

# HOLDING COMPANIES IN LUXEMBOURG

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## Introduction:

In Luxembourg, investors have the choice between two holding vehicles: the Holding Company structure “*SOciété de PARTicipations Financières*” (hereafter “SOPARFI”) and the Private Asset Management Company “*Société de gestion de Patrimoine Familial*” (hereafter “SPF”), created to “replace” the old Holding 1929.

The SPF has been introduced in the Luxembourg legislation by the modified Law of 11<sup>th</sup> May 2007 concerning the Private Asset Management Company, “*Loi du 11 mai 2007 relative à la création d'une société de gestion de patrimoine familial*”. The aim of the SPF is mainly to manage financial private assets. The SPF offers numerous tax advantages and is notably exempt from Luxembourg Income Tax and annual Net Wealth Tax.

On the contrary, the SOPARFI is not regulated by any particular legislation but is governed by the Law of 15<sup>th</sup> August 1915 on Commercial Companies, “*Loi du 10 août 1915 sur les sociétés commerciales*”. The SOPARFI benefits from the Directive of 30<sup>th</sup> November 2011 (2011/96/EU) on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and the tax treaties in force in Luxembourg.

## 1. The Legal Regime

The main legal features of a SOPARFI or a SPF depend on the characteristics of the chosen commercial company.

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1 Partner - AS AVOCATS, Luxembourg

### **1.1. The common characteristics of SOPARFI and SPF**

Frequently created with the same legal forms, SOPARFI and SPF both share in common the same text to establish their articles of association: the Law of 15<sup>th</sup> August 1915 on Commercial Companies (hereafter “Law of 1915”).

#### **1.1.1. The legal basis**

The SOPARFI and the SPF have to comply with all the dispositions of the Law of 1915. The SOPARFI and the SPF are authorised to hold and manage participations.

#### **1.1.2. The legal form**

The most common company form chosen for a SOPARFI or an SPF is the public limited company “*Société Anonyme*” (hereafter “S.A.”), less frequently, the limited liability company “*Société à Responsabilité Limitée*” (hereafter “S.à r.l”). It is also possible to choose the form of a partnership limited by shares “*Société en Commandite par Actions*” (S.C.A.) or a cooperative company “*Société Coopérative*” (S.C.).

#### **1.1.3. The share capital**

The legal share capital has to be at least 31.000 € for an S.A. and 12.500 € for an S.à r.l. The capital of a SOPARFI or a SPF having as legal form an S.A., has to be paid up to at least one quarter.

#### **1.1.4. The shares**

The statutes of the SOPARFI / SPF define the type of shares. An S.A. can have registered or bearer shares, the latter ensuring the anonymity of the holder. Furthermore, the statutes can provide for the possibility to create, notably, preference shares or shares without voting rights.

### **1.2. The main differences between SOPARFI and SPF**

The SOPARFI is authorised to have commercial activities of any kind. The rules applicable to a SOPARFI are the same as in common law.

#### **1.2.1. The authorised activities**

As highlighted above, a SOPARFI is authorized to have commercial activities. If it intends to do so, it is obliged to obtain a permission of establishment from the

Ministry of the Middle Classes, and the company has to file a declaration of registration to VAT at the indirect tax administration, “*l’Administration de l’Enregistrement des Domaines*” (hereafter “AED”), in order to receive a VAT number.

The activities of an SPF are limited to the acquisition, the holding, the management and the disposal of financial assets.

An SPF is not authorised to directly hold immovable property. However, an SPF is allowed to hold shares of a real estate company, under the condition that the said company is not a transparent entity. A direct investment in immovable property would be considered as an economic activity, thus an activity prohibited for the SPF.

An SPF is neither allowed to take up non-negotiable loans. Nevertheless an SPF can provide interest free loans or guarantee the commitments of a company in which it holds a participation.

An SPF can hold a substantial participation in another company without “inferring in the management of the company”<sup>2</sup>. However the SPF’s shareholders can be the managers or even managing directors in a company in which the SPF holds participation.

#### 1.2.2. The shareholder

In the case of a SOPARFI, the S.A or S.à r.l can be created by a natural or a legal person.

The Law of 11<sup>th</sup> May 2007 provides that shares of a SPF can be hold by a natural person managing its own private asset, a company exclusively managing one or more private assets of natural persons, or an intermediary acting for investors mentioned above.

