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PARTNERSHIP AS A FORM OF CORPORATE STRUCTURE IN THE 1915 COMPANY ACT OF THE GRAND DUCHY OF LUXEMBOURG[2]

Abstract: *This paper is the result of a detailed examination of the lex generalis, known in practice as the 1915 Act on commercial companies of the Grand Duchy of Luxembourg. The main task of this paper is to interpret the meaning of legal standards and the effect of flexible legal regulations in the Company Act provisions, by presenting common examples of corporate structures seen in practice. The paper will present an analysis of the regulatory framework that is most frequently connected to private equity, private debt, and real estate market in the European Union. The law on commercial companies in Luxembourg is in many ways flexible and open. For this reason, some authors may even refer to it as not being limited enough and, therefore, tend to fill those gaps with other legal provisions that are available in lex specialis provisions. On the other hand, many authors and practitioners fully support the flexible provisions, which were initially intended to enable Luxembourg-based businesses to grow into the private equity, real estate, and fund departments. The ultimate goal was to make legal provisions more attractive for investors who would invest in Luxembourg in the future. This paper provides valuable clarification and critical analysis of Luxembourg legislation on corporate entities (both companies and partnerships), including an overview of the most common organizational structure in practice.*

Keywords: *Partnership, Fund, Company, Luxembourg 1915 Act on commercial companies, General Partner, Limited Partner, Special purpose vehicle.*

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[2] This paper is a result of more than two years of practice as a Legal Officer in the Luxembourg Fund Industry specialising in Alternative and Investment Funds.

1. Introduction

The Anglo-Saxon limited partnerships have been the "*go to*" vehicle for the asset management industry, especially in the field of private equity (company ownership), real estate (loans), and debt (corporate bonds) (Elvinger Hoss Prussen, 2020: 5). The reasons behind this are: 1) the advantages of simplified incorporation process without notary expenses; 2) flexible vehicles are free from corporate law overrides; 3) the maintenance of limited liability for investors; and 4) as limited partnerships are generally considered to be tax transparent, there is no tax leakage at the level of the fund (Hardeck, Wittenstein, 2018: 296).

The Luxembourg Act of 10 August 1915 on commercial companies (*fr. loi du 10 août 1915 concernant sociétés commerciales;* hereinafter: the 1915 Act) was influenced by the regulations prescribed in Belgian and French Company Acts. The initial version of this legislative act included a vague set of mandatory provisions and lacked a set of more flexible provisions (Constantini, 2017: 85), which would enable corporate entities organized, existing, governed and acting under the Luxembourg laws (with the registered office in the municipality of the Grand Duchy of Luxembourg) to compete and become equally attractive competitors to investors from foreign jurisdictions.

In the year 2013, Luxembourg used the opportunity to make the provisions more flexible and attractive to investors when implementing the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (hereinafter: AIFM Directive[3]) in its national jurisdiction. This Directive set a milestone and was the main incentive for all changes which followed this crucial change in the Fund sector. Thus, by adopting the national Act of 12 July 2013 on alternative investment fund managers (hereinafter: the AIFM Act)[4], Luxembourg amended many key elements in order

[3] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFM Directive); See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0061

[4] Currently, in the EU, a new EU Directive (*Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings*) and Regulation (*Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No.346/2013 and (EU) No. 1286/2014*) on the cross-border distribution of collective investment funds (the CBDF Directive and CBDF Regulation) are required to be implemented in EU Member States (as of the 2nd of August 2021). Among other things, the new rules amend the existing EU Alternative Investment Fund Managers Directive (AIFMD) with the objective of harmonising the capacity of EU alternative investment fund managers (AIFMs) to distribute alternative investment funds (AIFs) across the EU, *inter alia* by introducing a new regime for "pre-marketing."

to make its corporate structures more attractive for future businesses. Those changes and amendments had a snowball effect and were followed by additional charges to the 1915 Act in 2016. Currently, they contain provisions that expand the structural framework for businesses and investors (professional investors,[5] institutional investors[6], family offices,[7] retail investors[8] and other eligible investors[9]), enabling them to set the rules of their corporate structures established and governed under the Luxembourg 1915 Act (Theissen, 2017: 8).

2. Legal forms of partnerships in Corporate Structures of Luxembourg

Reciprocal trust (*intuitu personae*) between partners is the main base for the formation of partnerships (*fr. sociétés de personnes*), for a limited (*fr. Momentanée, de. momentan)* or unlimited (*fr. Illimité, de. unbegrenzt*) period of time.[10] For this

[5] As defined by Annex II, para I, point (1) of the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFiD II): "[...] *(a) Credit institutions; (b) Investment firms; (c) Other authorised or regulated financial institutions; (d) Insurance companies; (e) Collective investment schemes and management companies of such schemes; (f) Pension funds and management companies of such funds; (g) Commodity and commodity derivatives dealers; (h) Locals; (i) Other institutional investors* [...]", see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065

[6] Broadly speaking, institutional investors per se are: endowment funds, commercial banks, other authorised financial service firms, mutual funds, hedge funds, pension funds, insurance companies, large companies that exceed certain size thresholds, and national government or central bank bodies.

