or
- a national or international public body operating in the financial sector.

The 2003 Law also recognises the possibility for an agent to be a foreign entity subject to regulatory supervision and located in the EU or the European Economic Area, without the need to operate out of or via a permanent establishment or place of business in Luxembourg.

6.2 Fiduciary Liabilities

The *fiducie* estate is separated from the personal estate of the *fiduciaire*, as well as from any other *fiducie* estate managed by the *fiduciaire*.

It implies, on the one hand, that its assets may only be seized by creditors whose rights have arisen in connection with this separate *fiducie* estate. On the other hand, in the case of the liquidation or bankruptcy of the *fiduciaire*, or in any other situation of the *fiduciaire* generally affecting the rights of its personal creditors, the assets comprising the *fiducie* estate are not affected by these procedures.

In the absence of any official publication of the *fiducie*, it is possible that third parties having recourse on the *fiduciaire* acting on its own behalf or on behalf of other *fiducie* estates seize assets that form part of a *fiducie* estate other than the one on the occasion of which their claim arose. In such case, it will be possible to obtain the release of the seizure by injunction.

The *fiduciaire* has the obligation to keep a separate accounting of its personal estate and each of the other *fiducie* estates. This is essential for the *fiduciaires*, which are all regulated entities, some of which are subject to capital adequacy rules that would have potentially damaging consequences if they considered the assets and liabilities attached to the *fiducie* estates.

The Fiducie Agreement

In principle, the *fiducie* agreement has effect towards third parties by its mere execution, with the only exceptions being as indicated above. The extent and measure of this effect can, however, give rise to subtle distinctions. The 2003 Law sets forth that restrictions on the powers of the agent under the *fiducie* agreement are only binding upon third parties who are aware of them.

A third party that is unaware that assets are the subject matter of a *fiducie* arrangement would thus not be bound by the terms of it, while other parties made aware of the terms of the *fiducie* agreement would be subject to its limitation. A

question may, of course, arise as to whether mere awareness that assets are the subject matter of a *fiducie* arrangement would be sufficient to impose the limitations of the *fiducie* on the third parties. This may be imposed based on the general principles of law under which a party may not participate in the infringement of a contract by another party if they knew or should have known that they helped in the infringement of a contract.

In the case of a *fiducie* arrangement, a third party aware of the fact that the assets are the subject of a *fiducie* agreement could be under the obligation to request a copy of the *fiducie* arrangement to ensure that they do not participate in its infringement.

In principle, clauses limiting a *fiduciaire*'s liability are permitted under Luxembourg law. However, no limitation of liability is possible for gross negligence and wilful misconduct.

6.3 Fiduciary Regulation

Absent derogation by agreement between the *fiduciant* and the *fiduciaire*, or a provision of the 2003 Law, the rules of the mandate agreement established in the Civil Code are applicable to the *fiducie* agreement. A major carve-out is the exclusion of any rule thereof that relates to the representation by the agent. In other words, the *fiduciaire* may not represent – and create obligations – on behalf of the *fiduciant*.

If the *fiduciaire* contemplates representing the *fiduciant* in any other transaction, it is assumed that they will do it based on other contractual arrangements since there is no reason for the *fiduciaire* to mix the capacities in which they act. This implies that neither the *fiduciant* nor the third-party contractor may invoke the existence of a direct contractual relationship between themselves.

Other principles of the mandate agreement remain applicable. For example, the *fiducie* is rendered gratuitously if no specific provision sets forth the right to compensation. Should any compensation be envisaged, the *fiduciaire* will be liable for mere negligence. The *fiduciaire* will be under an obligation to inform the *fiduciant* (or the third-party beneficiary) of the fulfilment of its duties at the end of the agreement at the latest.

6.4 Fiduciary Investment

There are no specific investment rules or diversification requirements.

7. CITIZENSHIP AND RESIDENCY

7.1 Requirements for Domicile, Residency and Citizenship

Introduction

Residents that have been living in Luxembourg for at least five years may acquire Luxembourgish nationality by naturalisation under certain conditions. The acquisition of Luxembourgish nationality by naturalisation confers the status of Luxembourger, with all attached rights and duties. The applicant is not obliged to give up his or her nationality of origin owing to the principle of dual nationality, provided the law of his or her nationality of origin allows this.

Luxembourg applies the second generation *jus soli*: a child born in Luxembourg one of whose parents or adopting parents was already born in Luxembourg is automatically a Luxembourgish national.

Residency

Nationals from the EU and Iceland, Norway, Switzerland and Liechtenstein do not need a prior residency/work permit to reside/work in Luxembourg. However, if their residency exceeds

a period of 90 days, they need a subsequent registration certificate.

