Introduction

In July 2013, the bill of law n° 6595 (the Bill) was submitted to the Luxembourg parliament. Its purpose is to introduce (i) a new wealth management vehicle in the form of a private foundation (fondation patrimoniale) inspired by foundation regimes introduced in other countries, and (ii) a “step-up in value” mechanism for income tax purposes for individuals migrating to Luxembourg.

The Bill is being discussed and is expected to be adopted before the end 2015. The below is subject to any changes which could be made to the Bill up until its final enactment.

Why choose a Luxembourg private foundation?

The Luxembourg private foundation aims at:

- ensuring cohesion of the estate: the private foundation can be used as an instrument to prevent the dispersal of the estate
- ensuring the continuity in management: the private foundation separates the economic ownership, the familial estate and the management by the family of its business. This could be useful when a founder has no children or if he considers that some of his heirs are not fit born or they do not wish to run the family business. Also it can allow a family business to move towards a more open structure
- enabling the realisation of a specific goal: the familial estate can be assigned to a specific purpose (e.g. to cover the financial needs of a child or a disabled relative)

Main features of the Luxembourg private foundation

**Legal personality** - the private foundation has a separate legal personality. Assets contributed to the private foundation become its own property.

**Availability** - the use of a private foundation is restricted to physical persons or to patrimonial entities whose aim and object are the management and administration of private wealth.

**Orphan structure** - the private foundation has no shareholders.

**Incorporation formalities** - the articles of incorporation of the private foundation shall be recorded before a notary in the Grand-Duchy of Luxembourg. A notice of its incorporation shall be filed with the Luxembourg trade and companies registry and published in the Luxembourg official gazette, but without disclosing the names and addresses of the founders and beneficiaries.

**Confidentiality** - the names and details of the founder(s), the beneficiary(-ies) and the assets allocated to the private foundation do not need to be published or disclosed.
Registered office - the private foundation shall have its registered office in Luxembourg. It can either have its own premises or be domiciled with a professional domiciliation agent.

Minimum contribution - the private foundation shall be implemented with a first contribution of a minimum amount of EUR 50,000 to be brought in cash or in kind.

Authorised activities – the purpose of the private foundation is to manage and administrate assets for the benefit of one or several beneficiaries.

It can own any movable or immovable, tangible or intangible properties, be a subscriber or beneficiary of insurance policies, be a founder or beneficiary of public and private foundations (or trusts) including holding interests in a company (in the absence of interference in the management of the company whose interests it holds).

The private foundation is not allowed to carry out any commercial, industrial, agricultural nor any independent professional activities. Any activity in relation to the trade of financial assets or of any other assets held by the private foundation is prohibited.

Certificates - the private foundation may issue certificates in registered form representing certain financial rights in relation to its assets.

Management – the private foundation is managed by one or several directors. A supervisory board can be appointed at the moment of its incorporation. Such supervisory board becomes mandatory if the private foundation has more than five beneficiaries or if its assets exceed EUR 20,000,000. The same person can act both as founder, beneficiary and manager. A manager cannot be a member of the supervisory board.

Decisions shall be taken by a simple majority of the votes, without any quorum requirement, except as otherwise provided for in the incorporation deed.

Subsequent amendments of the incorporation deed – any subsequent modifications are governed by the provisions of the incorporation deed: the founder may reserve the right to amend essential aspects of the foundation, such as its duration, its object, its beneficiaries, the powers of the directors or the powers of the supervisory board (if any) at his sole discretion.

In the absence of any specific provisions in this respect, the default rule is that the incorporation deed may be amended by the board of directors upon motion by the supervisory board (if any). Such resolution shall be taken at the simple majority of the votes. However, in order to protect the foundation’s estate and its beneficiaries, as well as to comply with the founder’s will, certain essential aspects of the foundation (e.g. its object or its duration) may only be amended for serious reasons and if the incorporation deed specifically authorises the board of directors to do so.

Accountancy – an accurate accountancy shall be held even though the annual accounts shall not be filed with the Luxembourg trade and companies registry nor published in the Luxembourg official gazette.

The appointment of a statutory auditor (réviseur d’entreprises agréé) is optional but becomes mandatory if the private foundation has more than five beneficiaries or if its assets exceed EUR 20,000,000.

Tax treatment

The private foundation is fiscally opaque and taxable on corporate income. However, in its current form the Bill provides for an exemption in respect of wealth tax. Dividends, interest and capital gains derived from transferrable securities would also be exempted.
Payments made by the private foundation to a beneficiary are not considered as dividends and thus not subject to withholding tax in Luxembourg.

The capital and the redemption value received pursuant to an individual long-term savings, disability or life insurance policy should also be tax exempt at the level of the private foundation.

Transfers made by the private foundation during the founder’s lifetime are subject to gift tax; the rate of which depends upon the family relationship between the founder and the beneficiary.

**Introducing the “step-up” concept**

In addition to the new private foundation, the Bill also foresees the introduction of the “step-up” concept for individuals transferring their residence to Luxembourg.

This mechanism should allow non-resident individual persons to value certain securities acquired at market value on the date of their tax residence migration, thus mitigating any risk of double taxation in the new Luxembourg residence state.

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