Arendt Wealth Management Morning

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Agenda

- **Introduction**
  Guy Harles, Partner and Co-Chairman
- **The Family Charter: an underused tool**
  Alexandre Gobert, Counsel
- **Introduction of the keynote speaker**
  Max Kremer, Partner
- **AI and Digital Assets in the Future of Wealth Management**
  Matthew Gardiner, Founder of Catch London
- **Civil law: topics of interest for 2019**
  Marianne Rau, Partner
- **The use of foundations, trusts and life insurances for Luxembourg tax residents: pitfalls or opportunities?**
  Eric Fort, Partner
  Elise Nakach, Senior Associate
- **Navigating between transparency and privacy – where do things stand**
  Marc Berna, Associate
- **Conclusion**
  Eric Fort, Partner

Introduction

The Family Charter: an underused tool

The Family Charter – Introduction (1)

Characteristics of a family business

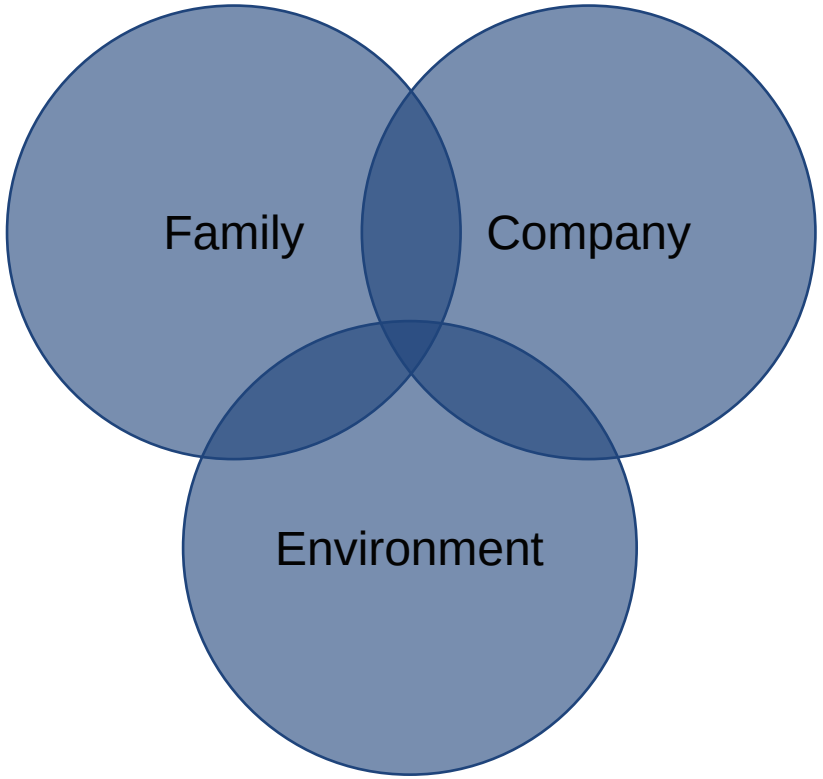
- held in majority by members of a family or decisively influenced by members of a family
- investments are generally made through equity
- intention to keep the business in the family
- intention to ensure the continuity of the business

Family businesses are a significant component of the Luxembourg economy

The Family Charter – Introduction (2)

Family businesses are at the crossroads of three “worlds”:

- family
- company
- environment



The Family Charter – Characteristics

- a key document that sets out the relationship between the family members, the family members who are shareholders and the management of the company

- principal goals of the family charter:

- to set out a long-term vision for the development of the company
- to increase confidence and ties between the family members
- to increase the transparency of the management of the company
- to increase professionalism in the company

The Family Charter - Purpose

- can be likened to a kind of constitution
- is a point of reference for family members
- promotes communication between the family members
- may anticipate conflicts
- is a key tool for preparing the transfer of the business to the next generation

The Family Charter – A necessity?

- depends on the phase that the company is in:

- founder is a majority shareholder of the company and is running it ("*pater familias*")

- second generation ("sibling partnership")

- third generation ("cousins confederation")

- each phase has its specific challenges and problems

- need to set the rules for the long term

The Family Charter - Timing

- added value to have it in place to ensure the smooth transfer of the business to the next generation
- should be in place at the latest when the third generation takes control
- ideally should be drafted when circumstances are favorable and before any conflict
- time required to draft the family charter should be taken into account

Family Charter – How to draft it

- every family is different, hence a family charter is a tailor-made document

- process of drafting the family charter will depend on many factors such as the size of the family, the harmony of the relationships between the family members and the phase the company is in.

- 7 steps can be identified in drafting a family charter:

- identifying the members of the family
- identifying the key values of the family
- identifying the objectives of the family
- identifying the subjects to be covered in the family charter
- conducting discussions with family members, including through individual interviews
- agreeing on a decision mechanism
- putting the result in writing

The Family Charter – Content (1)

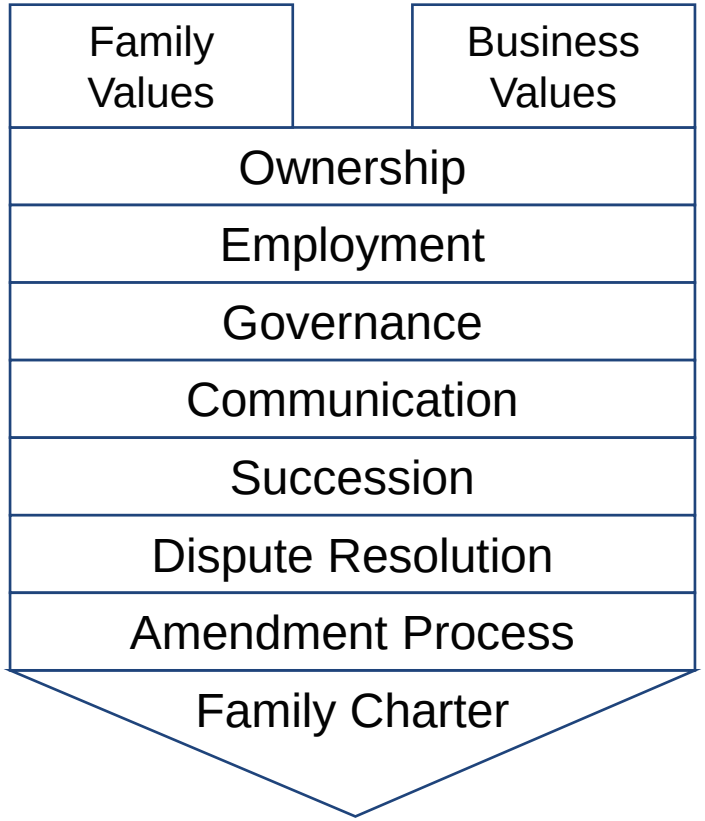
- each family charter is a tailor-made document but usually the following key topics are covered:

- values and objectives of the family
- ownership of the company
- employment policy
- dividend policy
- management of the company

The Family Charter – Content (2)

- communication
- succession planning
- dispute resolution process
- amendment process

The Family Charter – Content (3)



Family Charter and Shareholders' Agreement

- key difference between family charter and shareholders' agreement consists in their signatories
- shareholders' agreement must be properly aligned with family charter
- the following provisions of a shareholders' agreement must reflect the principles set out in the family charter:

- management of the company
- dividend policy
- transfer of shares of the company

The Family Charter – Legal value

- no specific legal provisions governing the family charter
- legal value will depend largely on the drafting of the document
- in principle the family charter must be considered to be an agreement falling within the scope of the provisions of the Civil Code governing agreements
- family charters rarely contain provisions regarding breaches of the charter
- if drafted in sufficient detail, a court action may be considered to enforce a provision of the family charter

The Family Charter - Conclusion

- key document for setting out the “rules of the game” between the family members, the family members who are shareholders and the management of the company
- no legal framework
- tailor-made document
- useful tool for anticipating conflicts in a family business
- key tool for preparing the transfer of the business to the next generation
- content of family charter is, to a certain extent, not as important as the process developed for its drafting

Introduction of the keynote speaker

AI and Digital Assets in the Future of Wealth Management

Civil law: topics of interest for 2019

Civil law: topics of interest for 2019

Family Judge and reforming divorce and parental authority: Law of 27 June 2018

Inheritance law: recent Case Law and legislative reforms in Luxembourg and our neighboring countries

EU matrimonial property regime regulation: council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of Matrimonial property regimes

Family Judge and reforming divorce and parental authority

- The law of 27 June 2018 establishing the Family Judge and reforming divorce and parental authority entered into force on **1 November 2018**

A. Family Judge inspired by the French system:

- **competences** of the Family Judge:
  - requests relating to marital agreements, matrimonial property regimes or actions for separation of property
  - divorce and legal separation
  - maintenance obligations
  - measures relating to the attribution of parental authority
  - etc.
- allocation of most competences in family matters to **a single magistrate**

