The Executive Remuneration Review

Fifth Edition

Editors
Arthur Kohn and Janet Cooper

Law Business Research

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-31-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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THE DISPUTE RESOLUTION REVIEW

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THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BAKER & McKENZIE

BONN STEICHEN & PARTNERS

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ SC

DLA PIPER

GORRISSEN FEDERSPIEL

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LENZ & STAEHELIN

MATTOS FILHO ADVOGADOS

TAPESTRY COMPLIANCE LLP

TRAVERS SMITH LLP

VIEIRA DE ALMEIDA & ASSOCIADOS

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EDITOR'S PREFACE

Executive remuneration encompasses a diverse range of practices and is consequently influenced by many different areas of the law, including tax, employment, securities and other aspects of corporate law. We have structured this book with the intention of providing readers with an overview of these areas of law as they relate to the field of executive remuneration. The intended readership of this book includes both in-house and outside counsel who are involved in either the structuring of employment and compensation arrangements, or more general corporate governance matters. We hope that this book will be particularly useful in circumstances where a corporation is considering establishing a presence in a new jurisdiction and is seeking to understand the various rules and regulations that may govern executive employment (or the corporate governance rules relating thereto) with regard to newly hired (or transferring) executives in that jurisdiction.

The most fundamental considerations relating to executive remuneration are often tax-related. Executives will often request that compensation arrangements be structured in a manner that is most tax-efficient for them, and employers will frequently attempt to accommodate these requests. In order to do so, of course, it is critical that employers understand the tax rules that apply in a particular situation. To that end, this book attempts to highlight differences in taxation (both in terms of the taxes owed by employees, as well as the taxes owed – or tax deductions taken – by employers), which can be the result of:

a the nationality or residency status of the executives;
b the jurisdiction in which the executives render their services;
c the form in which executives are paid (e.g., cash, equity (whether vested or unvested) or equity-based awards);
d the time at which the executives are paid, particularly if they are not paid until after they have 'earned' the remuneration; and
e the mechanisms by which executives are paid (e.g., outright payment, through funding of trusts or other similar vehicles or through personal services corporations).

In addition to matters relating to the taxation of executive remuneration, employment law frequently plays a critical role in governing executives' employment relationships with their employers. There are a number of key employment law-related aspects that employers should consider in this context, including:

a the legal enforceability of restrictive covenants;

b the legal parameters relating to wrongful termination, constructive dismissal or other similar concepts affecting an employee's entitlement to severance on termination of employment;

c any special employment laws that apply in connection with a change in control or other type of corporate transaction (e.g., an executive's entitlement to severance or the mechanism by which an executive's employment may transfer to a corporate acquirer); and

d other labour-related laws (such as laws related to unions or works councils) that may affect the employment relationship in a particular jurisdiction.

The contours of these types of employment laws tend to be highly jurisdiction-specific and therefore it is particularly important that corporations have a good understanding of these issues before entering into any employment relationships with executives in any particular country.

Beyond tax and employment-related laws, there are a number of other legal considerations that corporations should take into account when structuring employment and executive remuneration arrangements. Frequently, these additional considerations will relate to the tax or employment law issues already mentioned, but it is important they are still borne in mind. For example, when equity compensation is used, many jurisdictions require that the equity awards be registered (or qualify for certain registration exemptions) under applicable securities laws. These rules tend to apply regardless of whether a company is publicly or privately held. In addition to registration requirements, it is critical for both employers and employees to understand any legal requirements that apply in respect of executives' holding, selling or buying equity in their employers.

Given the heightened focus in many jurisdictions on executive remuneration practices in recent decades – both in terms of public policy and public perception – the application of corporate governance principles to executive compensation decisions is crucial to many companies. Decisions about conforming to best practices in the field of executive remuneration may have substantial economic consequences to companies and their shareholders and executives. Corporate governance rules principally fall into two categories. The first concerns the approvals required for compensatory arrangements; a particular remuneration arrangement may require the approval of the company's board of directors (or a committee thereof) or even, in certain circumstances, the company's shareholders. The second concerns the public disclosure requirements applicable to executive remuneration arrangements; companies should be aware of any disclosure requirements that may become applicable as a result of establishing a new business within a particular jurisdiction, and in fact may wish to structure new remuneration arrangements with these disclosure regimes in mind.

Finally, we would be remiss in discussing the topic of executive remuneration without highlighting the financial services industry. The global financial crisis has, of course, led to a worldwide effort in recent years to more stringently regulate the manner in which those working within the financial services industry are paid.

We hope that readers find the following discussion of the various tax, statutory, regulatory and supervisory rules and authorities instructive.

