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CHAMBRE DE COMMERCE LUXEMBOURG

Vecteurs de croissance au Luxembourg

Highlighting the principles and business opportunities for intellectual property

Chambre de Commerce Luxembourg
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Avant-propos

Dans un but de soutien à l'intérêt économique général et afin de développer la sensibilité à une large variété de sujets économiques, la Chambre de Commerce du Grand-Duché de Luxembourg, en collaboration avec Deloitte S.A., publie en 2009 le premier volet d'une série technique périodique «Vecteurs de croissance au Luxembourg». Chaque édition fournit une introduction détaillée à un sujet économique spécifique susceptible d'intéresser les entrepreneurs localisés ou désirant se localiser au Luxembourg.

Les publications de la Chambre du Commerce, en partenariat avec Deloitte S.A., visent avant tout à faciliter l'accès du grand public à ces sujets économiques spécifiques. Ainsi, ces ouvrages s'adressent tant aux entreprises non-résidentes envisageant d'investir au Luxembourg, qu'aux entreprises déjà implantées au Luxembourg ou à toute personne intéressée par les thèmes développés dans ces ouvrages.

Nous avons le plaisir de présenter la deuxième édition des «Vecteurs de croissance au Luxembourg» consacrée à la propriété intellectuelle, de son développement à sa cession, en passant par sa gestion, tout en évoquant parallèlement les opportunités que le Luxembourg présente dans ce domaine.

Cette édition des «Vecteurs de croissance au Luxembourg» permettra aux lecteurs de mieux comprendre ce qu'est la propriété intellectuelle, son impact dans la conduite de leurs affaires ainsi que les bénéfices potentiels que le Luxembourg peut offrir.

Nous tenons tout particulièrement à remercier les auteurs de cette deuxième édition, Bernard David, Christophe De Sutter, leurs co-auteurs et Lex Kaufhold de l'Office de la Propriété Intellectuelle du Ministère de l'Economie et du Commerce extérieur, ainsi que Gilbert Renel et Carlo Thelen pour la coordination complète de cette collection.

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Foreword

With the aim of supporting business generally and fostering greater awareness of a broad range of technical business issues, the Chamber of Commerce of the Grand Duchy of Luxembourg launched in 2009, in cooperation with Deloitte S.A. a new technical series under the title "Vecteurs de croissance au Luxembourg". Each edition provides a comprehensive overview of a specific business-related topic of potential interest to companies based in or contemplating a move to Luxembourg.

It is the policy of the Chamber of Commerce, together with Deloitte S.A., to make these specific business issues more accessible to the public. The technical series is thus aimed at non-resident companies considering investing in Luxembourg, resident companies in Luxembourg, and anyone interested in these technical topics.

We are pleased to introduce the second edition of the "Vecteurs de croissance au Luxembourg" on the subject of intellectual property, which explains the basic principles concerning intellectual property, from development to management to disposal and the opportunities that Luxembourg presents throughout a company's intellectual property life cycle.

This edition of "Vecteurs de croissance au Luxembourg" will enable readers to better understand what intellectual property is, the impact it has on their business and the potential benefits that Luxembourg has to offer.

We thank the authors Bernard David, Christophe De Sutter, their co-authors, and Lex Kaufhold, of the intellectual property office at the Ministry of the Economy and Foreign Trade, for preparing this second edition and in particular Gilbert Renel and Carlo Thelen for the overall coordination of the technical series.

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A. Executive summary

This edition of "Vecteurs de croissance au Luxembourg" provides an introduction to the concept of intellectual property, its principles and its importance in Luxembourg

Introduction

Section 1 of this booklet provides an introduction to the concept of intellectual property, its principles and its importance in Luxembourg.

Simply put, intellectual property is the protectable part of an entity's knowledge and ideas, including its copyrights, patents and processes, among other intangible assets.

An entity's knowledge management sets the course for efficient knowledge transfer to its subsidiaries, strategic partners and to the marketplace. Leveraging this knowledge transfer can help management teams increase the entity's return on investment, positively affect the bottom line and reduce the global tax burden.

Recognising the importance of intellectual property, Luxembourg has taken steps over the years to offer a conducive, friendly environment for the development and management of intellectual property.

Moreover, the Luxembourg government has the ambition that Luxembourg becomes a major hub of economic development in Europe and accordingly supports research and innovation through various types of initiatives.

Regulatory framework

Section 2 provides a description and guidance on the application of the intellectual property regime. Furthermore, it describes the local incentives available for intellectual property development and management. It also takes the opportunity to discuss how to structure your IP development and management within the transfer pricing and accounting frameworks.

Business opportunities

When developing a business plan for effective intellectual property development and management, decision criteria should be sure to include corporate income taxes, VAT, transfer pricing and legal regulations. In Section 3, various business opportunities taking these aspects into account are discussed, including the purchase, the exploitation, and the sale of intellectual property rights.

For general information regarding the development of intellectual property in Luxembourg, or for managing your existing intellectual property from Luxembourg, please refer to Section 4, which provides an overview of the Chamber of Commerce's role in intellectual property development and management, and Section 5 which includes the contact details for your intellectual property queries in Luxembourg.

B. Intellectual property – principles and business opportunities

1. The context of intellectual property

Intellectual property (IP) is a major asset for most companies, specifically multinational entities (MNEs). From a tax perspective, IP comprises both intangible assets of industrial nature (e.g. patents, designs, copyrights for computer programmes) and of marketing nature (e.g. trademarks and trade names). IP allows companies to differentiate their products and services from those of competitors and can contribute substantially to their overall profitability. It is therefore imperative for companies to invest in IP-developing activities and to preserve the value of their existing IP assets.

The European Union has also recognised the importance of continuous investment in new IP, and mainly industrial IP. Several initiatives have been undertaken in recent years aimed at increasing the competitiveness of European companies, including the promotion of a favourable tax environment for research and development (R&D). Although MNEs also have to consider non-tax related aspects when deciding on what would be the most favourable location from which to develop and exploit their IP assets, tax is often a decisive factor.

1.1. What is intellectual property?

IP rights are legal property rights over creations of the mind, i.e., results of an intellectual activity in the industrial, scientific, literary and artistic fields and can be divided into two main categories:

- Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of origin
- Literary and artistic works, which include copyright and neighbouring rights (for performers, producers of phonograms and broadcasting organisations)

The main features of industrial property are as follows: owners are granted an exclusive right on a variety of intangible assets; (usually) for a limited period of time; (usually) on a limited territory; (usually) subject to review and registration procedure with a state/supra national authority; (usually) registered with and granted by a state/supra national authority; (usually) conferring rights to use (prohibiting the use by third parties) or licence the use of IP; and (usually) requiring disclosure of intangible assets/inventions.

IP assets, not concerning industrial property, are not subject to registration procedures, but still benefit from legal protection for a limited or unlimited time.

R&D is the preliminary step for certain IP. R&D can be defined, according to the OECD, as the *"creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new applications"*.

For the purpose of this brochure, the description of each category of IP will be very brief and only the national and European level protection will be explained in more detail.

1.1.1. Patent

A patent is a title of ownership granted by a state/authority to an inventor or his employer for a limited period of time and on a limited territory in exchange for disclosure of the invention. To benefit from patent protection, an invention has to meet a series of conditions of patentability in order to be granted the set of exclusive rights: novelty, inventive step and industrial applicability.

In order for the patent to be granted, the invention should have a technical effect, i.e. it has to provide a solution to a technical problem. Some inventions are therefore regarded to be unpatentable by law, such as ideas, discoveries, scientific theories or mathematical methods. Aesthetic creations, plans, principles and methods for performing mental acts or intellectual activity (e.g., games or economic activities) cannot be protected by a patent either.

1.1.2. Trademarks

A trademark is a distinctive sign or indicator (word, slogan, symbol, design, or combination of these elements), which identifies and distinguishes the goods or services of one party from those of other entities. A service mark is similar as a trademark, except that it is used to distinguish a particular service.

A trademark confers on its owner an exclusive right to prevent third parties to use, without consent, the same or a similar mark for identical or similar goods and/or services as those protected by the trademark. To benefit from trademark protection, it should meet five conditions: distinctive character, availability and acceptability in view of legal provisions, novelty and individual character.