#### 1.2.3. Financing the subsidiary

In Luxembourg no legal disposition governs the financing of subsidiaries by a SOPARFI. However, according to the tax authorities, a debt/equity ratio of 85/15 is applied in practice by the Luxembourg tax authorities in case of direct or indirect financing by the company’s shareholders.

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2 Terminology inspired by the judgment of the Court of Justice of the European Communities, Cassa di Risparmio di Firenze, 10th January 2006, C-222/04

No legal disposition governs the indebtedness of an SPF; however a debt / equity ratio of 8/1 is applied in order to calculate the Subscription Tax.

A loan from a shareholder and a guarantee given by a shareholder for loans granted by a third party are considered as debt for the financing, in order to evaluate whether the debt/equity ratio is respected. No such debt/equity ratio is applied for financing by third parties.

In practice, a loan contracted without interest is considered by the tax authorities as capital equity available to finance a subsidiary.

## **2. Tax Aspects**

### **2.1. General taxation principles in Luxembourg**

Luxembourg Tax legislation ensures a common Specific Fixed Registration Fee for the SPF and the SOPARFI and both holding vehicles are subject to the same rules when income is transferred to a natural person who is a shareholder.

On one hand, the SPF benefits from exemptions under the Law of the 11<sup>th</sup> May 2007 and on the other hand, the SOPARFI from the European Directives and from tax treaties.

#### **2.1.1. Specific Fixed Registration Fee**

In Luxembourg, the capital duty has been abolished as from the 1<sup>st</sup> January 2009. Instead a Specific Fixed Registration Fee of 75 € must be paid for the setting up of a company and for the amendments of the articles of association.

#### **2.1.2. Income Tax**

Income Tax includes the Corporate Income Tax (CIT), at a rate of 20%, if the taxable income is less than 15.000 €, and 21 %, if the taxable income exceeds 15.000 €, the Municipal Business Tax (MBT), its rate depending on the municipality where the company has its seat, and the Surcharge for the Unemployment Fund of 5%. For example a company based in the city of Luxembourg pays Luxembourg Income Tax at a rate of 28.80%.

Since 2011, a fully taxable collective entity, having an activity not subject to an authorisation by a Minister or a supervisory authority, and which has at least 90% of the balance sheet as holding participation, must pay a fixed minimum amount of Income Tax of 1.575 € (which includes the 5% for the unemployment fund).

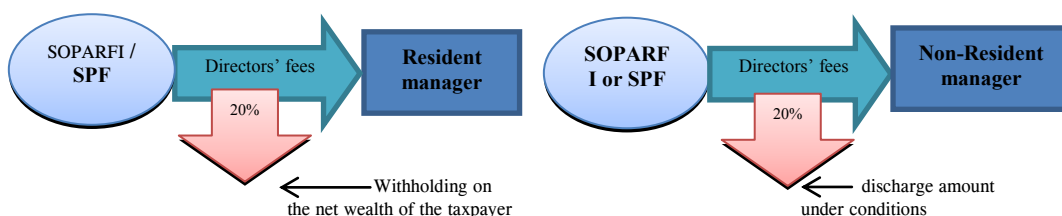
### 2.1.3. Withholding Tax

Dividends are in principle subject to a Withholding Tax at a rate of 15%, unless reduced by the provisions of a double tax treaty or national law.

### 2.1.4. Net Wealth Tax

The Net Wealth Tax due is calculated on the total of the assets and rights of the property of a company minus its debts. The actual net wealth tax rate is 0.5% per annum.

### 2.1.5. The Tax on directors' fees



Article 152 title 2 LIR claims that the directors' fees paid by a company are subject to a Withholding Tax on the income at a rate of 20%.

This Withholding Tax for a resident taxpayer administrator is due on the gross amount of the directors' fees. Deductions for operating expenses are not accepted. The non-resident taxpayer benefits from a discharge of Tax return if its Luxembourg income is only composed by the directors' fees and if the amount of these fees does not exceed 100.000 € per year.

