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GLOBAL GUIDE 2018
CORPORATE GOVERNANCE AND DIRECTORS' DUTIES

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Corporate governance and directors' duties in Luxembourg: overview

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CORPORATE GOVERNANCE TRENDS

1. What are the main recent corporate governance trends and reform proposals in your jurisdiction?

In 2016, the following reforms significantly modified the Luxembourg law relating to companies:

- Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law).
- Law dated 23 July 2016 on the simplified private limited company (*société à responsabilité limitée simplifiée*) (SARLs).
- Law dated 23 November 2016 on the company with social endeavours (*société d'impact societal*) (SIS).

Companies Law

This law introduced the following:

- For private limited companies (SARL):
  - an increase in the maximum number of shareholders up to 100;
  - the introduction of the authorised share capital mechanism;
  - modification of the rules relating to the transfer of shares to a non-shareholder;
  - the possibility to appoint a day-to-day manager; and
  - abolition of the double majority system (that is, in the number of shareholders representing three quarters of the share capital) for any decision amending the articles of association.
- For public limited liability companies (*sociétés anonymes*) (SA):
  - the possibility to set up a management committee (*comité de direction*) or appoint a managing general officer (*directeur général*);
  - the possibility for shareholders with at least 10% of the voting rights to take action on behalf of the company against the management and supervision bodies; and
  - the possibility for the shareholders to renounce temporarily or permanently the exercise of all or part of their voting rights.
- For both SA and SARL, the possibility:
  - for the management (board/manager/director) to suspend the voting rights of defaulting shareholders;
  - for the shareholders to enter into voting agreements;
  - to change the company's nationality without the unanimous consent of the shareholders; and
  - to transfer the company's registered office from a municipality to another by a decision of the board.
- The concept of the simplified joint stock company (*société par actions simplifiée*) (SAS) inspired by French law and including companies benefiting from limited liability. This company form is quite flexible as the corporate governance rules are mainly determined in the articles.

SARLs

The new law governs simplified private limited companies that can be incorporated under a private deed with a share capital between EUR1 and EUR12,000. They must be managed by natural person(s) and its corporate purpose must fall within the scope of the activities for which a business licence is required.

SIS

The new law governs simplified private limited companies which integrate both profit interests and social improvement considerations by supporting persons in fragile situations and/or fighting against any kind of inequality and/or exclusions. The main characteristics are as follows:

- The share capital must be represented by at least 50% impact shares that do not allow their holders to gain from the benefits generated by the SIS and, for the remaining part, by performance shares that entitle their holders to the profits of the SIS to the extent that the corporate object of the SIS is reached.
- The profits allocated to the impact shares are exclusively for the achievement of the corporate object and must be reinvested in the preservation and the development of the SIS.

CORPORATE ENTITIES

2. What are the main forms of corporate entity used in your jurisdiction?

It is too early to assess if the simplified joint stock company will be as successful as in France (*see Question 1, Companies Law*), so the main forms of corporate entity in Luxembourg are currently as follows:

- Public limited liability companies.
- Simplified private limited companies.
- Partnerships limited by shares (*société en commandite par actions*) (SCA).
- Special limited partnerships (*société en commandite simple*) (SCSp) which is a legal entity distinct from that of its partners with its own assets but without legal personality.

Only public limited liability companies and SCAs can issue shares to the public.

LEGAL FRAMEWORK

3. Outline the main corporate governance legislation and authorities that enforce it. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? List any such groups with significant influence in this area.

Luxembourg companies are mainly governed by the:

- Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law).
- Law dated 19 December 2002 on the commercial and companies register and on the accounting and annual accounts of undertakings, as amended (RCS Law).
- Civil Code.
- Commercial Code.
- Ten values of corporate governance of the Luxembourg Stock Exchange for listed companies.

The corporate governance rules are enforced by the courts but also, as applicable, by the Luxembourg Supervision Commission of the Financial Sector (*Commission de surveillance du secteur financier*) (CSSF) and the Luxembourg Stock Exchange.

