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# Corporate Governance 2022


Luxembourg: Law & Practice
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Luxembourg: Trends& Developments
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# LUXEMBOURG

## Law and Practice

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# 1. INTRODUCTORY

## 1.1 Forms of Corporate/Business Organisations

The most frequently used legal forms in Luxembourg are companies with limited liability, which represent the absolute majority of all newly established companies, where the liability of all shareholders is limited to the amounts of their contributions (this includes public limited liability companies (*société anonyme* or SA) and private limited liability companies (*société à responsabilité limitée* or SARL)) and partnerships, where the liability of one or more shareholders is unlimited, joint and several (this includes partnerships limited by shares (*société en commandite par actions* or SCAs), limited partnerships (*société en commandite simple*) and special limited partnerships (*société en commandite spéciale*)).

Simplified joint-stock companies (*sociétés par actions simplifiée*) are also increasingly used due to their contractual basis and simplified governance handled by their president.

This chapter will focus only on SAs, SARLs and SCAs.

## 1.2 Sources of Corporate Governance Requirements

The principal source of corporate governance applicable to both listed companies – whose shares are listed on the official list of the Luxembourg stock exchange (LuxSE) and admitted to trading on one of the two markets of the LuxSE, either the regulated market or the multilateral trading Euro MTF market (listed companies) – and to companies whose shares are not listed, is the law dated 10 August 2015 on commercial companies, as amended (the "Companies Law").

Additionally, certain further legal provisions apply to companies whose shares are publicly traded, as further explained in **1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares**.

## 1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares

In addition to the Companies Law which applies to listed companies, other regulations apply.

### X Principles

The X Principles of Corporate Governance of the LuxSE, as last revised in December 2017 (the "X Principles") apply to all companies whose shares are admitted to trading on the regulated market, and include:

- a series of mandatory general principles regarding the general corporate governance framework, duties and responsibilities of the board, its remuneration, its composition and appointment procedures for the members of the board of managers and the members of the special committees, financial reporting, internal control, risk management, certain shareholders' rights and corporate social responsibility (CSR);
- recommendations, which describe the proper application of the general principles and are based on a "comply or explain" principle, and where a company which considers that a particular recommendation does not suit its situation can ask not to comply with it; and
- guidelines, which reflect the best corporate practices and are optional.

### Rules and Regulations of the LuxSE

The Rules and Regulations of the LuxSE, as last revised in January 2020, (the "Rules and Regulations") set out the disclosure requirements for listed companies. They are mandatory for listed companies, but the LuxSE may exempt an issuer from publishing certain information in some particular cases.

The following mandatory laws and regulations also apply to listed companies with certain exceptions:

- the Luxembourg law dated 16 July 2019 relating to prospectuses for securities, as amended, implementing EU Regulation 2017/1129 (the "Prospectus Law");
- the Luxembourg law dated 11 January 2008 on transparency requirements for issuers, as amended, implementing EU Directive 71/3013 (the "Transparency Law") – such legislation applies to issuers for which Luxembourg is the home member state in accordance with the Transparency Law;
- the Luxembourg law dated 23 December 2016 on market abuse (the "Market Abuse Law"), as amended, implementing EU Regulation 596/2014 (the "MAR Regulation") – the MAR Regulation and the texts adopted for its implementation put into place a new legal framework for the prevention, detection, investigation and punishment of market abuse; and
- the Luxembourg law of 19 May 2006 on takeover bids implementing EU Directive 2004/25 (the "Takeover Bid Law") – this law establishes a set of rules to be followed in the event of a public offer which follows or aims for the acquisition of control of a company.

However, listed companies whose shares are admitted to trading on the Euro MTF are only subject to the Market Abuse Law, at the exclusion of the Prospectus Law and of the Transparency Law, which apply to the regulated market only.

### Other Authorities/Laws

The Luxembourg national regulatory authority, the *Commission de Surveillance du Secteur Financier* (the CSSF), has issued various circulars, recommendations and instructions related to the corporate governance in relation to entities supervised by the CSSF and applicable to listed companies.

Finally, the Luxembourg law dated 24 May 2011 relating to the exercise of shareholders' rights in shareholders' meetings of listed companies, as amended by the law of 1 August 2019 (the "Shareholders' Rights Law"), applies to listed companies whose shares are admitted to trading on the regulated market.

## 2. CORPORATE GOVERNANCE CONTEXT

### 2.1 Key Corporate Governance Rules and Requirements

In addition to the aforementioned laws and regulations, the articles of association (the "Articles") of both listed companies and non-listed companies, which may be complemented by governance charters and internal procedures, govern the decision-making process within a company at the level of the board and of the shareholders and regulate the relationship between shareholders, the company and third parties, subject to the mandatory provisions of the Companies Law.

### 2.2 Environmental, Social and Governance (ESG) Considerations

The X Principles provide that "the company shall define its corporate social responsibility policy with respect to and including those responsibilities related to social and environmental aspects. It shall set out the measures taken for its implementation of that policy and shall provide for these to be adequately published."

Furthermore, the LuxSE set forth guidelines for reporting on ESG aspects dedicated to companies, issuers of sustainable debt instruments, and asset managers active in sustainable and responsible investment funds (LuxSE Guidelines) which suggest, among others, to:

- determine the roles, responsibilities and capabilities within the company relevant to ESG reporting;
- align ESG reporting with the corporate strategy so that goals related to internal and external stakeholders and impactful decision-making are properly addressed;
- engage stakeholders which is of good practice towards any relevant risk management and mitigation activity;
- identify and understand the audience and their concerns (for instance, long-term investors concerned about the effects of climate change on the activity);
- identify the themes and define the relevant matrix for the business strategy with a link between both long-term and short-term value creation;
- assess the relevance of performance indicators by using widely accepted indicators developed via a credible process;
- identify the format and communication channel to ensure that investors receive relevant, easily accessible, comparable and timely information; and
- bring ESG reporting quality up to financial grade reporting.

In terms of ESG, Luxembourg companies shall also comply with the provisions of EU Regulation 2019/2088 (SFDR) (although the entry into force of level 2 measures has been delayed until January 2023) and EU regulation 2020/852 (the "Taxonomy Regulation"), as completed by the Luxembourg law of 25 February 2022 (the "ESG Law").