Family Judge and reforming divorce and parental authority

B. Divorce reform:

- repeal of the **divorce for fault**
- **two** types of divorce:
  - divorce **by mutual consent**

  and

  - divorce **for irremediable rupture of the marital relationship**
- objectives of the reform: **simplification** and **acceleration of the divorce procedure**

Family Judge and reforming divorce and parental authority

- **major offences** (such as assault and battery, rape, indecent assault) still have **consequence**s:
  - payment of damages to the other spouse
  - loss of maintenance payments
  - loss of matrimonial benefits (*avantages matrimoniaux*)
- **duty of fidelity** is maintained (art. 212 of the Civil Code)

C. Parental authority reform:

- principle of **joint parental authority**
- **equal rights** for all parents
- **best interests of the children**

Family Judge and reforming divorce and parental authority

D. Matrimonial property regime:

- **a two-year period** is no longer required before the spouses can **change their matrimonial property regime (art. 1397 of the Civil Code)**

Conclusion:

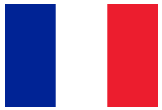
- a **major legislative reform** seeking to adapt the law to **the evolution of our society**

Inheritance law : recent Case Law and legislative reforms

Luxembourg

- **Cour de Cassation, 5 July 2018** (arrêt n° 77/2018 – n°4000 du registre): **revocation of wills:**
  - **reversal** of a decision rendered by the **Court of Appeal** in 2013
  - freedom to revoke any will, even if it has been passed in authentic form, by a will in any valid form whatsoever as long as it is made subsequently (art.1035 of the Civil Code)

Inheritance law : recent Case Law and legislative reforms



France

- **Cour de Cassation, 27 September 2017** (n°16-13.151 and n°16-17.198):
  - do **forced heirship rules** constitute an **international public policy exception**?
  - **no**, unless the application of the foreign law leads to a **situation incompatible with the essential principles of French law**, such as a situation where the deprived heir would be left in a situation of economic precariousness and severe need
  - what would the answer to this question be in **Luxembourg**?

Inheritance law : recent Case Law and legislative reforms

Belgium

- **reform of inheritance law:** entry into force on the **1 September 2018:**
  - reduction of the reserved portion to **half of the estate**
  - **ascendants** are no longer designated **reserved heirs**
  - recognition of the **waiver of the reduction action** during the lifetime of the parents

Inheritance law : recent Case Law and legislative reforms

Switzerland

- **planned reform of inheritance law:**
  - greater testamentary freedom
  - reduction of the reserved portion to **half of the estate**

Luxembourg

- **planned inheritance law reform**?

EU matrimonial property regime regulation

- entry into application: **29 January 2019**

- **objective**: increase of **legal certainty** and **predictability** for married couples with regard to their **property**

EU matrimonial property regime regulation

Material Scope

- "This Regulation shall apply to **matrimonial property regimes**" (art. 1)
- 'Matrimonial property regime' means a **set of rules concerning the property relationships** between the spouses and in their relations with third parties, as a result of marriage or its dissolution (art. 3.1.(a))
- **Included** are:
  - the **primary regime** of the applicable law which is the set of rules that are applicable to all married couples
  - rules relating to the **capacity and power of the spouses** to enter with one another into **contracts and gifts**

EU matrimonial property regime regulation

- **excluded** are (art. 1.2.):
  - (a) the legal capacity of spouses
  - (b) the existence, validity or recognition of a marriage
  - (c) maintenance obligations
  - (d) the succession to the estate of a deceased spouse
  - (e) social security
  - (f) the entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage
  - (g) the nature of rights *in rem* relating to a property
  - (h) any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register

EU matrimonial property regime regulation

Geographical scope:

- a limited number of **participating EU Member States** (18):

- **non-participating EU Member States** are considered **third States**
- **universal application** of the law designated by the Regulation (art. 20)

EU matrimonial property regime regulation

Temporal Scope:

- conflict-of-law rules have **no retroactive effect**
- application to spouses who marry after **29 January 2019** or who decide to **change their marital regime after that date** and/or express on that occasion a choice of law
- **Depending on the date of marriage, different rules** have to be taken into consideration for couples that have not entered into a marriage contract/expressed a choice of law**:**
  - marriage before **01/09/1992:** the law of the **first habitual residence**
  - marriage between **01/09/1992 and 29/01/2019**: **Hague Convention** 14/03/1978
  - marriage, choice of law or change of matrimonial regime **after 29/01/2019**: **EU regulation** on matrimonial property regime

EU matrimonial property regime regulation

Which law may be chosen by the future spouses (art. 22):

- the law of the State where the spouses or future spouses, or one of them, is **habitually resident** at the time the agreement is concluded; or
- the law of the State of **nationality** of either spouse or future spouse at the time the agreement is concluded

- **reduced choice of law** in comparison with the Hague Convention of 1978

- **no** automatic **retroactive effect** in case of a change of the law applicable to the matrimonial property regime made during the marriage

- **principle of unity** of the applicable law (art. 21)

EU matrimonial property regime regulation

Formal validity of the agreement on a choice of applicable law and of a matrimonial property agreement:

- the **choice** must be expressed in a **written document** dated and signed by both spouses
- the document must be drawn up **in accordance with**:
  - the additional formal provisions laid down in the law of the State in which they are **habitually resident** at the time of conclusion of the agreement, or
  - the additional formal provisions laid down in the law of only one of the States if they are **resident in two different countries but both parties to the EU Regulation** (art 23.3 and 25.2(2))
  - the additional formal provisions laid down in the law of the Member State in which **one of the spouses is resident** while the other is resident in a third country, or
- **in addition**, the matrimonial property agreement must comply with the **formal requirements of the law chosen for the matrimonial property regime**, if any (art 25.3)

EU matrimonial property regime regulation

Determination of the applicable law in the absence of choice by the parties:

- the **law applicable to the matrimonial property regime** shall be the law (art. 26.1.):
  - (a) of the **spouses' first common habitual residence** after the conclusion of the marriage; or, failing that
  - (b) of the **spouses' common nationality** at the time of the conclusion of the marriage; or, failing that
  - (c) the law with which the **spouses jointly have the closest connection** at the time of the conclusion of the marriage, taking into account all the circumstances
- **exceptions** (art. 26.3)

EU matrimonial property regime regulation

Scope of the applicable law (art. 27):

- the **law applicable** to the matrimonial property **shall govern**, inter alia:
  - (a) the classification of property of either or both spouses into different categories during and after marriage
  - (b) the transfer of property from one category to the other one
  - (c) the responsibility of one spouse for liabilities and debts of the other spouse
  - (d) the powers, rights and obligations of either or both spouses with regard to property
  - (e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property
  - (f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties
  - (g) the material validity of a matrimonial property agreement

- **exceptions**:
  - overriding mandatory rules of the law of the forum (art. 30)
  - public policy of the forum (art. 31)

EU matrimonial property regime regulation

- **Jurisdiction – choice of court** (between participating States)
- **Mutual recognition of judgements** and authentic instruments (between participating States)

Conclusion?

The use of foundations, trusts and life insurances for Luxembourg tax residents: pitfalls or opportunities

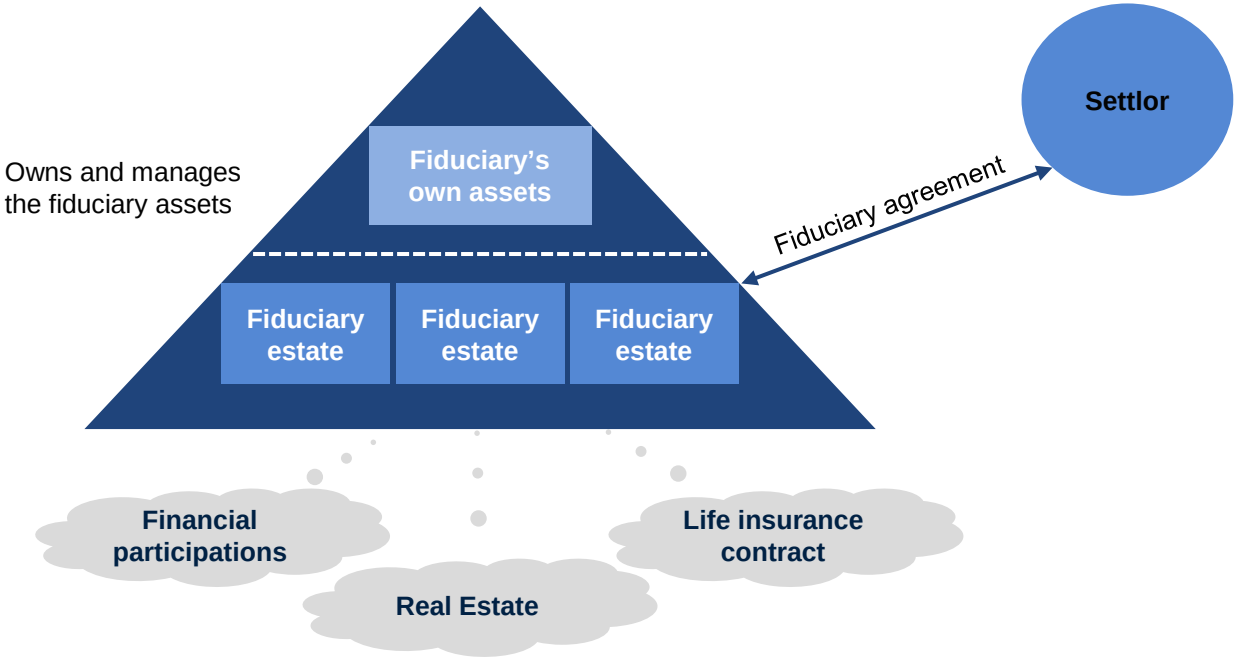
Taxation rules for resident individuals – Overview (1/2)