4. Has your jurisdiction adopted a corporate governance code?

There is no corporate governance code that applies to all companies, only the ten values of corporate governance, a set of rules for listed companies which was adopted by the Luxembourg Stock Exchange in 2006 and amended in October 2009 and March 2013. The ten values aim to ensure the highest market standards through transparency, business ethics and controls. The ten values apply to all companies listing shares on the Luxembourg markets and are aligned with the European Commission's guidance set out in the 2003 Action Plan, and cover the following matters:

- Corporate governance framework.
- Board of directors' remit.
- Composition of the board of directors and of the special committees.
- Appointment of directors and executive managers.
- Conflicts of interest and business ethic rules.
- Evaluation of the performance of the board.
- Management structure.
- Remuneration policy.
- Financial reporting, internal control and risk management.
- Rights of the shareholders.

The ten values contain different kind of rules that are either:

- Mandatory without exception.
- Recommendations that can be waived if the company can explain the reasons for their non-application.
- Mere guidelines.

Information relating to the corporate governance of a listed company is available in:

- The corporate governance declaration published in the company's annual report.
- The corporate governance chart published on the company's website.

The guidelines must be followed by the board of the company when preparing and approving its corporate governance declaration and the corporate governance chart. The shareholders can notify the board of any disagreement with the declaration or the chart.

The Luxembourg Stock Exchange supervises the application of the rules and periodically publishes reports on the relevant practices. The Luxembourg Supervision Commission of the Financial Sector is in charge of supervising listed companies.

CORPORATE SOCIAL RESPONSIBILITY AND REPORTING

5. Is it common for companies to report on social, environmental and ethical issues? Highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

A company must, to the extent necessary to understand its development, performance and position, indicate in the annual report and consolidated annual report, non-financial key performance indicators, including environmental and employee matters.

The law dated 23 July 2016 relating to the disclosure of non-financial and diversity information by certain large undertakings and groups compels the largest companies and groups of companies to disclose non-financial information concerning company policy, risks and performance relating to social, environmental and employee matters, respect for human rights, anti-corruption and bribery matters in one of the following:

- The annual management report published each financial year.
- A non-financial statement document filed to the Electronic Companies and Associations Register (*Recueil Electronique des Sociétés et Associations*) (RESA).
- On the company's website.

Any information covered in the report can be disclosed in accordance with the "comply or explain" principle.

The National Institute for Sustainable Development and Corporate Responsibility has also published non-binding guidelines on corporate social responsibility and can give a corporate social responsibility label to promote this concept.

With regard to social endeavour companies, at least one out of the two criteria below must be satisfied:

- Bringing support to people in a fragile situation.
- Contributing to the preservation and development of social ties, fighting against social exclusion/marginalisation and health, social, cultural, economic or gender gaps, maintaining or reinforcing territorial cohesion, participating in the protection of the environment or developing cultural, creative, educational or lifelong learning activities.

BOARD COMPOSITION AND RESTRICTIONS

6. What is the management/board structure of a company?

Structure

The Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law) provides that only limited liability companies can be managed either by way of a one tier structure with a sole director or a board of directors, or by

way a two tier structure with a management board and a supervisory board.

Management

Subject to *Question 17*, the following applies:

- A private limited company is managed by a sole manager or, in the case of several managers, by a board of managers.
- Limited liability companies are managed in a one tier structure by a board of directors (or a sole director if it is held by a sole shareholder), and in a two tier structure by a management board which is under the supervision of a supervisory board.
- Joint stock companies are managed by a president.
- Partnerships limited by shares are managed by one or more general partners or by one or several managers.

Board members

Companies must have the following board members/managers:

- In a private limited company, manager(s) can be shareholders or third parties, a natural or legal person (in the case of a natural person there is no requirement to appoint a permanent representative).
- In a simplified private limited company, managers can only be natural persons.
- In a public limited liability company, directors can be shareholders or third parties, natural or legal persons (in which case there is an obligation to appoint a permanent representative).
- In a simplified joint stock company the president can be a shareholder or a third party, a natural or legal person (in which case a permanent representative must be appointed).
- In partnerships limited by shares, the general partners can be appointed from among the unlimited members (*actionnaires commandités*) or third parties, can be either natural or legal persons (in case of natural person there is no requirement to appoint a permanent representative) and the managers can be either natural or legal persons.

