

## A new flexible corporate form in Luxembourg : The SAS

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As part of the far-reaching Luxembourg company law reform of 23 August 2016, a new form of company has been introduced into the Luxembourg legal system: the simplified joint stock company (*société par actions simplifiée* or **SAS**). The purpose of this client briefing is to highlight the main characteristics of the SAS.

### What is the SAS?

The Luxembourg SAS is directly inspired by the French SAS, which has proved to be a huge success for entrepreneurs, joint ventures and groups alike, making it the most prevalent legal structure in France.

The main idea behind the SAS is to offer a vehicle whose main operational rules can be set by both parties with very light statutory prescriptions, whilst ensuring a common ground by having the *société anonyme* – public limited liability company (**SA**) regulations applying to the other matters. Such flexibility allows the setting up of a governance structure adapted to very diverse investors' profiles. Importantly, the articles of association of the SAS (the **Articles**) will be a key document, setting out the organization tailor-made to the needs of the parties.

Driven by its ever business-friendly model, the legislator offered the opportunity to the Luxembourg business world to take advantage of this corporate form as, thereby providing an interesting alternative to the well-known (i) *société à responsabilité limitée* – private limited liability company (**SARL**), (ii) SA and (iii) *société en commandite par actions* – partnership limited by shares (**SCA**) due to certain unique characteristics.

### Applicable law

In a nutshell, a specific (and quite short) section has been created in the Luxembourg law dated 10 August 1915 on commercial companies, as amended from time to time (the **Law**), and the SAS legal regime is as follows:

1. The SAS is regulated by Section IV *bis* of the Law
2. The SAS is subject to all the SA rules to the extent they are compatible with Section IV *bis*
3. A number of SA provisions (notably relating to corporate governance) are excluded since they do not fit with the flexible SAS regime.

## Main characteristics

The basic SAS features will not come as a surprise and are worth mentioning without the need to dwell upon them:

1. Minimum share capital of EUR 30,000 (or its equivalent in another currency) and a fully subscribed share capital (although shares may be partially paid up to 25%)
2. One or several shareholders, without maximum
3. Limited liability for shareholders
4. No public disclosure of shareholders
5. Auditor's requirement.

Clearly the real attractiveness of the SAS lies in the following areas:

### Governance

The only obligation is to have a "Chairman" (*président*), who may be a legal or natural person and may be a shareholder or not. Such a Chairman may be elected for a limited or unlimited period of time and revocable *ad nutum* or not (ie with or without reason, notice...). He or she will hold all management and representation powers of the SAS, and potentially certain powers usually reserved for shareholders in the other Luxembourg historic corporate forms (SARL, SA, SCA...).

The Law also offers the possibility to appoint one or several Director(s) (*directeur(s)*), who may exercise (all or part of) the powers entrusted to the Chairman (under the conditions to be set out in the Articles) and who shall have the same powers as the Chairman with regards to third parties.

From there, a great deal of organizational freedom is available, and the following may be considered:

1. A sole shareholder who is also the Chairman/or a Chairman who is not a shareholder
2. The appointment by the Chairman or by the shareholder(s) (upon proposal of the Chairman or not) of one or more Director(s), whose powers are to be determined by either (i) a resolution of the Chairman or the shareholder(s) appointing them or (ii) the Articles

3. Directors with different management powers (the powers granted to them may however not exceed the powers of the Chairman), forming a board of Directors or not
4. The Chairman and Director(s) appointed for different periods of time and with different appointment and/or revocation rules (the Articles may organize the conditions of removal of the Chairman and the Director(s), and the circumstances under which they can be revoked. The mandates may be irrevocable, and it is also possible to make them revocable by certain shareholders only)
5. A rotating management structure, changing each six or twelve months for instance
6. A supervisory board and separate committees if and as needed
7. Management rules that may differ depending on the type of decisions to be taken or contracts to be signed in the name of the company.

By law, the Chairman and the Director(s) (if any) shall not incur any personal obligation by reason of the SAS commitments.

From a sole plenipotentiary Chairman to a sophisticated allocation of powers between a Chairman, a sole or multiple Director(s), boards or committees, the limit will be the clients' needs and the counsels' creativity.

### **Shareholder(s)' involvement**

In line with the spirit of great flexibility that embodies the SAS, the shareholders have to be consulted on certain decisions only:

1. Increase, amortization or reduction of the share capital
2. Merger / de-merger
3. Dissolution
4. Transformation into another legal form
5. Appointment/removal of auditors
6. Approval of the annual accounts and allocation of profits.