### 2.1.6. Final interest withholding tax

The vehicles distributing interests in Luxembourg have to respect the Law of 23<sup>rd</sup> December 2005, introducing a final interest Withholding Tax, "*Loi du 23 décembre 2005 sur la retenue à la source libératoire (RELIBI)*", at a rate of 10% on interest income paid by paying agents, notably SPFs and SOPARFIs established in Luxembourg, to beneficial owners resident in Luxembourg.

The Law of 21<sup>st</sup> June 2005, following Directive 2003/48/CE on taxation of savings income in the form of interest payments, "*Loi du 21 juin sur la fiscalité des revenus de l'épargne et intérêts*", has created a Withholding tax on the payment of interest to non-resident taxpayers: since 1<sup>st</sup> July 2011, the rate of 35% has to be applied.

## **2.2. The SPF tax aspects**

The SPF is subject to a different Tax regime than the SOPARFI. The Law of 11<sup>th</sup> May 2007 governs its taxation and grants many exemptions.

### **2.2.1. Exemptions**

The SPF is exempt from Income Tax and Net Wealth Tax.

The Law of 18th February 2012 abolished the foreclosing to benefit of the exemption regime for dividends if more than 5% of an SPF's incoming dividends stemmed from participations taxed at a lower rate than the Luxembourg equivalent.

Since 1<sup>st</sup> January 2012, a SPF is authorised to receive incoming dividends from resident and non-resident companies, without any restrictions whatsoever.

### **2.2.2. Subscription Tax**

The rate of the Subscription Tax is 0.25%, due every year. The tax base is constituted by the capital paid up and the issuing premium. Furthermore the part of the debt which is 8 times higher than the capital paid up is added to the issuing premium. The Subscription Tax is limited to a maximum amount of 125 000 €.

### **2.2.3. Double taxation**

The SPF does not benefit from tax treaties, neither from the Directive of 30<sup>th</sup> November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, nor from the Directive of the 17<sup>th</sup> February 2005 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, nor from the Directive of 3rd June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

### **2.2.4. Withholding Tax**

Dividends distributed to the shareholder of an SPF are not subject to Withholding Tax.

## **2.3. The SOPARFI tax aspects**

A SOPARFI is a fully taxable company and is therefore entitled to benefit from the

Parent-Subsidiary Directive, the Mergers-Exchanges Directive, the Interests-Payments Directive and the double taxation treaties. If the SOPARFI fulfills the conditions of threshold and period of holding participation, dividends and capital gain can be exempt from Income Tax.

Directive 90/435/EEC of the 23<sup>rd</sup> July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, modified by Directive 2011/96/EU of 30<sup>th</sup> November 2011, has been introduced in the Luxembourg law, through the modification of the Articles 147 and 166 of the Luxembourg's Income Tax Law of 4<sup>th</sup> December 1967 "*Loi modifiée du 4 décembre 1967 concernant l'impôt sur le Revenu des collectivités*" (hereafter "*LIR*").

### 2.3.1. The exemption of Income Tax

#### 2.3.1.1. The exemption of Income Tax on dividends received from a subsidiary



Article 166 LIR provides that, in order to benefit from the dividend exemption on Corporate Income Tax, the SOPARFI which receives the dividend has to be:

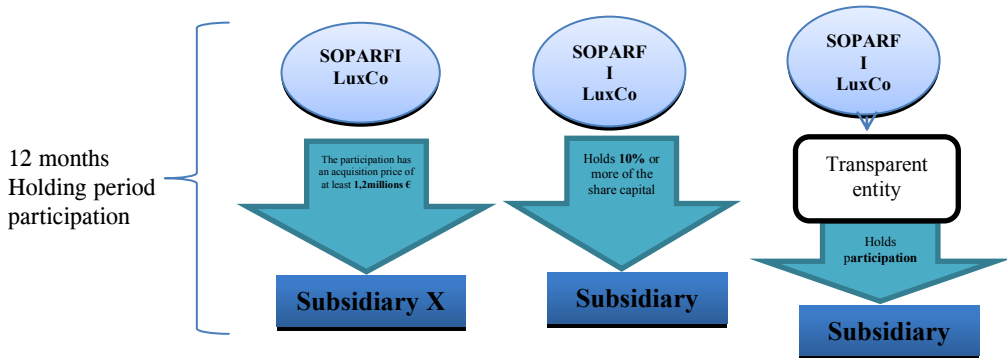
- a fully taxable resident company which adopted one of the legal forms listed in the annex of Article 166, paragraph 10 LIR; or
- a fully taxable resident capital company not listed in the annex of Article 166, paragraph 10 LIR; or
- a Luxembourg permanent establishment of a collective entity referred to in the Article 2 of Council Directive of 30<sup>th</sup> November 2011 (2011/96/EU) on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (could even be a transparent company); or
- a Luxembourg permanent establishment of a corporation resident in a State with which Luxembourg has concluded a double tax treaty; or
- a Luxembourg permanent establishment of a corporation or cooperative company resident in an EEA country other than an E.U. Member State.