Nationals from third countries need to apply for a prior work/residence permit. This needs to be done before arriving in Luxembourg in most cases. The first work/residence permit is valid for a year, after which it can be renewed. After five years of residence in Luxembourg, third-country nationals can apply for a long-term residence permit.

A special residency permit for investors has been introduced. There are three possibilities: the investor may either invest at least EUR500,000 in a company that already exists or in one that is to be created in Luxembourg, or they may invest at least EUR3 million in a Luxembourg investment structure, or finally they may invest at least EUR20 million as a deposit with a Luxembourg bank in order to obtain a residency permit.

Acquisition of Luxembourgish Nationality

To apply for Luxembourgish nationality by naturalisation, the candidate must meet the following conditions:

- be at least 18 years old at the time the application is submitted;
- have legally resided in Luxembourg for at least five years. The final year of residence immediately preceding the naturalisation application must have been uninterrupted;
- have knowledge of the Luxembourgish language, as evidenced by a Luxembourgish language test certificate;
- have attended a civic course (*Vivre ensemble au Grand-Duché de Luxembourg*) or passed the test covering the topics taught in this course; and
- meet good repute and integrity requirements.

7.2 Expeditious Citizenship

Luxembourgish nationality can be assigned to non-Luxembourgish nationals “by option”. This is possible in ten specific cases and subject to further conditions (such as meeting good repute and integrity requirements):

- for adults with a parent, adoptive parent or grandparent who is or was Luxembourgish;
- for parents of a Luxembourgish minor;
- in the event of marriage to a Luxembourgish national;
- for persons born in Luxembourg, over the age of 12;
- for adults having completed seven years of schooling in Luxembourg;
- for adults residing legally in Luxembourg for at least 20 years;
- for adults having fulfilled the obligations arising from the Welcome and Integration Contract (*Contrat d'accueil et d'intégration*);
- for adults who settled in Luxembourg before the age of 18;
- for adults with stateless person, refugee or subsidiary protection status; or
- for volunteer soldiers.

Luxembourgish nationality may also be recovered under certain conditions – eg, if a direct ancestor of the candidate was a Luxembourgish national on 1 January 1900. Due to the COVID-19 crisis, the deadline to complete one of the formal requirements could be extended to 31 December 2021.

8. PLANNING FOR MINORS, ADULTS WITH DISABILITIES AND ELDERS

8.1 Special Planning Mechanisms

There are no special planning mechanisms for minors or for adults with disabilities in Luxembourg.

8.2 Appointment of a Guardian

Appointing a guardian, conservator or similar party requires a court proceeding and ongoing supervision by the court.

8.3 Elder Law

Under certain conditions, elderly people may benefit from the Social Inclusion Act, which provides basic livelihoods to people whose pension or other means of livelihood are insufficient. In addition, any person in need may contact the social office of his municipality of residence, whose purpose includes carrying out all steps required to obtain social services and financial aid, accepting (to the extent possible) the supervision imposed by the guardianship judge, and covering the risk of illness, disability and senescence of uninsured people.

9. PLANNING FOR NON-TRADITIONAL FAMILIES

9.1 Children

Children born out of wedlock enjoy the same rights as legitimate children.

The law distinguishes between full and simple adoption. In the case of a full adoption, the adoptee loses all legal ties with their family of origin, with the new filiation completely replacing the original filiation. In the case of a simple adoption, the adoptee maintains their filiation with their family of origin while acquiring inheritance rights in his adoptive family.

The adoptee has the same civil rights as a non-adopted child within their adoptive family, except that the adoptee is not entitled to the forced heirship (*réserve héréditaire*) in the succession of the ascendants of their adoptive parent.

9.2 Same-Sex Marriage

Luxembourg recognises same-sex marriage, and has also recognised the right to enter into a civil partnership since 2004. Partners have fewer rights than spouses. Partnerships can be terminated *ad nutum*. The ex-partner might be entitled to alimony in the year following the end of the partnership.

Contrary to marriage, a civil partnership does not entail automatic succession rights for the surviving partner. However, if the predeceased partner bequeaths (part of) their estate to their partner, the tax exemption applies if the partnership was registered three years before his or her death.

10. CHARITABLE PLANNING

10.1 Charitable Giving

Luxembourg has attempted to incentivise charitable giving by offering a variety of legal forms that can be used to set up a Luxembourg charity:

- charitable associations (*associations sans but lucratif* or ASBLs);
- charitable foundations (*fondations sans but lucratif*); and
- societal impact companies (*sociétés d'impact sociétal* or SIS).