[7] Family offices are private wealth management advisory firms that serve ultra-high-net-worth individuals (HNWI). They are different from traditional wealth management shops as they offer a total outsourced solution to managing the financial and investment aspect of an affluent individual or family.

[8] A retail investor, also known as an individual investor, is a non-professional investor who buys and sells securities or funds that contain a basket of securities, such as mutual funds and exchange traded funds (ETFs).

[9] Eligible Investors are investors that do not qualify per se as professional investors, but have the possibility to "opt-up" their classification if they are fulfilling certain conditions that are set by MiFiD II. As stated in the paper prepared by Committee of European Securities Regulators (CESR), "CESR Technical Advice to the European Commission in the context of the MiFID Review – Client Categorisation", on page 3: "*[...] MiFiD II on the contrary allows them to opt-down, at any time (for example, eligible counterparties can always opt down to professional client status where they manage money on behalf of others, e.g.: pension funds), those clients that do not feel comfortable with their classification can request additional regulatory protection. This is an important safety feature already built into the process and should not be overlooked by the Commission in proposing any changes to the regime*." (see: https://www.esma.europa.eu/sites/default/files/library/2015/11/10_1040.pdf)

[10] Art. 310-1 of the Amendments to the 1915 Act enacted on 10th August 2016.

reason, constitutive documents such as the Limited Partnership Agreement (LPA) or Articles of Association or Incorporation (AoA or AoI) contain strictly defined conditions for the sale of shares to third parties[11] (in order to avoid any unwanted new partner[12]). In principle, a partner's death, withdrawal, removal, expulsion, dissolution, insolvency or bankruptcy will not result in the dissolution or liquidation of the Partnership as a corporate entity, thus the Partnership would continue to exist and the Partner would need to be replaced[13], unless otherwise provided for in the incorporation agreement (Olliges,Vilain, 2020:8). Therefore, it can be concluded that the trust between partners is built on their respect; in practice, in some types of Partnerships, there can be no acceptance of a new partner or interest-holder (by paying preferred commitments/ capital commitments) without the provided consent (most commonly via Written Resolution/ Circular Resolution[14]) by the managers of the Partnership, whose decision is based on the Limited Partner's prior approval.

A Partnership or General Corporate Partnership (*fr. société en nom collectif, de. offene handelsgesellschaft* - SENC[15]) is a commercial company which is an unlimited company (*fr. societe illimité, de. gesellschaft mit unbeschränkte haftung*)[16] characterised mainly by the fact that the partners are jointly (*fr. solidairement responsible, de. gemeinsam verantwortlich*) and severally liable (*fr. solidairement responsible, de. gemeinsam verantwortlich)* to an unlimited extent for all of the company's commitments; for this reason, the aforesaid trust among partners is crucial.[17] Unlimited companies are the oldest form of commercial companies, as they draw their origins from the will of several people to meet collectively around the same corporate object by making a contribution with a view to making a profit.[18]

[11] In Luxembourg, this is commonly done via the Share Purchase Agreement (SPA).

[12] Art. 310-2 of the Amendments to the 1915 Act enacted on 10th August 2016.

[13] Art. 22 of the Amendments to the 1915 Act enacted on 12th July 2013.

[14] The name Circular Resolution comes from the explanation of how it is performed in practice; as there is no meeting held, the resolution is just being circulated between Managers in order to sign it.

[15] Title II, Art 200 - 1 of the Amendments to the 1915 Act enacted on 10th August 2016; some articles are amended by the amendments to the 1915 Act enacted on 5th December 2017.

[16] Unlimited partnerships are governed by Article 200-1 (formerly article 14) of the 1915 Act, as well as by Article 1832 onwards of the Civil Code.

[17] Art 100–8 point 1, Art 100– 9, Art. 310–3, 320-4 of the Amendments to the 1915 Act enacted on 12th July 2013, Art 200- 1 of the Amendments to the 1915 Act enacted on 10th August 2016.

[18] Currently, unlimited partnerships are governed by Article 200-1 (formerly article 14) of the Act, as well as by Article 1832 onwards of the Civil Code.

