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# Luxembourg

## International Estate Planning Guide

Private Client Tax Committee

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## I. Wills and disability planning documents

### A. Will formalities and enforceability of foreign wills

#### 1. POSSIBLE FORMS FOR WILLS

In order to be valid in its form under Luxembourg law, a will must take one of the following forms:

##### i. Notarised (authentic) will: Article 971 *et seq*<sup>1</sup>

The testator dictates his or her will to a notary in the presence of two witnesses or alternatively to two notaries. The will must be dictated by the testator in one of Luxembourg's three official languages: Luxembourgish, German or French. If the testator does not speak any of these three languages, he or she can use a language understood by the notary and witnesses or by the two notaries. The notary who is entrusted with keeping the deed containing the will must then translate orally the testator's wishes directly into one of the three official languages. In the event that the testator does not speak any languages understood by the notary and the second notary or witnesses, he or she will need to seek assistance from a sworn translator.

Either the notary or his or her clerk will reproduce the content of the testamentary dispositions as dictated by the testator in the authentic instrument. The notary will then read aloud the testamentary dispositions in the presence of the testator and two witnesses or the second notary to ensure that what is written conforms to the wishes dictated by the testator.

Following this, the will is signed by the testator, then the notary and the two witnesses or by the two notaries. In the event that the testator is physically incapable of signing the will, it is the responsibility of the notary to specify this in the deed and indicate the reason that prevents the testator from signing the will. In this case, the notarised will received by the notary in the form of an official record will be kept by the notary.

##### ii. Holographic (handwritten) wills: Article 970

The conditions for a holographic will to be valid are simple and require the testator to:

- draft his or her testamentary dispositions by hand;
- date; and
- sign his or her will.

It can be kept by the testator, entrusted to a third party or filed in a notary's official record.

##### iii. Sealed will: Articles 976 *et seq*

The testator can opt to handwrite or type his or her will, or instead have it handwritten or typed by a third party. The testator then presents his or her enveloped, stamped and sealed will to two notaries or to a notary accompanied by two witnesses. It should be noted that the testator can also envelope, stamp and seal his or her will in the presence of two notaries or one notary and two witnesses.

The testator must declare that it is his or her will and indicate in which form the will has been drafted (by hand or typed, by him or herself or a third party). Where the testator's will has been drafted by a third party, the testator must indicate that he or she has personally checked the wording.

In principle, the will must be signed by the testator. If the testator does not sign the will, he or she must declare that he or she did not know how to or was unable to sign it and provide justification.

The notary will immediately draw up a deed (*acte de suscription*) on the envelope containing the will. This deed, either written by hand or typed, must indicate the date and location of when it was made valid and, in particular, include the testator's statements and a description of the seal used, and mention all the formalities required for the deed to be valid. The testator can choose whether the will and deed will be kept by the notary or given back to the testator.

It should be noted that, regardless of the form the will takes, it may only contain the testamentary dispositions of a single person as Luxembourg law strictly forbids joint wills (Article 968). However, foreign joint wills validly drafted under a foreign law nonetheless have legal effect in Luxembourg.

## 2. SUBSTANCE

As a formal legal instrument to the extent that the legal formalities imposed are required not for a purely evidentiary purpose but as conditions of validity, the will can cover all or part of the testator's estate.

Given that it concerns the transfer of property and constitutes the final words of the deceased, the law imposes strict formal procedures to ensure that the testamentary dispositions truly reflect the wishes of the deceased and that they are established with as much certainty as possible.

In addition to the form requirements detailed above, there are substantive conditions that must be fulfilled for a will to be considered valid.

- Consent: The testator must express him or herself freely, without there being any change to the consent given. Therefore, any proven deceit, error or flaw in the consent will result in the will being null and void.
- Capacity: The testator must have the capacity to act and be of sound mind (temporarily or permanently) at the time of drafting the will.
- Object of the will: This must be lawful.
- Lawful and moral purpose of the will: The intention to confer a benefit to the beneficiary or beneficiaries of the will.

## 3. AMENDMENTS TO THE WILL

Any will can be supplemented and/or amended through a subsequent deed known as a codicil. The original version of the will remains in effect for provisions that are not affected by the amendments introduced by the most recently dated will.

## 4. REVOCATION: ARTICLE 1035 *ET SEQ*

A will may be revoked either directly or indirectly, which can render all or part of the previously drafted will null and void.

- Direct revocation: The drafting of a subsequent written will that expressly revokes the previously drafted will or that contradicts or renders incompatible all or part of the previously adopted provisions.

- Indirect revocation: During his or her lifetime, the testator gifts asset(s) that are the subject of testamentary dispositions, thus removing them from the estate and preventing the execution of the testamentary dispositions.

Some bequests included in wills may also be ineffective if the intention is to allocate them to the disposable part of the estate (*quotité disponible*) and this proves to already have been exhausted. The testamentary disposition is thus null and void (for explanations of the concept of the disposable part and allocation of gifts, see II.B).

It should be noted that the method for revoking a notarised will has long been a topic of debate. Some were of the opinion that a will purporting to revoke a notarised will must also be drafted in the authentic form in order to have the desired effect. However, in its decision of 5 July 2018 (list number 77/2018), the Cour de Cassation (Luxembourg's highest court of appeal) overturned an appellate decision in that a will in either holographic or sealed form will validly revoke a notarised will.

## 5. REGISTERING A WILL

It is not necessary to register a will in the Register of Wills and Testaments (*registre central des dispositions de dernière volonté*), which is administered by the Registration Duties, Estates and VAT Authority (Administration de l'Enregistrement, des domaines et de la TVA), in order for it to be valid, but this is an effective method to protect against the will being forgotten or lost. Therefore, registering a will with the competent authority is recommended, regardless of whether it is holographic, sealed or notarised, in addition to providing the following details:

- the testator's surname and first name(s) and, if applicable, spouse's name;
- the testator's date and place of birth, national identification number (13-digit *matricule*), profession and address or domicile;
- the date of the will; and
- the name and address of the person or institution entrusted with the will and the place where it is kept.

Bear in mind that a notary entrusted with receiving a will via an authentic instrument or filing a holographic will in his or her official record at the testator's request will automatically proceed to registering the relevant will with the competent authority.

It is important to highlight that the will itself is not kept in the Register of Wills and Testaments. Therefore, all possible suitable precautions must be taken to ensure that the will can be stored and found at the right moment.

## 6. ENFORCEABILITY OF FOREIGN WILLS

In principle, for a will created under foreign law to be recognised as valid in Luxembourg:

- it must have been drafted in a form that complies with one of the applicable laws set out in the 1961 Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions ('1961 Hague Convention'); and
- with regard to substance, it must be in line with the law governing it, provided that the applicable law corresponds to the options in Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European

Certificate of Succession (the 'EU Succession Regulation') and does not contain provisions that are in conflict with Luxembourg public policy.

Luxembourg ratified the 1961 Hague Convention on 7 December 1978, with the convention entering into force on 5 February 1979. The EU Succession Regulation entered into force on 17 August 2015. In this respect, a will is valid with regard to its form if it is drafted in line with the form of one of the laws listed below in Article 1 of the 1961 Hague Convention:

'A testamentary disposition shall be valid as regards form if its form complies with the internal law:

- a) of the place where the testator made it, or
- b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
- c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
- d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
- e) so far as immovables are concerned, of the place where they are situated.

For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system.

The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.'

With regard to the substance of testamentary dispositions, it is necessary to refer to the EU Succession Regulation, which indicates that the law applicable to succession will be the law of the last place of habitual residence of the deceased or the law of one of the nationalities of the deceased, if he or she has chosen one.

As the EU Succession Regulation is universally applicable, it is possible for the law applicable to succession to be that of a third country, except for provisions that are contrary to the public policy of the forum.

#### *B. Will substitutes (revocable trusts or entities)*

It is possible to plan to transfer an estate through methods other than a will. However, trusts, which are the solution par excellence in countries with a common law system, do not exist per se in Luxembourg law.

In spite of this, Luxembourg domestic law recognises the concept of the trust.

This means that the legal effects of trusts validly established under foreign law are also recognised under Luxembourg law. Furthermore, these trusts are also enforceable in Luxembourg courts, on the condition that these entities are not in violation of Luxembourg public policy and comply with the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition and the Law of 27 July 2003 approving the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition as amended (Law of 27 July 2003 on Recognition of Trusts).