## 3. MANAGEMENT OF THE COMPANY

### 3.1 Bodies or Functions Involved in Governance and Management

In relation to SAs and SARLs, the Companies Law provides for the principle of the separation of powers between the shareholders and the management of the company, according to which the management body has exclusive powers to manage the company's affairs and determine its strategy.

In Luxembourg SAs, the management body is represented either by a board of directors, or by a management board and a supervisory board (see **4.1 Board Structure**) which may be assisted by additional bodies and/or individual executives.

#### Additional Collegiate Executive Bodies

*Management committee (comité de direction)*

If provided for in the Articles, the board of directors may transfer its management powers to a management committee, which will manage and represent the company, save for the actions listed in **3.2 Decisions Made by Particular Bodies** (Decisions of the Additional Collegiate Executive Bodies). This option is mainly used by large-sized companies with a large number of day-to-day operations.

*Additional committees*

The board of directors may create additional committees, which shall advise the board of directors on specific issues and report to them. It shall determine their composition and duties. While this possibility is optional for non-listed companies, listed companies whose shares are admitted to trading on the regulated market are obliged to establish special committees – such as nomination, remuneration, and audit committees – in accordance with the X Principles.

*General board (conseil général)*
The directors and supervisory auditors (*commissaires*) may together constitute the general board, the role and functions of which shall be determined by the Articles. However, this body is rarely used in practice.

### Additional Single-Person Executive Bodies

*Day-to-day manager*
The management body may delegate the day-to-day management and the power to represent the company in this context to one (or more) directors, officers, managers or other agents, acting alone or jointly.

*Managing executive officer (directeur général)*
The company may delegate the management powers to the managing executive officer as an alternative to the appointment of a management committee.

SARLs are managed by one or more managers, which may form the board of managers. They may also delegate the day-to day management and the power to represent the company to one or more managers, officers and other agents.

SCAs are managed by general partners, who have unlimited, joint and several liability for the commitments of the partnership. The delegation of management powers to a third party is possible. Partners with limited liability cannot undertake acts of management under the risk of being indefinitely, jointly and severally liable towards third parties for all acts of management performed by them.

### Observers

In connection with private equity or venture capital transactions, observers are often appointed to attend and participate in board meetings without any voting rights.

## 3.2 Decisions Made by Particular Bodies

The board of directors or the management board in SAs are vested with the most extensive powers to achieve the company's objective, save in particular for those powers reserved by law or by the Articles to the shareholders, such as:

- approval of the company's annual accounts, and distribution of the annual dividends;
- appointment and removal of the directors and auditors, granting them a discharge;
- modification of the Articles;
- increase or reduction of the share capital of the company; and
- the decision to put the company into liquidation.

In case of delegation of their functions to the additional collegiate or single-person executive bodies described above, their decisional powers will be limited to the following.

### Decisions of the Additional Collegiate Executive Bodies

*Management committee (comité de direction)*
In the case of delegation to the management committee, the board loses its right to manage the company, but keeps the rights to perform the actions reserved to the board by other legal provisions (such as distribution of interim dividends, capital increase by way of authorised capital, etc) and the rights relating to the general policy of the company. The notion of "general policy" is not defined by law and shall be defined by the Luxembourg courts on a case-by-case basis. Doctrine admits that the decisions on defining the company's long-term strategies, opening or closing of the company's subsidiaries and branches, making strategic investments and issue of debt instruments belong to the company's general policy.

*Additional committees*

If created, additional committees review specific issues determined by the board and make their recommendations. Thus, in listed companies whose shares are admitted to trading on the regulated market, nomination committees prepare the plans for the succession of the directors by reviewing, evaluating and suggesting the candidates. The remuneration committee defines the remuneration policy for the directors.

The audit committee intervenes in the areas of financial reporting, internal control and risk management. The additional committees are not allowed to act towards third parties, their role being limited to providing internal advice to the board.

*General board (conseil général)*

The general board usually plays an advisory role by issuing recommendations in relation to major transactions to be entered into by the company. If provided for in the Articles, it may also take decisions on specific issues.

### Decisions of the Additional Single-Person Executive Bodies

*Day-to-day manager*

The day-to-day manager shall be entrusted with the capacity to take, on a daily basis, those decisions that are considered to be common, routine and standard for the company, taking into account its corporate purpose. Such delegation shall not cover the totality of the acts of management and excludes those decisions on operations that are considered as unusual or are of high importance for the company (either by their amounts or by their consequences).

*Managing executive officer (directeur général)*

If appointed, the managing executive officer shall be entrusted with identical powers to the management committee. Each manager of an SARL may carry out all operations which are necessary or useful for the company's purpose.

Any limitations to the powers of the board of directors or management board (for SAs) or board of managers (for SARLs) resulting from the Articles or from the decision of the competent corporate bodies are not valid vis-à-vis third parties, even if published.

In SCAs, the unlimited partners are vested with the broadest powers, which shall be defined by the partnership agreement. The limited partners may have an advisory or a supervisory role.

## 3.3 Decision-Making Processes

### Board Decisions

In SAs, unless the management powers are delegated to additional bodies, decisions are taken by the board of directors or the management board, acting as a collegiate body through deliberations in accordance with the provisions of the Articles. The board meets as often as the company's interest so requires upon the request of the chairman or the members of the board at the place and on the date indicated in the convening notice for the meeting. The notice is not required if all members of the board are present or represented and if they state they have full knowledge of the agenda of the meeting.

The board may validly deliberate and make decisions only if the majority of its members are present or represented; decisions are adopted by the simple majority of its members (save for the stricter provisions in the Articles). A member of the board may act at any meeting of the board by appointing another director as their proxy.

Provisions of the law of 23 September 2020, as amended from time to time (the COVID-19 Regulation) and which are applicable until 31 December 2022, allow directors to:

- attend a meeting by virtue of telecommunication means permitting their identification; and
- adopt decisions by written circular resolutions.

The X Principles recommend adopting a decision-making process where no single director or group of directors dominates the board, thereby allowing each member of the board to express his/her opinion. As a best practice, the board shall devote a point on the agenda every two years to discuss and assess the way it operates in compliance with the principle of good governance and fulfilment of its mission.

