Ogier

S.à r.l. or SAS?

Insights - 22/09/2016

S.à r.l. or SAS?

The private limited liability company (*société à responsabilité limitée* or **S.à r.l.**) is, by number, the most widely used form of companies in Luxembourg. With the introduction of the simplified public limited liability company (*société par actions simplifiée* or **SAS**) within the Luxembourg legal framework, the question as to whether the SAS may become a credible alternative to the S.à r.l. arises.

Inspired by the French market, the SAS is characterised by a very high degree of flexibility and a very limited level of statutory prescription, notably as regards its mode of governance which can be tailored to the shareholders' needs. Another advantage of the SAS is the ability to include specific clauses in its articles of association aimed at regulating shareholder relations, thereby stabilising the control of the company. The SAS is also less regulated than the S.à r.l. in terms of share transfer restrictions, shareholders exclusion and standstill provisions. Contrary to similar provisions in a shareholders' agreement, such clauses are binding upon third parties if provided for in the articles of association.

The purpose of this client briefing is to highlight the main characteristics and differences between the S.à r.l. and SAS.

	private limited liability company	simplified public limited liability company
	yes	yes
	no but eligible for US tax purposes	no
	1 to 100	1 to unlimited

	- public record - share register can be inspected by any shareholder	- no disclosure requirements of the shareholders - share register can be inspected by any shareholder
	articles of association - notarial deed required	articles of association - notarial deed required
	- full publication of the articles of association and amendments - annual accounts - details on managers - details on shareholders	- full publication of the articles of association and amendments - annual accounts - details on chairman and of directors (if any)
	limited or unlimited	limited or unlimited
	EUR 12,000	EUR 30,000
	- new shares are issued at the nominal value or, in the absence thereof, at par value - shares with different nominal value can be issued	- new shares are issued at the nominal value or, in the absence thereof, at par value - shares with different nominal value can be issued - shares without nominal value for a subscription price below their accounting par value can be issued in certain circumstances
	fully paid up	partially paid up: at least 25% of the shares
	in cash, in kind or by way of sweat equity (*apports en industrie*)	- in cash or in kind - contributions in kind are subject to a valuation report from an independent auditor (no valuation report is however required in the case of a contribution of a receivable held by the holder of the debt instrument against the company)
	limited to the amount paid-up / committed	limited to the amount paid-up / committed
	authorised share capital permitted (subject to limitations if new shares	authorised share capital permitted (subject to limitations if new shares

	are issued to a non-shareholder of a S.à r.l.)	are issued to a non-shareholder of a S.à r.l.)
	registered shares	bearer or registered shares or dematerialised form
	may not be issued	may be issued subject to specific conditions
	may be issued	may be issued
	may be issued – economic and voting rights freely determined in the articles of association	may be issued – economic and voting rights freely determined in the articles of association
	cannot be issued	free shares can be issued to limited beneficiaries (notably to employees and management)
	no	exercise period for preferential subscription rights limited to 14 days minimum
	not freely transferable to non-shareholders	- freely transferable - rules relating to the transfer of shares can be freely set out in the articles of association, e.g. prior consent of the shareholders, right of preemption, tag-along, drag-along, etc.
	no specific provisions but transfer of shares to non-shareholders can only be made with the approval of 75 % of the share capital (possibility to decrease the majority to 50%)	- lock-up clauses are valid provided that they are limited in time - approval and pre-emption clauses are valid provided that the non-transferability period starting from the date of a transfer approval request or the invitation to exercise pre-emptive rights do not exceed 12 months
	valid but subject to limitations (transfer of shares to non-shareholders can only be made with the approval of 75 % of the share capital (possibility to decrease the	validity of arrangements organizing the transfer of shares that do not have as sole purpose the control of participation in profits and losses

	majority to 50%))	
	not permitted	not permitted
	overall principle: one share = one vote but majority requirements at general meetings are based on the proportion held by a shareholder in the share capital	overall principle: voting rights proportionate to the nominal value of the shares (i.e. shares with nominal value of EUR 1 = one vote, shares with nominal value of EUR 2 = two votes)
	management can suspend voting rights in case of defaulting shareholders	management can suspend voting rights in case of defaulting shareholders
	waiver to exercise voting rights (in full or in part) possible on a permanent or temporary basis	waiver to exercise voting rights (in full or in part) possible on a permanent or temporary basis
	valid to the extent: (i) concluded in the corporate interest of the company (ii) do not jeopardise the principle of independent vote (iii) are limited in time	valid to the extent: (i) concluded in the corporate interest of the company (ii) do not jeopardise the principle of independent vote (iii) are limited in time
	no specific rights	minority action may be launched by shareholders representing at least 10% of the voting share capital
	no specific rights	no specific rights
	shareholder(s) representing 10% of the share capital or holding 10% of the voting rights can address questions to the management. In the absence of response by the management within one month, an independent expert can be appointed by a Luxembourg court to establish a report on the operations of the company that ' the subject of the written questions.	shareholder(s) representing 10% of the share capital or holding 10% of the voting rights can address questions to the management. In the absence of response by the management within one month, an independent expert can be appointed by a Luxembourg court to establish a report on the operations of the company that ' the subject of the written questions.
	private and public placement subject to limitations for the issue of convertible bonds	private and public placement