Arthur Kohn
Cleary Gottlieb Steen & Hamilton LLP
New York
October 2016

Chapter 13

LUXEMBOURG

Anne Morel, Christine Beernaerts and Pierre-Alexandre Degehet[1]

I INTRODUCTION

Executives in Luxembourg do not enjoy one single legal status as the term 'executive' covers several legal notions. Various legal provisions have been implemented at different levels to take into account the particularities linked with the position and level of responsibilities of certain employees for the purpose of regulating the legal situation of executives and, in particular, executives' remuneration. Such legal provisions, in particular with respect to tax law, reflect an economic reality in which many executives in Luxembourg have often been either transferred or seconded to a Luxembourg company after having worked for another entity of the same group located abroad.

One should as a consequence differentiate between two separate legal notions: executives being bound by an employment contract with the company within which they perform services, and executives who are entrusted with a corporate mandate as legal representatives of a Luxembourg company but who are not considered employees from a labour law perspective. This chapter mainly deals with the rules applicable to executives who are considered employees.

II TAXATION

i Income tax for employees

General

Individuals are subject to income tax on their global income, which is the aggregate of the net income of the seven categories of income (including income from employment) defined under Article 10 of the Luxembourg Income Tax Law.

1 Anne Morel and Pierre-Alexandre Degehet are partners and Christine Beernaerts is a principal at Bonn Steichen & Partners.

Income tax rates are progressive and range from zero to 40 per cent. The contribution to the unemployment fund increases the income tax due by 7 per cent. The surcharge rate is 9 per cent for the taxable income exceeding €150,000 (€300,000 for taxpayers taxed jointly). This leads to a marginal income tax rate of 42.8 per cent (43.6 per cent for the portion of the taxable income exceeding €150,000).

For instance, the tax due by a taxpayer having an annual taxable income of €150,000 is €52,765 (including the contribution to the unemployment fund), which corresponds to a global income tax rate of 32.87 per cent.

Stock options

There is no specific legislation on the tax treatment of stock options. However, the tax administration issued a circular that defines the tax treatment of stock options granted to employees. A distinction is made between transferable options and non-transferable options.

Transferable options (i.e., listed options) are treated as a benefit in kind in the hands of the employee and are taxable upon granting. The taxable income is equal to the difference between the fair market value of the stock option at the date of grant and the price paid by the employee for the acquisition of the transferable option. The estimated value of freely marketable but non-quoted stock options is to be determined according to recognised financial evaluation methods. In the absence of such financial evaluation, the value of a freely marketable option is deemed to be 17.5 per cent of the underlying share price at the moment of receiving the option.

Non-transferable options are also treated as a benefit in kind in the hands of the employee but the taxation is deferred until the date of exercise of the options (i.e., when the employee acquires the shares). The taxable income corresponds to the difference between the fair market value of the shares and the exercise price. The employee is allowed an annual 5 per cent rebate with a maximum of 20 per cent of the share value if the employee is required to keep the shares for a certain period of time.

For Luxembourg tax residents, the capital gains realised upon disposal of the shares or the options acquired within the framework of a stock option plan are taxable only in the two following situations:

a the gains are realised on the disposal of shares or options that have been held for less than six months; or

b the gains are realised on shares that have been held for more than six months and the shareholder has held, directly or indirectly, at any time during the five-year period preceding the date of the disposal, a participation of more than 10 per cent in the capital of the company. These gains are taxed as an extraordinary income at the half of the global income tax rate.

The gains realised upon the disposal of the shares within seven days of the date of exercise of the options are considered as the disposal of the stock options.

Stock option plans put in place since 1 January 2016 must be notified to the Luxembourg tax authorities two months before their implementation and a copy of the stock option plan and the list of the beneficiaries provided to the tax authorities. Stock option plans set up prior to 1 January 2016, but for which the grant of options did not yet take place, must also be notified to the Luxembourg tax authorities.

ii Social contributions for employees

Social contributions must be paid by employees and employers in Luxembourg. The social contributions are determined on the basis of the annual gross remuneration of the employee, capped, however, to an annual social security ceiling. The contributions made to a Luxembourg or a non-Luxembourg social security entity will be deductible provided they are compulsory.

iii Tax deductibility for employers

Social contributions paid by the employers are expenses fully deductible from their corporate income tax basis.

iv Other special rules

Carried interest

The law concerning the implementation of the Alternative Investment Fund Managers Directive (the Law) has introduced specific provisions with respect to the taxation of carried interest (i.e., profit participation in an alternative investment fund (AIF)) paid to Luxembourg-resident employees of AIF managers and of companies managing an AIF who move to Luxembourg. According to such provisions, carried interest is taxable as extraordinary income in the hands of such employee at a quarter of the global rate (i.e., roughly 10 per cent), provided that the following conditions are met:

a the beneficiary was not tax-resident in Luxembourg and was not subject to tax in Luxembourg on Luxembourg-source professional income during the five-year period preceding the year during which the Law entered into force;
b the beneficiary becomes tax-resident in Luxembourg during the year in which the Law entered into force or in the five following years;
c the beneficiaries did not receive any advance payments of carried interest; and
d the entitlement to the carried interest is subject to the prior repayment of the funds invested by the investors.

