

Q&A CNC 23/029	<u>QUESTIONS / ANSWERS:</u> ACCOUNTING ASPECTS OF COMPANY MIGRATIONS TO LUXEMBOURG UNDER LUX GAAP AND LUX GAAP-FV REGIMES
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Context:

Companies incorporated abroad may, during the company's social existence, voluntarily decide to migrate¹ to another country, which may be a Member State of the European Union (EU) or of the European Economic Area (EEA) or of a third country.

In the current environment, company migrations from abroad to Luxembourg or from Luxembourg to other countries are relatively frequent.

Under Luxembourg accounting law (LUX GAAP and LUX GAAP-FV regimes), these company migrations to Luxembourg raise a number of questions, such as the continuity of accounting / book values, the duration of the first financial year following the migration, the restatement of accounting policies and measurement bases when not all of them comply with Luxembourg accounting law, and the presentation of comparative figures for the previous financial year and any adjustments that may need to be made to comparatives.

In the absence of legislative provisions or doctrinal guidelines, CNC observes that a fairly heterogeneous practice has developed in Luxembourg, with some considering that the accounting existence of the migrating company only begins upon its arrival in Luxembourg, while others consider that, in the case of a migration carried out with legal continuity, the accounting existence of the company that began abroad continues without interruption in Luxembourg, despite the migration of the company.

The position taken by CNC in this Q&A is that of accounting continuity, which mirrors the legal continuity on which the migration is based.

In this context, this Q&A aims to answer the questions hereafter in order to assist companies in handling the accounting aspects of a company migration to Luxembourg.

It should be noted that, in line with its approach focused on accounting law, CNC does not address in this Q&A the many other aspects associated with a company migration, such as those relating to company law or tax law.

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¹ Luxembourg company law applies to a company that migrates to Luxembourg provided that the company's central administration is transferred there (Art. 100-2, paragraph 3 LSC and Art. 1300-2, paragraph 1 LSC).

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Questions / Answers:

1. Do companies migrating to Luxembourg have to file and publish an opening balance sheet (assets, liabilities and equity) upon arrival in the Grand Duchy of Luxembourg?

Under current Luxembourg accounting law, companies migrating to Luxembourg are not required to file an opening balance sheet drawn up on the date of arrival in the Grand Duchy of Luxembourg.

However, such a statement of assets, liabilities and equity is often required in the context of the notarial deed held upon arrival in Luxembourg (e.g. check of the financial position, verification of compliance with the minimum share capital) or for tax purposes (e.g. opening tax balance sheet) or for internal administrative purposes within the company (e.g. initial financial position attributable to the new administrative or management body). With regard to company law, this accounting situation must be established in accordance with Luxembourg accounting law².

However, this document does not have to be filed with the RCS or published in the RESA.

2. If the migrating company kept its day-to-day books in a currency other than the euro prior to migration, does it have to convert its bookkeeping currency and the currency of presentation of the annual accounts upon arrival in Luxembourg?

Q&A CNC 22/026 (R) entitled "*Currency of bookkeeping and of presentation of the accounts under LUX GAAP and LUX GAAP-FV*" concludes that "*there is no legal requirement for undertakings to keep their day-to-day books and to present their annual accounts in a specific currency, for example the euro as legal tender in Luxembourg or the currency in which their share capital is denominated. In this context, undertakings are free to determine the currency in which their day-to-day books are kept and their annual accounts are presented (...)*". In practice, however, it is important that the currency chosen is fully convertible and freely usable and that it is issued or guaranteed by a central bank or a public authority.

Subject to the above, a company migrating to Luxembourg is not required to convert its day-to-day books and its annual accounts into euro or into another currency such as the currency of its share capital.

3. Does the migration of a company to Luxembourg imply accounting continuity?

The migration of companies to Luxembourg is based on the principle of legal continuity³. Thus, the migration of a foreign company to Luxembourg does not result in its dissolution, as the company continues to exist as a legal entity despite its migration.

² Namely, under LUX GAAP or LUX GAAP-FV, as the assumption that the migrating company will adopt IFRS-EU is not considered in this Q&A.