### Delegation

Where the board of directors or the management board has delegated its powers to the management committee, the deliberation process is as set out in the Articles and, where the Articles are silent in this regard, it shall be defined by the board. If the board did not provide for any specific decision-making process, the rules for the holding of a meeting of the board shall be applied by analogy. In SARLs and SAs, resolutions may also be passed, if permitted by the Articles, by unanimous written consent of the members.

In SARLs, the decisions shall be adopted in accordance with the procedure established by the Articles. Where the latter are silent, the rules provided for SAs shall apply.

The decision-making process in SCAs is regulated by the partnership agreement.

## 4. DIRECTORS AND OFFICERS

### 4.1 Board Structure

In SAs, the management may be organised under a one-tier or a two-tier structure. In a one-tier structure, which is the most common for both listed and unlisted companies, companies are managed by the board of directors, and in a two-tier structure by the management board acting under the supervision of the supervisory board.

Such a possibility does not exist for SARLs and SCAs.

### 4.2 Roles of Board Members

The management body shall act and take the decisions as a collegial body. There are a few exceptions to this rule, such as companies with a single director, delegation of the daily management to the day-to-day management, or an authorisation given to one or more directors to represent the company in legal proceedings.

In accordance with the Companies Law, the board of directors or the management board and the supervisory board may elect a chairman among their members. The role of the chairman differs depending on whether the chairman has been appointed in a listed or an unlisted company.

In unlisted companies the chairman does not have a particular role. They preside over the board discussions, have a casting vote (unless otherwise provided for in the Articles) and may have general powers of representation of the company. In listed companies whose shares are admitted to trading on the regulated market, and in accordance with the X Principles, the chairman prepares the agenda for the board meetings after consulting the chief executive officer (CEO) or the senior independent director, and ensures the proper application of the internal procedures.

## 4.3 Board Composition Requirements/ Recommendations

### Number of Directors

An SA with a one-tier structure shall have a board of directors composed of at least three members (only one for a single-shareholder company). Companies with two-tier structures shall appoint at least three members to the supervisory board (only one for a single-shareholder company) and at least two members to the management board (one for companies with one shareholder or if the company's share capital is less than EUR500,000). In practice, companies (be they listed or unlisted) often have an odd number of directors in order to avoid deadlock caused by a tie vote.

Boards with an even number of directors often give a casting vote to the chairman. Companies employing at least 1,000 employees over the last three years must appoint at least nine directors.

In listed companies whose shares are admitted to trading on the regulated market, the created special committees shall be composed of at least three members. The Companies Law does not fix the maximum number of directors. However, pursuant to the X Principles, 16 directors is considered a reasonable limit.

### Qualities and Qualifications

Company shareholders and employees may be appointed as directors. Nevertheless, and pursuant to the recommendation of the X Principles, each director shall avoid any direct or indirect conflict of interest with the company or any subsidiary controlled by the company (see **4.5 Rules/Requirements Concerning Independence of Directors**).

Even if the Companies Law does not provide any requirements regarding the director's skills or abilities, the general duty of skills has been confirmed by Luxembourg courts. Persons accepting a mandate of directorship shall ensure that they have all necessary skills and qualities to perform their duties.

For listed companies whose shares are admitted to trading on the regulated market, the X Principles provide that directors shall be honest and have complementary experience and knowledge useful to the company – knowledge that shall be kept up-to-date.

### Gender, Nationality and Age

There are no gender quotas or nationality restrictions for the members of the management body. The directors shall have full legal capacity to act. Persons under guardianship or curatorship are not allowed to manage a company.

The X Principles recommend that companies have an equal number of male and female board members and an appropriate representation of geographical origin on their boards of directors. It is further recommended to include in the CSR report the gender balance as a CSR performance indicator.

### Natural or Legal Entities

A company may be managed by a legal entity (or legal entities), in which case such an entity shall appoint a permanent representative to exercise the relevant duties in the name and for the account of the legal entity (applicable only to SAs).

### Incompatibility

Except for specific cases where a special authorisation may be obtained, Luxembourg public or military servants, notaries, the company's auditors and members of the Luxembourg judicial order are prohibited from being directors in a Luxembourg company.

In addition, the X Principles recommend that directors limit the number of their other professional commitments (especially offices held at other companies) in order to dedicate sufficient time and attention to fulfil their duties properly, which shall depend on the nature, size, and complexity of the relevant company's business.

### 4.4 Appointment and Removal of Directors/Officers

In SAs with one-tier structures, the members of the board of directors are appointed and removed by the shareholders, by way of sole shareholder resolutions or resolutions adopted in an ordinary shareholders' meeting. In SAs with two-tier structures, the members of the management board are appointed and removed by the supervisory board. The Articles may also give an exclusive competence to the shareholders to appoint/dismiss members of the management body. The term of the mandate of the board members (for both structures) cannot exceed six years.

In the case of vacancy of a director, the remaining directors may co-opt a new director on a temporary basis, which shall be approved by the shareholders at the next general meeting. The chairman is appointed and dismissed internally by the directors. The shareholders can also revoke him.

In SARLs, the members of the board of managers are appointed and dismissed by the general meeting of the shareholders for a limited or unlimited period of time. Except where allowed by the Articles, the managers cannot be dismissed without a legitimate reason.

The X Principles further recommend the establishment of a formal procedure for the appointment of directors and the establishment of a nomination committee, composed of non-executive directors, to assist in the selection of directors, made from a list of candidates submitted by the board of directors which shall take account of the specific features of the company.

### 4.5 Rules/Requirements Concerning Independence of Directors

The question of independence is not regulated by the Companies Law. For listed companies whose shares are admitted to trading on the regulated market, the X Principles recommend having at least two independent directors, who do not have any significant business relationship with the company, close family relationship with any member of the executive management, or any other relationship with the company, its controlling shareholders or executive managers. The companies shall draft a detailed list of criteria in order to assess the independence of the directors.

Any director having a direct or indirect financial interest in a transaction that conflicts with the company's interest shall declare such a conflict at the relevant board meeting, abstain from taking part in the deliberation and cause a record of his/her statement to be included in the minutes of the meeting. A special report shall be made at the next general meeting of the shareholders or to the management body detailing the conflict of interest concerning the member of the management committee, the managing executive officer.

According to the X Principles, in listed companies whose shares are admitted to trading on the regulated market, the director in a situation of a conflict of interest shall disclose such a conflict to the chairman and then submit it to the audit committee or the statutory auditor.