Such tax regime would apply for a period of 11 years as from the year the employee takes up the position in Luxembourg entitling him or her to the carried interest. The capital gains arising upon the sale of the shares or units of the AIF are subject to the standard tax treatment applicable to capital gains.

Expatriate and impatriate regime

The specific tax regime for highly skilled employees expatriated to Luxembourg may result in significant tax savings both for the employees and the employers, since the fees that are generally paid by the employer as part of an expatriate package benefit from a tax relief. It is not considered as employment income or as a benefit in kind at the level of the employee, and thus does not generate additional income tax or additional social contributions. In addition, the Luxembourg employer is able to deduct such expenses as operating expenses from its income tax basis.

The costs for which the tax relief may be obtained are mainly:

a moving costs and house fit-out expenses;
b travel costs for extraordinary reasons;
c regular housing costs;
d school fees and specific cost of living allowance; and
e tax equalisation expenses.

A highly skilled employee is defined as an employee seconded by a foreign company within an international group to work for a limited period of time in Luxembourg for a Luxembourg-resident group company; or an employee recruited directly abroad by a Luxembourg company or by a company established in another European Economic Area Member State to work temporarily for it.

Several conditions must be met by the employer and the employee. In particular, the following conditions must be met at the level of the employee:

a he or she becomes a Luxembourg tax resident and has not been a Luxembourg tax resident or subject to income tax on professional income for the five years preceding the arrival;
b he or she has specialised professional experience of at least five years in the sector concerned;
c the employee directly recruited abroad must have substantial knowledge and experience in a field of work for which the Luxembourg market lacks qualified persons;
d the employment is exercised as the principal activity, and the employee shares knowledge and skills to the benefit of the Luxembourg employer;
e he or she receives an annual gross remuneration of at least €50,000; and
f he or she does not replace non-highly skilled employees.

The highly skilled employee seconded to a Luxembourg group company must in addition meet the following conditions:

a the employment relationship with the original employer must be maintained and the employee must have the right to return to the original employer after the secondment period; and
b the original employer and the Luxembourg employer must enter into an agreement with respect to the secondment of the employee.

The employer must employ or commit to employ, at mid-term, at least 20 employees in Luxembourg, and the number of impatriated cannot exceed 30 per cent of the total full-time working force. This condition is not required for companies existing for less than 10 years.

The benefit of the regime is granted during the period the highly skilled worker is employed in Luxembourg and limited to the end of the fifth fiscal year following the arrival of the employee in Luxembourg.

Salary split

For employees working in several countries, the salary split may allow the split of taxation of the income in the countries where the employment is carried out. The income will be divided across the countries concerned, and the employee will benefit from the effect of lower progressive tax rates on the respective parts of the taxable income. The aggregate of the tax due in each country will then be lower than the tax that would have been paid without the salary split.

Various conditions are required to make a salary split:

a the right to tax the income is granted to the country where the employment is exercised, as per a double tax treaty;
b the employee must be physically present in the country where the activity is performed and for which an income is paid; and
c employer and employee must have agreed, in writing, that part of the employment will be carried out in another country or countries.

III TAX PLANNING AND OTHER CONSIDERATIONS

As stated above, a specific regime for highly skilled employees exists under Luxembourg law that may result in significant tax savings both for employees and upon submission of a list by the employer of impatriate workers employed for the application of this tax regime.

IV EMPLOYMENT LAW

i Definition and scope of application of non-competition covenants

Under Article L125-8 of the Luxembourg Labour Code (Labour Code), non-competition clauses are clauses in which an employee agrees not to carry out, as a self-employed person, similar activities to those carried out by his or her former employer after the termination of his or her employment contract, so as not to interfere with such former employer's interests.

Such legal provisions are only applicable in the framework of an employment relationship between an employee and employer and are triggered by termination of the employment. The scope of application of such legal provision is moreover strictly limited, as it refers to any activity performed by a former employee as a self-employed person. Such legal provision will therefore not cover situations where former employees carry out an activity as an employee with a competitor. Non-competition covenants are ultimately not enforceable if the employer terminates the employment contract (1) with immediate effect where the termination is deemed abusive or (2) without complying with the legal requirements governing notice periods where the termination occurs with notice.

ii Conditions for the validity and enforceability of non-competition clauses

Non-competition covenants between an employee and an employer will only be enforceable to the extent that they comply with the legal requirements.

Such a clause must be stated in writing in the employment contract or in any other subsequent contract. An unwritten non-competition covenant is null and void. Moreover, it is deemed null and void if, at the time of signature of the employment contract, the employee is under 18 or the employee's annual remuneration when he or she leaves the employer does not exceed €52,844.71 (at current index 775.17).