Employees' representation

Employees in private limited liability companies, partnerships limited by shares and simplified joint stock companies have no right to board representation.

However, at least three directors and three members of the supervisory board must be appointed to represent the employees of a public limited liability company:

- With more than 1,000 employees over the last three years.
- With a qualifying public participation.
- Benefiting from a concession from the state.

Number of directors or members

Companies must have the following number of directors or members:

- In a public limited liability company with a one tier structure, at least three directors on the board of directors (only one where there is one shareholder). The minimum number is increased to nine directors if the company had more than 1,000 employees over the last three years. In a two tier structure, at least three members on the supervisory board (only one if the company has one shareholder) and at least two members on the management board (only one if the company has one shareholder or if its capital is less than EUR500,000).
- In a private limited liability company, one or more managers (in which case there must be a board).
- In a partnership limited by shares, one or more general partners or one manager (only for a sole person company) or at least three members.
- In a simplified joint stock company, a sole president and, depending on the articles, one or several executive officers.

The ten values of corporate governance (*see Question 4*) suggest a limit of a maximum of 16 directors to ensure deliberation and decision-making.

7. Are there any general restrictions or requirements on the identity of directors?

General restrictions

The general requirements are as follows:

- Directors who personally contributed to the company's bankruptcy through gross and qualified negligence can be prohibited from carrying out any management function for between one and 20 years.
- Companies with social endeavours or companies that undertake a regulatory activity are subject to a business licence implying that directors satisfy certain qualification conditions and exhibit a level of professional integrity.
- A director cannot (at the same time) be a public agent (except with specific authorisation) or exercise any mandate as a member of the Luxembourg Government.

Age

Any individual appointed as a director must have full legal capacity to act (that is, be adults or emancipated minors). It is not possible to be a director if a person is under guardianship or curatorship or has been banned from management or commercial activities.

Nationality

From a legal standpoint, there are no nationality restrictions or requirements on being a director.

Gender

There are no gender quotas or disclosure requirements for directors.

8. Are non-executive, supervisory or independent directors recognised or required?

Recognition

A two tier structure in a public limited liability company recognises the functions of executive directors who manage the company (management board) and the members of the supervisory board, who are in charge of controlling the management body.

The ten values of corporate governance (*see Question 4*) recommend that boards include both executive and non-executive directors.

Board composition

The Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law) does not provide any legal requirements for board composition. The ten values of corporate governance recommend adapting the numbers of independent directors depending on the nature of the company's business activities and the structure of its shareholding, with at least two independent directors.

Independence

The Companies Law does not provide a legal requirement on independence but based on the ten values of corporate governance, an independent director must not have any:

- Significant business relationship with the company.
- Close family relationship with any executive manager.
- Any other relationship with the company, its controlling shareholders or executive managers that is liable to impair the independence of the director's judgement.

9. Are the roles of individual board members restricted?

The company's articles must provide:

- Whether the directors/managers can bind the company with their sole signature or if a joint signature of two directors/managers or more is required.
- Whether one of the directors (typically the chairman) has a preponderance voice.

In a public limited liability company with a two tier structure, a member of the management board cannot be simultaneously appointed as a member of the supervisory board.

10. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors

The managers and directors are appointed for the first time either in the articles of association or most commonly by the first general meeting of the shareholders held after incorporation.

In a public limited liability company, where there is a vacancy in the office of director, the remaining director(s) can co-opt a director on a provisional basis (which is mandatory if, due to the vacancy, the number of directors is lower than the legal requirement). This appointment must be confirmed at the next general meeting.

Removal of directors

The following rules apply when removing directors:

- In a private limited liability company, subject to any contrary provisions in the articles, managers can be removed for legitimate reasons by the general meeting.
- In public limited liability companies and partnerships limited by shares, subject to any contrary provisions in the articles, directors can be removed at any time (*ad nutum*) by the general meeting. However, under the two tier structure, the members of the supervisory board are appointed and removed in the same way as directors, and the members of the management board are appointed and removed by the supervisory board or, if the articles provide, by the shareholders.
- In a simplified joint stock company, the articles determine the conditions for removal of the president and executive officer(s) (if any).