Under certain conditions, donations to charities are deductible from income tax and may be exempt from gift tax.

10.2 Common Charitable Structures

Foundations are common charitable structures. Any person may establish a foundation by way of a notarial deed or will, by irrevocably allocating all or part of their estate to this purpose. In order to benefit from legal personality, the foundation's articles of association must be approved by Grand-Ducal decree.

A foundation must be registered with the Luxembourg register of trade and companies, and must pursue a philanthropic, social, scientific, religious, artistic, educational, sports or tourist objective, each time without the intention to generate profit. Consequently, a foundation can be defined as an independent pool of assets or rights with legal personality that is set up to carry out a public interest purpose.

Foundation Assets

Most assets can be allocated to a foundation but only real estate assets that are used by the foundation to carry out its purpose can be allocated to the foundation (notably the registered seat of the foundation).

The allocation of assets by its founder(s), made through the deed of foundation, becomes irrevocable upon approval of the Minister of Justice. This irrevocable nature also appears during the foundation's existence and at its liquidation. A foundation is prohibited from distributing profits and may be liquidated if it cannot carry out its public interest purpose.

If the foundation is liquidated, liquidation proceeds must be allocated to another foundation.

Foundation Management

A foundation is managed by a board of directors whose appointment procedure must have been stated in the foundation's articles of association. The Ministry of Justice checks that foundations' assets are used in accordance with the public interest purpose for which they were created. There is a requirement for the board of directors to submit the foundation's accounts and the provisional budget to the Ministry of Justice within two months following the end of each financial year.

Foundation and Taxes

Foundations are taxable entities, but income derived from charitable or public interest activities is exempt. Due to their public interest rationale, Luxembourg foundations are thus exempted from Luxembourg taxes. The exemption only applies as long as the activity carried out by the foundation is charitable or related to public interest.

If a foundation carries out a commercial or industrial activity, it will normally be taxed for the part related to said activities. In this context, commercial or industrial activities are defined as those that aim to make profit. In addition, if a foundation carries out a different purpose than the charitable or public interest purposes for which it was settled, there is a risk of the dismissal of directors and the judicial liquidation of the foundation.

The registration of a foundation deed with the Luxembourg register of trade and companies is subject to a fixed registration duty that amounts to EUR12.

Loyens & Loeff has a private wealth team in Luxembourg that is part of a fully integrated (tax and legal) firm with home markets in the Benelux countries and Switzerland, and offices in all major financial centres. To meet the increasing demand for expertise in all tax and legal aspects relating to the structuring of inbound or outbound investments into or through Benelux and Switzerland, Loyens & Loeff also has various regional teams in Asia-Pacific, Latin America, Canada, Central and Eastern Europe, the

Middle East and North Africa, France, Germany, Italy, Spain, Portugal, the Nordic countries and Russia/CIS. Most of them operate from local representative offices and provide face-to-face advice on aspects of law that could impact clients' businesses. The firm's lawyers are immersed in the local markets, keep abreast of the constantly evolving legal and business environment in Luxembourg and identify opportunities for their clients.

AUTHORS



Peter Adriaansen is a tax partner and specialises in Luxembourg and Dutch international tax consultancy relating to private equity, investment funds, holding and

financing activities, joint ventures and M&A. He regularly advises Luxembourg listed entities, family offices and international private clients on cross-border structuring. Peter is a member of the Latin America Region Team and visits the region on a frequent basis. He also belongs to the Dutch Association of Tax Advisers and the International Fiscal Association.



Veronica Aroutiunian is a senior associate in the investment management practice of Loyens & Loeff in Luxembourg. Her practice covers corporate and financial

restructuring, investment management/funds, private equity, private wealth and regulatory matters. She is a member of various working groups at the Luxembourg Investment Funds Association (ALFI) and contributes to industry publications.

Contributed by: Peter Adriaansen, Veronica Aroutiunian and Nelli Kluschin, Loyens & Loeff



Nelli Kluschin is a tax associate who focuses on cross-border tax structuring for multinationals, investment funds and family-owned businesses. She specialises in Luxembourg and international tax planning, and has a focus on corporate reorganisations, private equity and the structuring of investment funds, as well as international real estate investments. Nelli is a member of the firm-wide France Region Team and increasingly serves the French-speaking market. She is also a member of the Luxembourg Bar and the Luxembourg Branch of the IFA.

Loyens & Loeff (Luxembourg)

18-20 rue Edward Steichen
L-2540 Luxembourg
Luxembourg

Tel: +352 466 230
Fax: +352 466 234
Email: info@loyensloeff.lu
Web: www.loyensloeff.lu

LOYENS  LOEFF