The non-competition covenant is only enforceable if the restriction:

a applies to a specific professional sector and to similar activities to those carried out by the former employer;

b does not exceed 12 months starting on the day the employment contract is effectively terminated (i.e., expiry of the notice period); and

c is limited to a geographical area (not outside the Grand-Duchy of Luxembourg) where the employee would be in a position to effectively compete with his or her former employer, taking into consideration the nature of the concerned activities and their range.

The non-competition covenant is not enforceable if the employer has abusively terminated the employment contract with immediate effect or has terminated the employment contract in breach of the legal requirements governing the notice period.

Any provision of an employment contract that would depart from legal provisions to the detriment of the employee, and restrict his or her rights, is deemed null and void.

Monetary damages may be agreed between the parties in the event of breach of the non-competition covenant and stated in the employment contract, although such practice is unusual in Luxembourg.

iii Non-solicitation covenants

Non-solicitation covenants, whereby an employee commits to not solicit, interfere with or endeavour to entice away from the employer the custom of any person, firm or company who, at the date of termination or within a certain time period prior to the termination, was a customer or client of, or in the habit of dealing with, the employer, or who at such date was negotiating with the employer in relation to all or part of its business, and with whom the employee personally came into contact during the course of his or her employment, are enforceable and can provide for monetary damages. Non-solicitation covenants are not specifically regulated by Luxembourg law. They should not aim at limiting the rights of the employee in respect of his or her constitutional right to work, and at circumventing the strict legal requirements for a non-competition covenant as detailed above.

iv Release of claims

An employer may obtain a release of claims by an employee by entering into a compromise agreement (transaction) as governed by Article 2044 of the Luxembourg Civil Code. A compromise agreement is a contract by which parties put an end to a dispute that has arisen between them or prevent a dispute from arising. A compromise agreement must be in writing, and the parties must reciprocally make concessions to each other. The release will operate in respect of the questions that have given rise to the dispute.

v Payment of severance remuneration

In the event of termination by the employer with notice for real and serious cause, the employee is entitled to a notice payment. Notice pay is the pay relating to the notice period, and its amount depends on the seniority of the dismissed employee. Notice pay is paid in the same way as a salary, at the end of each month. The employer is required to withhold taxes and social security contributions. Notice takes effect only on the first or 15th day of the month. Notice given before the 15th of the month takes effect on the 15th day; notice given after the 14th day takes effect on the first day of the following month.

Notice by the employer must be given as follows:

Length of service	*Notice required*
Less than 5 years	2 months
At least 5 but under 10 years	4 months
10 years plus	6 months

Any dismissed employee is moreover entitled to a severance payment after at least five years of service. Severance pay is determined on the basis of the average gross salary effectively paid to the employee over the 12 months preceding the dismissal notification. In calculating the severance payment, the following are taken into account: sickness benefits, bonus and any recurrent payment. Overtime compensation, premiums paid on a discretionary basis and reimbursement of expenses are excluded.

Years of service	*Severance indemnity (in months of salary)*
Between 5 and 10	1
Between 10 and 15	2
Between 15 and 20	3
Between 20 and 25	6
Between 25 and 30	9
30-plus	12

Finally, if a dismissal is deemed abusive, the employee is entitled to compensation for damage. The Labour Code does not provide for predetermined compensation for damage; the labour court judges have the widest powers to assess, at their own discretion, the amount of the compensation. However, compensation for damage is generally determined as follows.

Moral damages

In the event of unfair dismissal, the following criteria are taken into consideration in assessing the compensation for damage: difficulties caused by the dismissal, circumstances in which the dismissal has occurred, the employee's age and his or her length of service and education.

Financial damages

Financial damages greatly depend on the professional situation of the employee after the dismissal and are determined on a case-by-case basis by the courts. The courts take into consideration a reference period after the dismissal that is deemed a sufficient amount of time for the employee to find another job. The reference period starts at the expiry of the period of notice. The compensation for financial damage is determined on the basis of the difference between the remuneration paid to the employee by the former employer, and the salary or unemployment benefits paid to the employee after the expiry of the period of notice. The reference period is generally set at six months and may be extended up to 12 months, depending on the age of the employee and his or her length of service. Courts have recently extended the reference periods up to three years to bridge the gap between the payment of the remuneration and old-age pension benefits. The employer may also be required to reimburse the state for the unemployment benefits paid to the employee over the reference period.