As defined by the law, in order to incorporate and establish a Partnership, one mandatory condition must be fulfilled: it must contain at least one Limited Partner (LP) and one Unlimited Partner which is also known in practice as a General Partner (GP). The LP is the one that contributes a specific amount constituting partnership interests, thus making his liability limited, and the contributions may but need not be represented by investments as provided in the LPA. On the other hand, the liability of the GP is unlimited, joint, and several for all the obligations of the common limited partnership.[19]

During the incorporation phase, the GP must be initially[20] established prior to the Partnership, and it is established in the legal form of a limited liability company (known as S.à r.l.; *fr. société à responsabilité limitée*). In market practice, for the purposes of partnership incorporation, the initial (and temporal) LP is most commonly the Sole Shareholder of the GP. The initial LP will additionally (but not necessarily) be changed during the 1st close when the (additional or new) investors will be admitted to the Partnership.[21]

The share capital of some Partnerships (SCS, SCSp) is not divided into shares but into interests (limited and unlimited, depending on the partner). In practice, the ratio of ownership between partners is as follows: the GP owns less than 5% and the LP owns more than 95% of the overall interest.

The legislative framework of the Grand Duchy of Luxembourg makes a distinction between Partnerships (the aforementioned SENC/ *fr. société en nom collectif*) that have or do not have a legal personality (*fr. la personnalité juridique, de. Rechtspersönlichkeit*). Therefore, partnerships which have legal personality are: Partnership limited by shares (*fr. société en commandite par actions*- SCA),[22] and

Common limited partnership (*fr. société en commandite simple* - SCS).[23] On the other hand, Special limited partnership (*fr. La société en commandite spéciale* - SCSp)[24] is without legal personality.

[19] Title III, Art 310– 1 to 310-7 of the Amendments to the 1915 Act enacted on 12th July 2013; some articles are amended by the Amendments to the 1915 Act enacted on 10th August 2016.

[20] In case of a *Special limited partnership* (SCSp/ *société en commandite spéciale)*, it is also formed in advance given that partnership itself has no legal personality, unlike the Limited Liability Company *(S.à r.l./Société à responsabilité limitée).*

[21] The investors are admitted to the Partnership by subscribing to its capital via Subscription Agreement (SA), which may be amended and restated (A&R SA) in case of a top-up.

[22] Title VI, Art 600 – 1 to 600 -7 of the Amendments to the 1915 Act enacted on 12th July 2013; some articles are amended by Act of 10th August 2016.

[23] Title III, Art 310 – 1 to 310 -7 of the Amendments to the1915 Act enacted on 12th July 2013; some articles are amended by Act of 10th August 2016.

[24] Title II, Art 320 – 1 to 320 -9 of the Amendments to the 1915 Act enacted on July 2013;

(1) Partnership limited by shares (*fr. société en commandite par actions, de. Die Société en commandite par actions* - SCA) is a commercial company established by contract (AoA), for a limited or unlimited period of time, by one or more shareholders (*fr. Actionnaires, de. Aktionäre/innen*) who are indefinitely and jointly liable for the obligations of the company and of one or more shareholders who only contribute a specific share capital (*fr. capital social, de. Aktienkapital*)[25]. Specifically, the 1915 Act has prescribed a minimum initial share capital (*fr. capital social minimum, de. Mindestgesellschaftskapital*) in the amount (or equal to the amount) of EUR 30,000 which must be paid fully to the bank account of the Partnership prior to its establishment; thus, making the contribution[26] in cash or kind (a report by a statutory auditor is required if a contribution in kind is made to the SCA[27]) is a fundamental condition for the incorporation (*fr. contrat de société, de.Firmenvertrag*). The second condition which is mandatory and must be fulfilled is that the SCA has to be established by the GP and the LP[28] by means of the AoA as an incorporation document. This legal form is established in front of the notary (*fr. acte notarié, de. Notarielle Urkunde*) by means of a public deed which is also known as the Extraordinary General Meeting (EGM). Finally, it must be registered in the Trade and Company Register (*fr. registre de commerce et des sociétés - RCS[29]*), where the incorporation deed (AoA) is published in its entirety. The management of the company is carried out by the GP, or more specifically one or more Managers (*fr. Gérants, de. Geschäftsführer)* who can have limited or unlimited liability, and who may but need not be unlimited partners, designated in accordance with the AoA[30] and the incorporation deed (*fr. Consti-*

some articles are amended by Act of 10th August 2016

[25] Art 600 – 1 of the Amendments to the 1915 Act enacted on 12th July 2013.

[26] Art 420 – 1, formally known as Article 26 of the 1915 Act: "*The constitution of a public limited company requires: 1. that there is at least one partner; 2. that the capital is at least 30,000 Euros; however, this amount may be increased by a grand-ducal regulation to be taken on the advice of the Council of State with a view to its adaptation either to variations in the national currency in relation to the unit of account, or to changes in European regulations*."

[27] The *statutory auditor (réviseur d'entreprises*) is and external auditor from the list kept by the Financial Sector Supervisory Commission/ CSSF (C*ommission de Surveillance du Secteur Financier).* The statutory auditor is not to be confused with the *supervisory auditor* (defined in Art 600/7 of the Amendments to the 1915 Act enacted on 12th July 2013) who is actually an internal auditor. The underlying idea is that an audit by a statutory auditor supersedes the responsibility of the internal auditors and carries a broader mandate than the one granted to them.