### 4.6 Legal Duties of Directors/Officers

The scope of duties and obligations of directors set out above is likely to vary depending on the nature of their relations with the company and of their status within the company (whether they are executive, non-executive, independent or paid directors).

### Duty to Manage Carefully and Wisely

In ordinary business circumstances, directors are expected to manage carefully and wisely (*en bon père de famille*) by providing due care to the management of the company's business. This shall not necessarily consist of in-depth and exhaustive care but of "informed care" – ie, in accordance with what is usually expected from a "reasonable" director put in the same circumstances. In the context of the COVID-19 pandemic, such duties were increased, in particular with regard to the monitoring of the company's finances.

### Duty of Loyalty

Directors have a duty of loyalty that consists of a "general and absolute duty to ensure that the general interest of the company prevails over their personal interest", which implies for directors:

- to put the company's interests over their own;
- to avoid any situation of a conflict of interest;
- not to take undue advantage of their position to the detriment of the company; and
- not to exercise any activity which competes, directly or indirectly, with the activity of the company they manage.

### Duty of Diligence

The duty of diligence is a legal obligation for directors to perform their functions with care, diligence and in good faith, as an ordinarily prudent and diligent (ie, "reasonable") director placed in the same circumstances would.

Subject to such duty, directors are expected to:

- exercise their functions personally;
- act in full knowledge and seek out all necessary information, and supervise other directors or persons to whom the board delegated its functions (in particular, the day-to-day manager or the management committee).

### Duty of Skills and Availability

Directors shall have all the necessary skills, qualities and availability in order to exercise their functions and to keep them up-to-date.

Accepting a mandate of director while being aware of an inability to exercise it properly may be considered as a fault of management, entailing a lack of seriousness in the performance of their functions. Accepting a mandate while not being able to assume the function, being passive in the exercise of the mandate, or never attending the meetings of the board are a few of the management faults that may be attributed to directors.

Considering those duties, Luxembourg courts decided that "the acceptance of a fictive mandate of director and the lack of care in the preparation of annual accounts by refraining from any participation in the life cycle of the company, imposed on any person that has accepted the functions of director, is a management fault."

### Duty of Confidentiality

Directors shall keep material non-public information about the company and its performance confidential.

The X Principles further specify that any information received in their capacity as directors shall not be used for any other purpose than for fulfilling their mandate.

## 4.7 Responsibility/Accountability of Directors

Directors owe their duties to the company, its shareholders, employees, creditors, third parties, national authorities and regulators.

Based on the X Principles, the listed companies whose shares are admitted to trading on the regulated market are subject to additional duties and responsibilities related to social and environmental aspects.

## 4.8 Consequences and Enforcement of Breach of Directors' Duties

### Liability

Directors are liable to the company for the execution of their mandates and for any misconduct in the management of the company's affairs, meaning management errors (*faute de gestion*) or infringement of the general duty of care that would not have been committed by a normally prudent and diligent director, and that could have been easily avoided. Such a breach may be enforced only by the company upon a collective decision of the shareholders – the individual shareholders cannot solely sue the directors.

The company's shareholders, acting individually or on behalf of the company, and third parties can enforce a breach by the members of the board of directors or the management board, the managing executive officer of their management duties, for all damages (caused to the individual shareholder, the company or to third parties) resulting from the violation of the Companies Law or the Articles, unless the directors were not responsible for such a breach and reported it first to the general meeting. In such a case, the directors shall be jointly and severally liable both towards the company and any third parties.

Additionally, directors may be liable to the shareholders, acting individually and not on behalf of the company, as well as to third parties, for the prejudice caused by their fault on the basis of tortious liability.

### Criminal Liability

Directors may also be held criminally liable in different cases (eg, offences relating to the normal running of the company, misuse of corporate assets and powers, offences under general criminal law). Luxembourg criminal law admits criminal liability of a corporate body. Companies are criminally liable for the offences committed on their account and for their interest by their corporate bodies or representatives (including de facto directors). The public prosecutor may choose to sue either the company, its representatives, or both.

### Liability Towards Tax Authorities

Based on the law dated 22 May 1931, should the company fail to comply with its tax payment obligations, directors may be held personally liable towards Luxembourg tax authorities, even for the period before they took their duties.

### Bankruptcy

A company's bankruptcy, if caused as a result of the serious and characterised misconduct of a director, may involve a responsibility of the directors.

### Consequences

Consequences for the directors vary depending on the nature, type of alleged faults and damages, and may include: an obligation to indemnify the party which suffered a damage; fines; imprisonment; prohibition from exercising a mandate or conducting the business; or even personal extension of bankruptcy to such a director.

## 4.9 Other Bases for Claims/Enforcement Against Directors/Officers

Additionally, Luxembourg directors or officers can be liable for any breach of securities laws, environmental, health, safety, antitrust, tax, or e-commerce laws, as well as the anti-money laundering and processing of personal data laws.

Additionally, under the law dated 13 January 2019 transposing EU Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "RBE Law") (see **6.3 Companies Registry Filings**) directors can be held criminally liable for the failure to file with the register of beneficial owners (RBE) the information on their company's beneficial owners (with fines ranging from EUR1,250 to EUR1.25 million).

The liability of a director or officer to the company (but not to third parties) can be contractually limited. However, director and officer insurance cannot cover criminal, tax or administrative penalties, or damages resulting from gross negligence and wilful misconduct.

### 4.10 Approvals and Restrictions Concerning Payments to Directors/Officers

In SAs with one-tier structures, the shareholders fix the amount and modalities of payment of the directors' remuneration either in the Articles, or by taking separate resolutions. Where the Articles are silent on this subject and no decision has been taken by the shareholders, the board may decide itself on the amount of its remuneration. In such a case, further approval and ratification by the general meeting of the shareholders will be required.

In SAs with two-tier structures, the type and amount of remuneration of the management board are determined by the supervisory board. The type of remuneration and the amount of fees payable to the members of the supervisory board are determined by the shareholders in the Articles or in separate resolutions. The remuneration of the management committee, the managing executive officer and the day-to-day manager shall be determined by the Articles. In the case of the absence of such provisions in the Articles, it shall be determined by the board.