1.1.3. Industrial designs

An industrial design is an exclusive right granted by a state/authority to its owner that covers the outward appearance of a product or of a part of it, resulting from the lines, contours, colours, shape, texture, materials and/or its ornamentation for a limited period of time and on a limited territory. Two-dimensional features as well as three-dimensional features can be protected.

To benefit from registered design protection, it should meet two conditions: novelty and individual character.

1.1.4. Copyright

Copyrights give the creator of an original *work of authorship*, including literary, dramatic, musical, artistic and certain other intellectual works, the exclusive right to publish and/or duplicate it. The exclusive rights granted to the author can be divided in two categories:

- Moral rights including respect of the work, the right to disclose the work and the right to claim the authorship of the work
- Economic rights including reproduction right and representation right

Software copyright is an extension of the *copyright* law to computer programmes. Software is protected as literary work, which includes the preparatory design material relating to the programme. The scope of protection covers the source code but does not cover the functioning of the software. As for a copyright, the right is established automatically as soon as the work is created, provided that said work is original. Besides, for the creators of databases which do not qualify for copyright, a sui generi right exists which protects the "*qualitatively and/or quantitatively substantial investment in either the obtaining, verification or presentation of the contents*".[1]

1.1.5. Other non-IP rights

1.1.5.1. Domain name

A domain name is the electronic address of a website, not to be confused with the Internet Protocol address which is the numeric/digital address. The mechanism that makes an Internet Protocol address corresponds to an electronic address is called Domain Name System (DNS). Finally, the full address is named Universal Resource Locator (URL).

There are two types of domain names:

- gTLDs: generic Top Level Domains (.com, .org, .int, .net, .gov, .biz, .info, …)
- ccTLDs: country code Top Level Domains (.lu, .be, .fr, .es, .cn, .nl, .de,…)

In certain registers, there is no particular condition to be granted a domain name; registrars grant the protection on a *first come, first served* basis. For other domain names, mostly ccTLDs but also some gTLDs (.museum for example), certain conditions must be met.

[1] See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

There is not always a provision in the national laws for the protection of domain names. The registration is usually administered by domain name registers (e.g., Restena is the national office in charge of the management of .LU domain names) delegating the possibility to register domain names to registrars who sell their services to the public. However, domain name registration with a registrar does not confer any legal ownership of the domain name, only an exclusive right of use.

After acceptance of the domain name by the registrar, the right to use it remains in general valid for one year, after which it is renewable.

1.1.5.2. Know-how and trade secrets

Know-how is a bundle of knowledge possessed by a person or a company, unpatented and generally not open to third parties. Know-how can take many forms, e.g., plans, documents, technical files, audio-visual material, computer programmes and professional trainings. A trade secret is a formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers. In some jurisdictions such secrets are referred to as *confidential information* or *classified information*.

There is no legal protection for know-how and trade secrets except for unfair competition; the only way to protect knowledge and trade secrets is on a contractual basis through non-compete and non-disclosure agreements.

The duration of the above mentioned agreements depends on the negotiation of the contract. Since it is not protected by law, the know-how and trade secret will last as long as the secret is kept. Therefore, a trade secret could last much longer than a patent (20 years), which involves the disclosure of the invention.

1.2. Historical overview

Throughout its modern history, Luxembourg has been a front-runner in participating in different international organisations and custom/economic unions. Thus, Luxembourg was one of the founders of the Benelux custom (1944) and economic union (1958).

Luxembourg entered into the Benelux Convention on Trade Marks (1962) and the Benelux Convention on Designs (1966). Within these frameworks, the Benelux Trademarks Office and the Benelux Designs Office were created. In 2005, the Benelux Convention on intellectual property was enacted to merge these two offices into one Benelux Office for Intellectual Property (BOIP) which registers trademarks and designs for the whole territory.

At a European level, Luxembourg was among the six founding members of the European Coal and Steel Community, in 1951, which was the embryo of the European Economic Community and later the European Union.

Luxembourg was among the first European countries to enact the protection of IP rights in their national laws[2] and include it into their international treaties.[3]

Luxembourg is party of the major European and international IP treaties, including European Patent Convention of 1977 and the Patent Cooperation Treaty of 1978 (patents), Madrid Agreement of 1924 and Madrid Protocol of 1998 (trademarks), The Hague Agreement for Industrial Designs and TRIPs Agreement,[4] negotiated in the 1986-1994 Uruguay Round of the WTO, with respect to the securitisation of IP rights.

Moreover, Luxembourg offers the possibility to protect trademark and design at the European Union level pursuant to the Community Trademark Regulation of 1993 (now replaced by the new Regulation of 26 February 2009) and the Community Design Regulation of 2001. Such protection covers the territory of all Member States of the European Union.

Recently, the Luxembourg government has made a political priority of IP rights by including specific references to IP within the *"programme gouvernemental 2009-2014"*. In this respect, the government aims at reinforcing the synergy between University of Luxembourg and public research centres. Also, among others, it wishes to create a common organisation for transfer of knowledge and IP management.

1.3. IP in Luxembourg

Research, development and innovation are key factors in ensuring the competitiveness and success of today's modern industries and service providers. Luxembourg is well aware of these challenges and therefore the government has notably set up a research driven university as well as public research centres. Their missions are to boost and foster R&D activities in Luxembourg, to encourage technical and scientific cooperation as well as technology transfer between the public

[2] Law of 30 June 1880 on patents and subsequent updates (replaced by Law of 20 July 1992), Law of 28 March 1883 on trademarks (replaced by the Benelux Convention of 1966), Law of 10 May 1898 on copyright (replaced by Law 28 March 1972, and subsequently replaced by Law of 18 April 2001).

[3] At an international level, Luxembourg concluded the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886, in 1922 and 1888 respectively. Both treaties are now administered by the World Intellectual Property Organization (WIPO).

[4] Agreement on Trade-Related Aspects of IP Rights

and private sector and to stimulate the development of new economic activities.[5]

In this context, the Luxembourg government, in cooperation with the Chamber of Commerce, actively supports business and innovation centres that offer a platform to host and assist entrepreneurs or technology-based companies wishing to set up a new and innovative activity in Luxembourg. Incubators provide the appropriate support and guidance to new projects, thus facilitating their development and growth. They also serve as relay-centres offering a temporary location to foreign companies setting up their business in Luxembourg.

As an example for the continuous efforts to increase the competitiveness of the country, Luxembourg announced in spring 2008 a major investment initiative in biomedical research in collaboration with cutting-edge U.S. biotech firms (TGen) and research institutions (Institute for Systems Biology – ISB).

1.4. Protection of IP

The protection of IP rights is key. On the one hand, owners invest significantly in R&D (e.g. resources, capital, and time) to realise these end results. On the other hand, an invention, a design, a brand or an artistic work can have a considerable value and become a significant source of revenue for their owners.

If creators of IP are not protected, they would have little incentive to continue researching and developing products for public use, which would slow down the marketing of new goods and services. Therefore, economic growth in industrialised nations is, to a large extent, dependent on the protections granted by IP laws.

Since 1991, in reference to the total value of a company's assets, the value of the intangible assets has increased from an average of 8% to an average of 70% for the 500 largest listed companies on the New York Stock Exchange. Such value could even amount to 95% of the total assets for companies like Microsoft Inc.[6]

This underlines the importance of IP rights and their adequate protection. Many aspects of a business can be protected by IP rights, such as its trademarks and logo, innovative products (invention), designs, any work of creative effort: these are valuable assets that distinguish a company from competitors and its owners are granted exclusive rights of use. In addition, the IP owners may also licence or sell their IP rights, providing an important revenue stream.

In Luxembourg, IP rights are protected under different levels of legislation.

At the domestic level, there is a redundant protection governed by Luxembourg law for patents and copyrights, and Benelux protection governed by a Benelux level convention for trademarks and designs.

At a second level, there is European level protection for certain IP, namely community trademark and the European patent.

Finally, at the international level, Luxembourg is a member of several international conventions dedicated to IP.

