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The close corporation in Luxembourg

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I. Introduction



History of Company law in Luxembourg

- Influence of Belgian company law (10 August 1915 Act on commercial companies) and of French company law when no model in Belgian law
 - Act of 10 August 1915 drafted by a Belgian Professor (Nyssens)
- French influence on Luxembourg company law
 - *Société à responsabilité limitée* (SARL) introduced in 1933 following French law
 - Introduction of the two-tier board system in public limited companies (2006), following the French, not Belgian (none) or the German model
 - Proposal to introduce the French simplified public company (*Société par actions simplifiée* or SAS)
- Advantages of using foreign law as model: cost and legal certainty
 - Let the others Member States do the preliminary work for you
 - Compensates for the limited amount of Luxembourg case law



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Main characteristics of Luxembourg company law

- Classic division between public limited companies (*Sociétés anonymes* or SA) and private limited company (*Société à responsabilité limitée* or SARL)
- Need for a notary to register, application of the real seat doctrine and need for a licence in order to start a business (*autorisation d'établissement*)
- Very liberal approach reducing the need for a reform, including using systematically options when implementing EU company law directives and being always more liberal (competitive) than Belgian or French law
- Willingness to attract medium and large companies in Luxembourg, not small ones, through flexibility: « if it is not prohibited, it is allowed »
- Tendancy of the Luxembourg legislator to be slow to regulate and reform



Recent developments in Luxembourg

- Recent company law reform passed by the Parliament
 - Law of 25 August 2006 modifying the 1915 Act (hereafter 2006 Act)
 - Law of 13 July 2012 on Alternative investment funds managers (AIFM) creating a new type of limited partnership without legal personality in order to accommodate investment funds (*Société en commandite spéciale*)
- Bills introduced in Parliament or proposed by the Luxembourg chamber of commerce
 - Bill n° 5730 to modernize the law of 10 August 1915, introduced on 8 August 2007 (hereafter Bill 5730): significant improvement in the protection of minority shareholders (*actio ut singuli*, related parties transactions...)
 - Proposal by the Luxembourg chamber of commerce of a simplified SARL (2011), like the Belgian Sprl-S, German UG, etc...
 - Poor ranking for Luxembourg in the Doing business report for « starting a company » (103 in 2014, down from 72 in 2010)



I. Public limited companies

A The classic public limited company



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- **Constitution**
- Single member public limited company allowed (2006 Act)
- Cross-border transfer of seat subject to a majority vote (2/3) and not to an unanimity vote, except if articles of association require so (Bill 5730)
- **Capital and related issues (Bill 5730)**
- Possibility to introduce shares with different par values (voting right to be linked to the amount of the contribution)
- Contribution for services would be accepted (*parts sociales en industrie*) following French law
- Possibility to introduce double voting rights if nominatives shares are held after a two years period following the French law



Management (Bill 5730)

- Right to appoint an executive committee (*comité de direction*) as long as the transfer of powers is limited and does not include the general strategy
- Right for the board of directors to take decision without meeting by written statement (*résolution circulaire*), except for annual accounts, increase in capital and any other decision decided in the articles of association
- **Shareholders' agreement (Bill 5730)**
- Validity of shareholders' agreement is recognized in the law subject to same conditions as in Belgian company law
- Violation of the shareholders' agreement triggers the nullity of the shareholders' meeting unless the violation had no impact on the result



- **Shareholders (Bill 5730)**
- Sell-out: possibility for a shareholder to force other shareholder(s) (eg majority shareholder) to buy its shares if just cause (*justes motifs*) which originates with the other shareholder(s)
- **Control of the capital by articles of association (Bill 5730)**
- Articles of association can block the free transferability of shares by qualified majority (*clause d'inaliénabilité*) contrary to France (unanimity)
 - Provision must be time restricted (France: 10 years) and not contrary to the social interest (Belgium: must be in accordance with social interest)
 - Transfers in violation of the articles of association are null and void
- Buy-out : possibility for a shareholder holding 30% of the capital to buy-out a shareholder if just cause (*justes motifs*), to be developed by case law



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B. The simplified public limited company



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- **Constitution (Bill 5730)**
- 1 euro capital
- Can be a single member company
- Application of the rules of the public limited company, when compatible, except provisions regarding management and shareholders' meeting (including rules on votes and shares)
- Transformation of a company into an SAS must be by unanimous vote

