

Q&A CNC 26/037	<u>QUESTIONS / ANSWERS :</u> A REMINDER OF THE DIFFERENCES BETWEEN ANNUAL ACCOUNTS PREPARED FOR STATUTORY PURPOSES AND ANNUAL ACCOUNTS PREPARED FOR CONTRACTUAL PURPOSES OR ON A VOLUNTARY BASIS
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Context :

CNC was recently asked whether an undertaking could prepare a set of annual accounts under IFRS - EU, subject to approval by the general meeting of members or shareholders, and whether it could file with the Trade and companies register (RCS) and publish in the Electronic register of companies and associations (RESA) a separate set of annual accounts prepared in accordance with LUX GAAP for purely administrative purposes and therefore not subject to approval by the general meeting of members or shareholders.

This question relates in particular to the distinction between the concept of statutory annual accounts (in French: “*comptes annuels légaux*”) and that of annual accounts prepared for contractual purposes or on a voluntary basis. It also relates to other associated topics.

In this regard, the purpose of this Q&A is to address this question and related issues by seeking to establish guiding principles and identify their implications.

Questions :

1. What is generally meant in Luxembourg by the terms “annual accounts prepared for statutory purposes” (statutory annual accounts)?
2. Does the undertaking have the option to file a set of annual accounts with RCS and publish them in RESA by means of a reference to the filing without submitting them for approval by the general meeting of members or shareholders?
3. If annual accounts are prepared for contractual purposes or on a voluntary basis (contractual annual accounts), does the undertaking have the option to disseminate those annual accounts to a wide audience?
4. According to which accounting framework does the undertaking have the option to present its annual accounts prepared for statutory purposes (statutory annual accounts), and what about annual accounts prepared for contractual purposes or on a voluntary basis (contractual annual accounts)?
5. Does an undertaking have the option to prepare, for statutory purposes (statutory annual accounts), a set of annual accounts in abridged format for filing with RCS and publication in RESA (third-party creditors and general public), and a more detailed set of annual accounts for submission to the general meeting for approval (members or shareholders)?

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<p><u>Questions / Answers :</u></p> <p>1. What is <u>generally</u> meant in Luxembourg by the terms “annual accounts prepared for statutory purposes” (statutory annual accounts)?</p> <p>In Luxembourg, the terms “statutory annual accounts” (in French: “<i>comptes annuels légaux</i>”) <u>generally</u> refers to the annual accounts that an undertaking is required by law to prepare. For the vast majority of Luxembourg undertakings¹, these statutory annual accounts are those required by Title II of Book I of the Commercial Code (C.com.)² as well as — In most cases³ — by Title II LRCS, and which are prepared for the purpose of informing and protecting members or shareholders, as well as third-party creditors and, more broadly, the general public. These statutory annual accounts have the following characteristics:</p> <ul style="list-style-type: none"> • they are subject to approval by the general meeting of members or shareholders⁴; • they serve as the basis for the appropriation of earnings, the constitution of reserves, and the determination of distributable reserves, as well as for the maintenance of capital; • they are filed with the Trade and companies register (RCS), where they are generally available to the public⁵ ; • they are published in the Electronic register of companies and associations (RESA) by means of a reference to the filing with RCS⁶.
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¹ Although legally required, pursuant to Article 15 of the Commercial Code, to prepare annual accounts (“statutory annual accounts”), special limited partnerships (SCSp) are not covered by this Q&A, which is primarily intended for limited liability companies and similar companies as referred to in the Accounting Directive 2013/34/EU (see footnote 5).

² According to Article 15 of the Commercial Code:

“Any undertaking shall draw up once a year a complete inventory of its assets and rights of any kind and of its liabilities, obligations, and commitments of any kind.

After their reconciliation with the inventory, the accounting books shall be summarised in a descriptive document which shall form the annual accounts”.

³ By way of illustration, although credit institutions and insurance and reinsurance companies are subject to the obligation to prepare annual accounts pursuant to Article 15 of the Commercial Code, the latter are subject to presentation, audit, filing, and publication of their annual accounts not in accordance with the provisions of Title II LRCS (Luxembourg general accounting law) but in accordance with sector-specific accounting laws (Luxembourg special accounting law), namely:

- the amended Law of June 17, 1992, on the accounts of credit institutions;

- the amended Law of December 8, 1994, on the accounts of insurance and reinsurance companies.

⁴ Depending on the undertaking's legal form

⁵ This Q&A focuses primarily on limited liability companies and similar companies as defined by Accounting Directive 2013/34/EU, namely: public limited companies (SA), corporate partnerships limited by shares (S.C.A.), private limited companies (S.à r.l.), and — where members of the undertaking having otherwise unlimited liability in fact have limited liability — unlimited companies (S.N.C.) and common limited partnerships (S.C.S.).

⁶ See footnotes 4 and 5

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- 2. Does the undertaking have the option to file a set of annual accounts with RCS and publish them in RESA by means of a reference to the filing without submitting them for approval by the general meeting of members or shareholders?**

No. CNC was asked whether an undertaking could prepare a set of annual accounts under IFRS - EU subject to approval by the general meeting of members or shareholders, and whether it could file a separate set of annual accounts prepared under LUX GAAP with RCS and publish them in RESA for purely administrative purposes (in accordance with the templates available on the electronic financial data collection platform (eCDF)) without seeking the general meeting's approval of the latter.