³ See: Case C-106/16 – Polbud – Wykonawstwo sp. z o.o. – Judgment of the Court (Grand Chamber) of 25 October 2017: infocuria.europa.eu/tabs/document?source=document&text=&docid=195941&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs&t&part=1&cid=2622084

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This legal continuity is generally accompanied by accounting continuity. This means that the migration does not alter the company's financial position in any way and that the assets, liabilities and equity, as well as the expenses and income for the current financial year, are transferred to the accounting books kept in accordance with Luxembourg accounting law at the value at which they appeared in the accounting books kept in accordance with the foreign accounting law at the time of the migration. However, there are exceptions to this principle of accounting continuity, and adjustments are sometimes required where the company applied accounting policies or measurement bases prior to its migration that complied with foreign accounting law but do not comply with Luxembourg accounting law (see points 5.1 and 5.2).

4. If the migrating company arrives during the financial year, is its first financial year in Luxembourg necessarily a shortened financial year? In other words, does migration have an effect on the length of the statutory financial year?

As the migration takes place with legal and accounting continuity, it has no effect on the length of the financial year as provided for in the articles of association. Consequently, the company's accounting existence continues despite the migration.

Therefore, the first annual accounts to which Luxembourg accounting law applies are the annual accounts for the financial year in which the migration takes place. These annual accounts cover the entire financial year (e.g. calendar year or divergent financial year).

5. In a situation where there are significant differences between the accounting policies and measurement bases applicable in the country of origin and those applicable in Luxembourg, is it necessary to make accounting adjustments?

Upon arrival in Luxembourg, Luxembourg accounting law applies to the company, which means that the day-to-day books must be kept and the annual accounts must be presented in accordance with general principles and measurement bases that comply with Luxembourg accounting law (LUX GAAP or LUX GAAP-FV regimes⁴). If, prior to its migration, the company used measurement bases that did not comply with Luxembourg accounting law, the question arises as to whether these book values should be carried forward or, where applicable, whether they should be restated. In this regard, two methods appear possible, namely the preferred method (point 5.1) and the alternative method (point 5.2).

For illustrative purposes, the example of company XYZ is taken, which, in accordance with the accounting and company law of its jurisdiction of origin, applied fair value to its shares in affiliated undertakings (fair value fluctuation of 25) and, prior to its migration, had distributed 60% of the fair value reserve corresponding to an amount of 15 (see **Fig. A**).

⁴ The assumption that the migrating company has adopted IFRS-EU is not considered in this Q&A.

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Amounts denominated in thousands of euros

Undertaking XYZ, SA
Balance sheet as of 31.12.2022

Shares in affiliated undertakings	75	Subscribed capital	30
- purchase cost: 50		Results brought forward	10 (a)
- fair value change: 25		Result for the financial year	15
Total fixed assets	75	Total equity	55
Receivables	10	Payables	32
Cash at bank	2		
Total current assets	12	Total liabilities	32
Total balance sheet	87	Total balance sheet	87

(a) Increase in the fair value reserve of 25 and distribution of 60% of this amount, i.e. 15.

Fig. A

It should be noted that regardless of the method chosen (see points 5.1 or 5.2), the administrative or management body must consider any restatements related to current and deferred tax issues, which are not covered in this Q&A and in its illustrative examples.

5.1. The preferred method: restatement of elements measured using accounting policies and measurement bases that do not comply with Luxembourg accounting principles

The preferred method consists of restating the book values in accordance with the general principles and measurement bases accepted in Luxembourg (LUX GAAP or LUX GAAP-FV), as if Luxembourg accounting law had always applied to the migrating company.

For example, if the company previously carried out periodic revaluation of its tangible fixed assets⁵, these items would have to be restated in order to return to a measurement that complies with Luxembourg accounting law, i.e. a measurement at historical cost – less, where applicable, systematic depreciation – or even at a lower value in the event of durable impairment (Art. 55 LRCS).

⁵ By way of assumption, this does not refer to investment properties that could be subject to optional fair value measurement under LUX GAAP-FV. See: Q&A CNC 16/009 "Investment properties under LUX GAAP and LUX GAAP-FV: cost model vs fair value model".