vi Tax regime in cases of termination

Payments	*Situation of the employee*	*Tax exemption*
Severance indemnity as provided for by the Labour Code	Less than 60 years old	No ceiling – full exemption
	Over 60 years old and annual taxable income exceeding €150,000	Exemption within the ceiling of €7,691.84 (index 775,17)
	Eligibility for old-age pension	No tax exemption
Compensation for damage awarded by a court as a result of a dismissal ruled as being abusive	Less than 60 years old	Exemption within the ceiling of €23,075.52 (index 775.17)
	Over 60 years old and annual taxable income exceeding €150,000	Exemption within the ceiling of €7,691.84 (index 775.17)
	Eligibility for old-age pension	No tax exemption

Payments	*Situation of the employee*	*Tax exemption*
Ex gratia payments in the framework of a compromise agreement	Less than 60 years old	Exemption within the ceiling of €23,075.32 (index 775.17)
	Over 60 years old and annual taxable income exceeding €150,000	Exemption within the ceiling of €7,691.84 (index 775.17)
	Eligibility for old-age pension	No tax exemption
Ex gratia payments on termination of the employment contract by employee or by mutual agreement of employee and employer	Less than 60 years old	Exemption within the ceiling of €23,075.52 (index 775.17)
	Over 60 years old and annual taxable income exceeding €150,000	Exemption within the ceiling of €7,691.84 (index 775.17)
	Eligibility for old-age pension	No tax exemption
Ex gratia payments on partial or total cessation of activity resulting in a collective redundancy		Exemption within the ceiling of €23,075.52 (after clearance by the 'Comité de conjuncture')
Ex gratia payments negotiated in a social plan		Exemption within the ceiling of €23,075.52 (after clearance by the 'Comité de conjuncture')

vii Change of control

No specific rules of labour law are foreseen for cases of changes of control. A change of control is not deemed a real and serious cause for termination *per se* and any termination by an employer based solely on a change of control would be deemed abusive.

viii Transfer of employment in connection with a corporate transaction

No specific rules or guidelines are foreseen for determining whether severance compensation is payable upon a transfer of employment in connection with a corporate transaction. Two situations may arise:

a the corporate transaction entails a transfer of undertaking within the meaning of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, in which case, the transfer of employment will automatically operate and the rights of the concerned employees will be safeguarded; or

b the corporate transaction does not entail a transfer of undertaking within the meaning of the above-mentioned Directive, but the transfer of employees to another legal entity is envisaged, in which case, the transfer must occur with the employees' consent and a new employment contract will be negotiated.

V SECURITIES LAW

Rules on corporate governance specifically relating to remuneration of executives can be found in various legal provisions in Luxembourg, depending on the type of company involved and the nature of its activities.

In respect of securities being offered to employees, there may be certain disclosure requirements depending on the circumstances. There are examples of rules relating to executives, for instance, and their holding of shares in the company. For example, the Law of 11 January 2008 regarding transparency requirements (Transparency Law) requires that shareholders declare their shareholdings to Luxembourg's financial regulator, the Commission for the Supervision of the Financial Sector (CSSF), as soon as thresholds of 5, 10, 15, 20, 33.33, 50 and 66.66 per cent are reached. Declarations should be made as soon as possible and within four trading days at the latest. In addition to this requirement, Article 17 of the Law of 9 May 2006 on market abuse (Market Abuse Law) requires that persons discharging managerial responsibilities and any persons closely associated to them notify the CSSF and the company of any dealings in the securities of the company.

There are no statutory limitations in relation to the number of securities a director can hold. Nor are there any legal requirements that executives hold stock of their employer. The articles of association of the company may, however, contain certain limitations on shareholders or contain thresholds on shares.

The CSSF issued Circular 10/437 in February 2010 implementing Commission Recommendation 2009/384/EC on the remuneration policies in the financial sector. This Circular applies to all CSSF-regulated entities, including their foreign branches, as well as all Luxembourg branches of similar entities having their registered office or central administration outside the EEA. Financial firms must establish, implement and maintain a remuneration policy that is consistent with and promotes sound and effective risk management and that does not induce excessive risk-taking. The policy must be submitted to the CSSF and should be linked to the size of the financial firm concerned, as well as to the nature and complexity of its activities. The implementation of the remuneration policy should be subject to independent internal review, and a report on the outcome of a review should be given to the board of directors and a copy made available to the CSSF. Control functions (i.e., risk management, internal control and compliance function) and human resource departments must be involved in the design of the remuneration policy, and external experts could also be involved.