##### *1. INSTITUTION CONTRACTUELLE (CONTRACTUAL APPOINTMENT OF AN HEIR)*

For a married couple, it is possible to enter into an *institution contractuelle*, which is an agreement stating that each spouse promises to transfer to the other all or part of his or her estate on his or her death (this agreement can be reciprocal or not, as the individual prefers). This *institution contractuelle* can focus on the assets existing on the day of concluding the agreement, but also on assets that the spouse making

the promise will acquire between that day and his or her death. Therefore, the *institution contractuelle* can include future assets and is thus: (1) an exception to the general principle decreed by Article 943 of the Civil Code concerning lifetime gifts, which stipulates that 'A lifetime gift may include only the donor's current assets, and if it includes future assets, this aspect of the gift will be considered null and void'; and (2) an anticipation of the opening of the succession (*ouverture de la succession*) on death involving the allocation of all or some of the assets of the estate without recourse to a will.

## 2. GIFTS

It is possible to transfer one or several assets during the donor's lifetime by means of gifts. Gifts can take several forms, such as gifts of full ownership, bare ownership or usufruct only, with express provisions for the reversion of the usufruct or subject to obligations. Gifts are part of the estate and inheritance planning, and thus act as a substitute for making a will. Gifts will be covered in more detail in III. A.

## 3. DONATION-PARTAGE (INTER VIVOS DISTRIBUTION)

The *donation-partage* is a structure that differs from traditional gifts in that, at the moment it is concluded, it partitions the gifted assets between the donees and is thus an exception to the principle of prohibition on agreements as to future succession. By distributing the donor's assets *inter vivos*, both the donor and the future heirs, known as joint partitioners, anticipate the results of opening the succession and settle the succession, at least in part, through planning and without resorting to a will (see also III.A).

## 4. LIFE INSURANCE POLICY

A life insurance policy is a mechanism by which the policyholder pays one or more premiums (generally as sums of money) so that, in the event of the death of the insured person or at the end of the policy's fixed term, an insurance company is obligated to pay a specific sum of money to one or several beneficiaries of the policy. In this way, the policyholder is able to anticipate the impacts of the opening of the succession and what will happen to his or her funds, without using a will.

### C. Powers of attorney, directives and similar documents for cases of incapacity

Luxembourg law currently does not have a provision to make concrete arrangements for potential future incapacity through a power of attorney, as may be the case in countries that have a common law system. Where incapacity has been duly established, the Luxembourg legal framework provides three systems of legal protection for adults, depending on the severity of the individual's disability. The most appropriate solution is determined by the court on a case-by-case basis.

#### 1. SAUVEGARDE DE JUSTICE (JUDICIAL PROTECTION): ARTICLES 491–491-6 OF THE CIVIL CODE

This protection regime does not deprive the protected person of capacity, but rather allows for obligations that he or she has entered into under unreasonable conditions to be annulled or reduced as excessive, with regard to the estate of the protected adult, without the need to prove that he or she was under the influence of a mental disorder. Therefore, an adult under judicial protection can carry out legal acts independently, but these acts can be annulled later in cases of abuse, for example. As a rule, this regime is temporary and is often a transitional stage before a curatorship or guardianship is established.

#### 2. CURATELLE (CURATORSHIP): ARTICLES 508–514 OF THE CIVIL CODE

This regime applies to persons who need to be assisted or advised for important acts, but without being declared generally incapable of acting. The curator assists the adult with performing certain legal acts, such as acts of disposition, and ensures that the protected

person does not act against his or her own interests. With regard to actions that the protected individual is permitted to perform independently, if they are performed under unreasonable conditions, the protected adult him or herself or the individual's curator may request that they be annulled, without the need to prove any mental disorder at the time of their performance.

### 3. TUTELLE (GUARDIANSHIP): ARTICLES 492–507 OF THE CIVIL CODE

This regime is intended to protect an adult who has lost his or her capacity to act. In this case, a guardian and/or a family council are/is appointed in order to perform the necessary acts on behalf of the protected person. Acts performed independently by a person over the age of majority under guardianship are subject to nullity, with no need to prove the existence of a mental disorder or that the act is detrimental to the person who is deemed incapable.

Thus, under Luxembourg law, a person over the age of majority is free to act and to conclude contracts until his or her incapacity has been established in court. An adult is therefore considered to be capable of acting until proven otherwise or until a protective measure is put in place. Once the protective measure has been ordered by a judge, the extent of the protected person's remaining capacity to act will depend on the type of protection applied. Consequently, it is not really possible to provide for potential incapacity, so the protection regime only applies *a posteriori*.

### 4. FUTURE PROTECTION MANDATE

However, following legal developments implemented in Luxembourg's neighbouring countries and in the knowledge that individuals could not easily plan for their potential future incapacity and choose their trusted person, the bill of Law No 8133 introducing the future protection mandate into Luxembourg law was proposed in January 2023 and is currently undergoing parliamentary scrutiny. Without going into detail, the future protection mandate as set out in the bill of law is explained below (subject to modifications before the text is adopted).

The future protection mandate will, in principle, constitute extrajudicial protection, allowing any fully capable person to nominate one or several authorised representatives to represent him or her in exercising his or her rights and obligations in the event that the capable person is no longer able to act in his or her own interests. The mandate may be executed in authentic form (in front of a notary) or signed privately, as best suits the nominator. However, these two forms will not have the same legal effects. To differentiate between the two types of mandate, the law refers to the powers that are granted to the guardian in the case of guardianship (the legal protection put in place when a person is vulnerable) (see above).

A future protection mandate signed privately will only give the representative the right to perform the actions that a guardian can carry out independently without the authorisation of a guardianship judge. This primarily concerns safe-keeping and managing the estate. By contrast, a notarised future protection mandate gives the representative the right to carry out all estate-related actions that a guardian can perform independently or with the authorisation of a guardianship judge (acts of disposition), other than acts done for no consideration (*actes à titre gratuit*) that can only be carried out with the consent of a judge.

The mandate will come into effect in the event of physical and/or mental incapacity that is duly established by a medical certificate. However, the guardianship judge can end this at any time, either in whole or in part, if the representative's actions in carrying out the mandate endanger the nominator's interests.

The judge may also choose to supplement the future protection mandate using judicial measures in the event that, due to its scope of application, the mandate cannot sufficiently protect the nominator's

personal or estate-related interests. This additional judicial protection measure can be entrusted to the representative who is the vulnerable adult's trusted person.

Furthermore, with regard to the protection of vulnerable adults, it should be noted that Luxembourg signed the Hague Convention of 13 January 2000 on the International Protection of Adults in 2018, but has not yet ratified it. We understand that Luxembourg plans to ratify this convention, and this should take place concurrently with or following the adoption of the future protection mandate.

Lastly, it should be noted that, with regard to end-of-life planning, there is an option to appoint a trusted person in an advance decision for cases in which an individual becomes unable to give his or her consent in the advanced or terminal stage of a serious and incurable illness and will thus be incapable of expressing his or her wishes. The trusted person who is appointed in this context will make decisions about care and treatment, and will give his or her consent to measures proposed by the medical team in accordance with the advance instructions of the ill person.

It is also possible to appoint a trusted person to act in the interest of a person who lacks capacity to make decisions that concern his or her health (excluding end-of-life situations, ie, in the event of brief, temporary incapacity). Medical confidentiality will also not be applicable with regard to the trusted person. However, it is essential that this is agreed in writing in order to be able to take full effect.

## **II. Estate administration**

### *A. Overview of administration procedures*

#### 1. SYSTEM

In Luxembourg law, the essential principle of inheritance is that, on death, everything transfers to the living. As soon as the person passes away, his or her heirs (who accept the inheritance) are considered a continuation of the deceased, replace the deceased and take his or her place. This means that the rights, actions and obligations of the deceased are transferred by operation of law and solely by virtue of death to the heirs appointed by law. This approach differs significantly from that in the majority of common law countries, where succession occurs with regard to assets, but not people. In general, in this system, the law organises the administration of the assets of the estate, under which the heirs are allocated the net assets after an administrator has managed the estate and settled any potential debts.

As a result, according to the approach used in Luxembourg, the heirs become joint owners of the assets of the estate on accepting the inheritance until the estate is divided, which will, in principle, take place at a later stage. They must settle the deceased's debts, potentially using their own means, if necessary.

#### 2. EXECUTOR OF A WILL

It should be noted that the concept of the executor of a will is in no way comparable to that of common law countries. In Luxembourg law, appointing an executor of a will is optional and is, in principle, only to ensure that the deceased's testamentary wishes are executed properly. To do this, the executor is granted certain powers, such as drawing up an inventory of the estate's assets, taking any protective measures or even taking legal action in the event that the will is contested (non-exhaustive list).

#### 3. PROCEDURE

After an individual's death, the heirs must instruct a notary to carry out the settlement of the estate.