- Individuals having their domicile or usual place of abode in Luxembourg are considered tax residents and subject to tax on their worldwide income.
- Maximum marginal income tax rate (including surcharge for the unemployment fund): 45.78%.
- Limited taxation of savings income and dividend: (i) 15% withholding tax on gross amount paid by Luxembourg companies and creditable on progressive income tax rates, (ii) exemption of 50% of the gross amount received from qualifying entities and (iii) 20% final withholding tax rate on certain interest paid to a Luxembourg resident (Relibi).
- No taxation on capital gains for shares held up to 10% and for more than 6 months.
- No taxation on capital gains in connection with the main residence and reduces rates for real estate.
- Wealth tax for individuals: abolished in 2006.
- Step up migration: individuals transferring their tax residency to Luxembourg who hold an important participation (> 10%) in a company may at the date of the transfer re-evaluate the acquisition price to reflect the market value.

Taxation rules for resident individuals – Overview (2/2)

- Gift tax is triggered upon the formal registration of the notarised gift deed with the tax authorities and takes the form of a registration duty varying from 1.8% to 3% for relatives in direct line to 14.4% for non-relatives and is computed on the fair market value of the gift received.
- Inheritance tax is levied in Luxembourg on the estate of the deceased only if his last residence was located in Luxembourg at the time of death.
- Inheritance tax is also levied on immoveable properties owned by non-Luxembourg resident if located in Luxembourg.
- Inheritance tax depends on the degree of kinship between the heir and the deceased.
- Transmissions in direct line are generally exempt from inheritance tax (legal part only) while a succession between unrelated parties is taxed at a minimum rate of 15% subject to a surcharge tax varying between 1/10 and 22/10. As a result, effective inheritance taxation ranges from 15% to 48%.
- Property disposed of by the deceased in the year of death without being subject to registration tax as well as life insurance contract are considered part of his estate.

The fiduciary agreement



The fiduciary agreement – Overview

- The fiduciary agreement is governed by the law of 27 July 2003: contract under which a settlor (*fiduciant*) agrees with a fiduciary (*fiduciaire*) that the latter becomes the legal owner of certain assets which constitute the fiduciary estate.

- The fiduciary estate forms a distinct and segregated patrimony of the fiduciary's personal and other fiduciary estates, even in the case of bankruptcy or insolvency of the fiduciary agent.

  - Other fiduciary estates and its assets may only be claimed by creditors holding rights deriving from the fiduciary estate.

  - The fiduciary books a given fiduciary estate separately from his personal and other fiduciary estates.

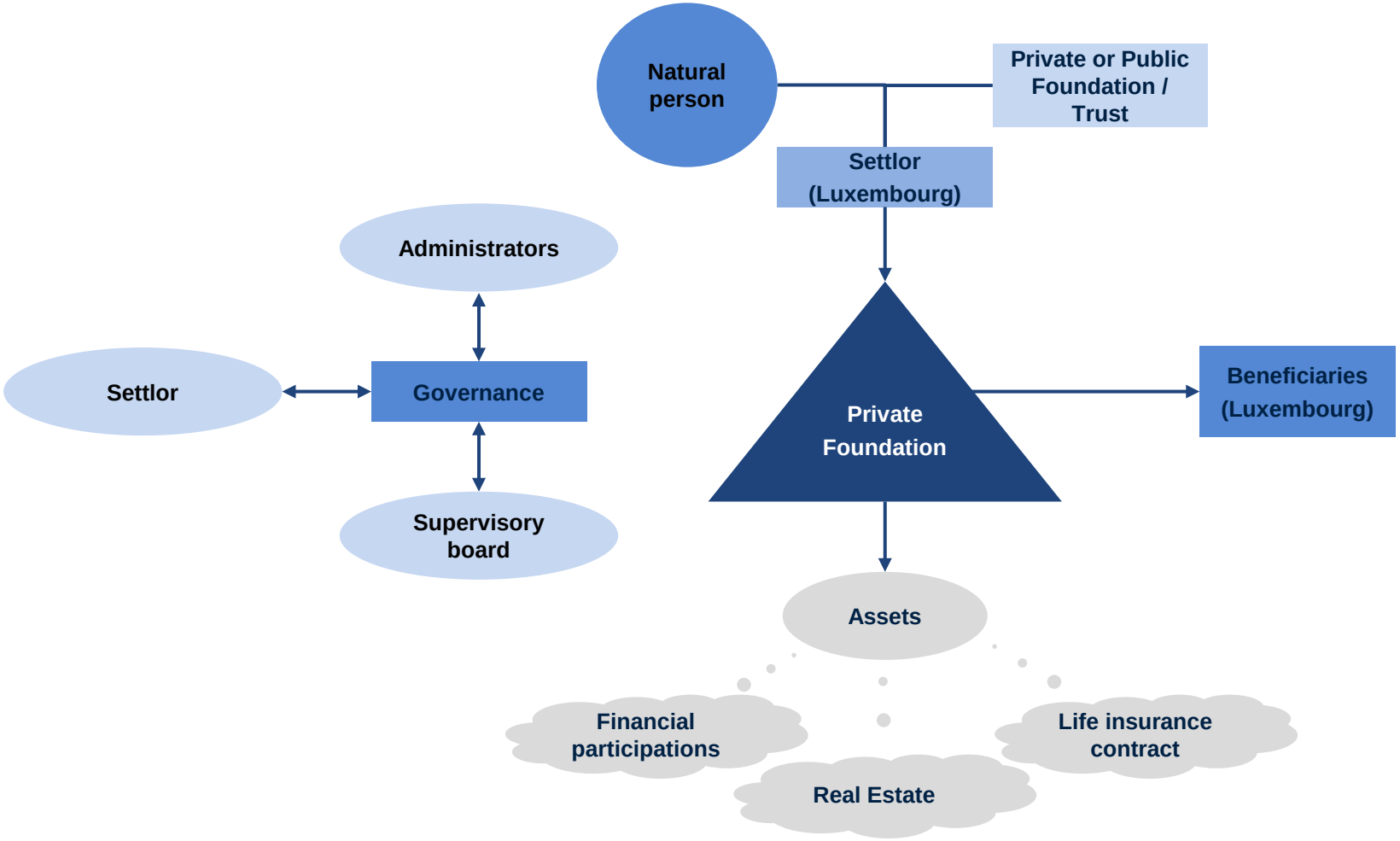
The fiduciary agreement – Tax treatment

- Implementation of the fiduciary agreement (look through approach):
  - The transfer of assets to the fiduciary agent is not subject to registration duties except when relating to real estate located in Luxembourg, or aircrafts or vessels registered in Luxembourg, or in case the fiduciary contract is registered in a notarial deed.
  - §11 (2) & (3) Tax Adaptation Law ("**TAL**"), assets that have been transferred or acquired on a fiduciary basis are attributable to the settlor.

- Ongoing income and distribution:
  - The settlor is taxed as if it holds the fiduciary assets directly and any income and capital gains derived from the fiduciary assets should be allocated to him and taxable in his hands.

- Termination of the fiduciary agreement:
  - The assets will return either to the settlor itself or to a third beneficiary.
  - Transfer of the assets to the settlor: the settlor will in principle not be subject to taxation in Luxembourg on the transfer of the fiduciary assets back to him.
  - Transfer of the assets to a Luxembourg third beneficiary: inheritance and gift taxes shall apply upon the settlor's death or donation.

The private foundation



The private foundation – Overview

- The bill of law of 22 July 2013 introduced the private foundation in Luxembourg law but has been abandoned since then.
- A foreign private foundation (such as Austrian, Belgian, Swiss, Liechtenstein private foundations) has legal personality, ensures its safety and protection while permitting the management of its activities.
- The objective of the foundation is limited to the management and administration of private inheritance and excludes all business activities. However, there is generally no restriction on the types of assets that can be held by a private foundation (shares, patents, real estate, etc.) compared to the Luxembourg private wealth management company (so called SPF, a form of holding company).
- The foundation is an orphan vehicle in that it has no shareholders or members, but rather three types of participants: settlors, beneficiaries and administrators.

The private foundation – Tax treatment (1/4)

- Tax treatment of the transfer of assets:
  - The transfer of the assets to the foundation is not subject to registration duties except when relating to real estate located in Luxembourg, or aircrafts or vessels registered in Luxembourg.