Luxembourg has transposed the Capital Requirements Directive 2013/36/EU (CRD IV) by the law dated 23 July 2015, which amends several existing laws and, in particular, the law dated 5 April 1993 on the financial sector (LSF). CRD IV provides for a cap to the ratio of variable to fixed remuneration and states that the ratio between the fixed and the variable remuneration (the ratio) of individuals whose professional activity influences the risk profile of credit institutions and investment firms (CRR entities) may not exceed 100 per cent. However, it is foreseen that CRR entities may set a higher ratio when authorised to do so. This authorisation is granted by the shareholders, owners or members of the CRR entities. It is nevertheless forbidden to set a variable component of the remuneration that would exceed 200 per cent of the fixed part of the remuneration. The thresholds and notification requirements set out in CRD IV are transposed in Article 38-6(g) of the LSF, which furthermore states that the CSSF must be promptly notified of any remuneration policy in which the ratio exceeds 100 per cent. The notification must include the detailed recommendation presented to the shareholders and must demonstrate that the approval of a higher ratio does not influence the risk management and does not violate any other obligations set out in the LSF, European Regulation No. 575/2013 and any obligation CRR entities may have regarding their own funds.

In relation to securities, it is also important to note that for Luxembourg incorporated companies listed on the Luxembourg Stock Exchange (LSE) there are corporate governance guidelines, known as the Ten Principles of Corporate Governance (CG Rules), which contain several provisions on directors' remuneration. However, it must be emphasised that the CG Rules are only soft law.

VI DISCLOSURE

Pursuant to Circular 10/437 (for all entities subject to the CSSF's prudential supervision) implementing Commission Recommendation 2009/384/EC on remuneration policies in the financial sector, information regarding remuneration policies and practices of all the entities subject to the above-mentioned Circulars must be disclosed to the public in respect of certain categories of staff whose professional activities have a material impact on the risk profile of the credit institution.

The following must be disclosed:

a information concerning the decision-making process used for determining the remuneration policy, including, if applicable, information about the composition and the mandate of a remuneration committee, the name of the external consultant whose services have been used for the determination of the remuneration policy and the role of the relevant stakeholders;

b information on the link between pay and performance;

c information on the criteria used for performance measurement and risk adjustment;

d information on the performance criteria on which the entitlement to shares, options or variable components of remuneration is based;

e the main parameters and rationale for any annual bonus scheme and any other non-cash benefits;

f aggregate quantitative information on remuneration, broken down by business area; and

g aggregate quantitative information on remuneration, broken down by senior management and members of staff whose actions have a material impact on the risk profile of the credit institution, indicating the following:
- the amounts of remuneration for the financial year, split into fixed and variable remuneration, and the number of beneficiaries;
- the amounts and forms of variable remuneration, split into cash, shares, share-linked instruments and other types;
- the amounts of outstanding deferred remuneration, split into vested and unvested portions;
- the amounts of deferred remuneration awarded during the financial year, paid out and reduced through performance adjustments;
- new sign-on and severance payments made during the financial year, and the number of beneficiaries of such payments; and
- the amounts of severance payments awarded during the financial year, number of beneficiaries and highest such award paid to a single person.

For institutions that are significant in terms of their size, internal organisation, and the nature, scope and the complexity of their activities, the quantitative information referred to above shall also be made available to the public at the level of persons who effectively direct the business of the institution. Credit institutions shall comply with the above requirements in a manner that is appropriate to their size, internal organisation, and the nature, scope and complexity of their activities.

Additionally, CRR entities that maintain a website on corporate governance and remuneration are required to explain how they comply with the requirements set out by the LFS in respect of remuneration policy.

VII CORPORATE GOVERNANCE

As previously mentioned, various rules relating to remuneration of executives exist depending on the circumstances and the types of companies involved. For example, certain provisions are contained in the Law of 10 August 1915 on commercial companies, as amended (the Company Law) and the Law of 19 December 2002 on the commercial register and the accounting and annual accounts of businesses (the Accounting Law). Other relevant laws include the Law of 10 July 2005 regarding the prospectus on securities, the Transparency Law and the Market Abuse Law.

Certain initiatives have also been taken at a European and international level to establish principles on sound remuneration policies and practices. The objective of these initiatives is to apply the defined principles globally.

The articles of association of a company may also contain rules on matters not provided for under the Company Law, or where the Company Law allows certain options to be taken. Additional rules and regulations result from various circulars and publications of the CSSF.

In respect of a public or private distinction with regard to companies, Luxembourg companies listed on the LSE or on a foreign stock exchange will in almost all cases be organised in the form of a public limited liability company.[2] Private limited liability companies may not offer their securities to the public and therefore are outside the scope of most regulation.

The rules on corporate governance that apply depend on the type of company involved. The Company Law, the Accounting Law and the LSE's Guidelines only apply to Luxembourg-incorporated companies, whereas prospectus regulations and ongoing transparency rules can apply to all public companies whose shares are listed on the LSE.

In respect of clawback provisions, there are no specific requirements set out in the legislation, although companies that award variable remuneration based on performance criteria should be entitled to apply clawback clauses that will permit them to reclaim variable components of remuneration directly related to individual performance in circumstances of misstatement or misconduct.[3]

In the case of a one-tier management structure, a public limited liability company is managed by a board of directors. In the case of a two-tier management structure (which is an option under the Company Law), a public limited liability company is managed by a management board acting under the supervision of a supervisory board.