Directors appointed in the articles can be removed only with the unanimous consent of the shareholders, or otherwise for legitimate reasons.

In any case, the removal must not be done in a harsh or vexatious manner.

11. Are there any restrictions on a director's term of appointment?

Subject to any renewal, the following terms of appointment apply:

- Private limited company and simplified private limited company: term can be unlimited.
- Public limited liability company: term cannot exceed six years.
- Partnership limited by shares: term can be indefinite for an unlimited manager and a maximum of six years for a non-statutory manager.

DIRECTORS' REMUNERATION

12. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company

The combination of an employment agreement and a corporate mandate requires that the following specific conditions be met:

- A hierarchical relationship between the company and the employee.
- The performance of tasks that are strictly separate and distinct from the duties carried out under the corporate mandate.
- Remuneration granted to the employee.

In addition, some conditions are set out depending on the legal form of the company, so the following can be company employees:

- In a private limited liability company: non-associated managers or minority shareholders and egalitarian managers (but not a sole shareholder who is also the sole manager of the company).
- In a public limited liability company:
  - directors who do not have not the sole authority to bind the company to third parties;
  - directors who are a member of a board composed of several members; and
  - directors who are subordinated to the board with regard to the duties to be carried out under the employment agreement.

Shareholders' inspection

Subject to any conflict of interest, any service agreement entered into between a director and a company must be authorised and approved by the management board and not by the shareholders.

Shareholders have a general right to ask questions of the management in the context of the ordinary general meeting, but can also request a management expertise (*see Question 36*).

13. Are directors allowed or required to own shares in the company?

Directors may or may not be shareholders of the company. The Companies Law does not provide any requirement for a director to hold shares in the company.

14. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

Determination of directors' remuneration

Apart from any possible salary from the company, directors may or may not be remunerated for their mandates. The conditions for remuneration must be detailed in the articles (in particular, its regularity and the body of the company in charge of its determination).

Remuneration can take the form either of *jetons de présence* (for effective attendance at meetings) or *tantième* (representing part of the profit of the company).

With regard to social endeavour companies, a remuneration policy must provide a cap on any remuneration.

Disclosure

The global remuneration of the directors must appear in the appendices to the annual statements of the company and be approved by the general meeting.

The ten values of corporate governance (*see Question 4*) promote more transparency around directors' remuneration in listed companies.

Shareholder approval

Subject to any contrary provisions of the articles of association, the general meeting will approve the remuneration of the directors (other than where it results from an employment agreement).

General issues and trends

After the financial crisis, the following non-binding rules were published to provide guidance to companies on remuneration:

- The ten values of corporate governance require securing the services of directors through fair remuneration that is compatible with the long-term interests of the company, and recommend establishing a remuneration committee consisting exclusively of non-executive directors.
- Circular 10/437 of the Supervision Commission of the Financial Sector provides guidelines concerning remuneration policies in the financial sector to help structure variable components or bonuses granted on performance criteria.
- The Association of the Luxembourg Fund Industry Code of Conduct requires reasonable and fair remuneration for board members to be adequately disclosed.
- The Luxembourg Institute of Directors (*Institut Luxembourgeois des Administrateurs*) guidelines on executive and director remuneration.
- The Committee of European Banking Supervisors Guidelines on Remuneration Policies and Practices.

In addition, the Luxembourg Law of 23 July 2015 transposing Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms provides a cap on bonuses and full transparency on corporate governance and remuneration issues.

MANAGEMENT RULES AND AUTHORITY

15. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

In public limited liability companies, the following rules apply:

- The board must be convened and held in accordance with the provisions of the articles of association in the company's interests. Convening notice is not required if all the directors are present or represented and if they state that they have been duly informed, and they have full knowledge of the agenda of the meeting.
- Subject to more restrictive provisions in the articles, the board can only validly debate and take decisions if a majority of its members are present or represented and any decisions are taken by a simple majority of the directors.
- The Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law) allows the directors, subject to any restriction in the articles, to attend the meeting using different methods of communication.
- Circular resolutions, when approved and signed by all the directors, must be proper and valid.