- Tax treatment of ongoing income and distribution:
  - To the extent the beneficiary together with the settlor will be entitled to more than 50% of the income of the foundation, the foundation and its income will, regardless any effective distributions, be fiscally allocated to the settlor if he is a Luxembourg fully-taxable resident, and to the fiduciary if the settlor is not a Luxembourg fully-taxable resident (§ 12 TAL).
  - On the opposite case, the foundation is to be considered as the tax recipient of the income.
    - Classification of the foundation (as a rule) as an opaque entity based on the so-called doctrine of "*Rechtstypenvergleich*" - *autre organisme de droit privé dont le revenu n'est pas directement imposable dans le chef d'un autre contribuable* (article 159(1)A-7.a) ITL).
    - The income will not be taxed in Luxembourg unless the management of the assets of the foundation is carried out in Luxembourg.

The private foundation – Tax treatment (2/4)

- Effective distribution by the foundation to a Luxembourg resident beneficiary (*jugement du Tribunal administratif 2 April 2014 n°32037* – Austrian foundation):

- For a foundation considered as an opaque entity, the qualification of income to be distributed should be determined according to Luxembourg law and will depend on the legal and economic link between the foundation and the beneficiary.

- Legal and economic link between the foundation and the Luxembourg beneficiary:
  - Did the beneficiary put a portion of his wealth at the disposal of the foundation?
  - Did the beneficiary make contributions or loans to the foundation in whatever forms?
  - Does the beneficiary own shares, portion of the capital, founder shares or other participation in the foundation?
  - Does the beneficiary have a statutory right in the foundation which entitles him to a specific payment?
  - Is the “beneficiary” status able to be transmitted?

The private foundation – Tax treatment (3/4)

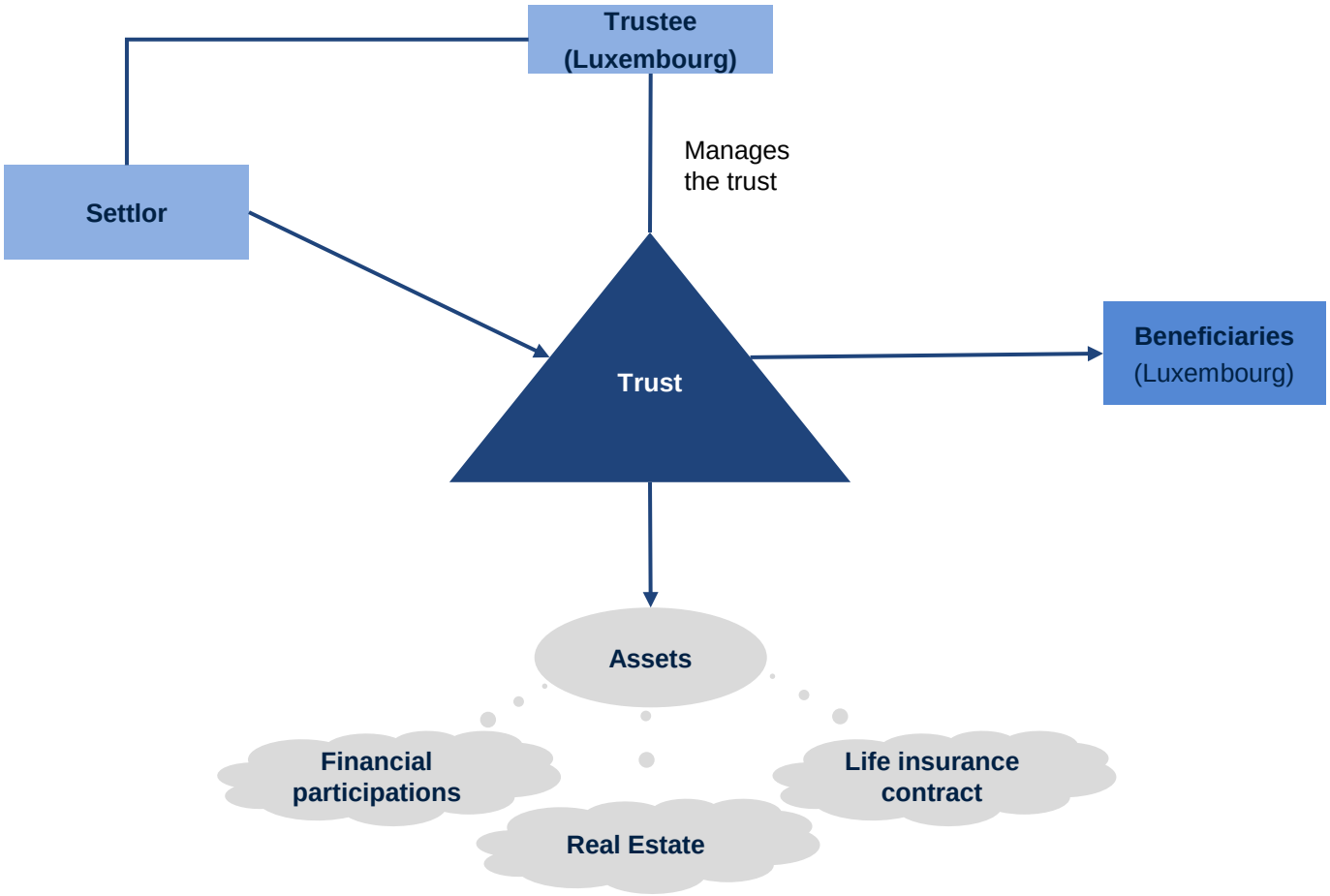
- Legal and economic link between the foundation and the beneficiary:
  - If yes: the income should be considered as investment income according to article 97 ITL and thus fully taxable according to the progressive income tax rates (top marginal rate of 45.78% in 2019).
  - If not:
    - proceeds should not be considered as investment income according to article 97 ITL.
    - Unlikely to fall within any other category of taxable income according to article 10 ITL.
    - Likely to qualify as a gift (*don manuel*) which does not need to be recorded in a notarial deed and thus is not subject to gift tax (this issue was not addressed though by the administrative tribunal).

- Tax treatment of the dissolution of the foundation:
  - Inheritance and gifts taxes shall apply on the assets transferred to the beneficiary located in Luxembourg upon the settlor's death or donation.

The private foundation – Tax treatment (4/4)

- Distribution by a Soparfi to a foundation considered as a tax opaque entity:
  - As a rule, any dividends distributed by a Soparfi will be subject to a Luxembourg 15% withholding tax.
  - However, reduction or exemption of the withholding tax on the distribution if application of the international / domestic participation exemption.
    1. Application of the double tax treaty ("DTT") – it should be checked if the foundation can be considered as "resident" within the meaning of the DTT and beneficial owner of the income.
    2. Application of the Luxembourg participation exemption (article 147 ITL) – it should be checked whether the foundation is a non-resident company limited by shares (*Rechtstypenvergleich*) which is subject to a tax comparable to corporate income tax (for 2019 a corporate tax rate of 8.5% generally satisfies this requirement as long as the taxable basis is determined according to rules and criteria similar to those applicable in Luxembourg).

The trust


Trustee
(Luxembourg)
Manages
the trust
Settlor
Trust
Beneficiaries
(Luxembourg)
Assets
Financial
participations
Life insurance
contract
Real Estate

The trust – Overview

- The concept of trust is not specifically addressed under Luxembourg tax law and it is not possible to establish a trust in Luxembourg.
- Luxembourg has ratified the Hague Convention of 1 July 1985 on the law of applicable to trusts and their recognition.
- The capacity of the trustees to act as representatives of the trust exists in the law of the trust.
- The law of the trust is not contrary to Luxembourg law and Luxembourg public policy.
- The action before the Luxembourg court introduced by the trustees is admissible.
- A trust is governed by the law chosen by the trustee.
- Classification of a trust.

The trust – Tax treatment (1/3)

- Transfer of assets to the trust:
  - The transfer of the assets to the trust is not subject to registration duties except when relating to real estate located in Luxembourg, or aircrafts or vessels registered in Luxembourg.

- Ongoing income received by the trust:
  - Classification of the trust: either a fiduciary agreement or a collective organization (*patrimoine d'affectation*) depending on the specific characteristics of the trust.
  - Fiduciary agreement: (Revocable trust and fixed interest trust):
    - the trustee holds the trust estate on behalf of the settlor on the basis of a pure fiduciary and service arrangement.
    - the trust estate is usually managed based on the instructions of the settlor for his account.
    - the settlor keeps the right to revoke the trustee at all time.

  → the settlor would be considered as the economic owner of the assets and the income arising from the assets for the purposes of income and wealth.

The trust – Tax treatment (2/3)

- *Patrimoine d'affectation* established as a collective organization: (irrevocable and discretionary trust):
  - independently managed by the trustee for the benefit of the trust.
  - Economically independent estate.
  - Distributions only decided by the trustee.