With respect to the last level, one of the most important international legal texts wherein Luxembourg is a party is the TRIPS Agreement from the WTO, which establishes minimum levels of protection that each government must grant to the IP of other WTO members. In addition, each main category is also covered by an international text with the *Paris Convention for the Protection of Industrial Property* (for patents, industrial designs and trademarks) and the *Berne Convention for the Protection of Literary and Artistic Works* (for copyright). Finally, Luxembourg is a member of the Madrid System which offers the possibility to file for an international trademark, The Hague Agreement for industrial designs and of the Patent Cooperation Treaty for an international patent.

[5] Luxembourg Board of Economic Development: www.bed.public.lu
[6] Source: European Management Journal 1997.

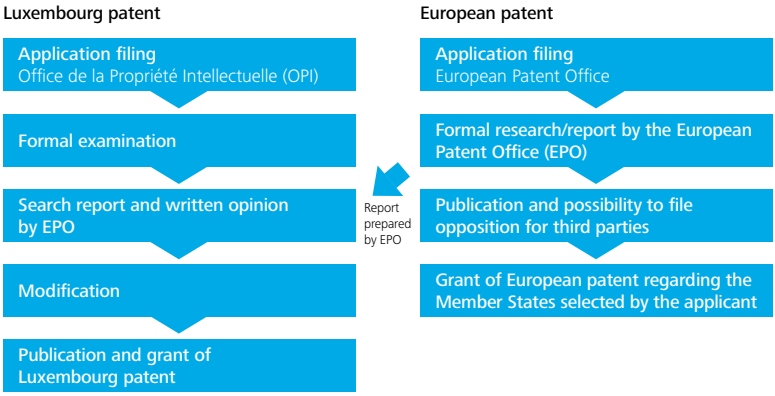
The table here below lists certain criteria which could be taken into account by a potential applicant of an IP protection to select the most appropriate level of protection.

Criteria / Type of IP	Territory	Duration of procedure	Duration of protection	Costs for filing[7]
Trademark	Benelux	6-12 months	10 years from filing date, renewable	€240
	27 EU Member States	6-12 months	10 years from filing date, renewable	€900 (e-filing)/ €1,050 (paper form)
Industrial Design	Benelux	2-6 months	5 years from filing date, renewable up to 25 years	€108
	27 EU Member States	2-6 months	- 3 years from disclosure for unregistered design - 5 years from filing date, renewable up to 25 years for registered design	€350
Patent	Luxembourg	18-24 months	20 years from filing date	€20
	Europe (36 countries, see footnote 8)	2-4 years	20 years from filing date	€1,150 (e-filing)/€ 1,230 (paper form)

- **Patent**
  In Luxembourg, patents are protected by the Law of 20 July 1992 amending the system for patents for invention. A patent application has to be filed with the Office de la Propriété Intellectuelle, a division of the Luxembourg Ministry of the Economy and Foreign Trade, which is published 18 months from the filing date. The Luxembourg patent is granted for 20 years after the filing date provided that a search report[8] drawn up by the European Patent Office (EPO) is provided after verification of the formalities. However, it can also be granted without such a search report, in which case the protection period is shorter.

Luxembourg is also a party to the European Patent Convention (EPC) of 5 October 1973.[9] The EPC is a centralised system for filing and examining applications for patents, carried out by the EPO in Munich and The Hague. The system leads to the granting of a European patent for each of the countries (parties to the EPC) selected by the applicant in his application.

Luxembourg and European patent protection lasts 20 years (except for the 6-year protection for Luxembourg patent without search report) starting from its filing date, provided that renewal fees are paid regularly, in general each year on the filing date.



[7] These costs are only for filing and do not include, among others, search fees or examination fees.

[8] A search report is a report prepared by a patent examiner that performed a search on the invention to determine whether it is new and inventive.

[9] 36 European countries are members thereto: Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, United Kingdom, Greece, Hungary, Croatia, Ireland, Island, Italy, Liechtenstein, Lithuania, Luxembourg, Latvia, Monaco, Former Yugoslav Republic of Macedonia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Sweden, Slovenia, Slovakia, Saint-Martin, Turkey.

- **Trademarks**
  At a Benelux level, trademarks can be protected by a Benelux Trademark pursuant to the Benelux Convention concerning IP of 25 February 2005. The Benelux Trademark gives exclusive rights for the whole Benelux territory. An application has to be filed with the BOIP or to the Office de la Propriété Intellectuelle in Luxembourg. Next, the BOIP verifies if the formal requirements have been fulfilled: the mark (sign) should be eligible for registration and available (although the availability is not a ground of refusal).[10] Finally, the trademark is registered and the owner receives a registration certificate provided no opposition has been filed within a given timeframe by third parties.

  At a European Union level, trademarks can also be protected with the Community Trademark governed by the Council Regulation (EC) No. 207/2009 of 26 February 2009. A Community Trademark grants a protection which covers the whole territories of the European Union and is thus valid in all 27 EU Member States. It is not possible to limit the geographic scope of protection to certain Member States. The Office for Harmonization in the Internal Market (OHIM) in Alicante,

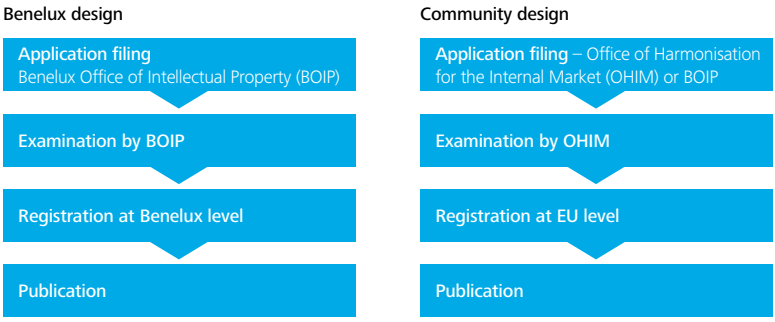
[10] Grounds of refusal (art 2.11 of the Benelux Convention):
- The sign is not distinctive
- The sign is deceptive
- The trademark is contrary to public policy
- The trademark consists of flags, arms and other official emblems of states or international organisations which are registered
- In case of a shape mark, the shape cannot be a trademark if it results from the nature of the goods themselves, gives a substantial value to the goods, or if this shape is necessary to obtain a technical result

Spain is responsible for registering Community trademarks.

The protection of EU and Benelux trademarks are valid for 10 years, starting from the filing date. However, trademarks can be renewed indefinitely as long as renewal fees have been paid.

- **Industrial designs**
  Similar to trademarks, industrial designs are protected at the Benelux level by the Benelux Convention concerning IP of 25 February 2005. An application has to be filed to the BOIP or to the Office de la Propriété Intellectuelle in Luxembourg. The BOIP examines the application for formal requirements only. This means that the novelty of the design is not examined. Finally, protection is granted and published.

  A protection is available at a European Union level with the Community Design.[11] A Community Design offers protection in all 27 countries of the European Union. There are two types of Community Design: (i) an unregistered design grants protection for three years from the date on which the design was first made available to the public, but only affords limited protection against copies of the design and (ii) a registered design grants protection for five years, renewable every five years.



[11] Council Regulation (EC) No. 6/2002 of 12 December 2001 on the Community Design

The maximum protection period is 25 years. A registered community design is valid in the European Union as a whole. It is not possible to limit the geographic scope of protection to certain Member States.

The protection for a Benelux Design lasts five years from the filing date and can be renewed for four periods of five years (i.e., a maximum total of 25 years).

- **Copyright**
  A copyright is established automatically as soon as the work is created, provided the work is original there is no specific registration required. At the domestic level, the exclusive rights of the author are protected by the Copyright Law of 18 April 2001.

  The economic rights subsist for 70 years after the author's death in favour of his heirs or successors in title, but the moral rights are not limited by any statute of limitation.

  For software copyright, the same law applies and the duration of protection is the same than the regular copyright.