The distributing company must be:

- a company referred to in article 2 of Council Directive of 30<sup>th</sup> November 2011 (2011/96/EU) on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; or

- a fully taxable resident corporation not listed at Article 166 LIR; or
- a non-resident corporation which is liable to a tax equivalent to the Corporate Income Tax.

At the date of disposal of the income, the SOPARFI must hold or commit to hold a continuous participation for at least 12 months. The participation must represent at least 10% of the capital, or the acquisition price must amount to at least 1,2 million euros.



The Parent-Subsidiary privilege offers also an exemption for expenses which are directly related to the dividend income such as interest expenses in relation to the financing of the participation. However, the expenses attached to the receipt of a dividend are deductible up to the amount of the dividend received.

The Luxembourg authorities have decided through the Grand-Ducal Regulation of 31<sup>st</sup> March 2004 on the Income Tax for securitisation vehicles, “*Règlement Grand Ducal du 31 mars 2004 sur l’impôt sur le revenu (Organismes de titrisation)*”, to exclude the participation of securitisation vehicle provided in Article 166 LIR. The income from a securitization vehicle has to be considered as interest and not as a dividend.

### The partial exemption of dividends

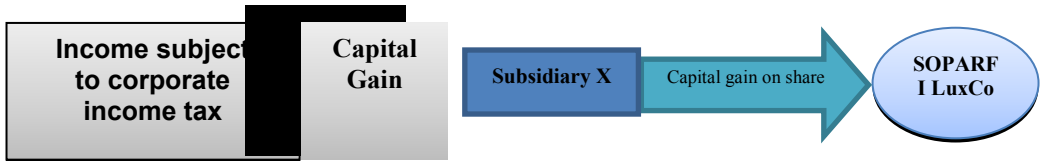
If the conditions for participation exemption are not fulfilled, Article 115.15a LIR provides for a 50% exemption on the Corporate Income Tax if the subsidiary is:

- a fully taxable resident capital company or;
- a capital company resident in a State with which Luxembourg has in force a double tax treaty and is liable to a tax corresponding to the Corporate Income Tax or;



- a capital company resident in a E.U. member State referred to in article 2 of Council Directive of 30<sup>th</sup> November 2011 (2011/96/EU) on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

### 2.3.1.2. Exemption of Corporate Income Tax on capital gain on sale of shares



According to the Law of 21<sup>st</sup> December 2001 concerning reforms of some legal requirements in direct and indirect taxes, “*Loi du 21 décembre 2001 sur les réformes de certaines dispositions en matière d’impôts directs et indirects*”, which modifies Article 166 LIR, the capital gains realized upon the disposal of shares are exempt from Corporate Income Tax, provided the following conditions are met:

#### 1. The SOPARFI seller is:

- a fully taxable resident company and has adopted one of the legal forms listed in the annex of Article 166, paragraph 10 LIR; or
- a fully taxable resident corporation that has been incorporated outside of the E.U.; or
- a Luxembourg permanent establishment of a company as referred to in Article 2 of the Directive of 30<sup>th</sup> November 2011 (2011/96/EU) on the Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; or
- a Luxembourg permanent establishment of a capital company resident in a State with which Luxembourg has concluded a Double Tax Treaty; or
- a Luxembourg permanent establishment of a corporation or cooperative company resident in an EEA country other than an E.U. Member State.