The notary draws up a deed in authentic form in order to establish succession. This deed includes, in particular, the identity of the deceased person and that of his or her heirs, as well as the deceased's matrimonial regime, if necessary, and any testamentary dispositions made by the deceased.



Since the entry into force of the EU Succession Regulation on 17 August 2015, if the succession has foreign elements, a European Certificate of Succession can be drafted with a view to proving the status of heirs to foreign authorities.

From a tax perspective, if the deceased was a Luxembourg resident or owned real estate located in Luxembourg, the heirs must file a declaration of inheritance with the Registration Duties, Estates and VAT Authority. The latter will assess whether inheritance taxes are due and will send the elements and information included in the declaration of inheritance in order to transfer real property into the names of the heirs.

Furthermore, the heirs have the option to accept or renounce the inheritance or to accept it subject to an inventory. This option can only be exercised after the opening of the succession, that is, as of the death of the person and pursuant to the prohibition on agreements as to future succession (prohibited primarily on moral grounds in an endeavour to prevent future heirs, with or without the support of the future deceased, from colluding and speculating on the estate of someone who is still alive). However, there are some exceptions to the general prohibition on agreements as to future succession, such as *inter vivos* distribution, *institution contractuelle* and life insurance (non-exhaustive list).

The simple acceptance of an inheritance can be tacit or explicit. It can be declared with an unambiguous letter or through the heir's behaviour, for example, by acting as such by leasing a real property that is in the estate, selling a fixed asset or even settling one of the deceased's debts. It should be noted that if the heir carries out tasks that are purely for safe-keeping or management purposes, these are not considered as accepting the inheritance, in principle. Simple acceptance results in the deceased being succeeded by the heir and involves the heir potentially being liable for the deceased's debts using the heir's own means, if he or she does not want to use funds from the estate or if the estate cannot cover the debts.

An inheritance must be renounced at the Civil Court of the location where the succession opened, namely the deceased's place of residence, thus revoking all rights that the heir had with regard to the death of the person whose estate is concerned. The heir then becomes a third party to the succession and his or her share is absorbed into that of the other heirs.

There is a third option, in which the inheritance is accepted subject to an inventory. This option allows an heir who does not know the details of the deceased's estate or is unsure of the extent of the deceased's debts to protect him or herself by avoiding his or her own funds being called on to settle the deceased's debts.

Thus, if an heir accepts the inheritance subject to an inventory by way of declaration to the clerk of the competent court (ie, that of the location where the deceased had his or her habitual residence), an inventory of the estate must be carried out in the three months following the death in order to allow the heir to assess the net inheritance assets. If the debts exceed the assets, the heir will not be obliged to settle the debts. The heir will then have 40 days to consider whether to accept or renounce the inheritance. This option allows the heir to take time to assess the state of the inheritance estate while protecting his or her own assets and leaving the heir the option to inherit.

#### *B. Intestate succession and forced heirship*

From the perspective of European Union law, in principle, Luxembourg law is applied when the deceased had his or her habitual residence in the Grand Duchy of Luxembourg or when the deceased opted for the law of his or her nationality if the deceased had Luxembourgish nationality (cf the EU Succession Regulation).

##### 1. DEVOLUTION OF PROPERTY

In broad terms, the devolution of property is organised by categorising the heirs, by operation of law, in order from the closest relatives to the furthest removed relatives of the deceased. First are descendants, alongside the surviving spouse, if any, who will be named the deceased's heirs by operation of law. If there are no descendants or surviving spouse, the next heirs are the parents (father/mother) and close

collateral relatives (brother/sister or their descendants), who will share the inheritance. If there are no parents or close relatives, distant ascendants (grandparents or great-grandparents) will inherit.

If there are no distant ascendants, distant collateral relatives (other than brothers, sisters and their descendants) are the final category of family members of the deceased who can inherit. Collateral relatives will be in line for succession, but on the condition that they are sufficiently close relatives because those more than six degrees removed do not qualify as an heir, with certain exceptions (cf *infra*).

If there are no family members who fit the categories or order mentioned above, the state will inherit the estate.

It should be noted that not all distant ascendants or collateral relatives are in line for inheritance. Only the closest blood relatives qualify as heirs. A degree of relation constitutes the interval separating two generations. As such, a mother and son are first-degree relatives and a grandfather and grandson are second-degree relatives. For collateral relatives, it must be possible to trace back to the common ancestor to follow the line to the potential heir. A sister and brother are second-degree relatives and a child and their cousin are fourth-degree relatives.

## 2. RIGHTS OF HEIRS

### i. Descendants and the surviving spouse

Descendants are entitled to a share of the inheritance from which they cannot be disinherited, known as the 'reserved share'.

This is dependent on the number of children left by the deceased. Note that children are all entitled to an equivalent reserved share, regardless of whether they are legitimate, born to unmarried parents or result from an adulterous relationship.

Thus, an only child is entitled to half of the estate as his or her reserved share. Two children are entitled to an equal third of the estate. In cases of three or more children, they are entitled to an equal share of three quarters of the estate.

It should be noted that if a child predeceases his or her parent, the child's descendants (grandchildren and so on) will take their place in the line of succession and will be entitled to equal shares of the inheritance that their parent (the predeceased child) would have received (known as the *mécanisme de représentation*). If there are no descendants, the child's share will be absorbed into that of the other heirs.

Therefore, the deceased can dispose of the remaining share as he or she wishes, which is referred to as the 'disposable share'. This amounts to half of the estate for an only child, one third for two children and one quarter for three or more children.

The reserved share must, in principle, be free of any obligation and full ownership must be allocated to descendants.

However, there are certain exceptions.

Provided they have not been expressly or de facto disinherited by the deceased, the surviving spouse will have the option to inherit: (1) the usufruct (life interest) of the primary residence belonging to the deceased or couple, as well as the usufruct of the furniture and furnishings in the primary residence; or (2) the remaining share after that of the child/children, that is, the disposable share, which will be a quarter, third or half, depending on the number of children left by the deceased.

In addition, if the surviving spouse opts for the usufruct of the primary residence and its furniture and furnishings, the children's reserved share may be subject to the surviving spouse's usufruct, and thus

the children will be unable to enjoy full ownership of their reserved share during the surviving spouse's lifetime.

The surviving spouse has a period of three months and 40 days to make his or her choice. If the surviving spouse fails to do this, he or she will be allocated the usufruct of the primary residence and its furniture and furnishings.

Another exception to the principle of allocating full ownership of the reserved share is *institution contractuelle* or gifts between spouses. One of the spouses or both spouses can agree to make a gift that will only come into effect on the death of the donor. However, this gift is limited to two options:

- a gift of the usufruct of the entire inheritance estate; or
- a gift of the full ownership of the disposable share and the usufruct of the remainder.

In both cases, the reserved share for children is legally encroached upon as this is permitted by law.

The children are then apportioned their reserved share as bare owners and will enjoy full ownership of the assets only on the death of the surviving spouse.

On the other hand, instead of being favoured by the deceased, the surviving spouse may experience the opposite: being disinherited. There are two possible situations:

- De facto disinheritance: The deceased may have disposed of the disposable share during his or her lifetime, with these gifts taking up the inheritance share that would have gone to the surviving spouse. As this share is not protected by a reserved share, none of it can be claimed; and
- Express disinheritance: The testator can make use of testamentary disposition to express his or her desire to deprive the surviving spouse of all rights in the testator's estate. Once again, the spouse cannot claim his or her legal share, except to legitimately contest the validity of the will.

To protect the reserved share for descendants, verification of the reserved share takes place when settling the estate. To do this, the notary in charge of settling the estate will question the heirs and keep a record of all the gifts that the deceased agreed to during his or her lifetime (regardless of whether these are to legal heirs or third parties to the estate). The notary will combine these gifts with the existing assets on death and deduct the deceased's debts, leaving the total for calculating the reserved share.

The notary will then follow the rules for allocating gifts to check that the reserved share is not affected. If this is the case, one or several of the gifts that carve into the reserved share may be subject to an action for reduction (*action en réduction*). This action aims to reduce or even overturn the gift agreed during the deceased's lifetime that carves into the reserved share.

The situation will be the same if the deceased agreed bequests to third parties that, in particular, would exceed the disposable share and carve into the reserved share. However, the reduction is not carried out in the same way for gifts and bequests.

In general, gifts are allocated from the oldest to the most recent based on: (1) the disposable share where they were agreed *par préciput et hors part* (outside of the future inheritance in order to benefit one heir in particular); and (2) the donee's reserved share by priority, then on the disposable share for the remainder, if applicable, where the gift was agreed as an advance on the inheritance (*consentie en avancement de part successorale*). The remaining excess will be subject to reduction. Therefore, the most recent gifts are the first to be reduced.