The protection of a creation is automatic but in the event of a dispute, the date of the creation (and thus its precedence) has to be proven, especially for copyright because of the lack of registration procedure. One of the tools to secure such evidence is called i-DEPOT. i-DEPOT is a system offered by the Benelux Office for Intellectual Property by which anyone who has an original idea may submit it (online or in a special envelope provided by the BOIP). It registers the name of the creator and the date of submission and provides a certificate to the creator with submission date. The system ensures full confidentiality so that that the submitted idea is not revealed to anyone. A submitted idea will be in storage for five years (in exchange for a small fee) and is renewable indefinitely.

1.5. Exploitation of IP - licence

Owners of IP rights can either use their IP for their proper business, or licence their IP rights to someone else and receive consideration in exchange.

A licence is a contract whereby the owner/licensor gives the right to use its IP to a third/related party/licensee in exchange for remuneration.

Royalties can be defined as *"payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, designs, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties"*.[12]

Different types of royalties can be identified:

- **Up-front or signing fees:** a one-time royalty due upon the signing of the licence
- **Milestone payments:** royalties that are payable upon the occurrence of certain events or milestones (e.g. successful clinical test, regulatory approval for pharmaceuticals, etc.)
- **Royalties based on sales (earned royalties):** royalties on the sales revenue and a percentage of all revenues received from sub-licences
- **Embedded royalty:** portion of a cost or expense paid, accrued or incurred by an entity for property received from or services rendered by a related member that relates to intangible property owned by such related member or to an intangible expense paid, accrued or incurred by said related member in a direct or indirect transaction with one or more other related members

Usually, licences are valid for a limited period of time and for a designated territory. In addition, they could be either exclusive or non-exclusive. Under an exclusive licence, the licensee generally gets the exclusive use of the IP to the detriment of the licensor. For a non-exclusive licence agreement, the licensor can licence the IP to several licensees (in the same territory).

The licence terms and the amount to be charged are negotiated between the owner of the right and the licensee.

Under Luxembourg law, patent licence agreements must be in writing and published with the Office de la Propriété Intellectuelle. Any non-written agreement shall be considered as null and void.

[12] Council Directive 2003/49/EC of 3 June 2003

For trademarks and designs, there is no such explicit requirement. Nonetheless, a written agreement is in fact recommended for evidence purposes and required for publication purposes in the BOIP in order to be enforced towards third parties.

1.6. Sale of IP - assignment

An assignment is a contract whereby the owner/assignor transfers permanently his rights on IP to a third party/assignee, usually in exchange for valuable consideration.

An assignment can be made in whole or in part, i.e. an IP owner can assign a percentage of its IP rights (e.g. trademarks, patents), and/or limit the assigned IP to a certain territory only.

Parties to the contract can also decide that the assignee licence back the IP, meaning that ownership to the IP rights has been transferred, but the assigning party is still able to use the IP subject to the terms and conditions of the agreement.

The terms of the agreement are negotiated between the owner of the rights and the assignee. The agreement states the rights and obligations of both parties, settles the amount and the form of the compensation as well as the covered territory (usually the one covered by the title of ownership).

For most IP rights in Luxembourg (patent, trademark and industrial designs), the transfer must be in writing, otherwise it is considered void, and has to be published in the relevant register in order to be enforced towards third parties.

1.7. Optimisation of your IP

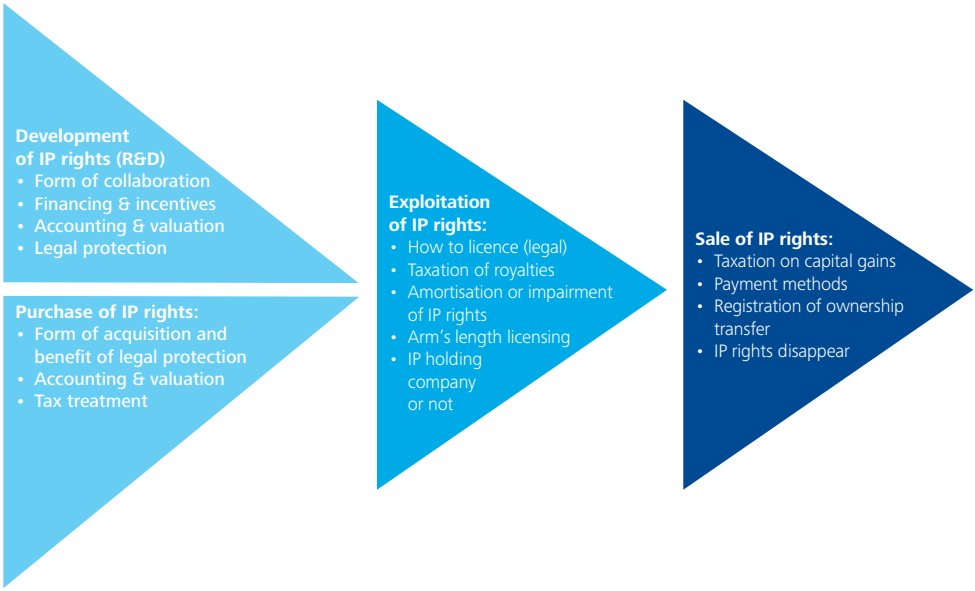
The optimisation of IP rights is of utmost importance for many companies, and in particular those which develop or exploit such IP rights as their core business. In fact, it is one thing to research and develop very innovative products; it is another thing to protect such products against third parties and to find the most efficient way to exploit them.

In a nutshell, the optimisation of IP rights during their life cycle could be summarised as follows:[13]

[13] This chart has been inspired from the content of a slide in a power point presentation titled "LES Benelux: Maximizing and protecting the value of your intellectual property – The tax dimension", prepared by Isabel Verlinden, Rotterdam, 13 June 2006, p.7.

[14] Commission of the European Communities: "Towards a more effective use of tax incentives in favour of R&D", Brussels 22 November 2006 (COM (2006) 728 final).

[15] As defined by each particular IP tax regime.



At each stage, several legal, tax and accounting aspects are intertwined and the optimisation should be done by juggling these aspects in the most efficient way.

1.8. Trends

The European Union recognises the importance of continuous investment in new IP, principally industrial IP. Several recent initiatives aimed at increasing the competitiveness of European companies have been undertaken, including the promotion of a favourable tax environment for R&D.[14] These initiatives have resulted in several Member States implementing tax incentives aimed at stimulating R&D investments and promoting the commercialisation of IP[15] through a reduction in the taxpayer's overall tax burden.

European IP tax regimes generally provide tax incentives through either a reduced corporate tax rate applied to income or a partial exemption from tax of royalty or patent income. In principle, these tax incentives are open to all corporate taxpayers. Although MNEs have to consider non-tax related aspects when selecting the most favourable location from which to exploit their IP assets, tax can be a decisive factor, as will be discussed below.

2. Regulatory framework

2.1. Direct tax

Luxembourg's corporate tax system ranks among the most favourable in Europe. Accelerated depreciation and tax credits, applied to qualifying investments, add to an attractive IP environment.

2.1.1. In general

The principal corporate taxes in Luxembourg are:

- Corporate Income Tax (CIT - impôt sur le revenu des collectivités – IRC) and Municipal Business Tax (MBT - impôt commercial communal – ICC), which are profit based taxes. The current cumulated rate is approximately 29% and depends on the municipality in which a company is established.
- Net wealth tax of 0.5% (impôt sur la fortune – IF or NWT in English), which is a capital based tax.

Income and capital gains realised on IP are in principle fully taxable to CIT and MBT. Losses realised on IP are tax deductible and can be used to offset any other types of income. Losses can be brought forward for an indefinite period of time.

A company may ask for a reduction of the NWT up to the CIT liability of the same year. In order to get this reduction, the company must commit itself to post, before the end of the subsequent year, an amount equal to 5 times the reduction claimed to a special reserve in its commercial accounts.

There is no withholding tax in Luxembourg on royalty payments.

2.1.2. Exploitation of IP

In order to encourage R&D activities, the Luxembourg government offers multiple incentives at different levels, which can be grouped as follows:

- Tax reliefs on investment - Art 152bis Luxembourg Income Tax Law (LITL)
- IP regime - Art 50bis LITL
- Direct investment incentives (see section 3.5. below)

In an international context, Luxembourg offers an attractive environment for IP management activities based on the above measures but also thanks to the absence of withholding tax on royalty payments as well as its extensive network of tax treaties.