The remuneration of the members of the board of directors is decided by the general shareholders' meeting. In practice, the board of directors submits a proposal for the remuneration (which may have been made by a remuneration committee, the establishment of which is recommended by the CG Rules) to the annual shareholders' meeting. If day-to-day management has been delegated to a director, the Company Law requires that a report be made to the annual shareholders' meeting on the total remuneration and benefits allocated to the managing director.

2 Other forms of companies that may be listed include a partnership limited by shares (SCA) or a *société européenne*.

3 This was also a recommendation of the Institut Luxembourgeois des Administrateurs Remuneration Committee in their Guidelines on Executive and Director Remuneration.

In a two-tier management structure, the method of determination and the amount of remuneration of the members of the executive board are decided by the supervisory board.[4] No provision under the Company Law prevents members of the executive board from signing employment contracts with the company. If the contracts are signed while they are already members of the executive board, they are subject to authorisation by the supervisory board and disclosure to the shareholders.[5]

The Company Law is silent on stock options and other management long-term incentives. If there is to be an increase in capital, shareholders must vote on the stock option plan. Similarly, any decision to buy back shares would need to be taken by shareholders, except in some specific circumstances, including in cases where shares of the company are bought back for distribution among staff of the said company. However, the distribution of any such shares must take place within 12 months from the date of the acquisition.

The CG Rules state that, prior to being adopted, schemes providing for the remuneration of directors and managers by new share issues, share options or any other new share acquisition right should be approved in advance by a resolution of the shareholders at an annual general meeting.

In terms of the composition of the board of directors of a public limited liability company, except in a single shareholder company where there may be only one director, the board must be composed of at least three members, and while the Company Law does not set a maximum number, the LSE Guidelines recommend a maximum of 16 members for listed companies.

In respect of listed companies, the CG Rules contain detailed recommendations on remunerations of directors and managers, criteria for bonus and share option schemes, and requirements for transparency. The total amount of direct and indirect remuneration received by directors and executive managers should be disclosed in an annual report (with a distinction between fixed and variable components and stock options). However, there are no governmental or union approval requirements in respect of executive remuneration arrangements. According to the CG Rules, monitoring of compliance with the CG Rules relies on the shareholders and the market authorities, possibly supplemented by other mechanisms.

VIII SPECIALISED REGULATORY REGIMES

Luxembourg labour law provides that senior executives are excluded from the application of certain rules. For example, they are excluded from the scope of application of collective bargaining agreements, unless otherwise stated, and from the application of the legal provisions governing working time.

The Labour Code defines senior executives as employees enjoying a higher level of remuneration in comparison with other employees falling under the scope of a collective bargaining agreement. This takes into consideration the time necessary to perform their duties, whether remuneration is given in return for effective and real management powers, whether their tasks stipulate a well-defined authority, and whether there exists a large amount of independence and freedom regarding working hours (notably, absence of constraints to the working schedule).

4 Article 60 *bis*-19 of the Company Law.

5 Id.

In certain industries where a collective bargaining agreement has been concluded (e.g., in the banking sector), senior executives are expressly excluded from the scope of application of such collective bargaining agreement.

As outlined above, certain rules will apply to some companies depending on their type and the activities in which they are involved.

In addition to the large proportion of funds domiciled in Luxembourg and created as UCITS, during the past decade Luxembourg has witnessed the launch of flexible and attractive financial vehicles such as the venture capital company, specialised investment funds and securitisation vehicles, alongside flexible and specific legislation in respect of each vehicle.

Because these are entities governed by the CSSF, where appropriate the rules set out in Circular 10/437 apply to them. It is important to note that the principle of proportionality applies to all remuneration provisions.[6] Supervision of various remuneration policies in respect of specialised investment vehicles is maintained by the CSSF.

In June 2012, the European Securities and Markets Authority (ESMA) issued a consultation paper on guidelines for sound remuneration policies under the Alternative Investment Fund Managers Directive of 2011 that are quite similar to the general policies set out in Circular 10/437.

ESMA's future guidelines will apply to managers of alternative investment funds, including hedge funds, private equity funds and real estate funds. These funds will be asked to introduce sound and prudent remuneration policies and structures, with the aim of increasing investor protection and avoiding conflicts of interest that may lead to excessive risk-taking.

Similarly, on 3 July 2012, the European Commission published a legislative package with a view to reinforcing investor protection. Among the proposed measures are amendments to the UCITS Directive outlining the need for clear rules on the remuneration of UCITS managers (e.g., that the manner in which they are remunerated should not encourage excessive risk-taking). Remuneration policies will be better linked to the long-term interests of investors and the achievement of the investment objectives of UCITS.