This means that the powers not reserved to the shareholders by the Law or the Articles (including the power to amend the Articles for matters not relating to the above decisions specifically reserved to the collective decisions of shareholders) are vested with either (i) one or only some of the shareholder(s), (ii) the Chairman and/or (iii) the Director(s), if any, and/or even (iv) potentially a third party. Additionally, a number of management decisions may be taken subject to prior shareholders' approval (again here, with maximum flexibility as to which shareholders (or group of shareholders) may be requested to give their consent).

The flexibility of the SAS with respect to shareholders' involvement does not stop there as:

1. Shareholders' decisions (including with respect to the approval of the annual accounts) may be taken by way of written/circular resolutions, and no formal meetings will be needed (save in case of resolutions to be taken before a notary, as the case may be)
2. There are no statutory prescriptions on shareholders' decision-making, quorum or voting rules, so that the conditions and requirements relating to convening notices, majority and quorum may be set as needed in the Articles.

## **Voting rights**

The powers of a shareholder do not need to be proportionate to the number of its shares, and the Articles may grant single or multiple voting rights in a very flexible fashion. Such rights may also differ depending on the type of decisions to be taken.

The Articles can also provide for the possibility for the management (Chairman/Director(s), if any) to suspend the defaulting shareholders' voting rights, whilst certain shareholders may separately waive their voting rights (in full or in part) on a permanent or temporary basis. Voting arrangements between shareholders are also recognized.

All these provisions clearly help run and manage the SAS in an efficient and cost-effective fashion, whilst ensuring an attractive and tailor-made corporate governance between the different participants in the SAS. Noticeably, the SAS is not a democracy and both majority and minority shareholders will need to be vigilant when investing into a SAS.

## **Means of financing**

The usual Luxembourg array of tracking shares, redeemable shares, alphabet shares, non-voting shares and beneficiary shares may be issued by the SAS. Also in the wake of the modernisation of the Law, free shares can be issued under certain circumstances (notably to employees and management). Shares may further be issued (i) at a certain nominal value or, in the absence thereof, at par value, (ii) with a different nominal value or (in certain circumstances) (iii) without nominal value for a subscription price below their accounting par value.

An authorised share capital will allow the Chairman or a Director to rapidly issue equity.

The SAS may further issue bonds or other debt instruments on a private or public basis, but it may not issue shares to the public. This is explained by the fact that the SAS shareholders enjoy a lesser protection than in the SA/SCA (which can issue shares to the public).

## **Share transfer**

As is the case in the SA, shares are normally freely transferable, but the rules relating to their

transfer can be set out in the Articles with great latitude, e.g. with or without prior consent of the shareholders or of certain shareholders only, and with rights of pre-emption, tag-along, drag-along, etc...as may be needed. Lock-up provisions (*clauses d'inaliénabilité*) are valid provided that they are limited in time (but not specifically to ten years as in a French SAS). Approval and pre-emption clauses in the Articles are valid provided that the non-transferability period starting from the date of a transfer approval request or the invitation to exercise pre-emptive rights does not exceed twelve months.

Ultimately, any transfer of shares in breach of the Articles shall be void by law. Founders can therefore create a protective structure, enabling them to control to a large extent the entry of new shareholders and/or give the required level of comfort to potential investors.

### **Importance of the Articles**

The Articles will bear a great importance in organizing the life and governance of the SAS, and their drafting will require particular attention to make sure everything works as expected.

### **Who may be interested?**

Clearly, the Luxembourg SAS may certainly appeal to investors used to the French SAS, who will enjoy finding a form of corporate vehicle they are very familiar with. In France, the SAS is used by a wide spectrum of investors, from the sole entrepreneur (sole shareholder and Chairman) to small or larger groups of companies (joint venture, fully owned subsidiary, holding company). It is also often used for more specific structuring purposes (LBOs, company succession or transmission thanks to the clear distinction between ownership of capital and management powers...). Wholly-owned subsidiaries are often organized in the form of a SAS to avoid the formal requirements of an SA, so that when an SA is recommended in Luxembourg, an SAS may also well be considered. Furthermore, the Luxembourg SCA could become less popular than the SAS, by offering such reliable distinction between the ownership of capital and the powers of management. By extension, the SAS also offers an efficient means to manage holding companies for all types of Luxembourg or foreign investors.

There is in fact not one single type of SAS, but a multitude of different ones depending on how the corporate governance is structured in the Articles, and the Luxembourg SAS may prove attractive for this diversity of stakeholders.

### **Tax aspects**

The SAS is an ordinary commercial entity which on the one hand does not enjoy any special tax regime and is fully taxable, but which may on the other hand significantly reduce its tax burden subject to proper structuring (like the SARL/SA/SCA).

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