2.1.3. Tax reliefs on investment

Article 152bis LITL provides for tax rebates for investments in tangible goods that are physically made within Luxembourg.

Tax rebate on additional investments

Eligible investments are depreciable tangible goods other than buildings, livestock and mineral and fossil mines acquired during the financial year of operation. The currently applicable

rate is 12% of the investments that are above the 5-year average level. Additional conditions apply, which can be consulted on the website of the income tax authorities.[16]

Tax rebate on overall investment
Eligible investments include all investments made in tangible depreciable goods during the financial year except investments in buildings, living livestock and mineral and fossil mines.

- The base for the calculation of the tax rebate is the purchase price or cost price of goods acquired during a financial year
- Rates: **6%** until €150,000 and **2% above** €150,000

In the event of investment in fixed assets of an ecological type that have been approved for special depreciation referred to in Article 32bis LITL, the tax rebates of 6% and 2% are increased to 8% and 4% respectively.

The total tax rebate available that is the result of the addition of the tax rebates on additional investment and on overall investment is deducted from the CIT payable for the year of taxation during which the investment was made. If there is insufficient tax, the excess tax rebate may be deducted from tax for the following ten years.

2.1.4. IP regime

With the law of 21 December 2007, the Luxembourg government introduced an 80% exemption on income derived from certain IP, as well as capital gains realised on the sale of such IP. This exemption is applicable from 1 January 2008 to all Luxembourg taxpayers and applies to the below qualifying IP acquired or created after 31 December 2007:

Eligible IP rights	Excluded IP rights
• Copyrights on software	• Copyrights of literary or artistic works
• Patents	• Plans
• Trademarks, "service marks"	• Secret formulas or processes
• Designs	• Similar rights
• Models	• Know-how
• Domain names	

[16] www.impotsdirects.public.lu

IP rights directly acquired from a related party are excluded from the regime.

For self-developed IP, all expenses in direct relation to the IP development need to be capitalised in the first year the benefit of the regime is claimed. The present regime combines two important roles; it allows for a full deduction of all R&D expenses for projects that do not generate any commercial results and does not penalize successful R&D projects through excessive taxation once they come to fruition.

Interestingly, taxpayers who use a self-developed patent for their own business benefit from a notional deduction amounting to 80% of the net positive income they would have earned from a third party as consideration for the right to use the patent. An election to fall under the beneficial regime can be made once the taxpayer applies for the relevant patent protection.

Finally, qualifying IP is fully exempt from NWT (the general annual rate is 0.5% on the net asset value at the beginning of the year).

2.1.5. Sale of IP

The above mentioned IP regime also covers capital gains realised on the sale of qualifying IP, thereby granting an 80% exemption.

A special rule exists for companies that fulfil the required conditions to be considered as small or medium sized enterprises (SMEs).[17] At the disposal of the qualifying IP, they are entitled to evaluate the realisation value based on the sum of expenses connected with the rights multiplied by 110%.

2.2. VAT

2.2.1. In general

As in other countries of the EU, Luxembourg has a system of VAT (Value Added Tax), a transactional tax impacting all supplies of goods and services. VAT is applied to sales of goods and services at different rates (15%, 12%, 6% and 3%), depending on the nature of the transaction, in case no specific VAT exemption[18] applies. Businesses are able to recover VAT that they incur on costs linked to their business activity depending on the nature of their activities.

Subject to certain conditions, persons carrying out business activities qualify as taxable persons for VAT purposes. In principle, taxable persons need to be VAT registered in Luxembourg, and they have certain reporting and declarative obligations.

The tax authority in charge of VAT is the "Administration de l'Enregistrement et des Domaines".[19]

2.2.2. General VAT implications for a business owning and exploiting IP

A business that exploits IP qualifies as a taxable person for Luxembourg VAT purposes and will have to VAT register and complete VAT returns.

The supply of IP qualifies as a supply of services for VAT purposes.

The following comments relating to the VAT treatment of these services are in respect of the rules in place since 1 January 2010.

2.2.3. Purchase of IP

a. Purchase from a Luxembourg established supplier

If a business established in Luxembourg purchases the IP from another Luxembourg based supplier, this supply will be subject to VAT in Luxembourg, and the supplier will have to charge Luxembourg VAT (at 3% for copyrights and 15% for all other IP) on the transaction. The purchaser will have to pay the VAT upfront to the supplier, before later recovering the VAT from the tax authorities on the relevant VAT return according to its VAT recovery position. In some cases this may result in a cash flow disadvantage.

b. Purchase from a supplier based outside Luxembourg

When a Luxembourg business purchases the IP from a supplier established outside Luxembourg, the supplier will not charge any VAT on the sale of the IP to the Luxembourg established customer. Instead, the customer will declare the VAT on the transaction on his VAT return, and recover the same VAT on the same VAT return according to his overall VAT recovery position (the reverse charge mechanism).

Please note that this purchase of IP may trigger an obligation for the purchaser to register for VAT if he has not already done so. Also, should the purchaser not be able to recover all its VAT, this may result in an absolute cost.

[17] Mém. A N° 38 of 1 April 2005, SMEs having less than 250 employees and net sales not exceeding € 50 millions or a balance sheet not exceeding € 43 millions.

[18] There are two categories of exemptions – one covering international operations (allowing VAT recovery on related costs), and a second category covering national operations such as real estate, financial services and insurance services (not allowing VAT recovery).

[19] Website: www.aed.lu

2.2.4. Licensing of IP

The licensing of IP qualifies as a service for VAT purposes. The VAT treatment of the supply will depend on where the recipient of the service is established and their VAT status (business or not). In all cases, however, it is an activity that will allow the supplier to recover VAT incurred on related costs.

a. The customer is in Luxembourg

Where the customer is in Luxembourg, the supply of the IP by a Luxembourg established supplier will be subject to Luxembourg VAT, and the supplier will charge VAT at the relevant rate (at 3% for copyrights and 15% for all other IP).

b. The customer is in another Member State of the EU

Where the customer is established in the EU but outside Luxembourg, the VAT treatment will depend on whether the customer is a business[20] for VAT purposes or not.

Where the customer is an EU established non Luxembourg business, no Luxembourg VAT will be due on this licence, and the customer will declare the VAT on the purchase under the reverse charge mechanism in his country.

From 1 January 2010, the Luxembourg established supplier will also have an obligation to complete EC Sales Listings for services - a periodic listing to record the supplies of non exempt services that the supplier makes to businesses in other EU Member States, and which documents transaction values and the VAT Identification numbers of customers .

Where the non Luxembourg EU based customer is not a business for VAT purposes (for example a pure holding company), the Luxembourg supplier will charge Luxembourg VAT on the licence to the non Luxembourg EU purchaser.

c. The customer is outside the EU

Where the customer is established outside the EU, no Luxembourg VAT will be due on the supply of the IP.

2.2.5. Sale of IP

The sale of the IP will have the same consequences as the licensing of the IP. As a result, the place of supply of the services will depend on whether the customer is a business or not, and where the customer is located for VAT purposes. The same rules as those set out in 2.2.4 will apply.

2.3. Transfer pricing

2.3.1. In general

2.3.1.1. Arm's length principle

Transfer pricing is the price set between two (group) companies for the transfer of physical goods, IP, services, or financing arrangements. The transfer price for transactions between companies belonging to the same group of companies has to be set so that it corresponds to the market price, taking into account the functional and risk profile and specific conditions of each party, i.e. the *arm's length principle*.

The arm's length principle is the international standard and forms the basis for transfer pricing analyses. The arm's length principle can be found in Article 9 of the OECD Model Convention,[21] stating:

"Where […] conditions are made or imposed between … two [related] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

In other words, if the arm's length principle is not respected for transactions between related parties, the transfer price and consequently the taxable basis can be adjusted by the relevant tax authorities.

The application of the arm's length principle is further described in the OECD guidelines.