IX DEVELOPMENTS AND CONCLUSIONS

Over the past few years, many initiatives have been taken by the government and the tax administration to create and develop a favourable tax environment for the highly skilled labour force. Stock options are a very efficient way to optimise the remuneration package of senior managers and top executives. The carried interest taxation regime specifically targets the investment fund industry by granting an attractive taxation for Luxembourg-resident managers of alternative investment funds. This should further boost the position of Luxembourg as a financial centre. The expatriate or impatriate regime provides powerful means for multinational companies to relocate their leading staff to Luxembourg and further internationalise the business location.

The benefit of these incentives and tax-planning opportunities in Luxembourg is to attract key personnel from all over the world, bringing added value to the Luxembourg economy and contributing to its further diversification.

6 For example, see CSSF Circular 11/505 on proportionality.

Appendix 1

ABOUT THE AUTHORS

ANNE MOREL
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Anne Morel holds a postgraduate degree in business law and tax law (Université Nancy II, France, DESS en Droit des affaires et fiscalité – diplôme de juriste conseil d'entreprise, 1993). She was admitted to the Luxembourg Bar in 1994.

Ms Morel assists clients in both individual and collective employment relationships, such as assisting clients in information and consultation procedures; negotiations with employees, representatives and trade unions; entering into collective bargaining agreements; and collective dismissals. She has extensive experience in structuring schemes or alternative forms of remuneration for large international companies, such as share option plans, employee participation schemes and supplementary pension plans.

She was recently involved in the restructuring and rationalisation measures of a US worldwide industrial group of companies active in the manufacturing business, which entailed the closure of the Luxembourg office (she assisted in the consultation phase and drafted all the documents required, in addition to assisting during the negotiation phase relating to collective dismissal and social plan implementation).

She has also assisted a client carrying out surveillance activities in litigation related to the application of legal provisions on the transfer of an undertaking in the event of successive contracts of service following a competitive tendering.

As she first started practising for a couple of years almost exclusively litigation in the area of labour law, Ms Morel represents her clients in court, which enables her to be the exclusive legal counsel in Luxembourg of several major national and international clients, dealing with both daily questions and litigation processes. She is a founding member and vice president of the Employment Law Specialists Association, Luxembourg.

CHRISTINE BEERNAERTS

Bonn Steichen & Partners

Christine Beernaerts has more than 20 years' experience in Luxembourg domestic tax law and international tax law. She advises clients on the tax structuring of alternative forms of remuneration, such as share option plans and employee participation schemes.

Ms Beernaerts also has extensive experience in corporate tax law. She regularly advises multinational companies in setting up tax-efficient structures for finance and holding activities. She is also frequently involved in the structuring of equity and debt-financed acquisitions through Luxembourg entities for both regulated and unregulated clients. Her recent transactions include tax advice on the structuring of acquisitions in the energy sector.

Before joining Bonn Steichen & Partners, Ms Beernaerts worked as a manager in the tax department of one of the Big Four firms. She is a regular speaker at seminars and training events in the tax area.

PIERRE-ALEXANDRE DEGEHET

Bonn Steichen & Partners

Pierre-Alexandre Degehet, head of the corporate M&A department of the firm, acquired significant experience in financing and corporate M&A during his time at Arcelor acting as senior legal corporate counsel. During this period, he was an active participant in Arcelor's defence team against Mittal Steel's hostile takeover, subsequently acting as special adviser to the chairman of the board of directors in relation to the cross-border merger that created ArcelorMittal.

Mr Degehet's practice covers a broad spectrum of corporate and transactional matters with a particular focus on domestic and cross-border merger and acquisitions, public takeovers, corporate finance transactions, as well as securities law, regulatory and general commercial matters.

His credentials include strong experience in takeovers (hostile or friendly) for major financial institutions and industrial groups but also small and mid-cap companies, as well as joint ventures and strategic alliance.

Mr Degehet regularly advises companies and their boards, as well as investors, on corporate governance issues, on legal and regulatory responsibilities including directors' duties, individual liability and contentious shareholders' meetings. He is also active with respect to the drawing-up of, implementation, and compliance with corporate governance rules.

In addition to his corporate expertise, Mr Degehet has been involved in a number of capital market transactions advising international and Luxembourg financial institutions and corporates on various types of financing, such as refinancing packages and debt restructurings. As member of the working group of the Luxembourg code of corporate governance of the Luxembourg Stock Exchange, he regularly advises clients either in case of disputes or more generally for good practices code as well as matters relating to general meeting of shareholders.

Very recently, Mr Degehet specialised in business process outsourcing (BPO) matters, specialising in multi-jurisdiction outsourcings and outsourcing in the financial services sector.

Mr Degehet is member of the Institut Luxembourgeois des Administrateurs and is constantly highly ranked by various independent legal organisations.

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