Bequests are, in general, allocated simultaneously to the disposable share and are reduced proportionally.

In the interest of maintaining maximum legal certainty and respecting the principle that gifts are irrevocable, bequests are reduced/overturned first, then gifts are reduced, if necessary.

Gifts and bequests are not reduced by operation of law; therefore, a forced heir can be disinherited if he or she so wishes (the reserved share is not a mandatory matter of public policy). However, under Luxembourg law, the action for reduction can be renounced only after the death of the deceased, as renouncing during the deceased's lifetime constitutes a prohibited agreement as to future succession (unlike French inheritance law, eg, which expressly provides for this).

ii. Close ascendants (*ascendants privilégiés*) and close collateral relatives (*collatéraux privilégiés*)

Parents and siblings are prioritised heirs in intestacy insofar as they are all entitled to inherit a share of the inheritance estate automatically, provided they are alive when the deceased passes away.

Parents will each inherit a quarter of the estate, while brothers and sisters will share half of the estate in equal parts. In the event that a brother or sister predeceases the deceased sibling, his or her children, meaning the deceased's nieces and nephews, can come into the line of succession and share the portion that would have gone to their parent.

If a parent predeceases the deceased child, the parent's share will be absorbed into that of the deceased's brothers and sisters. Therefore, if the deceased has only one remaining parent, the siblings will share three quarters of the inheritance. If there are no parents living, the close collateral relatives will inherit the entire estate.

However, it should be noted that the rights of the deceased's siblings vary depending on whether they are full siblings (same parents) or half-siblings (sharing the same father or mother). To understand the rights of all parties in the succession, if there are half-siblings, the inheritance is divided in two, with one half allocated to the maternal side and the other to the paternal (known as the *mécanisme de la fente successorale*). Full siblings are included in both lines, while half-siblings are included in either the paternal or maternal line, as applicable. In practice, this means that half-siblings who share one parent with the deceased have a lesser share of the inheritance than full siblings.

iii. Distant ascendants

Distant ascendants are the deceased's grandparents and great-grandparents, who will inherit only in the absence of all the heirs mentioned above (descendants, surviving spouse, close ascendants and close collateral relatives). The *mécanisme de la fente successorale* will apply to them, that is, the inheritance is divided between the maternal and paternal lines. In this case, only the closest ascendants qualify as heirs.

If there are no ascendants in one of the two lines, the entirety of the inheritance will go to the other line.

iv. Distant collateral relatives

In cases where the deceased left only distant collateral relatives, the *mécanisme de la fente successorale* will again apply and the closest heir will exclude more distant relatives. For example, if the deceased has a surviving paternal uncle and paternal great-uncle, only the uncle will inherit half of the estate.

If there are no distant collateral relatives on one side of the family (paternal or maternal) surviving the deceased, those from the other line will inherit the entire estate. Distant collateral relatives who are more than sixth degrees removed do not qualify as heirs, except when the deceased was unable to make a will, in which case collateral relatives up to and including the eighth degree inherit.

v. State

In the absence of any family members who qualify as heirs in line with the rules outlined above, the state will be designated the deceased's heir following the process with regard to vacant succession.

vi. Deceased's civil partner

The deceased's civil partner is not his or her legal heir, even if the official civil partnership was duly registered.

In order to have the right to inherit, the partner would have to be the beneficiary of one or several bequests agreed by the will. Otherwise, the partner has no right to inherit.

C. *Matrimonial property*

Under Luxembourg law, marriages are regulated by the Civil Code, which provides for both a primary regime that is applicable to all married couples and a secondary regime that differs depending on the structure that the spouses choose to plan their estates and thus determine the ownership of their assets.

1. PRIMARY REGIME

The primary regime constitutes all the basic rules applicable to all married couples and decrees the rights and obligations that spouses generally have towards each other. An exhaustive list is not provided in this document; some examples are below:

Spouses have the obligation to feed, care for and raise their children. They have a mutual duty to be faithful and provide support and assistance.

Furthermore, in order to sell the couple's habitual residence, where it is owned by only one of them, the other spouse must give his or her consent or the sale will be null and void.

In addition, the primary regime also provides for powers of representation between spouses, as well as, for example, responsibility for debt incurred by one of the spouses to maintain the household or support the children's upbringing (joint and several liability between spouses, except for cases of manifestly excessive spending or items purchased on credit).

2. SECONDARY REGIME

There are four major types of matrimonial property regime, which can also be adapted in line with the wishes of the spouses and within the limit of public policy.

i. Community of acquired matrimonial assets (*communauté de biens réduite aux acquêts*)

This is the matrimonial property regime applicable by default unless another regime is chosen. This regime states that assets acquired or received during marriage are the common property of both spouses, except for those that are gifts or inheritance, which remain individual property.

Property acquired before marriage remains the individual property of each spouse, but profit from it falls under joint assets.

ii. Separation of property regime (*séparation des biens*)

This is a matrimonial property regime according to which the spouses keep their estates and property separate. As a result, these remain personal, regardless of whether they were acquired before or during the marriage.

iii. Universal community of property regime (*communauté universelle*)

Under this regime, the spouses choose to make their entire estate joint property (assets acquired before or during marriage, as well as those received as gifts or inheritance during the marriage).

It also often includes a *clause d'attribution intégrale* for the surviving spouse, which means that the entirety of the couple's estate will be automatically passed to the surviving spouse. As a result, the deceased's heirs have to wait for the death of the second spouse in order to inherit.

It should be noted that this option is valid if the couple is child-free or has children together. As such, this option does not apply when there are children from a previous marriage. If the descendants of the first deceased spouse are not the children of the surviving spouse, there is a protective measure called *action en retranchement* (an action by the children from a previous marriage to claim their inheritance from the marital community or a spouse), which prevents these children from being disinherited. If the *clause d'attribution intégrale* is left to take full effect, the children of the spouse who dies first would be disinherited as they are not the heirs of the surviving spouse.

iv. Participation in acquired assets (*participation aux acquêts*)

This regime can be described as a hybrid. During the marriage, the spouses are under a regime separating property (they remain the owners of their individual property and all powers related to these, except for the primary residence, as mentioned above (cf II.C.1)). At the end of the marriage, whether this is due to death or divorce, any increase in the estate will be divided between the two spouses to ensure a certain degree of equality between them (liquidation of the matrimonial property regime leans towards a version of joint property).

The choice of matrimonial property regime and the possible adaptations are crucial because they determine the ownership of property and the powers to manage, oversee and dispose of this property.

In addition, foreign matrimonial property regimes are recognised in Luxembourg, provided that they are valid by virtue of a law permitted pursuant to the provisions of: (1) the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes for marriages concluded between 1 September 1992 and 28 January 2019; or (2) 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 for marriages concluded from 29 January 2019, except for clauses that are contrary to public policy.

It is also important to note that same-sex marriage has been legal in the Grand Duchy of Luxembourg since 2014, and civil partnerships have been available to opposite-sex and same-sex couples since 2004.

Couples in a civil partnership are subject to a separation of property regime by default, but have the option to choose a joint property regime.

D. *Tenancies, survivorship accounts and payable on death accounts*

With regard to the right to a lease in the event of the death of the tenant, the law of 21 September 2006 on residential leases modifying certain provisions of the Civil Code, as amended, provides in Article 13 that:

'In the event that the residence is abandoned by the tenant or in the event of the death of the tenant, the lease contract continues for an indeterminate period:

- in favour of a spouse who cohabited with the tenant or a partner who was in a declared partnership with the tenant and lived with them as a couple;
- in favour of descendants, ascendants or cohabitants who lived with the tenant in a joint household for at least six months prior to the date of leaving the residence or death and who declared their residence to the commune during this period.

In the event of multiple claims, the court will make their decision based on the interests present.

The rights of the lessor against a tenant who has abandoned the residence are not affected by these provisions.

If there is no-one meeting the conditions outlined in this article, the lease contract is terminated by operation of law by the death of the tenant.'

Survivorship accounts and payable on death accounts do not exist as such, but it is possible to make arrangements to avoid a potential freezing of bank accounts by granting a post-death power of attorney to a chosen person. A power of attorney given and effective during the lifetime of the nominator can also take effect after his or her death, provided that this was explicitly stipulated and the heirs have been informed. In this respect, the heirs reserve the right to revoke the power of attorney at any time.

### III. Trusts, foundations and other planning structures

#### A. Common approaches

The following legal tools can be used in estate planning.

##### 1. GIFTS

Gifts, which involve transferring ownership for no consideration of one or more assets to one or several donees, can take several forms and have different effects.