2.3.1.2. OECD transfer pricing guidelines

The OECD Guidelines provide guidance on how to apply the arm's length principle for intercompany transactions. As part of this guidance, the OECD Guidelines describe different methods to evaluate whether the conditions of commercial and financial relations in the context of cross-border transactions between related parties are in accordance with the arm's length standards. The selection of the appropriate transfer pricing method is generally based on a functional analysis describing the functions performed, risks borne and assets utilised by each of the parties to the transaction.[22]

[20] Although not strictly necessary, the best form of proof of the taxable status will be the valid VAT Identification number of the customer

[21] Model Tax Convention on Income and Capital providing guidelines for Double Tax Treaties

[22] LOQUET Erwan/RASCH Marc, Vecteurs de croissance au Luxembourg, first edition, Section 2

2.3.1.3. Statutory rules

Luxembourg reflects the arm's length principle in different articles of the LITL. Article 56 LITL provides the core provision on transfer pricing. This article allows the Luxembourg tax administration to estimate the profit of a taxpayer in case of a possible transfer of profits out of Luxembourg that is due to a special economic relationship with a non-resident company, either directly or indirectly. The definition of a related party (*special economic relationship*) is therefore very broadly defined as a relationship that differs from a normal commercial relationship, which allows for a potential transfer of profits.[23]

2.3.2. Purchase of IP

For the purchase of IP rights a distinction should be made between purchases from:

- Third parties: acquisition price can generally be considered to be the market price
- Related parties: acquisition price should be in line with the arm's length principles, i.e. transfer price for transactions between group companies has to be set so that it corresponds to the market price, taking into account the functional and risk profile and specific conditions of each of the parties

The arm's length price of the acquired IP rights can be determined through a valuation of these rights, considering the perspective of both the buyer and seller.

In particular, in an economic downturn, companies may be faced with a (temporary) decrease in the value of the IP rights. Subsequently, the acquisition price should generally be lower, which can be the right moment to transfer the IP to a jurisdiction with a beneficial IP regime, e.g. to Luxembourg.

2.3.3. Exploitation of IP

For an optimal implementation of the IP regime between group companies, it will be eminent to have a correct transfer pricing policy in place that will be acceptable from both a Luxembourg and a foreign country perspective. For the exploitation of IP rights, it will be important to have the right level of substance and a correct royalty rate that is supported by proper (transfer pricing) documentation.[24]

Substance

One of the prerequisites for receiving royalty income is to have sufficient substance at the level of the Luxembourg IP company. Substance that is generally required, in particular vis-à-vis the foreign licensees, is local

management able to make IP investment decisions and personnel capable of performing the basic functions relating to IP ownership and defence.

Royalty rate
For acquired or self-developed IP rights, the exploitation is generally achieved through granting a right to use the IP rights in return for a royalty. An arm's length royalty rate, i.e. an acceptable royalty rate as if it was concluded between third parties, will ensure that the royalty payments are acceptable by the tax authorities in the country of both the (foreign) licensees and the Luxembourg IP company. The determination of an arm's length royalty rate is generally based on an economic study.

Transfer pricing documentation
In order to support the level of royalty rates charged from both a Luxembourg and foreign perspective, it will be important to have proper (transfer pricing) documentation in place.[25] The documentation of an arm's length royalty rate based on an economic study, together with an intercompany agreement between the contractual parties, can serve as a basis for the transfer pricing documentation which is compulsory in most (European) countries.

2.3.4. Sale of IP

IP rights can be disposed to related parties or third parties, whereby in the latter case it will in principle be sold against market prices.

A disposal of IP rights to a related party, however, should be performed in accordance with the arm's length principle. Similarly, as in the case of a purchase of IP rights, to determine the arm's length price of the acquired IP rights, a valuation of these rights should be performed, considering the perspective of both the buyer and seller.

There exists under Luxembourg Tax Law a simplified valuation procedure of the IP rights for SMEs that benefit from the Luxembourg IP regime under article 50bis LITL (please refer to sections 2.1.4 and 2.1.5).

[23] LOQUET Erwan/RASCH Marc, IBFD country analysis, Transfer pricing database 2009, Par. 2.2
[24] Documentation describing and supporting related party transactions underlying transfer pricing, generally including: intercompany agreements, transfer pricing analysis, invoices and other relevant records such as minutes of meetings or brochures
[25] Documentation describing and supporting related party transactions underlying transfer pricing, generally including: intercompany agreements, transfer pricing analysis, invoices and other relevant records such as minutes of meetings or brochures

2.4. Accounting

2.4.1. Generally Accepted Accounting Principles in Luxembourg (Lux GAAP)

In this section we will refer to Lux GAAP as being presented in the Law of 19 December 2002 on the commercial and companies register and on the accounting records and annual accounts of undertakings.

2.4.1.1. Definition and classification

Fixed assets, including intangible assets, will comprise those assets which are intended for use on a continuing basis for the purposes of the undertaking's activity. Intangible assets include:

- Costs of R&D
- Concessions, patents, licences, trademarks and similar rights and assets
- Goodwill

Goodwill is out of the scope of this booklet, and thus not further discussed.

Lux GAAP does not provide for a more detailed definition of the above-mentioned intangible assets.

2.4.1.2. Initial recognition

Intangible assets will be recognised initially at purchase price or production cost whereas the cost of a separately acquired intangible asset will be calculated by adding to the price paid for the asset the expenses directly attributable to the acquisition in question.

Production cost will be calculated by adding to the purchase price of the raw materials and consumables the costs directly attributable to the product in question. However, a reasonable proportion of the costs which are only indirectly attributable to the product in question may be added into the production costs to the extent to which they relate to the period of production. Interest on capital borrowed to finance the production of intangible assets may be included in the production costs to the extent it relates to the period of production. In that event, the capitalisation of such interest must be disclosed in the notes to the accounts.

The capitalisation of R&D costs is neither prohibited, nor compulsory. In so far as R&D costs have not been completely written off, no distribution of profits shall take place unless the amount of the reserves available for distribution and profits brought forward is at least equal to that of the expenses not written off.

2.4.1.3. Valuation

After initial recognition, the purchase price or production cost of fixed assets with limited useful economic lives must be reduced by value adjustments calculated to write off the value of such assets systematically over their useful economic lives, i.e. amortisation.

In the international accounting language, systematic value adjustment over the useful life of an intangible asset is referred to as amortisation.

Moreover, value adjustments must be made in respect of intangible assets, whether their useful economic lives are limited or not, so that they are valued at the lower figure attributable to them at the balance sheet date if it is expected that the reduction in their value will be permanent.

In the international accounting language, this value adjustment of assets is referred to as impairment.

2.4.1.4. Amortisation

As already mentioned above, intangible assets must be amortised over their useful economic lives. Under Lux GAAP, R&D costs must be written off within a maximum period of five years. Such costs may, however, be written off over a period exceeding five years where the results of the research and development work may be used beyond that period. Where this option is used, the extended amortisation period and the reasons for it should be disclosed in the notes to the accounts.

2.4.1.5. Income derived from the exploitation of intangible assets, i.e. royalty

Royalty income derived from intangible assets is classified as other operating income unless it falls within the scope of the usual activity of the undertaking or it is a direct extension of the main activity of the undertakings. In such later case, this income is considered as turnover.

2.4.1.6. Income derived from the sale of intangible assets

Income derived from the sale of intangible assets is classified as other operating income unless it falls within the scope of the usual activity of the undertaking or is a direct extension of the main activity of the undertakings. In such later case, this income is considered as turnover.

2.4.2. International Financial Reporting Standards (IFRS)

2.4.2.1. Scope

IAS 38 *Intangible assets* prescribes the accounting treatment for intangible assets, including IP.

IAS 18 *Revenue prescribes* the accounting treatment for revenue, including royalty.