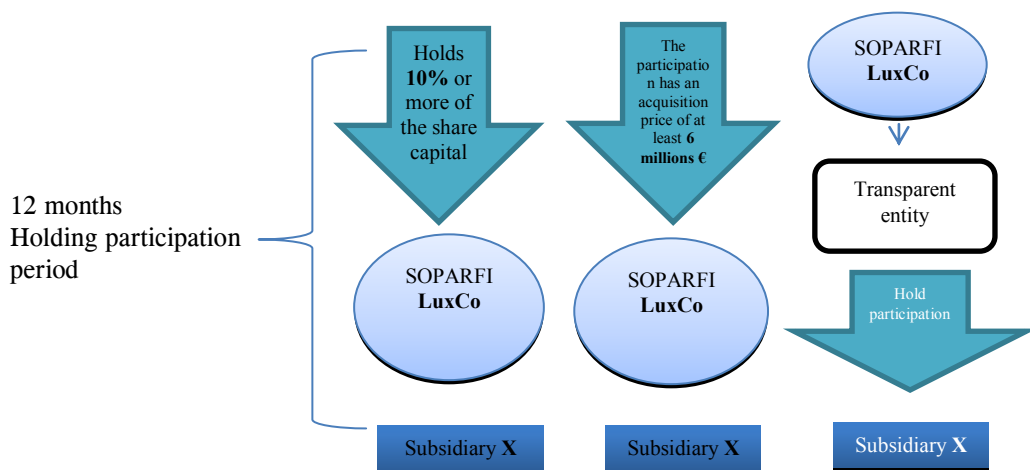
#### 2. The subsidiary company has to fulfill the following conditions:

- a company as referred to in Article 2 of the Directive of 30<sup>th</sup> November 2011 (2011/96/EU) on the Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; or

- a fully taxable resident capital company which has been incorporated outside of the E.U.; or
- a non-resident capital company which is liable to a tax corresponding to Luxembourg's Corporate Income Tax

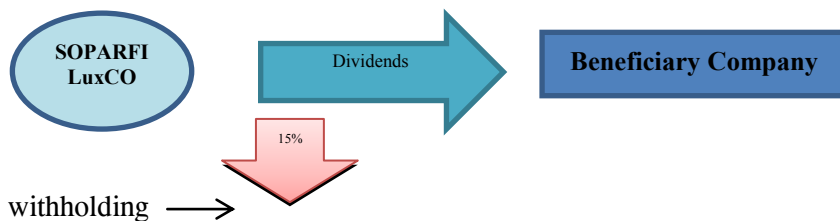
At the date of disposal of the income, the SOPARFI seller holds or commits to hold a continuous participation for a continuous period of at least 12 months. The participation must represent at least 10% of the capital, or the acquisition price must amount to at least 6 million Euros.

The SOPARFI seller may hold its participation in one of the above-mentioned qualifying subsidiaries through a transparent entity as defined by Article 175 LIR. The participation will be evaluated according to the proportion held in the net assets of the transparent entity.



### 2.3.2. The exemption of the Withholding Tax

#### 2.3.2.1. Withholding Tax on dividend distribution



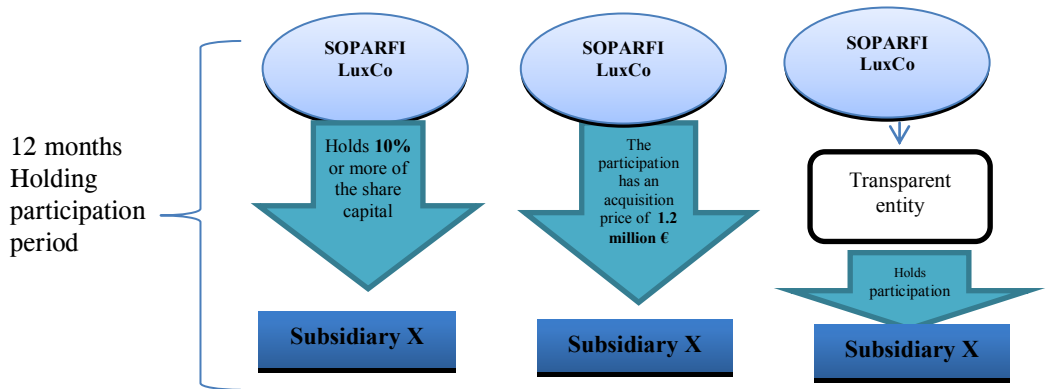
Directive 90/435/CEE, modified by Directive 2011/96/EU on the common system of taxation, applicable in the case of parent companies and subsidiaries of different