- i. *Donation en avancement d'hoirie or par préciput et hors part* (gift in advance against the reserved or disposable part of the estate)

First and foremost, the donor can choose the method of allocating the gift to either guarantee equal treatment among the heirs or favour one heir over the others. In doing so, the donor will agree a *donation en avancement d'hoirie* if he or she wants to ensure equality among the heirs, with the gift thus being allocated from the donee's reserved share and then the disposable share, if necessary. It will be subject to reduction only in the event that it exceeds the disposable share (cf II.B).

By contrast, if the donor wants to favour one of the heirs, he or she will agree a *donation par préciput et hors part*, which will be allocated from the disposable share and results in the donee having the right to both his or her reserved share and all or part of the disposable share, given that the donor's gift has been allocated from the disposable share (while the disposable share would usually be shared equally between the heirs).

- ii. *Donation en démembrement de propriété* (gift of dismemberment of property ownership)

In principle, a gift transferring ownership comprises the full ownership of the property, which includes *usus*, *fructus* and *abusus*: in short, the ability to use, profit from and dispose of the property, respectively. However, the donor can choose to reserve the *usus* and *fructus*, meaning the right to use and profit from the property, respectively, either for a fixed period (temporary usufruct) or for the donor's lifetime (life usufruct). In this situation, the donor chooses to gift to the donee only the bare ownership of the property (transfer of *abusus*), through which the donee

becomes the bare owner of the property, but does not have the right to profit from it. However, at the end of the usufruct, the donee will automatically gain full ownership of the property.

It should be noted that the donor can also opt to delay the bare owner's entitlement to enjoy the property by stipulating a reversion of the usufruct in favour of the surviving spouse. Therefore, on the death of the donor, the usufruct passes to the surviving spouse, with the bare owner only obtaining full ownership of the property on the death of the last of the usufructuaries.

Furthermore, the donor can choose to put stipulations on the gift, with one or more obligations falling on the accepting donee. For example, the donor can opt to give his or her house to the donee with the obligation that the donee will house them and provide food and necessary care until the donor's death. The obligations can be wide-ranging and varied, but must be ethical and must not change the *acte consenti à titre libéral* (with no consideration) into an *acte à titre onéreux* (for consideration).

Therefore, the gift, which takes effect during the lifetime of the donor, allows for an estate planning transfer with impacts on inheritance that are specific and adapted in line with the needs and wishes of each family.

## 2. DONATION-PARTAGE (INTER VIVOS DISTRIBUTION)

*Donation-partage* may have the same characteristics and specific features as simple gifting, as covered in the previous subsection.

However, *donation-partage* also involves the notion of sharing, which means that the donees' only remedy is to launch an action for reduction after the death of the donor if it emerges that an heir has been disadvantaged with regard to his or her reserved share. By contrast, the donees can no longer demand that the assets be shared as these have already been shared between them.

Thus, in an extreme example, if the donor had disposed of his or her entire estate during the donor's lifetime through *donation-partage* to the benefit of all his or her heirs, there would be nothing left to share on the donor's death and nothing to claim. The inheritance had been settled during the lifetime of the donor/future deceased. The *donation-partage* option constitutes a duly permitted agreement as to future succession.

Furthermore, in principle, *donation-partage* has the advantage of freezing the valuations contained in the document, as the gifted (and shared) assets will be valued on the date of the *donation-partage* (unless there is an agreement to the contrary), provided that all the protected heirs (those receiving a reserved share) were parties to the *donation-partage* document and were allocated one or several assets. This means that the gifted and shared assets will not be revalued at the time of death to verify the reserved share and determine the disposable share in the presence of forced heirs, which avoids the need for discussions in practice.

## 3. TESTAMENT-PARTAGE (DISTRIBUTION OF ASSETS)

Although rare in practice, this is a tool for anticipating succession in that it allows the testator to allocate the estate's assets to his or her heirs while also preventing them from disputing how the assets were divided. The allocated heirs may initiate an action for reduction in the event that their reserved share has been compromised, as in the case of *donation-partage*, but, for *testament-partage*, the assets are valued as at the day that the testator passes away.

## 4. ADMINISTRATION CLAUSE FOR DONEES WHO ARE MINORS

If gifts or bequests are given to a minor, the donor or testator can select a third-party administrator to manage the gifted or bequeathed assets until the donee or legatee reaches the age of majority. This proves to be a useful approach when the parents, the child's legal



representatives, are vulnerable or are not trustworthy, or in the event that one parent of the minor dies and the donor or testator does not want the other parent to manage the assets themselves.

#### 5. STIPULATION FOR THIRD PARTIES: LIFE INSURANCE POLICY

Another method of anticipating the opening of the succession is to take out a life insurance policy that constitutes a stipulation for the benefit of third parties (*stipulation pour autrui*). Using this mechanism, the policyholder usually transfers funds to an insurance company, which becomes the owner thereof and is instructed by the policyholder to pay the funds and accruals to the beneficiaries as indicated by the policyholder on his or her death. Thus, with this approach, the policyholder anticipates the opening of the succession and allocates part of his or her estate to one or several people.

It should be noted that this approach has the effect of releasing the funds transferred to the insurance company from the estate under civil law. However, the assets remain on record from a fiscal perspective and may be subject to taxation with regard to inheritance tax.

However, in our view, a life insurance policy involving the removal of the relevant funds from the inheritance estate does not permit the disinheritance of forced heirs. There is a safeguard allowing the heirs to recover all or part of funds paid to the insurance company in the case of premiums that are clearly inflated, meaning when the funds transferred to the company represent a significant share of the policyholder's estate with regard to the size of his or her fortune.

Thus, the life insurance policy is not a tool that enables the circumvention of the principle of the reserved share. Instead, it is a method of investing, while anticipating and planning for the opening of succession.

#### 6. TONTINE

Tontines are a type of agreement in which, when acquiring a property, several people agree that the last survivor will be considered the sole owner of the property and as having been so since the start. Therefore, this concerns an acquisition made under the condition precedent of their survival and a condition subsequent of their predeceasing the others.

From a civil law perspective, the property acquired is not part of the estate of those who pass away first, even though they had contributed financially to the acquisition. As this concerns an uncertain contract with consideration (*contrat aléatoire*), the heirs have no right to the acquired property because those who passed away first were not considered to have ever owned the property in question.

In order to avoid the risk of being recharacterised as a gift, the tontine agreement must contain a real contingency, namely that it is impossible to know in advance which of the buyers will outlive the others. Thus, in order to take full effect, a tontine clause must not, for example, be concluded between an octogenarian with a terminal illness and a 30-year-old in good health.

Although little used, a tontine clause can be an effective legal tool for estate planning.

#### 7. CORPORATE TOOLS

There is a wide range of tools available in Luxembourg within the context of wealth structuring, including, inter alia, tried and tested vehicles, such as the following.

- i. *Société de participations financières* (SOPARFI)

A SOPARFI is an ordinary fully taxable unregulated Luxembourg resident commercial company. Depending on the needs of the shareholders or investors, a SOPARFI can adopt several legal corporate forms. The most common legal forms are the public limited liability company (*société anonyme* or SA), private limited liability company (*société à responsabilité limitée* or Sàrl), simplified limited company (*société par actions simplifiée* or SAS) and partnership limited by shares (*société en commandite par actions* or SCA). Its main activity is to hold shares in subsidiaries benefiting from the participation exemption regime. It may also be used to receive and grant loans and to provide management services to affiliated undertakings. It may simultaneously carry out industrial and commercial activities as its primary or secondary activity.

ii. *Société de gestion de patrimoine familial* (SPF)

The SPF is an unregulated corporate vehicle dedicated to the management of the family wealth of individuals. The purpose of the SPF is to create a tax frame for the management of private wealth for individuals and intermediary vehicles acting exclusively for the management of the private assets of an individual or group of individuals. The SPF is a non-regulated corporate vehicle and is not subject to any risk diversification rules. It is strictly limited to the acquisition, holding, management and disposal of financial assets including shares, bonds, cash and derivative products. The SPF may hold participation in other companies, but only to the extent that the SPF does not become actively involved in the management of these companies. The SPF may not carry out any commercial or financing activities; therefore, it cannot provide loans to third parties. However, the SPF is allowed to invest in freely transferable debt securities.

It is also worth mentioning that the SPF may not invest in real estate directly or indirectly through a tax transparent entity, it being specified that investment in real estate through an opaque company is allowed.

iii. Partnerships and regulated fund structures, including the Specialised Investment Fund (SIF), Reserved Alternative Investment Fund (RAIF) and *Sociétés d'investissement en capital à risque* (SICAR)

Luxembourg has developed a broad range of investment structures that can be used in a wealth management context, offering various levels of flexibility, as well as various levels of regulatory supervision.