2.4.2.2. Initial recognition

In financial statements prepared in accordance with IFRS, an intangible asset will be recognised if, and only if:

- It is probable that the expected future economic benefits that are attributable to the asset will flow to the entity
- The cost of the asset can be measured reliably

An intangible asset will be measured initially at cost, where IAS 38 prescribes how to determine the cost at initial recognition depending on the way the entity obtained the asset. IAS 38 makes a distinction between the following categories:

a. Separate acquisition

b. Acquisition as part of a business combination

c. Acquisition by way of a government grant

d. Exchanges of assets

e. Internally generated intangible assets

2.4.2.3. Initial recognition of internally generated intangible assets

To decide whether an internally generated intangible asset qualifies for recognition or not is sometimes a difficult exercise. Therefore the entity classifies the generation of the asset into:

- A research phase
- A development phase

Research is defined as original and planned investigation undertaken with the prospect of gaining new scientific or technical knowledge and understanding. No intangible asset arising from research (or from the research phase of an internal project) should be recognised. Expenditures on research (or on the research phase of an internal project) should be expensed when incurred.

Development is the application of research findings or other knowledge to a plan or design for the production of new or substantially improved materials, devices, products, processes, systems or services before the start of commercial production or use. An intangible asset arising from development (or from the development phase of an internal project) shall be recognised if, and only if, an entity can demonstrate all of the following criteria required by the standard:

- The technical feasibility of completing the intangible asset so that it will be available for use or sale
- Its intention to complete the intangible asset and use or sell it
- Its ability to use or sell the intangible asset
- How the intangible asset will generate probable future economic benefits. Among other things, the entity can demonstrate the existence of a market for the output of the intangible asset, the intangible asset itself or, if it is to be used internally, the usefulness of the intangible asset
- The availability of adequate technical, financial and other resources to complete the development and use or sell the intangible asset
- Its ability to measure reliably the expenditure attributable to the intangible asset during its development

Internally generated brands, mastheads, publishing titles, customer lists and items similar in substance will not be recognised in the statement of financial position, but are expensed when associated costs are incurred.

2.4.2.4. Measurement after recognition

After initial recognition, an entity can choose either the cost model or the revaluation model to account for intangible assets. This is an accounting policy choice which will be made by the entity.

The cost model means, that after initial recognition, an intangible asset will be carried at its cost less any accumulated amortisation and any accumulated impairment losses.

Under the revaluation model, after initial recognition, an intangible asset will be carried at a revalued amount, being its fair value at the date of the revaluation less any subsequent accumulated amortisation and any subsequent accumulated impairment losses.

2.4.2.5. Amortisation

For amortisation purposes, an entity shall assess whether the useful life of an intangible asset is finite or indefinite and, if finite, the length of, or number of production or similar units constituting, that useful life.

An intangible asset will be regarded by the entity as having an indefinite useful life when, based on an analysis of all of the relevant factors, there is no foreseeable limit to the period over which the asset is expected to generate net cash inflows for the entity.

The depreciable amount of an intangible asset with a finite useful life will be allocated on a systematic basis over its useful life.

An intangible asset with an indefinite useful life will not be amortised. Instead, the entity is required to test an intangible asset with an indefinite useful life for impairment by comparing its recoverable amount with its carrying amount.

2.4.2.6. Revenue recognition arising from the use of entity's IP by others

Revenue arising from the use by others of entity assets yielding royalties shall be recognised only when it is probable that the economic benefits associated with the transaction will flow to the entity; and the amount of the revenue can be measured reliably.

Royalties accrue in accordance with the terms of the relevant agreement and are usually recognised on that basis unless, having regard to the substance of the agreement, it is more appropriate to recognise revenue on some other systematic and rational basis.

2.4.2.7. Sale of intangible assets

The gain or loss arising from the disposal of an intangible asset will be determined as the difference between the net disposal proceeds, and the carrying amount of the asset. It will be recognised in profit or loss when the asset is derecognised. Gains will not be classified as revenue, but rather other operational income.

3. Business opportunities

3.1. IP structuring in an international context

Proper IP structuring may not only lead to considerable tax savings but also enhance the legal protection and effective development of a groups' IP.

If a group wants to optimise its tax situation, this has to be done at an early stage of a new project since IP rights are gaining in value even in the presence of start-up losses in the first years.

Tax planning should not just be limited to avoiding heavy taxation on income and capital gains on IP but also avoid double taxation and withholding taxes. Above all, the structure put in place should be in line with operational realities of the business.

Taking the above criteria into consideration, holding group IP through offshore locations will often not provide the best overall results. This is often due to anti-abuse rules in a number of countries that deny the deductibility of royalties paid to tax havens and CFC legislation applied to IP holding companies that generate only passive income.

If we place ourselves in a scenario where intangibles are in the process of being built-up in a jurisdiction with a standard taxation system, such expenses can generate tax losses that can potentially be carried-over without limitation and offset future royalty income.

In the case of Luxembourg, losses can be carried forward without limitation in time and double taxation and withholding taxes can be effectively managed based on national law and the double tax treaty network. On top of that, various incentives are available for investments in IP, as explained in different sections of this booklet.

Certainly a number of non-tax factors have also to be taken into consideration in the choice of the optimal jurisdiction for implementing IP related activities. This includes the cost of real estate, labour costs, the availability of skilled workforce and the infrastructure. In this context it has to be noted that Luxembourg ranks among the most competitive business locations in the world.

In an international context, Luxembourg offers legislation for the efficient protection of IP and is a member of the major international IP conventions.

3.2. Opportunities in an economic downturn

Cost reductions are one of the first protective measures that are taken during an economic downturn. However, cost reductions should always be considered in relation to the optimisation of revenues in order to avoid long-term detrimental effects when the economy recovers.

In a downturn, there may be losses within the group and/or the value of the IP may have been reduced. In such a period, it should be considered if an optimisation of the entire supply chain can create additional tax advantages.

In case of a reduction in IP value, it may be the right moment to transfer the IP to a jurisdiction with a beneficial IP regime, e.g. to Luxembourg. In particular, if the IP value is low, the acquisition price should also be lower.

3.3. Practical example on the use of the IP box regime

During the years 01 and 02, a Luxembourg resident company develops an industrial patent. In the years 01 and 02, the development costs are 50 and 20, respectively. At the beginning of year 03, the patent is licensed to a foreign company for an annual royalty of 25, and the IP box regime starts applying. Therefore, during year 03, previous charges related to the patent must be activated. The five year amortisation period for the IP right begins in year 03 (assumption for illustration purposes). In year 08, the patent is sold for 50.

Year	Charges	Revenues	Accounting results	Tax adjustment/ exemption	Tax result	Losses carried-forward – Losses for the year	Year-end available carried-forward losses	Taxed	Recapture
01	50	0	-50		-50	50	50	0	50
02	20	0	-20		-20	20	70	0	20
03	14	70 25	81	11*80%	72.2	-70	0	2.2	-70
04	14	25	11	11*80%	2.2	0	0	2.2	0
05	14	25	11		2.2	0	0	2.2	0
06	14	25	11		2.2	0	0	2.2	0
07	14	25	11		2.2	0	0	2.2	0
08	0	50	50	50*80%	10	0	0	10	0
Total			**105**		**21**	**0**	**0**	**21**	**0**

(25-14)*80% – Activated charges not taken into account to compute the exemption

Tax result = 20% of accounting result

The main tax advantages of locating the patent research activities in Luxembourg can be summarised as follows:

- The royalty expenses should be tax deductible in most countries where a licence payment is made for the use of the IP rights, whereas in Luxembourg a total of 80% of the licence income is tax exempt.
- Potential significant reduction or elimination of foreign withholding taxes on royalties received for Luxembourg tax resident companies which can benefit from EU directives and from the extensive network of DTTs concluded by Luxembourg. To the extent there is foreign withholding taxes on royalties paid, it can be credited against the Luxembourg corporate income tax under certain conditions.
- Based on the applicable corporate tax rates for 2009, licence income under the IP regime would be subject to an effective tax rate of 5.71%, (for companies based in Luxembourg city) which is considered to be (one of) the lowest in Europe.
- A potential gain at the exit would benefit also from the 80% exemption.

Potential considerations
It will be important that the royalty payments made by the foreign licensees are in line with the arm's length standard. Therefore, it is highly recommended to have proper transfer pricing documentation and intercompany agreements in place.

3.4. VAT

- *Optimise VAT recovery on costs*
  In certain cases it may be possible to optimise the VAT recovery relating to the purchase of the IP.
- *Ensure the validity of your clients' VAT numbers*
  From 1 January 2010, businesses supplying services to other EU established businesses on a cross border basis are required to complete new reporting listings (the EC Sales Lists for services). These listings require the documentation of the VAT number of the EU customers and the value of the supplies in question.