In a private limited liability company, since the law does not provide specific rules, if the company's articles are silent, it must follow the same rules as for public limited liability companies.

In a simplified joint stock company, the articles provide the rules on company management.

16. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' powers

The Companies Law provides that all powers not expressly reserved by the law or the articles to the general meeting of shareholders (including amending the articles, approving annual accounts, changing management and entering liquidation) must fall within the competence of the board.

The board of a public limited liability company, or each manager for a private limited liability company, represents the company with regard to third parties.

Restrictions

Any limitation to the powers conferred on the board is not valid against third parties even if it is published. This applies in particular to any clause requiring prior approval from the shareholders for certain important reserved matters that are within the competence of the board.

Any director with a (direct or indirect) interest of a patrimonial nature that is opposed to the company's own interest and is subject to the vote of the management body, must declare it and abstain from taking part in the deliberation at the board meeting. The existence of any conflict of interest must be reported to the general meeting (or to the board of directors for conflicts of interest concerning a member of the management committee/the managing executive officer).

17. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

In a private limited liability company, the daily management can be delegated to one or several day-to-day managers who may be (but are not required to be) managers or shareholders.

In a public limited liability company, the daily management can be delegated to one or several day-to-day directors, who may be directors, officers, shareholders or other agents.

Some specific tasks can be delegated to a management committee or a managing executive officer, including any decisions except those relating to the general policy of the company and all actions expressly reserved to the board by the Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law). The management committee/managing executive officer remain under the supervision of the board or the management board. Setting up a management committee or appointing a managing executive officer are alternative options.

The board of directors or the management board can also create ad hoc committees that exercise their activities under the supervision of the board or the management board.

In a simplified joint stock company, the president can delegate powers to executive officer(s) under the provisions of the company's articles.

The ten values of corporate governance (*see Question 4*) recommend that listed companies set up special committees, ideally composed of four members, to review specific issues.

Circular 14/597 issued by the Supervision Commission of the Financial Sector recommends that the board be assisted by specialist committees where the nature, scale and complexity of the institution and activities require it. This includes in the areas of auditing, risk, remuneration, human resources, internal governance, ethics and compliance.

DIRECTOR'S DUTIES AND LIABILITIES

18. What is the scope of a director's general duties and liability to the company, shareholders and third parties?

Directors have the broadest powers to realise the corporate object of the company and to represent it to third parties.

Apart from liability resulting from the insolvency of the company (*see Question 21*), directors typically have:

- Contractual liability to the company (*action ut universi*) and the shareholders acting on behalf of the company (*actio ut singuli*) and also possibly towards one or several shareholders acting individually on their behalf (for any specific and distinct damage caused to them) for any damage caused by a breach of their management duties or of the law or the company's articles.
- Tortious liability to third parties or individual shareholders for any damage resulting from a fault separable from their functions.

19. Briefly outline the regulatory framework for theft, fraud, and bribery that can apply to directors.

Under the Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law) and the Criminal Code, directors may be liable for the following specific offences:

- Failure to submit the annual accounts to the general meeting (punishable with a fine of EUR500 to EUR25,000).
- Failure to convene the general meeting (punishable with a fine of EUR500 to EUR25,000).
- Fraud relating to subscription or payments, or purchase of bonds, shares or other securities by simulating or publishing false information (punishable by imprisonment from one month to five years and a fine of EUR250 to EUR30,000).
- Manipulation of the market price of shares, bonds and other securities (punishable with imprisonment from one month to two years and a fine of EUR5,000 to EUR125,000).
- Forgery of the annual accounts with fraudulent intent or intention to harm (punishable with imprisonment (reclusion) and a fine of EUR5,000 to EUR250,000).
- Misuse of company assets (punishable with imprisonment from one year to five years and a fine of EUR5,000 to EUR125,000).
- Failure to keep the share register or to appoint a depository or to deposit bearer shares (punishable with a fine of EUR5,000 to EUR125,000).