[28] Art 600 – 6 of the Amendments to the 1915 Act enacted on 12th July 2013.

[29] See: Luxembourg Business Registers (LBR): Legal aspects;' https://www.lbr.lu/mjrcs/jsp/webapp/static/mjrcs/en/mjrcs/legal.html?pageTitle=footer.legalaspect

[30] Art 600 – 5, point 1, of the Amendments to the 1915 Act enacted on 12th July 2013.

tution de societe). It is important to note that managers who are not unlimited partners are liable in accordance with Article 441–9[31] of the Amendments to the 1915 Act enacted in 2013[32], as this type of partnership is a combination of features of a limited partnership (*fr. société en commandite simple* - SCS) with those of a public limited company (*fr. société anonyme* - SA).[33]

(2) Common Limited Partnership (*fr. société en commandite simple* - SCS,[34] *de. Einfache Kommanditgesellschaft - KG*) is a commercial partnership, entered into for a limited or unlimited period of time, by one or more unlimited partners with unlimited and joint and several liability for all the obligations of the common limited partnership,[35] and one or more limited partners who only contribute a specific amount constituting partnership interests which may but need not be represented by investments as provided in the LPA.[36] This partnership can be

[31] In accordance with the general rules of the 1915 Act, directors, members of the executive committee and the chief executive officer shall be liable vis à vis the company for performance of the duties entrusted to them and for mismanagement. Directors and members of the executive committee shall be jointly and severally liable vis à vis the company and third parties for damages resulting from infringements of the Act or the articles of association of the company.

[32] Art 600 – 5, point 2, of the Amendments to the 1915 Act enacted on 12th July 2013.

[33] The SCA may be a useful legal form: it is aimed at bringing together investors and entrepreneurs, and it is suitable for small and medium-sized family businesses (as ownership may be transferred to a minor heir). Another benefit is that it is set up so as to enable the company to resist hostile takeovers.

[34] Before the 2013 and 2016 Amendments to the 1915 Act, there were two previously existing forms of partnership: Limited Partnerships (*Société en commandite simple*-S.E.C.S.) and Partnership Limited by Shares (*Société en Commandite par Actions*-S.e.C.A), whose succesors are SeCS and SCA. In the Limited Partnership (S.e.C.S.), the limited shareholder is legally prohibited from participating in the management of the company. No minimum share capital is required. In principle, shares are not transferable unless the articles of association provide for otherwise. General partners have joint, several, unlimited liability. The S.e.C.S. is in principle fiscally transparent and is frequently used for international tax planning matters. Partnership Limited by Shares (S.e.C.A) was at the time a hybrid partnership with joint stock company and civil aspects, formed by two classes of shareholders, (i) the general partner(s) with unlimited, joint and several liabilities and (ii) the limited shareholders with limited liability. Its legal regime is quite similar to that of the S.A. but the management is reserved to the general partner. Except provisions in the byActs providing for the contrary, the veto right granted to the general managing partner allows an effective control over the management of such a company. This control may be relevant for listed companies by providing for an efficient mechanism against external takeovers. For more, see: Noble & Scheidecker (2008). Legal Guide to Forming a Corporation in Luxembourg.

[35] Title III, Art 310 – 1 to 310 -7 of the Amendments to the 1915 Act enacted on 12th July 2013, some articles are amended by Act of 10th August 2016.

[36] Art 310-1 point 1 of the Amendments to the 1915 Act enacted on 23rd August 2016.

formed in front of a notary by means of a public deed, or a private deed which is done by fully executing the (short-form or long-form) LPA between both mandatory partners (the GP and the LP). In practice, it is common that this type of Partnership may be established during the incorporation period by a short form LPA, which is an incorporation document containing only the most important elements. Once the SCS is established, during the 1st close, the Amended and Restated Limited Partnership Agreement (A&R LPA), which is in practice called the long-form LPA, supersedes the original or short-form LPA, which shall be of no further force or effect. The A&R LPA contains more information on the form and substance which has been mutually agreed by all of the parties to this Agreement. Finally, once incorporated, the Partnership must be registered in the Trade and Company Register (*fr. registre de commerce et des sociétés- RCS*) within the 30 days' time limit, in order to obtain the registration number (the B number) and to be publicly listed in the register. In the RCS, unlike the aforesaid SCA form, the incorporation deed/ LPA will not be published in its entirety but only the short version (*fr. constat du constitution*) including only the basic corporate details.[37] After the registration, a time limit of 30 days will start running for the registration of the UBO (Ultimate beneficial owner[38]); in case there are no UBOs in the structure, then an SMO (Senior Manager Official[39]) shall be entered in the Register of Beneficial Owners (*Fr. Registre de Commerce et des Sociétés –RBE[40]*). This step became mandatory by the 5th EU Anti Money Laundering Directive, and it was initially introduced in the Luxembourg legislation by the Act of 12 November 2004, which was amended by the Act of 17 October 2010. The Luxembourg national body, the Financial Sector Surveillance Commission (*fr. Commission de Surveillance du Secteur Financier/CSSF*), had brought many circulars and regulations to ensure Luxembourg's compliance with the EU law. The most important is Regulation CSSF n12-02 of 14th December 2010,

[37] It includes full name and legal form of the partnership, its address, corporate object, first financial year end (FY), statement on whether it is incorporated for a limited or unlimited period of time, and the name of its GP.