→ Trust assimilated to a collective organisation: the income may not be taxed in the hands of another taxpayer and will not be taxed in Luxembourg unless the management of the assets is carried out in Luxembourg.

- Distribution by the foundation to a Luxembourg tax resident:
  - For a trust assimilated to a fiduciary: the distribution of income should be analysed as a donation from the settlor to the beneficiary subject to general gift tax rules.
  - For a trust assimilated to a collective organisation, the qualification of income to be distributed should depend on the existence of a legal and economic link between the trust and the beneficiary (investment income) or not (arguments to treat it as a gift).

The trust – Tax treatment (3/3)

- Termination of the trust:
  - The applicable law upon the trust dissolution is the law chosen in the trust deed.
  - If the trust can be assimilated to a fiduciary agreement, the rules of the fiduciary agreement regime shall apply.
  - If the trust is assimilated to a collective organization which has either its registered office or central administration in Luxembourg, the trust will be fully taxable on the liquidation profits resulting from the termination of the trust.
  - Inheritance and gifts rights shall apply on the assets transferred to the beneficiaries located in Luxembourg upon the settlor's death or donation.

Life insurance policies – Overview (1/3)

- Legal qualification under Luxembourg law as a stipulation for a third party (*stipulation pour autrui*) (art. 1121 Civil Code).

- It can be defined as a contract pursuant to which a person, the stipulator, receives from another person, the promising party, the promise that the promising party will perform a certain task for the benefit of a third party, the beneficiary.

- As long as the beneficiary has not accepted the contract:
  - The policy holder remains in control of the assets (different to other estate planning tools which often lead to a transfer of ownership).
  - The policy holder is in control of investment policy (especially if unit-linked insurance products).
  - The policy holder benefits from greater protection and confidentiality on assets (especially in case of investment in private equity or other alternative investments).

- The policy holder benefits from rights of partial or total redemption offering liquidity and flexibility.

- The underlying assets and policies can be in different currency.

Life insurance policies – Overview (2/3)

- The payment to beneficiaries can be done as lump-sum capital payments or in installments.
- The beneficiary has, at maturity, a direct and personal right to obtain performance from the promising party.
- Obligations to be performed are considered to have never been part of the stipulator's assets.
- It is a very efficient vehicle for estate planning purposes (if the policy contract is properly drafted, the benefits resulting from the policy do not form part of the estate of the deceased policy holder).

Life insurance policies – Overview (3/3)

- The subscription of a contract operates a transfer of ownership of assets underlying the policy to the insurance company.
- The policy holder holds a claim against the insurance company to be exercisable at maturity of the contract (partial or total redemption possible; under certain domestic insurance laws possibility of redemption is mandatory).
- The creditors and spouses of beneficiaries cannot exercise the right of acceptance in lieu of the beneficiary.
- The creditors and spouses of policy holder cannot revoke, amend or change the beneficiaries of a policy in lieu of the subscriber.

Life insurance contract versus capitalisation contract

- Life Insurance contract:
  - Deductibility of premiums paid at the level of the policyholder as an extraordinary expense.
  - Proceeds during lifetime: capital and buy back value of life insurance products are exempt in Luxembourg.

- Capitalisation contract (absence of a biometric risk):
  - Assimilation to a financial product: no right to the deductibility of the premiums and no exemption on capital gains on redemption value.

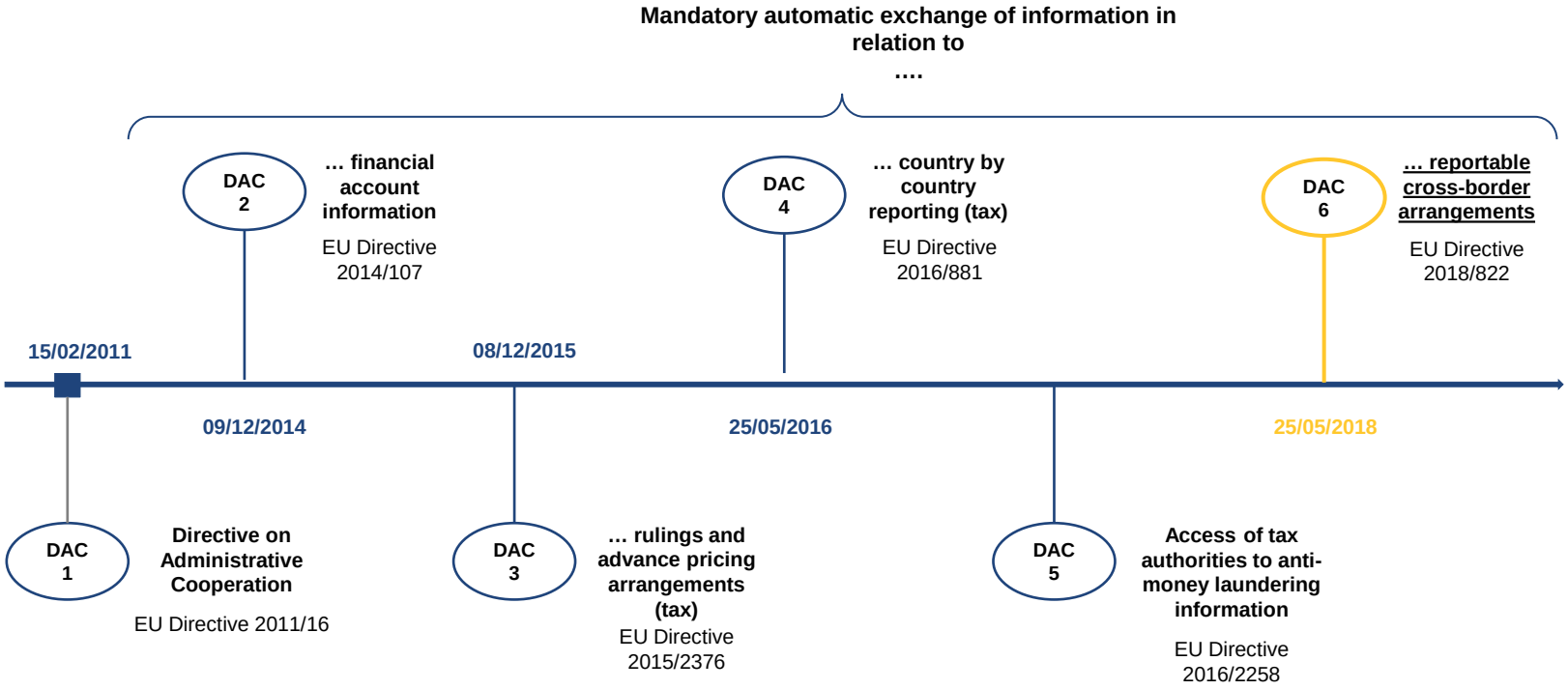
- Risk of requalification of a life insurance contract into a capitalisation contract:
  - *Jugement du tribunal administratif de Luxembourg*, 15 January 2018 , n° 40578: on the basis of the abuse of law and mostly in case of (i) absence of a biometric risk, (ii) short maturity with short-term realizations of the underlying assets and (iii) significant involvment of the policyholder in the management of the underlyings assets.

- Termination of the insurance contract:
  - Inheritance rules shall apply on the death of the insured person who was a Luxembourg tax resident on the amounts received by the beneficiary. In principle, the place of residence of the heir/beneficiary is irrelevant for Luxembourg inheritance tax law.