20. Briefly outline the potential liability for directors under securities laws.

The Supervision Commission of the Financial Sector can impose administrative and criminal sanctions including:

- A fine of EUR250 to EUR125,000 to anyone who knowingly carries out an offer of securities to the public within the territory of Luxembourg without a prospectus (*Law dated 10 July 2005 on prospectuses for securities, as amended*).
- Imprisonment from three months to four years and a fine of EUR251 to EUR5,000,000 (natural person) and a fine of EUR500 to EUR15,000,000 (legal person) for any market abuse, in particular for insider trading and market manipulation (*Law dated 23 December 2016 on market abuse, as amended*).

21. What is the scope of a director's duties and liability under insolvency laws?

Under the provisions of the Commercial Code, if a company is declared bankrupt, directors can be liable for the following penalties based on their serious and characterised misconduct or conducting the business for their personal interest:

- Prohibition from one year to 20 years for exercising a mandate or commercial activity.
- Personal extension of the bankrupt to the director.
- In the case of excessive indebtedness, liability for the liabilities in the context of an action for repayment.
- Imprisonment from one month to two years for a bankruptcy where, for example, the director has not declared a cessation of payment or kept complete and regular accounts.
- Imprisonment from five to ten years for fraudulent bankruptcy where, for example, the director has deliberately deleted information in the books or concealed assets of the company.

22. Briefly outline the potential liability for directors under environment and health and safety laws.

Directors can be subject to the following penalties:

- Imprisonment from eight days to six months and a fine of EUR251 to EUR100,000 for any violation of the Law dated 3 December 2014, as amended, on environment, in particular for any company that fails to handle waste management.
- Imprisonment from eight days to six months and/or a fine of EUR251 to EUR750,000 for any violation of the Law dated 19 January 2004, as amended, on protection of nature and natural resources.
- Imprisonment from eight days to six months and/or a fine of EUR251 to EUR125,000 for any violation of the Law dated 10 June 1999, as amended, on classified establishments.

- Imprisonment from eight days to one month and a fine of EUR251 to EUR50,000 for any violation of the Law dated 28 May 2009, as amended, on the application of Regulation 689/2008 on the export and import of hazardous chemicals.

Under the Labour Code, any employer (to whom the director is assimilated) must ensure the health and safety of its employees in relation to their work and prevent any professional risks or be subject to imprisonment from eight days to six months and a fine from EUR251 to EUR25,000.

23. Briefly outline the potential liability for directors under anti-trust laws.

Any infringement of the Law of 23 October 2011 on competition, as amended, may incur:

- A fine from EUR251 to EUR50,000 for price fixing.
- A fine in proportion to the gravity and length of the facts based on cartels and abuse of a dominant position.
- A fine for any directors who supplied incorrect, incomplete or misleading information.

The Criminal Code punishes any fraudulent price decrease or increase by imprisonment from one month to two years and a fine from EUR500 to EUR25,000.

24. Briefly outline any other liability that directors can incur under other specific laws.

The main additional liabilities that can be incurred by directors include the following:

- Tax law provides that directors must comply with the tax requirements (declaration and payments).
- The Social Security Code punishes any infringement of its provisions relating to payment or perception of social security contributions and incorrect, incomplete or misleading information. Penalties include imprisonment from eight days to three months and a fine from EUR251 to EUR6,250, and imprisonment from one month to five years and a fine from EUR251 to EUR15,000 for acting with fraudulent intent.
- The Law dated 2 September 2011 regulating access to the trades of skilled craftsmen, retailers, manufacturers and to certain professions punishes the non-authorised exploitation of a company. Penalties for natural persons include imprisonment from eight days to three years and/or a fine from EUR251 to EUR125,000 and for legal persons, a fine from EUR500 to EUR250,000.
- The Law of 12 November 2004 against money laundering and the financing of terrorism punishes knowingly failing in a directors' obligation to co-operate in the fight against money laundering. Penalties include a fine from EUR1,250 to EUR1,250,000.
- The Law dated 27 July 2007 on processing of personal data punishes infringements with imprisonment from eight days to six months and/or a fine from EUR251 to EUR125,000.
- The Law dated 18 July 2014 amended the Luxembourg Criminal Code to punish anyone who fraudulently intends to produce, sell, obtain, hold, import, diffuse or dispose of a computing device in order to violate the e-commerce law. Penalties include imprisonment from four months to five years and a fine from EUR1,250 to EUR30,000.

25. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

A director's liability to the company can be contractually limited, but not its liability to third parties.

Directors receive a discharge from the annual ordinary general meeting approving the annual accounts for their management of the company, including any irregular acts or management faults. The discharge has no effect against third parties and shareholders if they are not then in a position to correctly assess the importance of the fault/misconduct.

In practice it is typical for the company to take over the fees and expenses for any litigation relating to a director's civil liability (not criminal) by way of an indemnity letter.

26. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

The directors (or the company on behalf of its directors) can take out an insurance policy to protect against civil liability for professional mismanagement. However, the insurance will exclude gross negligence or wilful misconduct as well as any criminal liability.

27. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

Any person who, even though not appointed as a director of the company, is directly or indirectly and actively involved in the management of the company can be:

- Civilly liable to the company or third parties for any damage caused to them.
- Liable jointly with the company for its liabilities in the case of bankruptcy.
- Criminally liable.

TRANSACTIONS WITH DIRECTORS AND CONFLICTS

28. Are there general rules relating to conflicts of interest between a director and the company?

Any director with a (direct or indirect) interest of a patrimonial nature that is opposed to the company's own interest and is subject to the vote of the management body, must declare it and abstain from taking part in the deliberation at the board meeting. The existence of any conflict of interest must be reported to the general meeting (or to the board of directors for conflicts of interest concerning a member of the management committee).

29. Are there restrictions on particular transactions between a company and its directors?

Apart from the transactions in which a director has a conflict of interest, most of the restrictions on transactions between third parties and the company also apply to transactions between third parties and a director.

In particular a company cannot grant loans, advances or securities for the purpose of allowing a third party (including any director) to acquire shares in the company, unless:

- The transaction is realised on fair market conditions, especially with regard to interest received and security granted by the company.
- The transaction is submitted for prior approval by the general meeting, which must be provided with a written management report indicating the:
  - reason for the transaction;
  - interest for the company to enter into the transaction;
  - conditions and risks; and
  - financial conditions.
- The aggregate financial assistance granted to third parties will not result in the reduction of the net assets below the subscribed capital plus non-distributable reserves.

If these conditions are not met, a director can be punished with imprisonment from one month to two years and/or a fine of EUR5,000 to EUR125,000.

30. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

Most of the restrictions on transactions between third parties and the company also apply to transactions between third parties and a director. In particular, a company cannot redeem its own shares from a shareholder (including a director) if certain conditions are not fulfilled and if the acquisition offer is not made on the same terms and conditions to all the shareholders who are in the same position, unless:

- The acquisition of the company's own shares is necessary to prevent serious and imminent harm.
- The shares are acquired to be distributed to the employees.

The Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law) provides that any director who knowingly repurchases shares by decreasing the corporate capital or the legal reserve can be punished with imprisonment from a month to two years and/or a fine from EUR5,000 to EUR125,000.

Moreover the Law dated 9 May 2006 transposed the Regulation No 596/2014 of the EU Parliament and of the Council of 16 April 2014 on market abuse by setting up a legal framework for the prevention, detection, investigation and punishment of market abuse.

DISCLOSURE OF INFORMATION

31. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

The public

In principle, the mandatory legal information provided in the Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law) will be enforceable against third parties after it has been published on the Electronic Companies and Associations Register (*Recueil Electronique des Sociétés et Associations*).

Shareholders

Shareholders can obtain, free of charge, copies of the latest annual accounts, the management report and the report by the statutory auditor and its proposed amendments when share capital is issued without nominal value or the company is to be converted into another legal form, respectively eight days or 15 days before the meeting.

For mergers and demergers, the common draft terms, annual accounts and management report(s) must be made available to the shareholders one month before the meeting at the registered office of the company or on request.

Shareholders can inspect the following at the registered office of the company eight days before the general meeting to approve the annual accounts:

- The list of board members, the supervisory board and the approved statutory auditor.
- The list of sovereign debt, shares, bonds and company securities.
- The list of shareholders who have not paid-up their shares.
- The management report and supervisory auditors' report.
- Any proposed amendments to the articles.