Pursuant to the X Principles, listed companies whose shares are admitted to trading on the regulated market must structure the directors' remuneration in such a way as to protect the company against taking excessive risks. The shareholders shall approve the criteria for the directors' remuneration, as well as the various factors having an impact on the remuneration of the board members and the executive management. The X Principles recommend establishing a remuneration committee which will assist the board in drafting the remuneration policy.

### 4.11 Disclosure of Payments to Directors/Officers

The global amount of the emoluments granted during the company's financial year to the members of the management and supervisory bodies shall be disclosed in the notes to the company's accounts.

The X Principles recommend that listed companies, whose shares are admitted to trading on the regulated market of the LuxSE, regularly place an item concerning the remuneration of the directors on the agenda of the general meeting of the shareholders.

## 5. SHAREHOLDERS

### 5.1 Relationship Between Companies and Shareholders

Further to the contribution of funds, assets or even services (in the form of industry) to the company, shareholders obtain certain financial and political rights and obligations towards the company, which depend on the legal form of the company.

In SAs and SARLs, the liability of the shareholders is limited to the amounts of their contributions, and their impact on the strategic direction and the operations of the company is limited to the powers expressly reserved by law or by the Articles. The main powers belong to the management body.

SCAs are constituted by the general partners, who have unlimited, joint and several liability for the company's duties, and by limited partners, who are liable up to the amount of their contributions (unless they perform the acts of management).

### Shareholders

Fair and equal treatment of shareholders is one of the key principles of corporate governance and also of the Companies Law. The X Principles and the Shareholders' Rights Law require that companies respect the rights of their shareholders and ensure that all their shareholders, majority or minority, receive equal treatment. Additionally, the X Principles oblige companies to define a policy of active communication with their shareholders.

## 5.2 Role of Shareholders in Company Management

In SAs and SARLs, shareholders can only appoint or revoke the management and must abstain from carrying out acts of management. Otherwise, they may be held liable as de facto directors under some circumstances. Their involvement in the company's management is limited to the functions reserved to them by law.

The Articles may provide for some additional functions, such as, for example, approval of the company's major transactions. However, any limitations to the powers of the management body are not valid vis-à-vis third parties, even if published.

### Shareholders

Shareholders may control the management body during the annual general meetings by asking questions regarding the company's operations and management during the financial year. Apart from that, shareholders representing at least 10% of the corporate capital or votes, acting together or individually, may ask the management body in writing about acts of management, the company's operations or the transactions of one of the company's affiliated entities.

Certain matters must be reported to the shareholders by the management board. For example, transactions where the director or the manager is faced with a direct or indirect financial interest conflicting with that of the company must be presented to the shareholders in a special report at the next general meeting.

Additionally, in SAs, if, as a result of losses, the company's net assets fall below half of the corporate capital, the management body shall convene a general meeting in order to decide on a possible dissolution of the company with a majority of the votes cast (and with one quarter of the votes cast if the net company's assets fall below one quarter of the corporate capital).

### Role of the Shareholders in Partnerships (SCAs)

As described in **3.1 Bodies or Functions Involved in Governance and Management**, SCAs are usually managed by one or more general partners who are jointly and severally liable for the obligations of the company. Each manager may take any actions on behalf of the company which are necessary or useful in order to fulfil the corporate objective. Limited partners shall be prohibited from carrying out acts of management. However, they may execute the documents on the manager's behalf acting as a proxy without incurring any unlimited and joint and several liability.

## 5.3 Shareholder Meetings

### Annual General Meetings

SAs must hold at least one annual general meeting within six months following the end of the company's financial year (in the case of the newly incorporated companies, the Companies Law allows holding the first annual general meeting within 18 months following the incorporation).

SARLs with less than 60 shareholders are not obliged to hold general meetings without a physical presence – instead, their shareholders may send their votes in writing using a voting form.

The COVID-19 Regulation allows general meetings to be held without a physical presence through:

- remote vote in written or electronic form, provided that the full text of the resolutions to be taken has been published or communicated to them;
- proxyholder designated by the company; or
- videoconference or any other means of telecommunication allowing for their identification.

Shareholders or members participating by such means are deemed to be present for the computation of the quorum and majority at such a meeting. The annual general meetings resolve upon the approval of the annual accounts, distribution of profits, dividend allocation, appointment and dismissal of the members of the management bodies and auditors, etc. In SAs, the decisions are adopted by the simple majority of the votes cast, regardless of the number of shares represented. In SARLs, decisions are adopted by the simple majority of the corporate capital, and, if that figure is not reached at the first meeting, by a majority of the votes cast irrespective of the portion of capital represented.

### Extraordinary General Meetings

Extraordinary general meetings are convened in order to resolve on the amendments of the Articles. In SAs, the decisions are taken with a two-thirds majority of the votes of the shareholders present or represented if, upon the first call, at least 50% of the share capital is present or represented. Failing such a quorum, the resolutions can be passed by the same two-thirds majority, regardless of the portion of capital represented. In SARLs the resolutions are adopted by shareholders representing three quarters of the corporate capital. Articles may increase the quorum and majority requirements provided by the Companies Law.

### Convening Meetings and Agenda Items

In SARLs, general meetings may be convened by the manager(s), the supervisory board (if created), or shareholders representing more than one half of the share capital. In SAs, shareholders' meetings may be convened by the board of directors, the management board or the supervisory board (if any) and the internal auditors. Regarding general meetings in SCAs, the Companies Law provides its partners with significant flexibility regarding the establishment of the corporate governance rules.

The shareholders of SAs, SARLs and SCAs representing at least 5% of the share capital can convene shareholders' meetings in the case of merger and demerger in the merged and split companies. Additionally, in SAs and SCAs, shareholders representing at least 10% of the share capital may convene the general meeting by written request, ask to put one or more additional items on the agenda and/or require a prorogation of the general meeting.

According to the X Principles, shareholders of listed companies whose shares are admitted to trading on the regulated market, and holding at least 5% of the share capital, should be able to ask for items to be put on the agenda of the general meetings.

## 5.4 Shareholder Claims

The directors of the company may be exposed to shareholders' claims on the following bases.

- For management errors:
  - (a) not attending the meetings of the board;
  - (b) accepting the mandate while not being able to assume such a function;
  - (c) entering into a contract that is unfavourable to the company terms.
- For violation of the Articles or the Companies Law:
  - (a) acting outside the company's objective;
  - (b) non-respect by the director of the regime of the company's representation towards third parties, as established by the Articles;
  - (c) non-convening of the general meeting of shareholders (ie, if the company's net assets fall below certain thresholds);
  - (d) non-presentation of the annual accounts/management report to the general meeting of shareholders.