- The SIF is a regulated corporate vehicle reserved for 'well-informed' investors placed under the supervision of the *Commission de Surveillance du Secteur Financier* (CSSF). The SIF offers investment opportunities to sophisticated retail or private investors, including individuals as it is not subject to any restrictions relating to the sector in which it invests its funds or regarding investment strategies (however, the CSSF tends to favour investment by SIFs in so-called atypical assets, such as books, works of art and wine if it is restricted to institutional and professional investors).
- The RAIF is a type of investment vehicle that is not directly subject to the initial and ongoing supervision of the CSSF. However, the RAIF must be managed by a fully hedged alternative investment fund manager (AIFM) through which regulatory supervision will be performed by the supervisory authority competent for the supervision of the AIFM. The AIFM will be in charge of portfolio and risk management. RAIFs are, in principle, subject to the same legal, tax and regulatory regimes as SIFs.

- The SICAR is a regulated vehicle that offers a flexible investment structure matching the needs of risk capital investment managers and their investors. SICARs are dedicated to investments in risk and venture capital for the benefit of qualified investors.

- iv. Luxembourg limited partnership structures, such as the special limited partnership (SLP, *société en commandite spéciale* or SCS), common limited partnership (CLP, *société en commandite simple* or SCSP) and SCA

These may also be effective tools for structuring joint ventures, holding structures and fund vehicles. Given the contractual freedom and their flexible governance combined with legal certainty, Luxembourg partnerships prove highly attractive for any structuring of a business or investment activity while offering efficient tax treatment. The main specificity of the SLP is that, unlike the CLP and SCA, it is not vested with legal personality. Both the SLP and CLP regimes have proven to be widely accepted and used by all persons wishing to have an onshore European domiciled partnership with similar features to Anglo-Saxon types of partnership structures.

- v. Foundations

Luxembourg has recently adopted the law of 7 August 2023 on non-profit associations and foundations. Foundations that are covered by the law are those that essentially use their income to achieve a goal that meets the following conditions:

- the aim pursued is of general interest, as defined in the articles of association, and is of a philanthropic, social, religious, scientific, artistic, cultural, educational, sporting, therapeutic or medico-social nature; is of a tourist nature; protects the environment or animals; or defends and promotes human rights, and goes beyond local interests; and
- the aim pursued is of a permanent nature.

## B. *Fiduciary duties*

Contractual tools, such as fiduciary agreements, may also be used for structuring wealth and investments.

### 1. DEFINITION

A fiduciary contract is a contract by which a person, the fiduciant (principal), agrees with another person, the fiduciary, that subject to the obligations determined by the parties, the fiduciary will become the owner of the assets that form the fiduciary assets. This contract was introduced via the law of 27 July 2003 (the 'Fiduciary Law'), which ratified The Hague Convention on the law applicable to trusts and their recognition, and which regulates fiduciary contracts.

### 2. PURPOSE AND FEATURES

Under the Fiduciary Law, the fiduciary must be a credit institution, investment firm, investment company with variable or fixed share capital, securitisation company, fiduciary representative acting in the context of a securitisation transaction, management company of common funds or securitisation funds, pension

fund, insurance or reinsurance undertaking, or national or international public body operating in the financial sector.

The main features of the legal regime applicable to fiduciary contracts governed by the Fiduciary Law can be summarised as follows:

- transfer of ownership to the fiduciary;
- ownership rights are granted to the fiduciary over the fiduciary property;
- segregation of property (outside the scope of the personal assets of the fiduciary in the case of bankruptcy or insolvency); the fiduciary assets are segregated from the personal assets of the fiduciary and from any other fiduciary assets;
- non-disclosure of the identity of the fiduciant; and
- fiduciary agreements may be used for various purposes:
  - management purposes (*fiducie-gestion*);
  - guarantee purposes (*fiducie-sûreté*);
  - credit purposes (*fiducie-crédit*);
  - carrying purposes (*fiducie-portage*); and
  - gift or inheritance purposes (*fiducie-donation*).

### C. *Treatment of foreign trusts and foundations*

Luxembourg legislation does not contain a legal trust framework. Under Luxembourg law, it is not possible to legally create a trust. However, Luxembourg has ratified the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition, and the Law of 27 July 2003 approving the Hague Convention of 1 July 1985 on the Law applicable to Trusts and their Recognition, as amended. Thus, Luxembourg law does recognise the concept of trusts. Trusts that are set up validly and governed by the law of a foreign jurisdiction shall produce legal effects in Luxembourg, provided that the recognition of the trust does not violate Luxembourg public policy (*ordre public*) and the Hague Convention. For example, as forced heirship rules would be considered as public policy, it is thus not possible to set up a foreign trust to avoid Luxembourg forced heirship rules if Luxembourg law applies.

A foreign trust cannot be imported to Luxembourg, but it can be administrated from Luxembourg. Offshore families should note that, if according to the law applicable to any foreign trust, the settler has neither ownership nor control over the assets, the trust assets are not considered part of the settler's estate for Luxembourg inheritance law purposes or for the purpose of a collection procedure against the settler. This is subject to the condition that the trust is an irrevocable, fully discretionary trust where the settler is not the same person as the beneficiary, and is properly and genuinely set up and administered as such. If, for example, the settler does not respect the separation of trust assets from his or her own assets and constantly bypasses the trustee in the administration of the trust assets, the trust assets may be considered as the settler's own under Luxembourg law.

Because there are no clear rules relating to trust assets held in Luxembourg, the issue of the ownership of trust assets and the holding of trustee accounts with Luxembourg banks should be carefully handled in order to protect such assets properly.

Note also that, since a bill creating a register of *fiducies* and trusts was adopted on 1 July 2020, foreign trusts have been obliged to complete disclosure formalities with the Luxembourg authorities if the trustee is established or domiciled in Luxembourg, if they enter into a business relationship with a professional established in Luxembourg or if they acquire real estate located in Luxembourg for the trust. In this respect, there is, for example, an obligation for the trustee to keep an internal file listing the beneficial owners of the trust at the trust's registered place of business if it is administered from the Grand Duchy

of Luxembourg. The file is accessible to national competent authorities and professionals with whom the trustees enter into a business relationship or carry out certain types of transactions. Such information must also be shared with the Luxembourg authorities by filing with the Luxembourg register of *fiducies* and trusts. Such information is therefore available to:

- national competent authorities, such as the public prosecutor and the tax administration on request for the purpose of their supervisory duties; but also
- self-regulatory bodies (ie, the Bar Council and the Chamber of Notaries); or
- professionals of the financial sector (eg, credit institutions and insurance companies) in the context of their customer due diligence measures.

The public has no access to this register of *fiducies* and trusts.

Non-compliance with the obligations imposed on the trustees is punishable by administrative penalties, such as fines of up to €1,250,000.

#### **IV. Tax**

##### *A. Tax framework for individuals*

###### 1. TAX RESIDENCY CONCEPT

Individuals having either their domicile (ie, the place they occupy as a home under circumstances that indicate that they will retain and use it) or their usual place of abode (ie, where they are present for a period of at least six months per year) in the Grand Duchy of Luxembourg will be considered tax residents. More precisely, individuals are deemed to have their:

- i. tax domicile in Luxembourg if:
  - their place of residence is actually used in a continuous, permanent and effective manner;
  - they have indicated their intention to maintain it;
  - they possess a residential dwelling (owner, tenant, etc); and
  - they have a residential use of the dwelling; and
- ii. usual place of abode (ie, main place of residence in Luxembourg) if:
  - they spend more than six consecutive months in Luxembourg (even if the period overlaps two fiscal years or is interrupted by short periods of absences);
  - the stay cannot be temporary;
  - they have a predominant physical presence.

Should an individual be considered a tax resident under more than one country's domestic legislation, the relevant double tax treaty concluded between Luxembourg and such a country will determine tax residency.

Individuals who are not considered tax residents in Luxembourg acquire non-resident status and will be subject to Luxembourg income taxes only on Luxembourg source income. By contrast, Luxembourg tax residents are subject to tax on their worldwide income (with available treaty and non-treaty relief).

## 2. LUXEMBOURG INCOME TAX RULES

Luxembourg residents and non-residents with Luxembourg source income may be subject to Luxembourg income tax on an annual basis (ie, calendar year) at progressive income tax rates (ranging from zero per cent to 42 per cent).