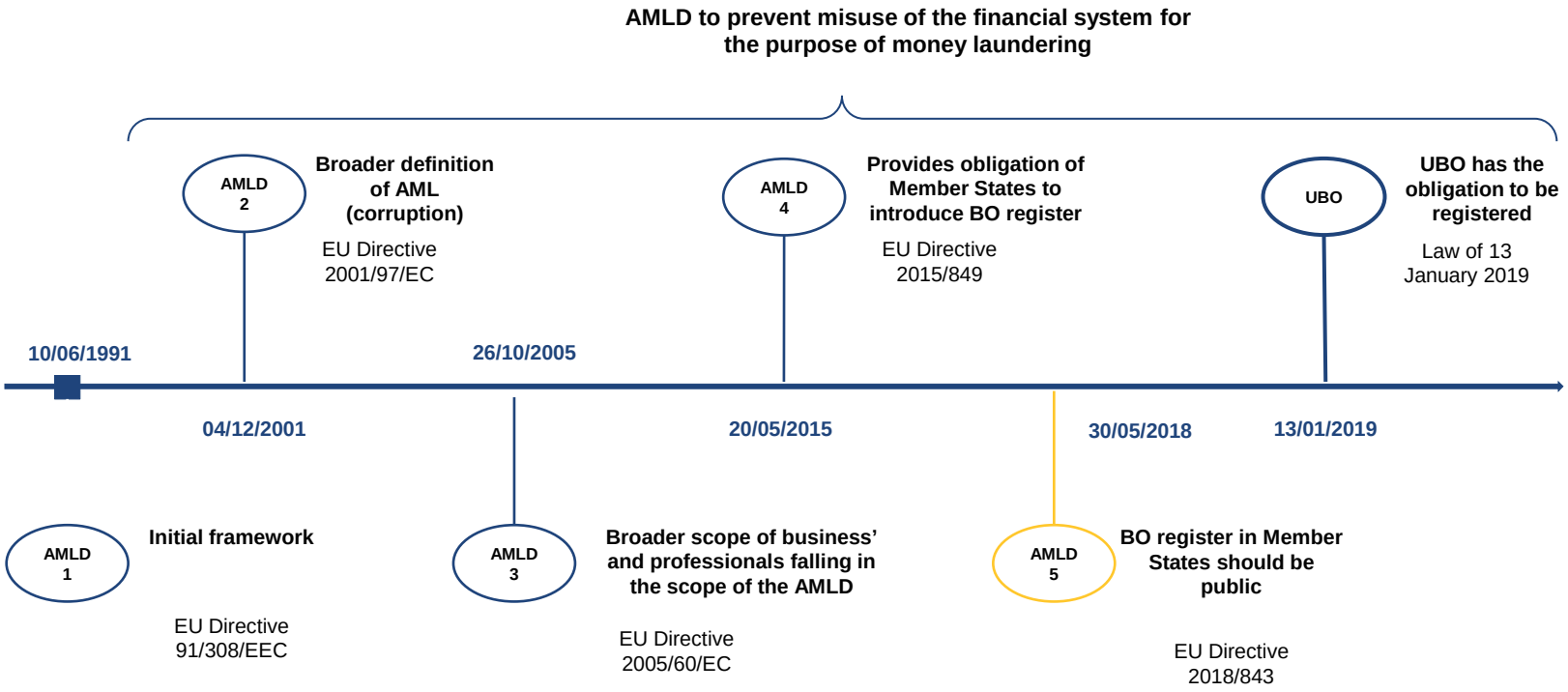
Navigating between transparency and privacy – where do things stand

Exchange of information and access to privileged information

- A step by step increase towards transparency:

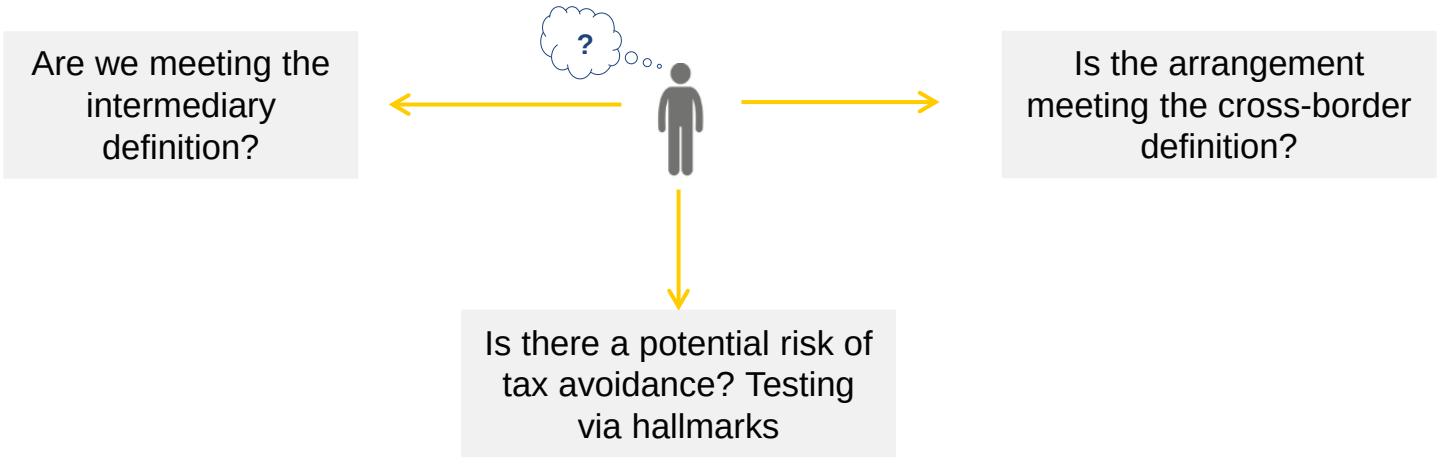


Exchange of information and access to privileged information



DAC 6 - Overview of the new reporting requirements

- **Scope of the new disclosure requirements**: 3 main conditions need to be verified in order to determine the need of filing information with the tax authorities.

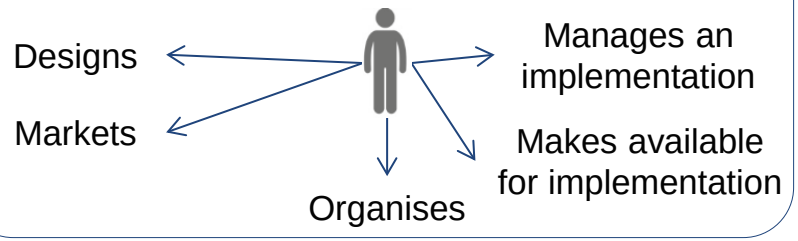


- **Timeframe of the new disclosure requirements**: information about arrangements the first steps of which were implemented between **25 June 2018** (date of entry into force of DAC 6) and 1 July 2020 (date of application of DAC 6) will have to be filed by 31 August 2020.

DAC 6 - Intermediaries – definition

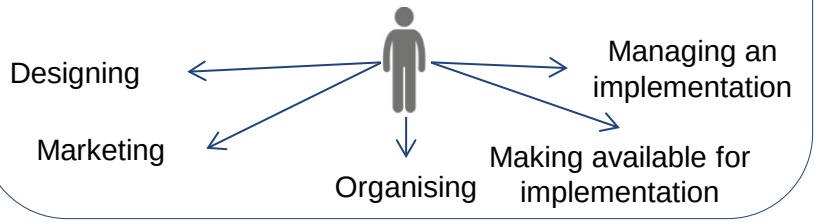
1. Type of **involvement in the reportable cross-border arrangement**:

PROMOTER: Any person that:



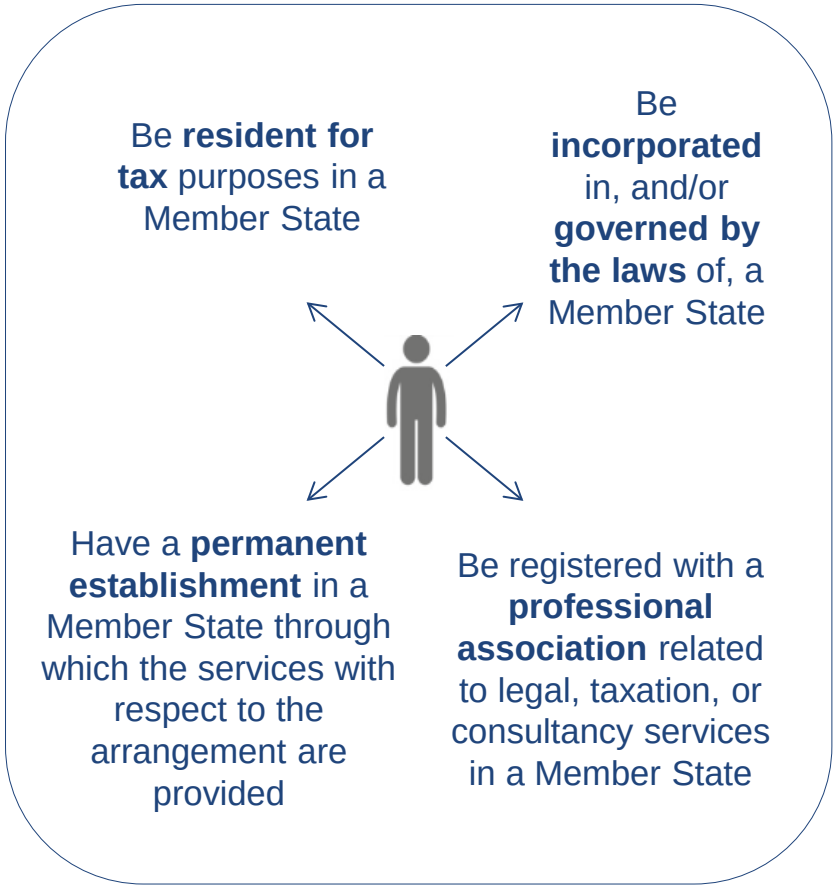
OR

ADVISER:
Any person that know**s or could reasonably be expected** to know that they have undertaken to provide, directly or by means of other persons, **aid, assistance or advice with respect to:**



AND

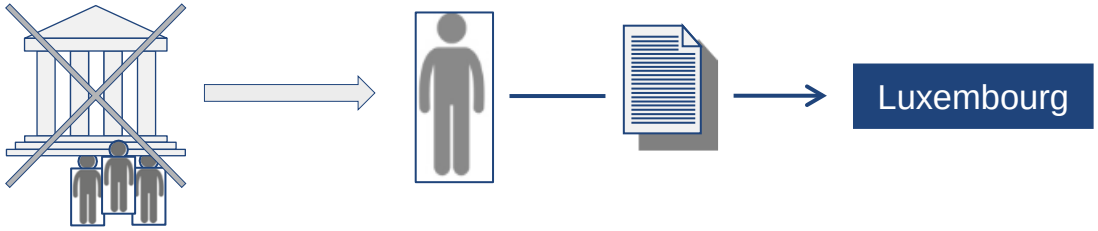
2. One of the following types of **relationship with a Member State**:



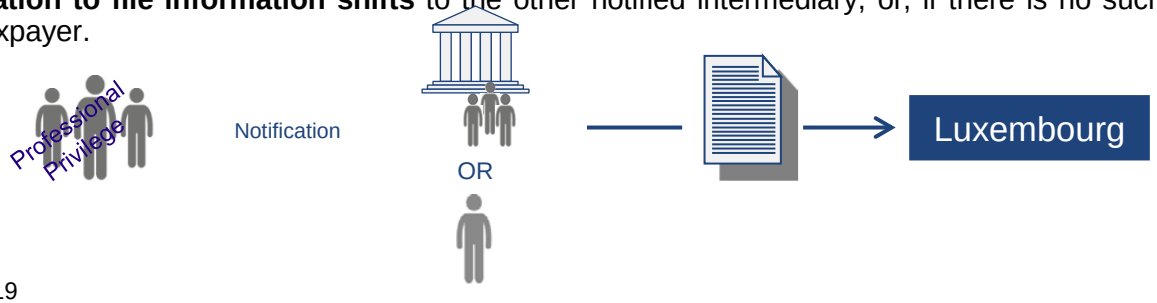
DAC 6 - Intermediaries – shifting of reporting obligation to the taxpayer

The obligation to report may shift to the taxpayer or another intermediary (where applicable), in the following cases:

1. **Absence of intermediary in the meaning of DAC 6:** the obligation to report shifts to the taxpayer himself.

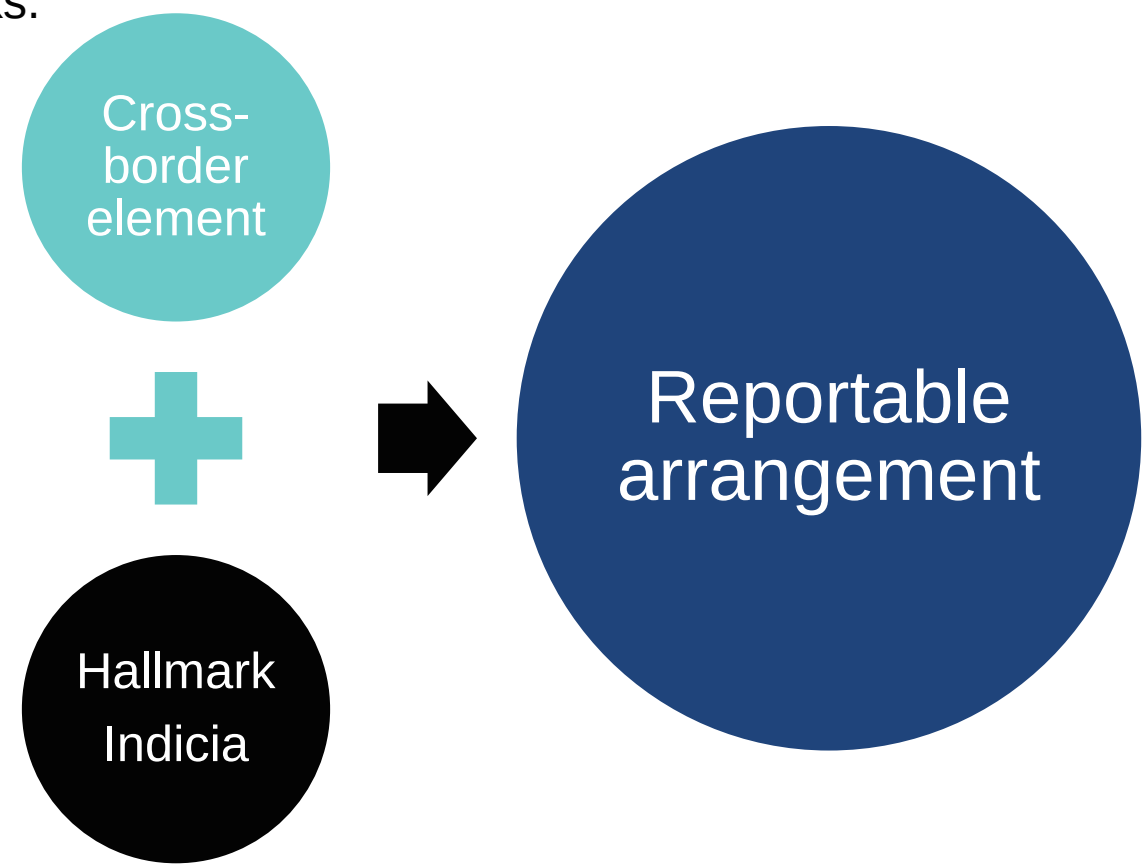


2. **Waiver where the reporting obligation would breach the legal professional privilege** under national law: intermediaries shall be granted the right to a waiver from filing to the extent that they operate within the limits of the relevant national laws that define their professions.
    1. **Obligation to notify**, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations.
    2. **The obligation to file information shifts** to the other notified intermediary, or, if there is no such intermediary, to the relevant taxpayer.



DAC 6 - Reportable cross-border arrangement

- **Definition:** any cross border arrangement that contains at least one of the hallmarks.



DAC 6 - Hallmarks – overview

- **Definition**: a characteristic or feature that presents an indication of a potential risk of tax avoidance and therefore rendering the arrangement reportable.
- Hallmarks are predefined and listed in Annex IV of DAC 6.
- Two types of hallmarks: (i) hallmarks linked to a main benefit test and (ii) standalone hallmarks.

- **Some hallmarks are characterising tax avoidance in the meaning of DAC 6 only if the arrangement also complies with the main benefit test:** where it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

DAC 6 – Hallmarks - linked to the main benefit test

- **Generic hallmarks:**

1. An arrangement where the taxpayer undertakes to comply with a condition of ***confidentiality*** which may require it not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.

2. ***Premium fee***: An arrangement where the intermediary is entitled to receive a fee for the arrangement and that fee is fixed by reference to:

    3. deductions the amount of the tax advantage derived from the arrangement; or

    4. whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees.

3. An arrangement that has substantially ***standardised*** documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

- **Specific hallmarks:**

1. The trade in ***loss-making companies*** to reduce tax liability under certain conditions.

2. Conversion of ***income into i.a. capital*** or lower-taxed revenue streams.

3. ***Circular transactions***.

4. Deductible cross-border ***payments between associated enterprises*** in cases where the recipient is not taxable or low-taxed in its jurisdiction of residence.

DAC 6 – Hallmarks - standalone hallmarks

- Other specific hallmarks are characterising tax avoidance in the meaning of DAC 6 without having to comply with the main benefit test.

  1. Specific hallmarks which relate to some ***cross-border transactions*** (category C);
  2. Specific hallmarks which relate to ***automatic exchange of information and beneficial ownership*** (category D);

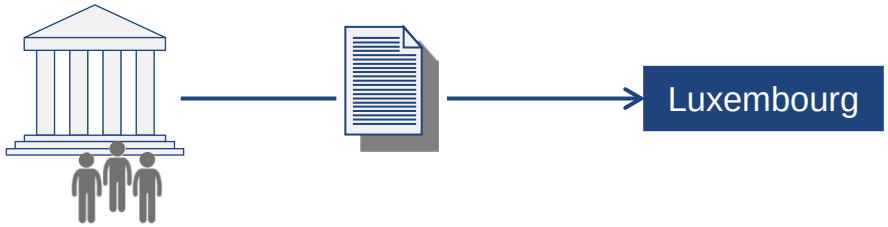
     "*In general, financial institutions providing banking services are required to collect and check a wide range of information about their clients. They have significant expertise in this field. On this basis, a financial institution should normally be in the position to consider the relevance of the various hallmarks to the services that they undertake to provide. In particular, the hallmarks under Category D are directly related to banking activities.*"[1]
  3. Specific hallmarks which relate to ***transfer pricing*** (category E).

1. Letter of Pierre Moscovici to Mr. Wim Mijs, Chief Executive Officer European Banking Federation dated 30 July 2018

DAC 6 – the reporting

The mechanism is divided into two steps:

Step 1: Disclosure of potentially aggressive tax planning cross-border arrangements by intermediaries and/or tax payers to the authorities of a Member State.



Step 2: Automatic exchange of the information between authorities of Member States.

DAC 6 – Filing the information – content of the report

- **Limited to the information the intermediary already knows, possess or controls** (no obligation to collect any further information): *"it is worth noting that even in the case that a bank qualifies as an intermediary, it is only liable to report information to the extent that such information lies within its "knowledge, possession or control"*[1].