  The information provided on these listings will be shared between the VAT authorities of the different Member States, with a view to ensuring the correct collection of the VAT due on the supplies/purchases.

  In case of non validity of the VAT numbers, there may be additional questions from the VAT authorities to the supplier, and potentially a requalification of the supply.

  It is therefore essential to validate the VAT numbers of your clients in advance, to avoid difficulties in obtaining such information at a later date.

3.5. Local incentives

Luxembourg offers a full range of custom-made investment incentives designed to give new ventures a head-start and more particularly to foster R&D and innovation. Financial support may be granted for the funding of specific investment and R&D projects in order to complement equity and bank financing.

The available incentives can be subdivided into three types following the institution granting them and are further explained in the below sections:

- Ministry of the Economy and Foreign Trade
- Ministry of Middle Class
- S.N.C.I.

Ministry of the Economy and Foreign Trade

Domain	Activities covered	Nature of the incentive
R&D projects or R&D programmes	Investments in fundamental research, industrial research and experimental development activities.	Financial aid should in general not exceed 25% of eligible costs. Aid for industrial R&D may be up to 50% and up to 100% for fundamental research.
Technical feasibility studies	Technical feasibility study prior to engaging in an industrial research project or experimental development.	For SME up to 75% for industrial research projects/50% for experimental developments. For large size companies, the limits are respectively of 65% and 40%.
Protection of technical industrial property	Aimed at SME and research organisms which do efforts to protect their industrial intellectual property.	Aid equal to the R&D aid that would have been obtained on the activities giving rise to the industrial IP.
Young innovative enterprises	Support for activities of small innovative enterprises or private research organisms.	Up to €1 million.
Innovation advice and support	Aid to SME or private research organisms for external advice provided in the domain of innovation.	Up to €200,000 over 3 years.
Secondment of highly qualified personnel	Costs linked to temporarily renting highly qualified personnel.	Up to 50% over 3 years on eligible costs.

Process innovation and organisational innovation	Support for process/ organisational innovation.	15% to 35% of admissible costs in function of the company size.
Innovation clusters	Create or extend an innovation cluster.	Up to 15% on eligible costs.
Financial aid for investment in tangible fixed assets	Investments in tangible fixed assets to create new/extend or modernise a business.	Up to 10% of the investment for SMEs.
"Eureka" programme	The label "Eureka" is attributed for specific innovative technological projects in the frame of international collaborations.	The label can allow for an increase of the aids on innovation.
De minimis rule	For companies not eligible to other incentives because of their size or other reasons.	Up to €200,000 over 3 years.

Ministry of Middle Classes, Tourism and Housing:

Domain	Activities covered	Nature of the incentive
Financial aid for innovation, research and development	Fundamental research, Applied research, Pre-competitive development research.	Respectively 75%, 50%, 25% of the eligible costs. These aids cannot however not exceed €200,000.
Financial aid for investment in tangible and intangible fixed assets	Investments in tangible fixed assets and intangibles to create new/extend or modernise a business.	Up to 10% of the investment for SMEs and 20% for small businesses.

S.N.C.I.

Domain	Activities covered	Nature of the incentive
Equipment loans granted by the SNCI	Loans to finance the purchase of depreciable tangible and intangible assets.	Loans at a beneficial interest rate for a term of up to 10 years.
Loans for innovation	Financing of costs related directly to a company's R&D programme.	Term of three to five years, interest is fixed at 2.5% per year.
Profit-sharing loans	Creation, extension, conversion, adaptation and rationalisation of industrial, commercial and craft companies in the general economic interest.	The term of a loan depends on the financing plan, but may not exceed ten years.

3.6. Research and development – cost sharing

There are various ways to organise a R&D project. Aside the classical structure where an entity carries out the R&D activities for its own account, often used models include R&D entities that work on a contract basis for the account of other group companies or cost sharing agreements in a joint development project.

The mentioned alternative models are a popular way to create legal ownership of an IP in a specific jurisdiction/ entity or to split legal and economic ownership of an IP among multiple parties.

Typically, a cost-sharing agreement (CSA) represents a contract whereby two or more parties are sharing the costs of developing one or more IP and then share the economic benefit from its exploitation.

A common CSA covers expenses for R&D activities, including preliminary research and testing expenses.

The cost-shared IP can be very specific, such as a single drug, or can be a portfolio of brand names. In order for the CSA to be qualified, once the participants have been identified, geographic or market rights that might be global, regional, or country specific have to be assigned to each of them.

The contract must also provide a method to calculate each participant's share of intangible development costs.

If a new participant joins the CSA during the development process, the new entrant has to compensate the other participants for its share. In order to do so, a key component of many CSAs entails *buy-in* and *buy-out* provisions.

A buy-in payment includes a valuation of the contribution of intangibles to a CSA. A buy-out payment reflects the consideration that must be paid under the situation where a withdrawing participant cedes its interests in the conjointly developed intangible assets and therefore must be compensated.

4. How can the Chamber of Commerce help you?

The Chamber of Commerce is a public institution encompassing all sectors of activity other than agriculture and the skilled-craft industry. Today, the Chamber of Commerce has some 40,000 affiliated members, representing 80% of GDP and 75% of total employment. The plenary assembly of the Chamber of Commerce consists of 25 elected members representing 6 sectors of activity: trade and other trade related activities; financial participations companies (Soparfi); industry, small and medium-sized industries; banking and other financial activities; insurance; the hotel, restaurant and bar business.

Guardian of wealth creation …

The rationale behind the Chamber of Commerce is simple: all wealth is created through companies. Thus, the Chamber of Commerce fulfils its role as guardian of the interests of Luxembourg companies by assuming the following tasks:

Promotion of the general economic interest

The primary task of the Chamber of Commerce is to express and represent the general economic interest. On this basis, the Chamber of Commerce promotes an open, dynamic and competitive economy in order to enable companies to benefit from unrestrained development. It also supports the promotion of Luxembourg companies and products abroad and encourages foreign investment.

An independent mouthpiece for the market economy and critical voice responding to national, European and international policy-making

As an accredited and independent mouthpiece for the market and its players, the Chamber of Commerce defends company interests and supports their development and expansion at national, European and international level.

Involvement in the legislative procedure

The task of promoting the interests of companies requires the participation of the Chamber of Commerce in the legislative procedure. Within this context, the government has the duty to request the opinion of the Chamber of Commerce regarding any bill or Grand-Ducal Regulation related to the sectors of activity represented by the Chamber. In addition, the Chamber of Commerce is entitled to submit bills to the government, to be transmitted to the Chamber of Deputies.

Service provider to business and the general public

Today, the Chamber of Commerce is also primarily a service provider for Luxembourg citizens and all those interested in setting up any commercial, financial or industrial activity in Luxembourg.

Five departments at your service

The Chamber of Commerce comprises five departments that offer a wide range of services:

- Department of Business Creation and Development
- Department for Legal Affairs
- Department of Economics
- Department of International Affairs
- Luxembourg School for Commerce (formerly Department of Education and Training)

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List of additional service providers specialized in IP in Luxembourg:
www.brevet.lu > *Auteurs* (http://www.brevet.lu/cms/veille/content.nsf/id/acteurs_brevet?opendocument&language=fr)

Abbreviations

BOIP	Benelux Office for Intellectual Property
CIT	Corporate Income Tax
CFC	Controlled Foreign Corporation
CSA	Cost-Sharing Agreement
EPC	European Patent Convention
EPO	European Patent Office
IFRS	International Financial Reporting Standards
IP	Intellectual Property
LITL	Luxembourg Income Tax Law
Lux GAAP	Generally Accepted Accounting Principles in Luxembourg
MBT	Municipal Business Tax
MNEs	Multinational Entities
NWT	Net Wealth Tax
OECD	Organization for Economic Co-operation and Development
R&D	Research and Development
SME	Small and Medium-sized Enterprises
SNCI	Société Nationale de Crédit et d'Investissement
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
VAT	Value Added Tax
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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