Member States, grants an exemption of 15% on the Withholding Tax on dividend distribution if the following conditions of Article 147 LIR are satisfied:

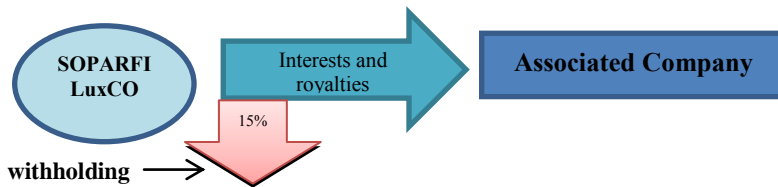
1. The distributing SOPARFI is:
  - a fully taxable resident company and has adopted one of the legal forms listed in the annex of the article 166, paragraph 10 LIR; or
  - a fully taxable resident capital company not listed in the annex of article 166, paragraph 10 LIR.
2. The beneficiary company of the dividend distribution must be:
  - another company referred to in Article 2 of the Directive of 30 November 2011 (2011/96/EU) on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and its permanent establishment; or
  - a fully taxable resident corporation and not registered in the annex of Article 166, paragraph 10 LIR and its permanent establishment; or
  - the State, a municipality, an association of local authorities, "*syndicat communal*", or a Luxembourg public law institution and its permanent establishment; or
  - a fully taxable company liable to a tax equivalent to the Corporate Income Tax and resident of a country with which Luxembourg has in force a double tax treaty and its permanent establishment; or
  - a corporation resident in the Swiss Confederation liable to the Corporate Income Tax and not exempt; or
  - a corporation or cooperative company which is a resident of an EEA country other than an EU member State and which is liable to a tax equivalent to the Corporate Income Tax;

In order to benefit from the exemption at the date on which the income is at the disposal of the receiver, the Beneficiary company must hold or commit to hold a continuous participation for at least 12 months. The participation must represent at least 10% of the capital, or the acquisition price must amount to at least 1,2 million euros.

The distributor's SOPARFI may hold the participation in one of the above-mentioned qualifying subsidiaries through a transparent entity as defined by Article 175 LIR. The participation will be evaluated according to the proportion held in the net assets of the transparent entity.



### 2.3.2.2. Withholding Tax on interest payments and royalties



Directive 2003/49/EC of 3<sup>rd</sup> June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, transposed by the Law of 9 July 2004, provides an exemption on Withholding Tax for interest and royalty payments between associated companies.

Both companies must have a registered office or a permanent establishment in different Member States of the E.U.

The participation of one company in the other must represent at least 25% of the capital.

### 2.3.3. Other exemptions

#### 2.3.3.1. Exemption on the annual Net Wealth Tax

A SOPARFI must generally pay an annual Net Wealth Tax at a rate of 0,5% on the assets, rights and properties of the company. The basis of taxation is reduced according to the same conditions of exemption as for Corporate Income Tax, as laid out in paragraph 60(4) of the Valuation Tax Act, “*Bewertungsgesetz*” (hereafter “*BewG*”):

1. The subsidiary has to be:
  - a company as referred to in Article 2 of the Directive of 30<sup>th</sup> November 2011 (2011/96/EU) on the Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; or
  - a fully taxable corporation not listed in the annex of paragraph 60(4) BewG or;
  - a non-resident corporation liable to a tax corresponding to Luxembourg's Corporate Income Tax
2. The SOPARFI must be :
  - a fully taxable resident company which has adopted one of the legal forms listed in the annex of paragraph 60(4) BewG; or
  - a fully taxable resident corporation non listed in the annex of paragraph 60(4) BewG; or
  - a Luxembourg permanent establishment of a company referred to in Article 2 of the Directive of 30<sup>th</sup> November 2011 (2011/96/EU) on the Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; or
  - a Luxembourg permanent establishment of a corporation resident in a State with which Luxembourg concluded a double tax treaty; or
  - a Luxembourg permanent establishment of a corporation or cooperative company resident in an EEA country other than an E.U. Member State.

The participation must represent at least 10% of the capital, or the acquisition price must amount to at least 1.2 million euros.

The beneficiary company may hold its participation in one of the above-mentioned qualifying subsidiaries through a transparent entity. The participation will be evaluated according to the proportion held in the net assets of the transparent entity.