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It should be noted that these restatements – which potentially relate to several financial years ended within the jurisdiction of origin – are treated as changes in accounting policies⁶ and are therefore recognised in full in the current financial year⁷ (see point 6 concerning comparative figures).

Furthermore, it should be noted that any distributions made abroad in accordance with the law applicable to the company prior to its migration to Luxembourg are not legally challenged. However, these distributions made in the jurisdiction of departure, combined with the restatements – upon arrival in Luxembourg – of elements measured using measurement bases that do not comply with Luxembourg general accounting principles, may significantly reduce the company's net assets (see: **Fig. B**). In the event that the company's net assets are reduced to an amount of less than the minimum share capital, the migrating company would then have to be recapitalised⁸.

Amounts denominated in thousands of euros

Undertaking XYZ, SA			
Balance sheet as of 01.01.2023			
Shares in affiliated undertakings	50	Subscribed capital	30
- purchase cost: 50		Results brought forward	-15 (b)
- fair value change: 25		Result for the financial year	15
Total fixed assets	50	Total equity	30
Receivables	10	Payables	32
Cash at bank	2		
Total current assets	12	Total liabilities	32
Total balance sheet	62	Total balance sheet	62

(b) The fair value reserve of 25 on the shares in affiliated undertakings is restated (eliminated) in accordance with Luxembourg accounting law. The distribution of 15 is not legally challenged, but the combination of the two, namely the 'elimination of the fair value reserve under Luxembourg accounting law' for 25 and the 'maintaining of the distribution made under foreign law' for 15 has the effect of significantly reducing the net assets position of undertaking XYZ.

Fig. B

⁶ See: Q&A CNC 21/024 (R) "Change of accounting policies, measurement bases and accounting estimates under LUX GAAP and LUX GAAP-F".

⁷ This is the first financial year ended in Luxembourg, even if it began in the jurisdiction of departure.

⁸ Without prejudice to the application of other provisions of company law or prudential regulations.

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5.2. The alternative method: continuity of accounting / book values without restatement but with presentation of unrealised revaluation differences in non-distributable reserves

The alternative method consists of assuming that the accounting / book values as included in the latest annual accounts closed and approved in the jurisdiction of origin (before migration) are in some way crystallised and are therefore carried over to the opening balance sheet of the first financial year closed in Luxembourg without requiring any restatement of these book values (strict interpretation of the accounting continuity principle).

In this context, the accounting / book values carried over are treated in Luxembourg as constituting a new accounting basis, i.e. as a deemed cost of the items concerned⁹.

In practice, this applies exclusively to the following elements that were subject to an accounting revaluation prior to the migration¹⁰ and in accordance with the general accounting principles and measurement bases accepted in the jurisdiction of origin:

- Financial fixed assets (e.g. shares in affiliated undertakings, associates, joint ventures and participations);
- Tangible fixed assets (e.g. owner-occupied property such as the company's administrative offices or factories and other warehouses).

However, in order to reconcile this principle of crystallisation of revaluations recognised prior to migration with the accounting principle of prudence applicable under Luxembourg accounting law, it is important that these reserves are presented in non-distributable reserves¹¹ until the assets concerned are actually realised (see **Fig. C**).

⁹ N.B.: for the purposes of this illustrative example, we are referring to cases where the assets are measured at acquisition price or cost under Luxembourg accounting law. The situation would be different for accounting items that could be measured under Luxembourg accounting law at a value other than historical cost (e.g. fair value, equity method).

¹⁰ It is important that these revaluations be carried out – at the latest – in the most recent annual accounts closed and approved in the jurisdiction of origin and that they comply with the general principles and accounting policies provided for by the accounting law of the jurisdiction of origin.

¹¹ For companies subject to general accounting law and more specifically to Article 72ter LRCS on the non-distributable nature of unrealised reserves.