For the purpose of income tax, individuals are granted a tax class depending on their personal situation (family status). The employment fund contribution is assessed as a surcharge applicable on the income tax computed using progressive rates (ie, seven per cent for income not exceeding €150,000 (for single taxpayers) or €300,000 (for couples jointly taxed) and nine per cent for income above these amounts). The Luxembourg marginal tax rate therefore amounts to 45.78 per cent (including the employment fund contribution).

Non-residents are generally subject to the aforementioned progressive rates, but with a minimum rate of 15 per cent.

Non-residents who are taxable in Luxembourg on more than 90 per cent of their worldwide income, or alternatively, whose income taxable outside Luxembourg does not exceed €13,000, can opt to be treated as if they were Luxembourg residents.

Income subject to Luxembourg income taxes is restricted only to the following eight categories defined by Luxembourg tax legislation:

- trade and business income;
- agriculture and forestry income;
- income from independent professional services;
- employment income;
- pension and annuities income;
- investment income (ie, interest and dividends);
- rental and royalty income; and
- miscellaneous income, including capital gains.

Income from each category is subject to specific calculation rules that, after netting, are aggregated in order to determine the total net income. Specific expenses are deducted to determine the annual taxable income. Losses arising in one category are set against the total net income in other categories, if not otherwise determined.

The tax treatment of the main categories of income may be summarised as follows:

<b>Individual taxation</b>		
<b>Type of income</b>	<b>Luxembourg resident individual</b>	<b>Non-resident individual</b>
<b>Business income</b>	<p>Progressive income tax rates</p> <p>All income and capital gains attributable to business activity is included in this category</p>	<p>Only to the extent that the non-resident individual operates through a permanent establishment or a fixed place of</p>

	Income from an independent economic activity can be subject to VAT	business located in Luxembourg
<b>Employment income</b>	Progressive income tax rates Wages are withheld at source	Only if Luxembourg source income
<b>Director's fees</b>	20% withholding tax (WHT) calculated on the gross income payable and creditable on progressive income tax rates  Activities performed for day-to-day management are subject to progressive income tax rates  Director's fees are, as a rule, subject to 17% VAT, unless they remunerate the management of a regulated investment fund or a regulated/unregulated alternative investment fund (AIF) (VAT exemption for fund management services)	Only if Luxembourg source income  20% final WHT under certain conditions (optional)  17% VAT can become due under the 'reverse charge' mechanism at the level of the Luxembourg company receiving the director services
<b>Interest</b>	Progressive income tax rates  Exception when paid by a Luxembourg paying agent (20% final WHT)	No taxation  No WHT
<b>Dividends</b>	15% WHT on gross amount paid by Luxembourg companies and creditable on progressive income tax rates  Exemption of 50% of the gross amount received from qualifying entities	Only if Luxembourg source income  15% WHT
<b>Royalties</b>	Progressive income tax rates  Generally subject to 17% VAT, unless located abroad	No taxation  No WHT
<b>Rental income</b>	Progressive income tax rates and application of specific expenses  For VAT purposes, a voluntary 'option to tax' is possible under certain conditions	Only if Luxembourg source income  No WHT  For VAT purposes, a voluntary 'option to tax' is possible under certain conditions
<b>Capital gains on movable assets</b>	Progressive income tax rates (if total short-term gains for the year amount to at least €500)  No taxation of capital gains after a six-month holding period, except where the seller holds a substantial participation of more than 10% in the target company, which will lead to taxation with a reduced tax rate (half of global rate, that is, 0% to 22.89%)  Step-up on basis for immigrants (see below)	No taxation of capital gains after a six-month holding period

<b>Capital gains on real estate</b>	<p>Progressive income tax rates applicable if the sale occurs within two years after the acquisition</p> <p>Reduced tax rate if the disposal takes place more than two years after the acquisition</p> <p>No taxation on capital gains in connection with the main residence</p> <p>For VAT purposes, a voluntary 'option to tax' is possible under certain conditions</p>	<p>Only if Luxembourg source income</p> <p>For VAT purposes, a voluntary 'option to tax' is possible under certain conditions</p>
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### 3. OTHER TAXES

#### i. Net wealth tax (NWT)

Luxembourg NWT for individuals was abolished on 1 January 2006.

#### ii. Property tax

Property tax (*impôt foncier*) is levied by municipalities in Luxembourg on the unitary value (market value as of 1 January 1941) of real estate property, built on or otherwise, located in Luxembourg.

The communal tax rate varies according to the municipality and depending on the situation and the type of property.

#### iii. Gift tax

Gift tax may be due on a gift or donation only if the gift is recorded in a deed and submitted for registration to the *Luxembourg Administration de l'Enregistrement et des Domaines*. Donations of immovable property must be recorded in a notarial deed and therefore always trigger gift tax.

Gift tax is computed on the fair market value of the gift received by a donee. The rates vary depending on the relationship between the donor and donee.

Relationship between the donor and donee	Applicable rates (%)
<b>Direct ascendants or descendants</b>	1.8 or 2.4
<b>Spouses and registered partners*</b>	4.8
<b>Brothers and sisters</b>	6
<b>Uncles/aunts, nephews/nieces and parents-in-law</b>	8.4
<b>Great-uncles/great-aunts and great-nephews/great-nieces</b>	9.6
<b>Others</b>	14.4

\* The partnership must be registered for at least three years before the opening of the estate

Furthermore, a municipal surcharge of 50 per cent is applicable on the amount of the registration duty for certain property located in Luxembourg City.



Additionally, donations of real estate are also subject to a one per cent transcription duty (*droit de transcription*).

Donations of immovable property located abroad are exempt from gift tax in Luxembourg, even if they have been registered in Luxembourg.

#### iv. Inheritance tax

Inheritance tax is levied in Luxembourg on the estate of the deceased only if his or her last residence was located in Luxembourg at the time of death. However, the inheritance of immovable property located abroad is expressly exempt from Luxembourg tax, even if this property is not subject to tax in the jurisdiction where it is located. Symmetrically, if the last residence of the deceased was not in Luxembourg, transfer tax may apply on the deceased's real estate located in Luxembourg.

Luxembourg has not concluded any double tax treaties on inheritance tax. However, Luxembourg is generally more competitive in terms of inheritance tax rates than its neighbouring countries France, Belgium and Germany.

Inheritance tax rates vary according to the value of the estate and the degree of relationship between the heir/beneficiary and deceased.

Relationship between beneficiaries/deceased	Applicable rates (legal part only) (%)
Direct ascendant or descendant	0
Spouses or registered partners*	0
Brothers and sisters	6
Uncles/aunts, nephews/nieces, adoptive parents and adopted persons	9
Great-uncles/great-aunts, great-nephews/great-nieces, adoptive parents and descendants of the adopted person	10
Others	15

\* The partnership must be registered for at least three years before the opening of the estate.

Any inheritance with a net value exceeding €10,000 is subject to a surcharge tax varying between 1/10 and 22/10.

#### 4. STEP-UP MECHANISM

An individual immigrating to Luxembourg will be taxed as a resident individual as from the day they become a Luxembourg tax resident. There are no specific Luxembourg tax rules affecting temporary residents.

Nevertheless, the Luxembourg law dated 18 December 2015 introduced a new 'step-up' mechanism for individuals immigrating to Luxembourg (applicable as from the 2015 tax year). According to this mechanism, for the purposes of capital gains taxation, individuals transferring their tax residency to the Grand Duchy of Luxembourg are allowed to determine the acquisition price of their substantial participations based on the fair market value of those participations at the moment the individual

becomes a Luxembourg tax resident, provided that, prior to the transfer of tax residency, the individual has not been a Luxembourg resident for more than 15 years or a non-resident for less than five years.

As a consequence, latent gains accumulated in qualifying participations held by the individual before the transfer of tax residency to Luxembourg are disregarded for Luxembourg tax purposes. The step-up is granted by Luxembourg irrespective of an absence of exit taxation on such latent gains by the former country of tax residency. Thus, only increases in value accumulated after the re-domiciliation to Luxembourg are subject to capital gains taxation.

## *B. Taxation of investment income*

### 1. DIVIDENDS

Whether the distributing company is resident or non-resident, dividend distributions to a Luxembourg tax resident individual are taxable as income from movable property by way of assessment (ie, the taxpayer must declare the gross dividend income on their annual tax return) according to the progressive tax schedule.

The first €1,500 in dividends is a tax-free allowance. The exempt amount is increased to €3,000 for spouses/partners filing jointly.

