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Private Asset Management Company *("SOGEPAF" – Société de Gestion de Patrimoine Familial" ("SPF"))*

Introduction of a new type of company in Luxembourg

Current situation:

On 26 April 2007 has been voted the law introducing the Private Asset Management Company *("Société de Gestion de Patrimoine Familial - SPF").* It has been exempted from the constitutional second vote by the High Formation of State Council *("Haute Corporation du Conseil d'Etat")*.

This SPF, which many professionals have waited for, has now become real.

The publication of the law in the Memorial has been done today (Mémorial A n°75, 14 May 2007, page 1.607). Thus, nothing shall interfere the entry into force of this law, which, subject to the applicable principles in the Grand Duchy of Luxembourg, happens three frank days after the insertion in the Memorial (in this case on 18 May 2007).

We can say that the first SPF will be set up on this date, the projects of formations having soon been prepared in many law firms of Luxembourg.

System:

According to the whole preparatory works of the Chamber of Deputies until the final project, this law has not been the object of fundamental modifications vis-à-vis the content of the first project (project n°5637, deposed in the Chamber of Deputies on 20 November 2006).

One of the reasons for this quick work is certainly the conformity of the project to the European laws and regulations, of which the government of Luxembourg made sure vis-à-vis the European instances (especially the General Direction of the European Commission protecting the competition, currently directed by Ms Neely KROES). It is the same General Direction which had conducted Luxembourg to repeal (by "phasing-out" until the end of 2010) the current system of the holding companies referred to under the law of 31 July 1929.

Another reason for the quick adoption of this law is certainly that it had become time for the Grand Duchy of Luxembourg to create a really attractive tool, with low tax, permitting private investors to manage their family (financial) patrimony by a flexible and tax free method, without too many administrative obligations.

We have to say that, in general, these objectives have been reached.

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The SPF is a company set up under the form of commercial capital companies (joint stock company *"société anonyme"*, limited liability company *"société à responsabilité limitée"*, partnership limited by shares *"société en commandite par actions"*, cooperative company limited by shares *"société cooperative sous forme d'actions").*

Its objects are to (and have to be limited to) acquire, hold, manage and realize assets, assets which the law of 11 May 2007 mainly defines by cross-reference to the legislation about the financial guarantees (law of 5 August 2005). Actually, it can be the management of cash and of "any kind" of assets held in account.

The definition given by the law of 5 August 2005 is very large by its scope of financial instruments covered, and we can understand that any kind of assets, securities and financial instruments (structured and tie-in products, exchange instruments, SWAPs etc.) are included. The precious metals are also included (see the report on the grounds for the bill of law).

The SPF must not have commercial or trade activities, neither shall it perform financial services to third persons (non partners). It must not exercise a real estate activity, neither hold directly or indirectly real estates (see the report on the grounds for the bill of law).

Nevertheless, the SPF can hold interests in Luxembourg or foreign companies. It can even hold interests as majority and controlling shareholdings.

There are legal restrictions about the right of control on subsidiary companies, as the law of 11 May 2007 highlights that the SPF is neither authorized to appoint members of the board directors or supervision organs (see the bill of law for the reasons), nor to designate its own directors or managers into these organs.

There are two other restrictions, which seem to derive implicitly from the law of 11 May 2007, and this, because of the fact that the SPF has not the right to have, in its name or for itself, commercial activities. These restrictions stand from old precedents of the Registration and Land Administration (*"Administration de l'Enregistrement et des Domaines"),* about the 1929 holding companies. The SPF - as today the 1929 holding companies – will be kept under supervision by this Administration, organically separated from the Tax Administration *("Administration des Contributions")*.

The SPF will not be able to - according to the author's opinion - hold non company type interests (direct *joint ventures*), and not to participate 100% in the capital of other companies (in that case the company would become *de facto* entrepreneur, according to the interpretations given about 1929 holdings).

The articles of association of the SPF Company have to mention *expressis verbis* that the SPF will abide by the provisions of the law of 11 May 2007, and the name of the company has to be followed by the initials "SPF" or "Société de gestion de patrimoine familial".