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Amounts denominated in thousands of euros

Undertaking XYZ			
Balance sheet as of 01.01.2023			
Shares in affiliated undertakings	75	Subscribed capital	30
- purchase cost: 50		Reserves in application of fair value	25 (c)
- fair value change: 25		Results brought forward	-15
		Result for the financial year	15
Total fixed assets	75	Total equity	55
Receivables	10	Payables	32
Cash at bank	2		
Total current assets	12	Total liabilities	32
Total balance sheet	87	Total balance sheet	87

(c) In the absence of restatement of the fair value measurement of shares in affiliated undertakings (crystallisation/deemed cost), the revaluation of 25 is maintained in the balance sheet prepared in accordance with LUX GAAP/LUX GAAP-JV but is presented in a non-distributable reserve entitled 'Fair value reserve'. As regards the distribution - under foreign law - of 60% of the fair value reserve, i.e. a negative (debit) amount of 15, this is presented under 'retained earnings' and reduces the future distributable capacity of undertaking XYZ by this amount.

Fig. C

6. Should comparative figures be presented in the balance sheet and profit and loss account of the first financial year ended in the Grand Duchy of Luxembourg? If so, should the figures for the previous financial year presented for comparison purposes be adjusted?

The company must present comparative figures to the extent that it already existed during the financial year preceding its migration (legal and accounting continuity) and that Luxembourg accounting law – which applies to it from the date of migration¹² – requires, pursuant to Article 29, paragraph 2, first sentence of the LRCS, that "each balance sheet and profit and loss account item [must include] the figure relating to the corresponding item for the preceding financial year (...)".

¹² Provided that this migration is accompanied by the transfer of the company's central administration (Art. 100-2, sub-paragraph 3 LSC and Art. 1300-2, 1st sub-paragraph LSC).

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It should be noted, however, that these comparative figures cannot be restated¹³ in accordance with the principle of intangibility (immutability) of the opening balance sheet referred to in Article 51, paragraph 1, point f) LRCS¹⁴. Therefore, if the company applied general principles or measurement bases that did not comply with Luxembourg accounting law prior to its migration, it would be necessary, if the preferred method referred to in point 5.1 is applied, to analyse these items as changes in accounting policies which – according to Q&A CNC 21/024 (R)¹⁵ – would be subject to restatement¹⁶ during the current financial year¹⁷, with :

- either recognition in equity on the first day of the current financial year of the effect of changes in accounting policies relating to previous financial years (preferred solution recommended by Q&A CNC 21/024 (R));
- or recognition in full in the profit and loss account for the current financial year of the effect of changes in accounting policies relating to previous financial years (alternative solution accepted in accordance with Q&A CNC 21/024 (R)).

However, in order not to mislead users, the lack of comparability of the comparative figures with the figures for the current financial year should then be disclosed in the notes and duly explained in accordance with Article 29(2), 2nd sentence LRCS.

7. Are companies migrating to Luxembourg required to file the trial balance of accounts in accordance with the PCN and to pass through the standard collection on the eCDF platform?

Migrating companies are subject to Luxembourg accounting law from the date of their arrival in Luxembourg for the entire current financial year, even if it began abroad.

Therefore, unless migrating companies are eligible for a PCN exemption¹⁸ (e.g.: companies subject to prudential supervision by the CSSF with the exception of support PSFs) which also comes with an exemption from standard collection on the eCDF platform, these companies will generally be subject to PCN and eCDF collection upon arrival in Luxembourg for the entire financial year.

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¹³ Excluding reclassifications between elements / captions with no impact on total equity or net income.

¹⁴ Article 51, paragraph 1(f) LRCS states that:

“the opening balance sheet for each financial year must correspond to the closing balance sheet for the preceding financial year”

¹⁵ Q&A CNC 21/024 (R) “Change in accounting policies, measurement bases and accounting estimates under LUX GAAP and LUX GAAP-FV”

¹⁶ Namely, in the event of restatement of items / elements measured using accounting policies and measurement bases that do not comply with Luxembourg accounting principles.

¹⁷ Namely, during the financial year in which the company migrates to Luxembourg and during which Luxembourg accounting law applies to it for the first time.

¹⁸ For a complete overview of PCN exemptions, please refer to Article 13, sub-para. 5 of the Commercial code and Article 75 LRCS.

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Disclaimer

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