As described in **4.8 Consequences and Enforcement of Breach of Directors' Duties**, shareholders can initiate a claim against directors either collectively (upon a collective decision of the shareholders for damages caused to the company), or individually (upon the decision of any individual shareholder for independent and distinct damage caused to them).

## 5.5 Disclosure by Shareholders in Publicly Traded Companies

### Transparency Law

The Transparency Law requires listed companies whose shares are admitted to trading on the regulated market to publish certain regulated information, such as annual and half-yearly reports (see **6.1 Financial Reporting**) and further information on a continuous basis.

On this latter point, in accordance with the Transparency Law, shareholders are subject to a disclosure obligation of major shareholdings, when they acquire or dispose of shares or depositary receipts representing shares of an issuer to which voting rights are attached. The shareholder shall make a notification in this respect to the issuer and to the competent authority if the acquisition or the disposal results in the thresholds of voting rights of 5%, 10%, 15%, 20%, 25%, 33.33%, 50% or 66.66% of the total number of voting rights being reached or crossed either upwards or downwards.

The same notification obligations and the same thresholds apply to shareholders being natural persons or legal entities entitled to acquire, to dispose of or to exercise voting rights, and to shareholders holding specific financial instruments that result in an entitlement to acquire shares with attached voting rights.

### Market Abuse Law

The Market Abuse Law stipulates that complete and effective public disclosure of any inside information must be published on both the company's website and the LuxSE's website.

The Rules and Regulations further provide that a listed company whose shares are admitted to trading on the Euro MTF shall inform the public, as soon as it comes to its notice, of changes to the structure (holders and breakdown of holdings) of the major holdings of its capital as compared to the capital structure that was previously made public in this respect. If applicable, the issuer shall inform the public in Luxembourg whenever it comes to their notice, and at the latest within nine calendar days, of the acquisition or disposal by a natural person or legal entity of a number of shares if the holding thereof becomes higher or lower than 10%, 20%, 33.33%, 50% and 66.66% of the total voting rights (Article 1001 of the Rules and Regulations).

## 6. CORPORATE REPORTING AND OTHER DISCLOSURES

### 6.1 Financial Reporting

Pursuant to the Transparency Law, issuers whose home member state (as this term is defined in the Transparency Law) is Luxembourg and whose securities are admitted to trading on the Regulated Market of the LuxSE shall publish the following reports.

- Annual financial report, at the latest four months after the end of each financial year. The Transparency Law requires that the financial statements be audited. In addition, a management report and statements made by the persons responsible within the issuer shall be published along with the annual financial report.
- Half-yearly report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at least three months thereafter.
- Issuers which are active in the extraction or logging of primary forest industries within the meaning of Article 41(1) and (2) of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statement, consolidated financial statements and related reports of certain types of undertakings (the "Accounting Directive") shall also prepare an annual report on payments to governments, at the latest six months after the end of each financial year.

The issuers shall ensure that their reports remain publicly available for at least ten years. Please note that for half-yearly financial reports published before 15 May 2016, this delay is only for five years.

#### Cross-Border Arrangements

Pursuant to the Law of 21 March 2020 implementing EU Directive 2018/822 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6 Law), certain intermediaries have to report cross-border arrangements presenting a strong risk of tax avoidance or abuse.

### 6.2 Disclosure of Corporate Governance Arrangements

The X Principles provide that listed companies whose shares are admitted to trading on the regulated market shall draw up a corporate governance charter to be published on the company's website. This shall describe the main aspects of their corporate governance policy, especially their structure, the internal regulations for the board, their committees and the executive management, as well as other important points such as remuneration policy.

Additionally, the X Principles provide that a statement on corporate governance shall be included in the annual report. This statement shall primarily provide factual information on the governance of the company and on the operation of the governing bodies during the year just ended, including any changes that have occurred – for example, the appointment of new directors, the appointment of committee members and the remuneration report.

The board shall also ensure that the corporate governance charter and the statement on corporate governance in the annual report are accurate and complete.

## 6.3 Companies Registry Filings

The amended law, dated 19 December 2002, on the Luxembourg Trade and Companies Register as well as company accounts and financial statements (RCS Law) sets out all information required to complete filing with the Luxembourg Trade and Companies Register (RCS). This includes all legal information such as the trade name or the corporate name, the social object, the share capital, the executive board membership information, the auditor, the authorised signatories and any other such data.

Companies are required to file the following documents with the RCS:

- the annual accounts (balance sheet, profit and loss account, legal annex);
- the balance of the accounts as resumed in the minimum standard chart of accounts (where applicable);
- the management report (where applicable);
- the financial auditor statement (where applicable);
- any other documents relating to the annual accounts (proposal for allocation of profit, profit allocation, list of authorised agents, the person(s) in charge of auditing the accounts, etc).

With effect from the end of the first quarter of 2022, all individuals to be registered with the RCS (as shareholder, manager, director, representative, etc), regardless of whether or not they are a Luxembourg resident, shall provide the RCS with their Luxembourg national identification number (LNIN). All individuals already registered with the RCS will be requested to regularise their registration and communicate their LNIN.

### Public Access to Documents

The RCS Law stipulates what documents filed with the RCS can be viewed by the public. In general, documents filed with the RCS but not published in the *Recueil Eléctronique des Sociétés et Associations* (RESA) cannot be viewed by the public. All registrations, filings and communications required by law must be submitted to the RCS within one month from the event that makes them necessary.

Since the RCS is a public body, anyone making a request may view any registered document and obtain a copy thereof; any information or document published at the RCS is made publicly available on its website.

Differently to SAs, the shareholding of SARLs is public.

### Filing With the RBE

Pursuant to the RBE Law, all entities registered with the RCS (except for those whose securities are traded on certain regulated markets) must file some information with the register of beneficial owners (name, date and place of birth, nationality, country of residence, professional or personal address, national identification number, and nature and extent of the beneficial interest held in the relevant entity). Unless a specific exemption is obtained, such information is accessible to the general public (save for the address and the national identification number).