- **Type of information:**

  1. the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;
  2. details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;
  3. a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;
  4. the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made
  5. details of the national provisions that form the basis of the reportable cross-border arrangement;
  6. the value of the reportable cross-border arrangement;
  7. the identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement;
  8. the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.

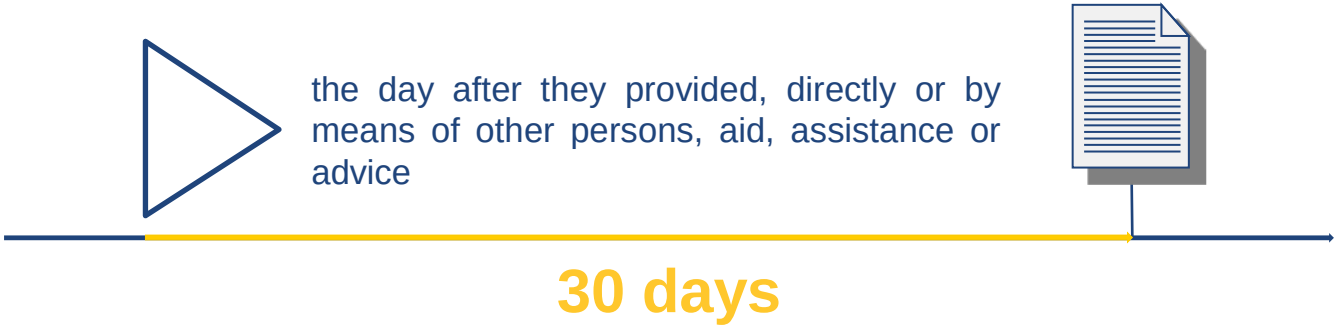
1. Letter of Pierre Moscovici to Mr. Wim Mijs, Chief Executive Officer European Banking Federation dated 30 July 2018

DAC 6 – Filing the information – timing

- **In principle, the intermediary has 30 days** to file the information with competent authorities.
- **Optional:** each Member State may take the necessary measures to require that each relevant taxpayer file information about their use of the arrangement to the tax administration in each of the years for which they use it.
- The delay **starts** to run from whichever of these three days occurs first:

DAC 6 – Filing the information – timing

- Advisers are also required to file information within 30 days.
- However, the delay starts on the day after they provided, directly or by means of other persons, aid, assistance or advice.



DAC 6 – Filing the information – reply and consequences

- **Absence of reaction of the tax authorities** shall not imply any acceptance of the validity or tax treatment of that arrangement.
- **Penalties for not correctly complying with the reporting requirements are to be specified by the implementation in national law:** Member States shall take all measures necessary to ensure that these rules are implemented and shall lay down penalties which are "effective, proportionate and dissuasive".
- **The automatic exchange of information** between administrations shall take place within 1 month of the end of the quarter in which the information was filed. The first information shall be communicated by 31 October 2020.
- 31 August 2020: first disclosures for period from 25 June 2018 to 1 July 2020.

RBE – Introduction

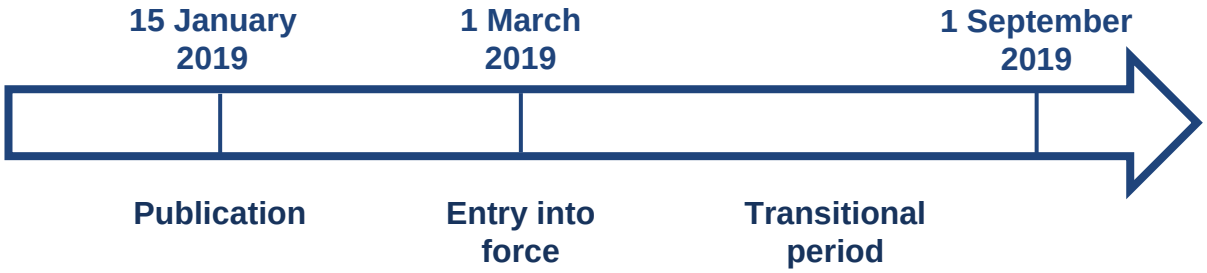
- The law of 13 January 2019 establishing a register of beneficial owners (the "**RBE Law**"):
  - implements the new transparency measures provided for *i.a.* by Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "**4th AML Directive**");
  - establishes a register of BOs of Luxembourg legal entities (the "**RBE**") which aims at enhancing transparency as required for by the 4th AML Directive.
- The RBE Law has been supplemented by a Grand-Ducal Regulation of 15 February 2019 on the modalities for registration, payment of the administrative fees and on the access to the information registered with the RBE (the "**Grand-Ducal Regulation**").

RBE– who is concerned

- All Luxembourg commercial companies and other legal entities registered with the Luxembourg trade and companies' register (*Registre de Commerce et des Sociétés de Luxembourg*, the "**RCSL**") such as public limited companies, privated limited companies, etc.

RBE– the new requirements

- **<u>Two sets of requirements</u>:**
  - Information regarding the BOs **to be held at the registered office** (the "**Internal File**").
  - Information regarding the BOs **to be registered in the <u>register of BOs</u>** (*Registre des bénéficiaires effectifs*), the so-called RBE, maintained by the Luxembourg Business Registers GIE (the "**LBR**") under the authority of the Ministry of Justice.
- The concerned entities need to comply with the new requirements *i.e.* by 1st September 2019 at the very latest.



RBE– the new requirements

A) the BO Internal File

- Obligation to identify the BOs.

- Obligation to **obtain and hold information** on its BOs at the registered office, **including**:

    - identity;
    - nationality;
    - date and place of birth;
    - country of residence;
    - address (private or professional);
    - identification number (national or foreign); and the
    - nature and extent of the beneficial interests held in the relevant legal entity.

- This information shall be **adequate, accurate and up-to-date**.

RBE– the new requirements

A) the BO Internal File

- The entities must make the information contained in the Internal File available to:

  - **The national competent authorities upon request** (*e.g.* the public prosecutor, the *Commission de Surveillance du Secteur Financier*, the *Commissariat aux Assurances*, the tax authorities) at the latest **within 3 days** of their request.

  - **The professionals subject to AML-CTF obligations under the 2004 Law upon justified request** (*e.g.* banks, PFSs, insurance undertakings and UCITS management companies) within the framework of their customer due diligence ("**CDD**") measures at the latest **within 3 days** of their request.
    - only for certain information on the BO (identity, nationality, date and place of birth, country of residence, nature and extent of the beneficial ownership held)
    - **except** where such access has been limited in exceptional circumstances, such as for instance where there is a risk of fraud, violence, information relates to a minor, etc.

RBE– the new requirements

B) BO information to be made available in the RBE

- Obligation to register the BO related information with the RBE **within 1 month after becoming aware or after one should have become aware of an event or circumstance** triggering the filing with or an update of the RBE.

- The BO related information must be registered and updated in the RBE by the concerned entity.

- Anyone having access to the RBE and the professionals subject to AML-CTF obligations under the 2004 Law must notify the LBR within 30 days of becoming aware of an error in the information filed and or the lack of information.

RBE– the new requirements

B) BO information to be made available in the RBE

- The registration of the BO-related information with the RBE shall include certain supporting documents.
- The filing must be done electronically via the website of the LBR.
- Each request for registration is dated on the day of acceptance by the LBR and is allocated a unique number. An acknowledgement of receipt will be issued by the LBR.
- The RBE must register the information filed **within 3 business days** following the application for registration.
- In case the entity is struck off from the RCSL, such information must be kept in a designated place for a period of 5 years.

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RBE– the new requirements

C) access to the RBE

- Electronic access **without any restriction** to the **national competent authorities**.
- Electronic access **to any person** to the following (restricted) information on BOs:
  - identity;
  - nationality;
  - date and place of birth;
  - country of residence; and
  - nature and extent of the effective interests held.

RBE– the new requirements

C) access to the RBE

- Possibility to **request a restriction of access** to the RBE where:
  - such access would expose the BO to a risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or
  - where the BO is a minor or otherwise incapacitated.
- In such case, access will be limited to national authorities, credit institutions, financial institutions, bailiffs and notaries acting in their capacity as public officer.
- Where restriction of access to the RBE has been granted, only national authorities will have a complete access to the RBE.
- The access to the RBE of credit institutions, financial institutions, bailiffs and notaries acting in their capacity as public officer, under such circumstances, will be limited to the issuance of excerpts requested by the LBR.

RBE– the new requirements

D) sanctions

- Criminal sanctions will be imposed **on legal entities** who:
    - do not register the information in the RBE within the required timeframes;
    - knowingly provide for information that is inaccurate, incomplete or not up-to-date;
    - fail to set up their internal BO file; or
    - knowingly provide the national authorities or obliged entities under the 2004 Law with information that is inaccurate or not up-to-date.

- Criminal sanctions will also be imposed **on a BO who fails to provide the relevant entity with the BO related information**.

- All those criminal fines range **between EUR 1.250,- and EUR 1.250.000,-**.

Conclusion

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