	can be passed by circular resolution, unless a notarial deed is required	can be passed by circular resolution if provided for in the articles of association, unless a notarial deed is required
	not necessary to convene annual general meeting to approve annual accounts if not more than 60 shareholders. If no annual general meeting is held, the resolution approving the annual accounts must be passed by circular resolution	not necessary to convene annual general meeting to approve annual accounts except if provided for in the articles of association. If no annual general meeting is held, the resolution approving the annual accounts must be passed by circular resolution.
	- approval of the annual accounts and allocation of results - appointment and removal of managers and their remuneration - appointment and removal of auditors and their remuneration (if applicable) - discharge of liability of managers and statutory auditors (if applicable) - acquisition of the company's own shares, without cancelation of the acquired shares - liability action against the managers and auditors - amendments to the articles of association (including *inter alia* the following: change of corporate purpose, change in the legal form of the company, increase and reduction of the share capital and capital reduction by way of the acquisition of the company's own shares, with their subsequent cancelation) - the commencement of voluntary liquidation and related matters - a merger, de-merger or similar re-organisation - prior approval for transfer of shares to non-shareholders - changing the nationality of the company	shareholders have to be consulted on certain decisions only: - increase or reduction in the share capital - merger or de merger - dissolution - transformation into another legal form - appointment of the auditors - approval of the annual accounts other decisions can be taken by the chairman if decided in the articles of association

	- increasing the shareholders' commitments	
	- ordinary resolutions: no quorum and simple majority of votes - extraordinary resolutions (modifications of articles of association): majority of 75% of the share capital - modification of rights attached to different classes of shares require approval by each class - approval of a new shareholder: majority of 75% of the share capital (can be reduced to 50 %)	the articles of association determine the modalities of the consultation, the quorum and the conditions of majority. A simple, relative, absolute or qualified majority can be stipulated
	subject to the following conditions: - interim accounts shall be drawn-up showing sufficient funds available for distribution are sufficient - the amount to be distributed may not exceed total profits made since the end of the last financial year for which the annual accounts have been approved, plus any profits carried forward and sums drawn from reserves available for this purposes, less losses carried forward and any sums to be placed to reserves pursuant to the requirements of the law and of the articles of association - the decision of the board to distribute an interim dividend may not be taken more than two months after the date at which the interim accounts referred to under the first item above have been made up - the internal or the external auditor (if any) shall verify whether the above conditions have been satisfied	subject to the following conditions: - interim accounts shall be drawn-up showing sufficient funds available for distribution are sufficient - the amount to be distributed may not exceed total profits made since the end of the last financial year for which the annual accounts have been approved, plus any profits carried forward and sums drawn from reserves available for this purposes, less losses carried forward and any sums to be placed to reserves pursuant to the requirements of the law and of the articles of association - the decision of the board to distribute an interim dividend may not be taken more than two months after the date at which the interim accounts referred to under the first item above have been made up - the internal or the external auditor (if any) shall verify whether the above conditions have been satisfied
		- the sole legal requirement is to provide for a chairman who is the only

		person entitled to represent the SAS
	- one or more managers - if several managers, they form a board of managers only if specifically provided for in the articles of incorporation	vis-à-vis third parties - the articles of association set the rules on internal organisation (e.g. management structure, collective decisions and information to the members) - therefore, the articles of association can entrust the management of the company to a sole chairman, or to a board of directors
	daily management can be delegated	delegation to directors possible
	- as determined in the articles of association - unless otherwise provided for in the articles of association, each manager can represent the company vis-à-vis third parties	- chairman represents the company - The articles of association may also provide for the appointment of managing directors (*directeurs généraux*) who also have the power to represent the company
	only for cause unless provided for by the articles of association	the articles of association can organise the conditions of dismissal of the chairman or the circumstances when he/she can lose his/her mandate (e.g. modification of the control of the company, decrease of his stake, loss of his quality of shareholder, etc.)
	- must prepare annual accounts and annual accounts must be published - annual accounts to be approved within six months following the end of the financial year	- must prepare annual accounts and annual accounts must be published - annual accounts to be approved within six months following the end of the financial year
	- statutory auditor only if more than 60 shareholders - external auditor mandatory if certain thresholds are met	- statutory auditor / supervisory board mandatory - external auditor must be appointed if certain thresholds are met
		- if the value of the net assets of the company falls below 50% of the share capital, management will be required to issue a special explanatory reports (which can be waived) that includes proposals regarding whether or not to

		continue the company's activities
	no specific requirements	- management must convene an extraordinary general meeting of shareholders so that it is held within a period not exceeding two months from the time at which such losses were or should have been ascertained by them and such meeting must decide on whether the company is to be dissolved or not

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

Meet the Author

Bertrand Géradin

Partner

Luxembourg Legal Services

E: bertrand.geradin@ogier.com

T: +352 2712 2029

Key Contacts

Laurent Thailly

Partner

Luxembourg Legal Services

E: laurent.thailly@ogier.com

T: + 352 2712 2032

Related Services

Corporate