# 7. AUDIT, RISK AND INTERNAL CONTROLS

## 7.1 Appointment of External Auditors

SAs, SCAs and SARLs shall appoint an external auditor (*réviseur d'entreprises*) only if their balance sheets after two consecutive years exceed the limits of at least two of the following criteria:

- a balance sheet total of EUR4.4 million;
- a net turnover of EUR8.8 million; and
- the average number of employees is 50.

If these thresholds are not reached, SAs, and SARLs with more than 60 shareholders, must be supervised by one or more internal auditors (*commissaires aux comptes*); in SCAs the supervision of the company must be entrusted to the supervisory board, appointed by the shareholders and composed of at least three auditors.

According to the Rules and Regulations, listed companies must have their accounts verified by an independent auditor. The audit report has to be sent to shareholders together with the management report and the financial statements before the annual general meeting is held.

### 7.2 Requirements for Directors Concerning Management Risk and Internal Controls

The board shall protect the company's interests in relation to financial reporting, internal control and risk management. In this respect, the X Principles recommend the establishment of three committees among the members of the board of directors. According to recommendation 8.3 of the X Principles, the audit committee should be composed exclusively of non-executive directors, at least half of whom are independent directors.

The audit committee is responsible for assisting the board of directors "in the discharge of its responsibilities in the areas of financial reporting responsibilities, internal control and risk management", and in particular for helping it in "monitoring the reliability and integrity of the financial information provided by the company". The establishment of an internal audit function is recommended, which can be entrusted to an external expert.

In the context of the sanitary crisis, the boards must also manage risks with regard to the criminal liability that the company faces from health and safety legislation.

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# Trends and Developments

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## Introduction

Recent years have been marked by unexpected events, ranging from the COVID-19 pandemic situation to the more recent events in Ukraine, leaving economic actors with no choice but to quickly adapt to sudden market movements and constantly evolving rules and conditions.

As a response, decision-making processes have been adjusted, looking to strike the right balance between reliability and efficiency, enabling companies to respond effectively. In this respect, technology plays a crucial role in making communication easier and decision-making processes more efficient.

Conscious of the challenges that companies are facing, the Grand Duchy was one of the first nations to create a Ministry of Digitalisation, in 2018, and to actively promote and sustain digital transformation.

The requirement to transition to a more digital approach has been coupled with increased transparency requirements and reporting obligations on Luxembourg companies, in particular in terms of environmental, social and governance (ESG) aspects.

Both trends have forced companies to reshape their corporate governance system and to adhere to the new rules.

## The Digital Era

Pursuant to the law of 10 August 1915 on commercial companies (the "1915 Law"), a Luxembourg company may hold virtual board or shareholder meetings, either by way of conference call or videoconference, subject to the articles of association expressly providing for the possibility to do so.

Although this alternative to in-person meetings is now usually introduced in the articles of all newly incorporated companies or when updating the articles of association of existing companies, there were still numerous companies whose articles of association did not include such provision and which, theoretically, were not able to hold virtual board or shareholder meetings.

During the COVID-19 pandemic, this limitation proved to be problematic as management body meetings are vital for companies in order to keep their activities running.

In response, a grand ducal regulation was first published on 20 March 2020 (the "Grand Ducal Regulation"), soon replaced by the law of 23 September 2020 (the "2020 Law"), setting out a more flexible corporate regime, derogating from the 1915 Law.

## What Changes?

Pursuant to the provisions of the 2020 Law, Luxembourg-based companies have been temporarily allowed to, among others, hold virtual shareholders' or noteholders' meetings as well as virtual board meetings, regardless of whether or not their articles of association provide for these options.

Shareholders and noteholders may exercise their voting rights (i) by voting remotely, either in writing or under electronic form, as long as the full text of the resolution has been published or communicated in advance, or (ii) by attending a meeting held by way of videoconference or any other means of telecommunication as long as the attendees can be identified.

Likewise, board members may pass written circular resolutions or attend board meeting by means of videoconference tools, or any other means of telecommunication as long as the attendees can be identified.

Shareholders, noteholders and board members participating in such meetings are deemed to be present for the purposes of quorum and majority calculation.

With the help of these measures, whose validity has been extended no less than four times and which are now in force until 31 December 2022, companies have been able to adjust their decision-making processes and sustain their operations even during times of crisis.

### What Is Hindering the Digitalised Approach and How to Address It?

Despite the exceptional travel restrictions and lockdowns, not all companies decided to benefit from the available flexible corporate measures and go virtual.

Many feared negative tax consequences on their business by taking management decisions from abroad. Indeed, under Luxembourg law, a company is considered to be a Luxembourg resident when its registered office or place of central administration is located in Luxembourg. Should management decisions mainly be taken by way of virtual meetings, ie, from abroad, there may be arguments to declare that the company is not a Luxembourg resident.

Likewise, the holding of a virtual board meeting may also result in a shift in the location of the centre of main interests (also known as COMI) of a company, defined by the EU regulation of 20 May 2015 on insolvency proceedings (the "Insolvency Regulation") as the place where the administration of its interests is conducted on a regular basis and which is ascertainable by third parties. As a consequence, other rules may apply to such a company in terms of insolvency.

Although those situations have been justified by the extraordinary and temporary nature of the pandemic, as argued by the OCDE in its analysis dated 3 April 2020, and the tax issues addressed temporarily by way of bilateral arrangement between the Grand Duchy of Luxembourg and its neighbouring countries, the situation is now getting back to normal, with the existing risks a Luxembourg company managed from abroad would normally face.

Companies are now rethinking their corporate governance charters, in order to find balance between flexibility and risk mitigation.

In this respect, a company may adopt simple rules to alleviate such risks. For example, all board meetings held by means of videoconference or audioconference may be initiated by a person situated in Luxembourg. Corporate governance rules may also restrict the number of board meeting that may be held virtually and impose that at least half of the board meetings are held by way of in-person meetings in the territory of Luxembourg. Likewise, companies may set up a minimum threshold of days per month (such a threshold also usually being driven by the tax treaty applicable between the Grand Duchy and the country of residence of a board member) where a board member may work from abroad.

It is now time for Luxembourg companies to initiate cross-departmental discussions. By bringing to the table IT functions, the HR department, and the legal and compliance functions, companies will be able to redefine their corporate governance rules in this post-pandemic era.