- **Capital and related issues (Bill 5730)**
- No possibility to have an offer of shares to the public
- Possibility to have a public offer of bonds, but not convertible bonds



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- **Management (Bill 5730)**
- « President » to represent the company towards third parties, as well as senior officers (*directeur général* and *directeur général délégué*)
- **Shareholders (Bill 5730)**
- Articles of association determine which decisions are to be taken collectively by the shareholders, with the exception of a list of decisions
- List of decisions which must be taken collectively by the shareholders: operations on the capital, transformation into another form, appointment of auditors, approval of annual accounts and dividends



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- **Control of the capital by articles of association (Bill 5730)**
- Inalienability clause valid if no more than 10 years
- Provision requesting the prior approval of the company in case of sale of shares (*clause d'agrément*) and preemptive right (*droit de préemption*)
- Any transaction done in violation of the articles of association is null and void



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- **Control of the capital by articles of association (Bill 5730)**
- Right to organize the exclusion of a shareholder or the redemption of the shares (exit clause)
- Price in case of exclusion or redemption to be determined by the parties and in case of disagreement, by the commercial first degree judge, at the value at the time of the notification of the sale or of the death of the shareholder



II. Private limited company

A The proposed reform of the SARL



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- **Constitution (Bill 5730)**
- Suppression of the limitation of the maximum number of shareholders (40)
- **Capital and related issues (Bill 5730)**
- Contribution for services would be accepted (*parts sociales en industrie*)
- Non-voting shares with increased financial rights would be accepted (*parts privilégiées sans droit de vote*)
 - Voting rights are provided only when financial rights are endangered
- Possibility to have an offer of bonds to the public, but not convertible bonds



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- **Management (Bill 5730)**
- Right for the articles of association to create a board of managers (*collège de gestion*)
- Right for the articles of association to create an executive board
- Right to appoint a senior officer for current decisions (*délégué à la gestion journalière*)
- Possibility for the management organ to take its decisions by written procedure and by electronic means



- **Shareholders (Bill 5730)**
- Right to have the shareholders' meeting through electronic means
- Right for the single shareholder to delegate his powers to the general managers (different from Belgian and French law)

- **Control of the capital by articles of association (Bill 5730)**
- Majority for approval in case of the sale of shares can be reduced to 50 %
- Right of the SARL to buy back its own shares
- Buy-out rights: possibility for a shareholder holding 30% of the capital to buy-out a shareholder if just cause (regime similar to the *société anonyme*)
- Sell-out rights: possibility for a shareholder to force other shareholder (eg majority shareholder) to buy its shares if just cause (*justes motifs*) which originates with the other shareholder (regime similar to the *société anonyme*)



B The proposed simplified SARL



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- **Constitution**
- Simplified template of articles of association
- Direct on-line creation through electronic means (24 hours company)
- No need to have a notary since a simplified template eliminates the need for an ex-ante control of the validity of the articles of association (option)
- No need to open a bank account before the constitution of the company



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- **Capital and related issues**
- 1 euro legal capital but need to reach the minimum normal capital of 12 394,68 euros within 5 years
- Obligation to put aside 25% of profits each year until the minimum normal capital is reached (solution inspired by Belgium and Germany)
- Proof of payment of the legal capital established by declaration of the founder under criminal penalty



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- **Capital and related issues**
- No obligation to convert the SARL-S into a normal SARL once the minimum normal capital is reached (different from Belgium Sprl-S)
- If normal capital has not been reached within 5 years, the SARL-S can be dissolved by Court on request of the Public prosecutor
- Joint liability of the shareholders for the difference between normal minimum capital and the paid capital of the SARL-S in case of filing for bankruptcy within 5 years



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- **Shareholder and managers**
- Shareholder(s) of the SARL-S must be a natural person
- Only one SARL-S per natural person but possibility to have a second one but the founder is personally liable for all the debts of the second SARL-S (both solutions from the Belgian Sprl-S)
- Director(s) of the SARL-S must be a natural person



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IV. Conclusion



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- Luxembourg company law is already very flexible
- Bill 5730 is likely to be passed in 2014, with significant amendments
- Luxembourg company law would not be much modified by the SMC, but could lead to the introduction of the SARL-S