[38] The UBO (Ultimate beneficial owner) is a natural person or corporate entity (or a number of them) holding at least 25% of the assets in the Partnership, whcih makes him/ her a significant owner.

[39] Directive (EU)2015/849 of the European Parliament and of the Council of 20 May 2015, Art. 3, item 12: "senior manager" means an officer or employee with sufficient knowledge of the institution's money laundering and terrorist financing risk exposure, and sufficient seniority to take decisions affecting its risk exposure, and need not, in all cases, be a member of the board of directors."

[40] See: *Registre des Benegiciares Effectifs* (RBE)/The Luxembourg Business Registers (LBR), https://www.lbr.lu/mjrcs-rbe/jsp/webapp/static/mjrcs/en/mjrcs-rbe/legal.html?pageTitle=footer.legalaspect

which was updated on 14th August 2020, making the UBO information crucially transparent.

Transfer of shares is determined by the terms and conditions in the LPA. Otherwise, in the absence of these provisions, any transfer (unless concerning transmission in case of death of a partner), any dismemberment or any pledge requires consent[41] of LPs.[42] Under the penalty of nullity, ownership shares may only be transferred, subdivided or pledged in accordance with the terms and conditions provided for in the partnership agreement.[43]

(3) Special limited partnership (*fr. La société en commandite spéciale, de. Spezialkommanditgesellschaft* - SCSp[44]) was introduced in the Amendments to the 1915 Act enacted on 12 July 2013.[45] This form of partnership was driven by the implementation of the Directive 2011/61/EU on Alternative Investment Fund Managers into Luxembourg Company law. The most recent legislation that came into force in 2016[46] defines this legal form as a type of partnership which can be entered into for a limited or unlimited period of time, by one or more unlimited partners with unlimited and joint and several liability for all the obligations of the partnership[47], and one or more limited partners who only contribute a specific amount constituting partnership interests which may but need not be represented by investments as prescribed[48] in the LPA.

[41] For limited partners' ownership shares, transfers of limited partners' ownership shares for a reason other than death, subdivision or pledging require the approval of the general partner(s); for general partners' ownership shares, transfers of general partners' ownership shares for a reason other than death, subdivision or pledging require the approval of the partners, who decide by majority vote representing three quarters of the ownership shares, and the approval of the general partners.

[42] Art. 310 – 6 (1) of the Amendments to the 1915 Act enacted on 10 of August 2016.

[43] Art. 310 – 6 (2) of the Amendments to the 1915 Act enacted on 10 of August 2016.

[44] Title II, Art 320–1 to 320-9 of the Amendments to the 1915 Act enacted in July 2013; some articles were amended by Act of 10th August 2016.

[45] This amendment also brought some technical changes concerning limited partnerships by shares, and modernised the common limited partnerships.

[46] Title II, Art 320–1 (formally known as Art. 22 - 1) to 320-9 of the Amendments to the 1915 Act enacted in July 2013; some articles were amended by Act of 10th August 2016

[47] Art 441–9 of the Amendments to the 1915 Act enacted in July 2013 „*Directors, members of the executive committee and the chief executive officer shall be liable vis à vis the company in accordance with general rules of Act for performance of the duties entrusted to them and for mismanagement. Directors and members of the executive committee shall be jointly and severally liable vis à vis the company and third parties for damages resulting from infringements of the Act or the articles of association of the company*".

[48] As defined in Art 320– 1, point 1, of the Amendments to the 1915 Act enacted on 10 August 2016.

Unlike other Partnership forms, the SCSp does not constitute a legal personality[49]; thus, it is not considered to be a legal entity by nature[50]. Nevertheless, the Act of 1915 recognizes that the Partnership incorporated in this form can (i) hold assets that are contributed or registered to his name (not to the name of the manager who are not partners)[51], and (ii) represent itself in front of the court[52] (unless otherwise defined in the provisions of the LPA for such situations).