In addition, a 50 per cent exemption is granted on the gross amount of dividends received by a Luxembourg resident shareholder if these dividends are distributed by one of the following:

- a fully taxable resident company;
- an EU-resident company covered by Article 2 of Council Directive 2011/96/EU of 30 November 2011 on the taxation of parent companies and subsidiaries, as amended by Council Directive 2014/86/EU of 8 July 2014; and
- a fully taxable limited company (*société de capitaux*) which: (1) is resident in a state that has entered into a double tax treaty with Luxembourg; and (2) is fully liable to a tax corresponding to Luxembourg corporate income tax (ie, at least 8.5 per cent in 2023).

Finally, a tax credit is granted for the domestic withholding taxes that were levied at the time of the dividend payment (ie, 15 per cent of the gross amount of dividends). A tax credit for foreign withholding taxes is generally available (subject to the provisions of the applicable double tax treaty, if any).

### 2. INTEREST INCOME

#### i. Non-residents

Under current Luxembourg tax law, there is no withholding tax on interest (paid or accrued) to non-residents.

#### ii. Residents

Payments of interest or similar income made by a paying agent established in Luxembourg to or for the immediate benefit of a beneficial owner who is a natural person and Luxembourg tax resident may be

subject to a withholding tax of 20 per cent. Such withholding tax will be in full discharge of income tax if the beneficial owner is an individual acting in the course of the management of his or her private wealth.

Luxembourg resident individuals acting in the course of their private wealth management who are beneficially entitled to interest payments made by a paying agent established in a Member State of the EU (other than Luxembourg) or European Economic Area (other than an EU Member State) may opt for a final withholding tax of 20 per cent. In this case, the 20 per cent tax will be calculated on the same basis as for payments from Luxembourg paying agents. The option must cover all interest payments made by paying agents to the beneficial owner during the calendar year. The Luxembourg resident individual who is beneficially entitled to the interest is responsible for declaring this interest income and enabling payment of the 20 per cent tax, which is non-recoverable. However, where the beneficiary individual is acting in the course of the management of his or her business activity, such interest income is subject to income tax at the progressive ordinary rate forming part of the individual's business income.

Interest income that is not eligible for the 20 per cent final withholding tax is taxable, similar to dividends, as income from movable property according to the progressive tax schedule. The first €1,500 of the interest income is a tax-free allowance. The exempt amount is increased to €3,000 for spouses/partners filing jointly. However, note that this maximum tax-free allowance encompasses both interest and dividend income together.

Foreign withholding taxes on interest payments can generally be credited against the 20 per cent withholding tax or progressive income tax liability on request.

### 3. CAPITAL GAINS FROM MOVABLE ASSETS

#### i. Luxembourg residents

In Luxembourg, capital gains realised by a resident individual acting within the management of their private wealth on the transfer of shares in a company are taxable if they qualify as either: (1) speculative gains; or (2) gains on substantial participation.

##### a. *Speculative gains*

If shares are transferred within the first six months of their acquisition or if their disposal precedes their acquisition, any resulting capital gains are deemed to be speculative gains and are taxed as miscellaneous income subject to the progressive income tax rates applicable to the individual.

Speculative gains are not subject to tax if the aggregate gains realised within the same tax year do not exceed €500. The deductibility of losses is subject to limitations. Gains are also subject to the 1.4 per cent long-term care contribution (part of the social security system).

Where shares are held for more than six months, capital gains realised on them are not taxable, provided that the entire participation is not deemed to be substantial.

##### b. *Gains on substantial participation*

Participation is deemed to be substantial where a resident individual shareholder holds, either alone or together with his or her spouse/partner and/or minor children, directly or indirectly and at any time within the five years preceding disposal, more than ten per cent of the share capital of the issuing company.

Capital gains realised on a substantial participation more than six months after its acquisition are subject to income tax applying the half-global rate method (ie, between zero per cent and 22.89 per cent in 2020) and are reduced by an allowance of €50,000 (€100,000 for spouses/partners filing jointly) every ten years.

A shareholder is also deemed to have disposed of a substantial participation if it was acquired for no consideration within the five years preceding the disposal, and if it constituted a substantial participation when held by the alienator (or alienators, in the case of successive transfers for no consideration within the same five-year period). A disposal may include a sale, exchange, redemption, contribution or any other kind of alienation of the shares.

#### ii. Non-Luxembourg residents

Capital gains realised by non-Luxembourg residents on substantial participations (as defined above) are taxable if the shares are disposed of within the six months either following the acquisition or preceding it. The latter scenario can occur, for example, when shares in a listed company are sold prior to their acquisition (on a regulated market that authorises such activity). This rule applies if the non-resident was previously a Luxembourg tax resident for more than 15 years and became a non-resident less than five years before the disposal. However, the provisions of double tax treaties can override the rules for non-residents (as most of the double tax treaties entered into by Luxembourg generally allocate the right to tax capital gains on movable assets to the shareholder's country of residence).

The taxable net income on movable capital gains is determined by the difference between the transfer price and the acquisition price plus the acquisition costs.

#### 4. CAPITAL GAINS FROM IMMOVABLE ASSETS

Capital gains realised on immovable assets within the first two years after purchase are treated as speculative gains and are fully taxable at the applicable income tax rate.

Capital gains deriving from the disposal of real estate more than two years after purchase are taxable at a preferential rate corresponding to half of the ordinary progressive tax rate (ie, zero per cent to 22.89 per cent) after adjustment for inflation of the acquisition price and application of an allowance (which is renewed every ten years) of €50,000 (€100,000 for spouses/partners filing jointly).

An additional allowance of €75,000 is granted for capital gains realised on the disposal of real estate inherited from a direct ascendant if it was the principal residence of the taxpayer's parents (or the spouse's parents). Capital gains derived from the disposal of the principal residence of a Luxembourg tax resident individual are exempt from income tax (under certain conditions).

#### 5. CARRIED INTEREST

A specific tax regime for carried interest has been implemented by the Law of 12 July 2013 in Luxembourg. Carried interest is a variable remuneration for the management of an AIF consisting of a share of the profit on the gain realised on the exit of the investments held. Under such a regime, carried interest derived by individuals who are employees of AIFMs or of management companies of AIFs are taxable at ordinary income tax rates (under conditions).

A special regime is also provided for employees who migrate to Luxembourg, within five years after the entry into force of the law. In that case, they benefit from a reduced tax rate (a quarter of the global rate, ie, a maximum of 11.45 per cent). The following conditions must be fulfilled to benefit from this exception:

- transfer of residency to Luxembourg as from 2013 to 2018;
- no tax residency in Luxembourg for the five years preceding 2013;
- no advance payment on carried interest received; and
- carried interests must be paid after investors have recovered the totality of their investment.

The taxation of carried interest generates significant attention and generates diverse perspectives from various parties involved. However, despite ongoing conversations, no concrete developments or changes to the current taxation framework for carried interest have emerged.

### C. *Contractual ownership structure*

#### 1. INSURANCE PRODUCTS

##### i. Definition

A stipulation for third-party products (eg, life insurance contracts) is a contract pursuant to which the stipulator receives from another person, the promising party, a promise that the promising party will perform a certain task for the benefit of a third party, the beneficiary.

##### ii. Purpose and features

Luxembourg has gained strong experience in using insurance products as private wealth tools. The Luxembourg insurance sector is under the supervision of the Commissariat aux Assurances. Insurance products offer certain flexibility as long as the beneficiary has not accepted the contract:

- policyholder remains in control of the assets (there is no transfer of ownership);
- policyholder remains in control of the investment policy (especially for unit-linked insurance products); and
- policyholder benefits from the substantial protection and confidentiality of assets.

##### iii. Tax regime

Life insurance products benefit from an exemption in Luxembourg in the event of partial or total redemption of the premium, as well as in the event of the payment of a capital endowment to the beneficiaries. Inheritance tax is due in Luxembourg if the holder is resident in Luxembourg at the time of his or her death. If the proceeds are received by a relative of the first degree (eg, a child) no inheritance tax is due to the extent foreseen by law.

A VAT exemption applies to insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents.

#### 2. FIDUCIARY AGREEMENT

For the definition, purpose and features of a fiduciary contract, see III.B.

##### i. Tax regime

According to law, the assets transferred to the fiduciary by the fiduciant are attributable to the fiduciant for tax purposes. The settler is therefore deemed to own the trust assets and deemed to be the beneficiary of the income generated from these assets for wealth tax, income tax and municipal business tax purposes.

In terms of registration duties, the law stipulates that the execution of a fiduciary contract and its amendments are not subject to registration formalities unless they affect real estate located in Luxembourg, as well as aircraft, ships or inland waterway vessels registered in Luxembourg, or rights to be transcribed, registered or recorded concerning such property.

#### **Note**

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<sup>1</sup> All statutory references are to the Luxembourg Civil Code unless otherwise stated.