In this regard, the answer must be negative, as article 75 LRCS provides that "*undertakings (...) shall file with the Trade and companies register their annual accounts, duly approved in the case of legal entities (...)*".

- 3. If annual accounts are prepared for contractual purposes or on a voluntary basis (contractual annual accounts), does the undertaking have the option to disseminate those annual accounts to a wide audience?**

A nuanced response is called for here. Indeed, in the case of annual accounts prepared for contractual purposes (e.g., bank covenants⁷) or on a voluntary basis and subject to no dissemination restrictions, the undertaking is, in principle, free to make such annual accounts available to a broad public. CNC is, however, of the opinion that the **preferred solution** — which should be favored in order to avoid misleading users and creating confusion among readers of the annual accounts — is to include a disclosure in the notes to the annual accounts prepared for contractual purposes or on a voluntary basis, mentioning the existence of annual accounts prepared for statutory purposes in accordance with an authorized accounting framework⁸ and filed with RCS, where they are generally accessible to the public⁹.

- 4. According to which accounting framework does the undertaking have the option to present its annual accounts prepared for statutory purposes (statutory annual accounts), and what about annual accounts prepared for contractual purposes or on a voluntary basis (contractual annual accounts)?**

In accordance with Q&A CNC 14/001 entitled "*Luxembourg accounting law applicable to undertakings: three separate regimes*," the Luxembourg general accounting law applicable to undertakings¹⁰ provides for — for the presentation of annual accounts prepared for statutory purposes (statutory annual accounts) — three separate accounting regimes, namely:

- the LUX GAAP regime set forth in chapter II of title II LRCS, based on the valuation rules in Section 7, namely the principle of prudence (art. 51(1)(c) LRCS) and the historical cost convention (art. 52 of the LRCS);
- the optional LUX GAAP – FV regime, based on the provisions of Section 7 bis, "*Rules applicable to fair value measurement*" of Chapter II of Title II LRCS;
- the optional IFRS – EU regime provided for in Chapter II bis, "*On the Preparation of annual accounts in accordance with international accounting standards*" of Title II LRCS.

⁷ Bank covenants refer to contractual obligations imposed by banks on borrowers — typically undertakings — to ensure the repayment of a loan.

⁸ See question 4

⁹ See footnotes 4 and 5

¹⁰ See footnotes 4 and 5

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However, in accordance with the principle of freedom to contract, an undertaking is free to present annual accounts prepared for contractual purposes or on a voluntary basis (contractual annual accounts) in accordance with the accounting standards or framework of its choice.

5. Does an undertaking have the option to prepare, for statutory purposes (statutory annual accounts), a set of annual accounts in abridged format for filing with RCS and publication in RESA (third-party creditors and general public), and a more detailed set of annual accounts for submission to the general meeting for approval (members or shareholders)?

As a reminder, Luxembourg general accounting law applicable to undertakings allows them to prepare abridged annual accounts if the undertaking is categorized as a "small undertaking". Article 35 LRCS thus allows "small undertakings" to prepare an abridged balance sheet (optional), while article 47 LRCS — which also applies to medium-sized undertakings — allows them to prepare an abridged profit and loss account (optional). Furthermore, article 66 LRCS provides that "small undertakings" may prepare abridged notes to the accounts (optional). Finally, article 79, paragraph 2 LRCS grants "small undertakings" the option not to publish their profit and loss account (optional).

Provided that the annual accounts prepared for statutory purposes (statutory annual accounts) are presented in accordance with the same accounting framework (LUX GAAP, LUX GAAP – FV, or IFRS – EU) and therefore present the same financial measures (e.g., equity, net income for the year, total assets), there appears to be no obstacle to an undertaking's ability to:

- submit more detailed annual accounts¹¹ to members or shareholders, including, for example, a non-abridged balance sheet, a non-abridged profit and loss account, and/or non-abridged notes to the accounts¹² ;
- file an abridged version of the annual accounts with RCS, provided that such abridged version complies with the provisions of the Luxembourg general accounting law.

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Disclaimer

This document - provided as a courtesy - is an unofficial translation of the French original document entitled "*Rappels sur les notions de comptes annuels établis à des fins légales vs comptes annuels établis à des fins contractuelles ou sur base volontaire*". In case of discrepancy in interpretation, the French version shall prevail.

The "questions and answers" published by the "Commission des normes comptables (CNC)" (Luxembourg Accounting Standards Board):

- are of a general nature and do not refer to the specific situation of any natural or legal person;
- are intended to contribute to the development of accounting doctrine in accordance with Article 73(b) of the amended Law of 19 December 2002 on the trade and companies register, as well as on the bookkeeping and annual accounts of undertakings;
- represent only the opinion of the GIE CNC on a number of doctrinal and interpretative issues.

The administrative or management bodies of undertakings remain responsible in accordance with general law for any decisions taken based on this document.

¹¹ It should be noted that for undertakings to which Luxembourg general accounting law applies — in whole or in part — and which are subject to prudential supervision, more detailed annual accounts may also be required as part of the supervisory authority's prudential oversight.

¹² Specifically, notes to the accounts containing one or more disclosures not required by the Luxembourg general accounting law applicable to "small undertakings".