The share capital of the SCSp consists of pooled assets, contributions made (i) in kind, (ii) cash or (iii) industry (i.e. sweat equity contributions), which must be made in order for partners to be admitted as the SCSp investors.[53] The contributions other than a transfer of interest, including admission of new partners, shall be made in accordance with the conditions and formalities provided in the LPA[54]. The partnership may issue debt instruments[55]. The contributions made to the Limited Partners (partnership interest) may be represented by securities; in case they are not secured, they can be represented by Partner's account (*fr. comptes d'associés*) (Allen & Overy, 2014: 6). Transfer of shares is prescribed by the law in the exact manner as for the above SCS.[56]

The SCSp can be established in front of a notary by means of a public deed, or incorporated via a private deed, by simple execution of a short-term or long-form LPA by all parties. Upon its incorporation, the SCSp shall be registered in the RCS and RBE registers, where the mandatory information shall be publicly available and transparent.

There are specific provisions applicable to the SCSp and relating to tax treatment advantages, transparency of corporate documents (including annual financial statements), the possibility to be excluded from VAT in case of being incorporated as an AIF, etc.[57] Additionally, both limited partnerships are not subject to a specific regulatory status. It is possible to use these structures to set up regulated as well as unregulated vehicles. The last two limited Partnerships are specific as they are not the subject of a specific regulatory status; thus, they can be used to set up both regulated and non-regulated vehicles (Allen & Overy, 2014: 6).

[49] Art. 320-1 point 2 of the Amendments to the 1915 Act enacted on 10 of August 2016.

[50] Art. 320-1 point 2 of the Amendments to the 1915 Act enacted on 10 of August 2016.

[51] As noted by Allen & Overy (2014), "*[...]the assets contributed to the SCSp are exclusively reserved for the creditors whose claims have arisen in connection with the creation, operation or liquidation of the SCSp.*" (Allen & Overy, 2014: 15).

[52] Art. 320 –8 of the Act of July 2013.

[53] Art. 320-1 point 3 of the Act of 10 of August 2016.

[54] Art. 320-1 point 3 of the Act of 10 of August 2016.

[55] Art. 320-4 point 3 of the Act of 10 of August 2016.

[56] Art 320 – 7 of the Act of July 2013.

[57] Also applicable to SCS legal form.

3. Types of Partners in Partnerships

As already mentioned, there are two types of partners (either a natural person or a corporate entity) which have to be admitted in order to form /incorporate[58] a Partnership: (1) General Partner - GP (*fr. associé commandité*), and (2) Limited Partner - LP (*fr. associé commanditaire*). In Partnership, partners are classified according to (i) pre-conditions, (ii) liability and ownership (securities as a creditor[59]), and (iii) management activity.

(i) There are mandatory pre-conditions that must be fulfilled by the company which is to act as a GP. Any person wishing to set up a company to do business in Luxembourg as a GP must have the authorisation and approval which is required to carry out the activity as a trader.[60] This means that, before setting up a partnership, it must be ensured that the GP is officially authorised to do business as a trader in the Grand Duchy of Luxembourg.

(ii) The GP (one or more) is(are) jointly and severally liable[61] without any limitations for the commitments of the company; for this reason, GPs are often referred to as the unlimited partners.[62] On the other hand, the LP (one or more) is (are) only liable up to the amount of their contributions, i.e. their liability is limited in proportion to the amount of their contributions to the partnership which constitute their share in ownership interests in the company,[63] for this

[58] Art 100, point 3 of the Act of 24th April 1983l; Art 310 –1 of the Act of 10 of August 2016

[59] Under Art 320 –1 point 3, and Art 310–1 point 2 of the Act of 10 of August 2016, the GP's security as a creditor shall not be limited to the corporate assets of the unlimited company; thus, it will include his personal assets, making his liabilities unlimited. On the other hand, the LP's security as a creditor will depend on his contribution participation.

[60] Art 320 –1 point 6, and Art 310 – 1 point 5 of the Act of 10 of August 2016.

[61] Article 1862 of Luxembourg Civil Code (*Code Civil*): "In companies other than commercial ones, the partners are not jointly and severally liable for social debts, and one of the partners cannot oblige the others if they have not conferred on him the power to do so."

[62] Art 320–3, point 1 of the Act of July 2013.

[63] On the other hand, the Luxembourg Civil Code regulates that the partners of a company other than a commercial company are not jointly liable. As those two legal provisions are contradictory, it is common in practice that the partner may be challenged, only after the unlimited company itself has been held liable by a court (Article 1400 -1 (formerly Article 152) of the Company Act); in case the partnership is held liable, the judgment will first impose a sanction on the unlimited company and then on the partners (for more, see: Ebke, 1988: 203). Therefore, the creditor may take action against any partner of the unlimited company for the repayment of his claim (Article 200-1 (formerly article 14) of the Company Act) but, as the unlimited and joint liability is applicable to relations with third parties only, he will be held liable after the Partnership.

reason, they are often referred to as the limited partners[64]. Due to the unlimited liability of the GP, it is most commonly established as a limited liability company, in order to protect interests and the liability of its Shareholder(s).