### What May Come Next: the Decentralised Autonomous Organisations (DAOs)

Companies which are aiming to upgrade their corporate governance rules may also be turning to DAOs.

DAOs are virtual, autonomously operated organisations, built on a blockchain using smart contracts (ie, digital one-of-one agreements), incorporating governance and decision-making rules.

The launch of a DAO starts with a developer or a group of developers defining the set of corporate governance rules, taking the form of smart contracts, followed by a phase of testing.

Once developers are satisfied with the security and robustness of their coding, tokens (which grant to their holders voting rights in the DAO) are then distributed or subscribed, in the same way as shares in a company. After the initial token subscription phase, the DAO is deployed on the blockchain and decisions are voted on by token holders. Once the DAO is launched, the founders of the DAO are not able to modify the corporate rules, which may only be changed through the law.

In this set-up, the decision-making powers do not belong to a centralised management body such as a board of managers or directors – such power of decision-making is shared between the several token holders. This alternative to the traditional corporate governance model is considered to be more cost-efficient and democratic, depending on the robustness of its code.

Grand Duchy regulation is already familiar with the concept of distributed ledger technology (DLT), on which blockchain is based, and for example has recognised fully DLT-operated dematerialised securities since 2021. However, DAOs are not yet regulated and their legal and tax status is largely still being discussed, and may have other ramifications on the relevant company's business. As interest in this alternative form of corporate governance structure is growing, especially among start-up entrepreneurs, DAOs may become the next challenge to be faced by Luxembourg legislators.

Beyond the digital influence, corporate governance is also remodelled to respond to the increasing requirements in terms of ESG.

### Socially Responsible

Companies are redefining their policies to remain attractive to potential investors, who are increasingly using ESG criteria to select the company in which they want to invest. In this respect, a focus should be given to two proposed directives which may accelerate this transition.

#### *Last addition to the EU action plan on sustainable finance*

In recent years, several texts have been adopted under the EU action plan on sustainable finance, in order to:

- impose disclosure requirements on large public interest entities that have more than 500 employees in terms of ESG, pursuant to the non-financial reporting directive of 22 October 2014 (the NFDR), specifying that such requirements will extend to (i) all large companies and (ii) all small and medium-sized entities whose shares are listed on a European regulated market pursuant to the proposal for a corporate sustainability reporting directive published on 21 April 2021 (the CSRD);
- set up harmonised practices on how ESG aspects are integrated into the processes of the financial market participants and financial advisers, and how the latter disclose such information (including the financial informa-

tion collected under the NFDR) to the final investors, pursuant to the European regulation on sustainability-related disclosures in the financial services sector of 27 November 2019 (the SFDR); and
- establish a common language between companies, issuers and investors, pursuant to the European regulation on the establishment of a framework to facilitate sustainable investment which entered into force on 12 July 2020 (the Taxonomy Regulation).

To ensure the enforcement of the SFDR and Taxonomy Regulation, the Grand Duchy has granted the Luxembourg financial supervision authority (the CSSF) and the Luxembourg insurance supervision authority (the CAA) greater powers of supervision, control and sanction, pursuant to the law of 25 February 2022.

The latest addition to the ESG European regulatory framework is the proposal for a directive on corporate sustainability due diligence (the CSDD) published by the European commission on 23 February 2022, which intends to complete, in particular, the NFRD and the CSRD.

The CSDD mainly targets large companies, namely:

- companies which have on average more than 500 employees and a net worldwide turnover of more than EUR150 million in the last financial year; or
- companies which have on average more than 250 employees and a net worldwide turnover of more than EUR40 million in the last financial year, at least 50% of which was generated in one of the sectors considered more harmful as listed in the CSDD.

Companies falling within the scope of the CSDD will be requested to proceed to systematic human rights and environmental due diligence of their contractors, subcontractors and commercial partners, pursuant to a due diligence internal procedure to be set up, in order to identify actual and potential adverse human rights impacts and adverse environmental impacts. In addition to evaluating their supply chains, companies will be requested to proceed with their self-assessment of their respect of human rights and environmental due diligence.

Should any potential adverse impacts be identified, preventative or mitigation measures shall be taken, as further laid down in the CSDD. Companies who fail to comply with their obligation under the CSDD, and where such negligence has resulted in a damage being caused, shall be held civilly liable.

### *A step towards gender diversity*

Among several indicators screened by investors, gender diversity in terms of composition of their management bodies ranks high.

Although the number of female board members is increasing in Luxembourg, women are still largely absent from board rooms and represent only 20% of the board members of companies, according to the last European Women on Boards Gender Diversity Index.

This may be partially explained by the lack of a binding quota in Luxembourg for the number of women sitting on the boards of listed companies, unlike in some other European countries. This being said, the Grand Duchy is not completely excluding the possibility of adopting a binding quota in the future.

As of today, in Luxembourg, companies whose shares are listed on the regulated market of the Luxembourg stock exchange (the "LuxSE") shall however comply with the X Principles of Corporate Governance (the "X Principles") of the LuxSE, which impose on listed companies the duty to ensure that the composition of their management boards appropriately represents both genders. Companies which do not comply with this recommendation must justify their choice by including a statement in their annual report.

Conscious of the efforts still to be made, the European Commission, on 14 November 2012, adopted a proposal for a directive on improving the gender balance among directors of companies listed on stock exchanges (the "Proposed Gender Balance Directive"), which has generated almost a decade of discussions. Finally, in March 2022, the EU member states agreed on a common approach to tackle the under-representation of women in economic decision-making processes, and the proposal is pending.

In its updated version, the Proposed Gender Balance Directive sets a minimum threshold at 40% for women in non-executive board member roles or 33% for all board members, at the discretion of each member state, to be complied with from 31 December 2021 by all listed companies which employ at least 250 persons, and have an annual turnover of at least EUR50 million or an annual balance sheet total of at least EUR43 million, thereby excluding small and medium-sized enterprises.

Companies falling within the scope of the Proposed Gender Balance Directive will be subject to annual reporting to the relevant national authorities on gender representation on their boards, distinguishing between non-executive and executive directors, as well as on the measures taken with a view to attain the minimum threshold.

In case they do not comply with the minimum threshold, companies will be requested to provide an explanation as well as an action plan, including the establishment of clear, neutrally formulated and unambiguous criteria in the board member selection process.

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