A minimum Net Wealth Tax of 62.5 € for a public limited company and 25 € for a limited liability company is due.

The resident Tax payer can, on request at the Tax administration, reduce the charge of the Net Wealth Tax.

### 2.3.3.2. Exemption of the capital gain of a merger



The Directive of 17th February 2005 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States transposed by the Law of 21<sup>st</sup> December 2007 on the direct and indirect Tax, “*Loi du 21 décembre 2005 sur les impôts directs et indirects*” provides an exemption of the capital gain in case of a merger.

The participation of the beneficiary company must represent at least 10% of the capital.

### 2.3.4. Luxembourg tax treaties

In order to, notably, avoid double taxation; Luxembourg has ratified 64 income tax treaties which are in force with the following countries:



A permanent establishment of a company resident in a country with which Luxembourg has a tax treaty can benefit from Articles 147 and 166 LIR. In order to be exempted from Withholding Tax, the company must prove that it has held or is committed to hold a qualifying participation for the required 12 month period stated in Article 147 LIR.

Moreover, tax treaties can exempt non-resident companies from Corporate Income Tax and Net Wealth Tax. The Withholding Tax on the distribution of dividends ranges from 0% to 15% and is fixed individually in each double tax treaty. Nevertheless, whatever the terms of the tax treaties, Luxembourg internal law provides for an exemption of the Withholding Tax if the Beneficiary company holds or commits to hold a continuous participation for at least 12 months and if the participation represents at least 10% of the capital, or the acquisition price amounts to at least 1,2 million euros.

### 3. Summary Table

	SPF	SOPARFI
Legal Source	Law of the 11 <sup>th</sup> May 2007	Law of the 15 <sup>th</sup> August 1915
Authorised activities	- purchase, holding, management and liquidation of financial assets	- holding participation - commercial activities
Legal Forms most often used	public limited company(S.A.) limited liability company(S.à r.l)	
Shareholder	- natural person managing its own private asset - company exclusively managing one or many private asset of natural person - intermediary acting for investors mentioned above	- natural person - legal person
Debt/equity ratio	<b>8/1</b>	<b>85/15</b>
Tax treaties	<b>Non applicable</b>	<b>applicable</b>
<b>Directives of the European Union</b>	<b>Non applicable</b>	<b>applicable</b>
Exemption of the Income Tax of Dividends <b>Exemption</b> <b>Minimum shareholding</b> <b>Holding period</b>	<b>Yes</b>	<b>Yes, if</b> 10% or 1 200 000 € 1 year

Exemption of the Income Tax of capital gain on shares <b>Exemption</b> <b>Minimum shareholding</b> <b>Holding period</b>	<b>Yes</b>	<b>Yes, if</b>  10% or 6 000 000 € 1 year
Capital Duty	<b>75 €</b>	
Subscription Tax	<b>0,25%</b> (minimum of 100 € and maximum of 125 000 €)	<b>No</b>
VAT	<b>Not subject</b>	- <b>Non subject</b> if its activity is only holding participation - <b>Subject</b> if commercial activity
Annual Net Wealth Tax <b>Exemption</b> <b>Minimum shareholding</b>	<b>Yes</b>	<b>Yes if</b> 10% or 1 200 000 €
<b>Withholding Tax on directors' fees</b>	<b>20%</b>	
<b>Withholding Tax on dividend to shareholder</b> Exemption	<b>Yes</b> -Resident: Schedule taxation (0 to 39%) -Non-resident: depend tax treaty	<b>Yes if</b> 10% or 1 200 000 € during 1 year
<b>Withholding Tax on interest payments and royalties</b> Exemption	<b>No</b>	<b>Yes if,</b> Companies in different Members States and 25% participation.
<b>Exemption on capital gain on Merger</b>	<b>No</b>	<b>Yes if</b> <b>10%</b> of participation
<b>Benefit of the RELIBI Law</b>	<b>Yes: 10% for resident and 35% for non-resident</b>	



#### **4. Conclusion**

Before deciding on which form of holding company to choose, it is necessary for an investor to assess its precise financial and residential situation and to decide whether a short, medium or long term investment is intended. The financial situation of the investor, as well as his State of residence, have to be carefully considered.