(iii) management by the GP of the Partnership on which it is elaborated in the below section 4.

4. Management of Partnerships

The GP of the Partnership is a company established as a Limited Liability Company (*fr. société à responsabilité limitée* - S.à r.l., *de. Gesellschaft mit unbeschränkte Haftung* - GmbH) that is formed under the laws of Grand Duchy of Luxembourg, and has the ultimate liability for the management[65], operation and administration of the Partnership. The corporate purpose of the Company (GP) is: (i) to act as a managing general partner (*associé gérant commandité*) or general partner (*associé commandité*) of one or more Luxembourg-based partnerships; (ii) to take on any corporate mandates (including without limitation), directorship mandates, management mandates, general partner mandates and mandates as a member of an investment committee) in relation to one or more Luxembourg or foreign partnerships, companies, entities, arrangements or unit trusts; and (iii) to hold any direct or indirect interests in, or provide advisory or management services to, any such partnerships, companies, entities, arrangements or unit trusts, to the exclusion of any activity which is subject to approval under Luxembourg Act of 1993 on the financial sector.

As already mentioned, the ultimate reason why the GP is almost always established in the legal form of S.à r.l. is to limit the liability of its Shareholder(s), as it has an unlimited liability as a partner in the Partnership.

The GP of the Partnership has the authority to make decisions that are within his scope of activities[66], and to execute documents on behalf of the Partnership[67]; for this reason, the GP is called an active partner. As the LPs do not have these management powers in the practice, they are called passive or "sleeping" partner. In SCS and SCSp, the GP may act as an LP[68] only in case there are at least one

[64] Art 320– 3, point 2 of the Act of July 2013.

[65] Art 310 – 2, 320 - 3 of the Amendments to the 1915 Act enacted in July 2013.

[66] Art 320 - 3, point 3 of the Amendments to the 1915 Act enacted in July 2013. In cases when the Partnership is an AIF, the GP must delegate some of its powers to the 3rd party such as AIFM.

[67] Art 310 -3 of the Amendments to the 1915 Act enacted in July 2013.

[68] Art. 310 – 1, point 4 of the Act of 10 of August 2016, and Art. 320 – 1, point 6 of the Amendments to the 1915 Act enacted on 10th August 2016.

unlimited and one limited partner who are legally distinct from each other, and unless otherwise provided in the LPA.

Other than the above, it is important that the decisions made by the GP are in the best interest of the Partnership. During the decision-making process, the GP has to ensure that all procedures are in compliance with all rules, and that the overall outcome is beneficial to the partnership and eventually LP(s).

The GP itself is managed by one or more managers, which are appointed by a resolution of the shareholder(s) of the GP; under the law, the managers do not have to be shareholders. If several managers are appointed, they constitute a board (in SCS and SCSp: Board of Managers/BOM, in SCA: Board of Directors/ BoD), which can consist of one or 2 different classes of managers appointed by the shareholder(s). The board is authorised to delegate the day-to-day management activities[69] and has the power to represent the Partnership.

If not otherwise defined by the LPA of the Partnership, the GP has full power and authority to act on behalf of the Partnership, thus binding the Partners to enter into, make and perform such deeds, contracts, agreements, undertakings, guarantees and indemnities as the GP may consider necessary, desirable and in the interest of the Partnership's business activity. The Partnership and its assets are managed by the GP, provided that the GP shall not carry on, and shall ensure that the Partnership does not carry on, any activity that would constitute a regulated activity for the purposes of the Financial Act[70], unless it is authorized by the Financial Act to perform such regulated activities.

The GP can be removed by the decision of LP(s) in two cases: (i) with cause or (ii) without cause. In practice, the removal with cause would be triggered by performance or non-performance of its duties and obligations, and if such damage is the direct or indirect result of gross negligence, wilful default, bad faith, misconduct, unauthorised activities that are out of scope of GPs powers, or fraud or fraudulent misrepresentation by the GP, or a key executive[71] or an affiliate of the GP who is involved in the operation of the Partnership. On the other hand, the no-fault removal of the GP typically requires a vote of between 70% and 80% (with reference to LP commitments), where the votes may be cast by written

[69] In practice the "Daily Manager" is most commonly proclaimed by means of a Written Resolution / Circular Resolution.

[70] Luxembourg Act of 5th April 1993 on the financial sector (subsequently amended several times).