The SPF can operate with the legal minimum capital depending on the type of company chosen (see hereabove). The old limit of 1.000.000.- LUF (about 25.000.- EUR) for the 1929 holdings as a minimum threshold is no more applicable.

Members:

The SPF cannot place or offer its stocks or shares to the public. Thus, the listing and quotation of shares (or other securities of a SPF) in a stock exchange or other type of market open to the public, are certainly excluded.

The SPF has to reserve its securities to a "limited circle of persons". This is a very crucial condition, because of the essence of the SPF, which is defined under the article 3 of the law of 11 May 2007, and it is circumvented to the following persons:

- one (or more) physical person(s) acting for the management of its (their) private patrimonial asset, or

- one patrimonial entity (legal person, trust a.s.o.) exclusively acting for the management of the private patrimonial asset of one or more physical persons, or

- an intermediary, acting for the final investors.

The bill of law strengthens that an "investors'club" or a "familial group" would be eligible to set up a SPF.

The SPF may undergo indebtedness to finance its activity! It can finance itself by advances of its partners, financial loans or bonds.

A debt relation of the octuple vis-à-vis the capital will be tolerated (thin-capitalisation) in the case of indebtedness under normal debts or debenture loans (debts) - even by way of long-term bonds. As a matter of fact, the old difference – as applicable for the 1929 holding companies – between the bonded debts and non bonded debts does no more exist (see the article 5 (2) of the law).

Tax:

The SPF is not liable for corporate revenue tax (and municipal commercial tax). It is neither liable to net asset tax *("impôt sur la fortune").*

The dividends distributed by a SPF are not liable for a withholding tax at source of dividends in Luxembourg (which, for ordinary taxable companies, has been brought down to 15% of the gross dividend since 1 January 2007).

The only taxes payable by the SPF are:

(i) The capital contribution tax (1% of the capital and of eventual share premiums; or of the value of in-kind contribution) at the formation or increase of capital. A few government ministries would like to delete this tax by the beginning of 2009.

(ii) The subscription tax (a tax on the capital) of 0.25% p.a., which will be paid on the company's capital (except for the carry-over of profits and special reserves). This annual tax also applies on share premiums and the amounts of the indebtedness exceeding the octuple of the capital. The absolute legal annual maximum of this subscription tax is 125.000.- EUR.

(iii) The withholdings taxes at source (in Luxembourg or in other countries) on distributions of which the SPF can beneficiate (for example withholdings on dividends). The SPF does not beneficiate of the SCHACHTELPRIVILEG (participation exemption), meaning the privilege of parent and subsidiary companies (434/90 directive) and international conventions against double taxation (in the future, it may be enabled to do so under new treaties).

(iv) The VAT, for which the SPF will not become liable as a VAT tax subject (i.e. in practice it will be treated as a VAT-end consumer).

(v) The tax on interests (savings tax), subject to the laws about the tax of income savings (see the law of 21 June 2005 for implementation of the European withholding on interests) (48/2003 directive) and the law of 23 December 2005 about the discharging withholding on interests derived from the movable property savings). In fact, when the SPF pays its interests, it may be legally compelled to deduct these withholdings – if applicable – and pay to its partners only the interest net of this (these) withholding(s).

Surveillance:

The SPF is not controlled by the Tax Administration. It fills its declarations to the subscription tax quarterly with the Registration and Land Administration *("Administration de l'Enregistrement et des Domaines")* which, in case of doubt about the respect of legal provisions, can inspect its books.

The SPF would, in specific cases and even intermittently (which means for one or many years), become liable for income and net worth taxes, if it departs from the legal SPF standards. It would quit *temporarily* the SPF status.

The SPF has to deliver annually to the Registration and Land Administration a certificate saying it fulfils the obligations and it respects the legal limits (especially in tax/interests withholdings). These two certificates must be established by a *"domiciliataire",* a licensed auditor or a licensed accountant.

Luxembourg, on 14 May 2007.

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P.S.: In order for the reader to exhaustively understand all the topics, the author insists on the provisions of this new law, and its modifying laws, and recommends also to consult the precedents of tax administrations and Courts which will be developed in the Grand Duchy of Luxembourg about this really innovative law.