[71] The key executive is most commonly used in the closed ended funds in case if Key Persons (the individual/individuals who the investors believe are critical to sourcing, making, managing and exiting from investments) agree to dedicate an amount of their time to the management of the relevant Partnership.

resolutions. In case the GP is removed, the GP should be replaced either by the LP (whose new function should be clearly distinguished from the LP function) or by a third party.[72]

In practice, the ratio of ownership between partners is as follows: the LP(s) own from 95% to 99% of the partnership interests, while the GP(s) own from 0.1% up to 5% of the interest in the partnership. A non-resident partner of a Limited Partnership form (SCS or SCSp) who does not have a permanent establishment in Luxembourg can be exempt from being subject to: (i) Luxembourg income tax, (ii) municipal business tax, or (iii) net wealth tax. However, the LP may be subject to: (i) any applicable tax treaty, (ii) liable to tax income, or (iii) sourced income in case of applicable municipal business tax. Regardless of the limited partnership legal form, profit distributions made to a non-resident partner are not subject to withholding tax in Luxembourg (Allen & Overy, 2014: 17).

5. Conclusion

Partnership is a legal form of corporate structure initially envisaged in the 1915 Act on commercial companies of the Grand Duchy of Luxembourg. Over the last decade, different forms of partnership have become more attractive, as their advantages were gradually increased within several amendments to the 1915 Act. Some of the main advantages which make Partnerships very attractive to national, regional and global investors are: 1) many contractual freedoms (considering that the incorporation deed is the main instrument which is used as a rule book for any future business of the partnership); 2) private seal as a possibility for establishment and liquidation of a partnership if incorporated as SCS or SCSp; 3) no legal provisions on the requisite minimum capital for SCS and SCSp; 4) withdrawals; 5) distributions; 6) well-established liability; and 7) available regulatory options and other tax benefits. The combination of these advantages constitutes a great tool for further investment and business development in the areas of real estate, infrastructure, private debt, private equity and joint venture (Meyers, 2006: 69). The legal forms of partnership are becoming quite common in many structures set-up by the new investors, and in the combination with the available vehicle shapes they are becoming a go-to vehicle in the multi-national structures of companies in financial centres. Thus, indicating that the role of both companies and funds which are established in the legal form of a partnerships are becoming more inclusive in the structuring of investment structures which are targeting real estate and private equity investment strategies. Therefore, one may conclude that the flexible legal provisions which

[72] The standard market practice is to admit new GPs within 90 days, unless otherwise prescribed by the court.

are contained in Luxembourg's Commercial Code are having a positive impact on the improvement of Luxembourg's financial sector.

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Abbreviations:

AoA – Articles of Association

AoI – Articles of Incorporation

AGM – Annual General Meeting

EGM – Extraordinary General Meeting

GP – associé commandité / General Partner (active partner)

LBR – Luxembourg Business Register

LP – associé commanditaire / Limited Partner (sleeping partner)

LPA – Limited Partnership Agreement

LPA A&R - Amended and Restated Limited Partnership Agreement

RBE – *Registre de Commerce et des Sociétés /* Register of Beneficial Owners

RCS – *Registre de commerce et des sociétés /*Trade and Company Register

S.À R.L. – Société à responsabilité limitée / Limited Liability Company

SCA – *société en commandite par actions* / Partnership Limited by Shares

SCS – *société en commandite simple /* Limited Partnership

SCSp – *société en commandite spéciale /* Special Limited Partnership

SENC – *société en nom collectif* / General Corporate Partnership

SMO – Senior Managing Official

UBO – Ultimate beneficial owner

WR – Written Resolution

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КОМАНДИТНО ДРУШТВО КАО ПРАВНА ФОРМА ДРУШТВА ЛИЦА У КОМПАНИЈСКОМ ПРАВУ ЛУКСЕМБУРГА

Апстракт

Рад представља резултат анализе луксембуршког компанијског права као Lex generalis-a (у пракси познатијег по називу Компанијски акт 1915). Основни задатак и циљ рада јесте да представи рефлексију и утицај флексибилних правних норми које су регулисане наведеним законом, као и тумачење правних стандарда и одредби законских прописа кроз упоредно представљање корпоративних структура и правних форми које су присутне у пракси. Важност истицања и анализе законског регулисања командитног друштва Компанијским актом Ликсембурга из 1915. је од значаја из разлога што отвара прозор и ствара доступност информација о пракси најутицајнијег финансијског центра Европе, као и државе са највишим процентом бруто домаћег производа. Један од циљева овог чланка јесте и представљање правне форме командитног друштва које је последње деценије имало најзначајнији утицај на развијање домаћег тржишта у сектору приватног капитала, приватног дуга, као и тржишта некретнина у Европској унији. Наведени закон је тема којом су се бавили многи академици, али и правници у пракси, због количине флексибилних правних норми. Док га са једне стране одређени аутори сматрају лошом организацијом, правници у пракси аргументују да се само повећава могућност коришћења већег броја lex generalis-a, попут Закона о специјалним инвестиционим фондовима, Закона о алтернативним инвестиционим фондовима, Закона о резервисаним алтернативним инвестиционим фондовима и другим.

Кључне речи: *командитно друштво, компанијско право, Луксембург, фондови.*