Listed companies

Listed companies must disclose the following:

- Information concerning the drawing-up, approval and distribution when securities are offered to the public or admitted to trading on a regulated market (*Law on prospectuses for securities of 10 July 2005*).
- Issuers of securities must provide ongoing and periodic information (called "regulated information"). Regulated information includes periodic financial reports, major holdings and inside information. Issuers must ensure (*Law of 11 January 2008 on transparency requirements for issuers of securities*):
  - the effective dissemination of the regulated information;
  - the information is available to an officially appointed mechanism for the central storage of regulated information; and
  - the regulated information is filed with the Supervision Commission of the Financial Sector.
- Any inside information linked to them (*Law dated 23 December 2016 on market abuses*).

SHAREHOLDER RIGHTS

Company meetings

32. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

Extraordinary general meetings must be convened to amend the company's articles. Most other meetings can be ordinary general meetings. The following rules apply:

- Except in the event of amendments to the articles, it is not compulsory to hold a general meeting in a private limited liability company where the number of shareholders is less than 60. The articles can authorise any shareholder to cast its vote by mail using a voting form.
- In a public limited liability company, at least one general meeting must be held each year within six months of the financial year end, to approve the annual accounts.

- Unless provided otherwise in the articles, there is no obligation for a simplified joint stock company to convene a general meeting.

33. What are the notice, quorum and voting requirements for holding meetings and passing resolutions?

Notice

All notice requirements are set out in the company's articles of association:

- **Private limited liability company.** Shareholders' meetings are convened by the managers, the supervisory board (if any), or by shareholders representing more than half of the capital. There are no specific provisions in the Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law) on convening shareholders' meetings except that registered letters are compulsory if the shareholders must be convened or consulted a second time. Meetings must be convened with reasonable notice. The convening notice includes the agenda of the meeting.
- **Public limited liability company.** The board of directors, management board, supervisory board (if any) and the internal auditors (*commissaires*) can all convene a general meeting. Convening notices must be published with the Electronic Companies and Associations Register (*Recueil Electronique des Sociétés et Associations*) (RESA)at least 15 days before the date of the meeting. For registered shares that require notice by registered letter, they must be sent at least eight days before the meeting unless the addressees have individually agreed to receive it by another means of communication. If the company issued bearer bonds, publication with the RESA is required. The agenda must contain and detail the amendments to the articles. Shareholders can unanimously waive the convening notice.

Attendance

Shareholders (with or without voting rights) of profit shares and bonds have the right to attend the meeting.

Shareholders must attend the meeting physically, or through a proxy or (subject to the articles) using telecommunication methods.

Voting requirements

Each shareholder can take part in collective decisions irrespective of the number of shares they own. Unless shares are issued without voting rights, each shareholder has voting rights commensurate with its shareholding. Where shares do not have an equal value, or where there is no indication of value, each share (unless otherwise provided for in the articles) will carry the right to a number of votes proportionate to the share capital represented by it with one vote being allocated to the share that represents the lowest proportion.

In public and private limited liability companies shareholders can waive their voting rights temporarily or definitively. The management body can suspend a shareholder's voting rights where there has been a breach of provisions of the articles or any separate agreement.

Voting arrangements are allowed subject to specific conditions.

Majority and quorum

The following apply for ordinary general meetings:

- In a private limited liability company, decisions are adopted by at least 50% of the share capital, and in the second notice by 50% of the votes cast.
- A public limited liability company has no quorum conditions. Decisions are adopted by a majority of the votes cast irrespective of the number of shares represented.

The following apply for extraordinary general meetings:

- In a private limited liability company, decisions are taken by shareholders representing at least 75% of the share capital.
- In a public limited liability company, deliberations require that at least 50% of the share capital be present or represented. Decisions are adopted by at least two-thirds of the votes cast. In the second notice, resolutions can be passed by the same two-thirds majority, regardless of the number of shares represented.

Quorum and majority requirements provided by the Companies Law can only be increased by a company's articles.

34. Are specific voting majorities required by statute for certain corporate actions?

The following specific voting majorities apply:

- In public and private limited liability companies, unanimous consent of the shareholders is required to increase their commitments or convert the company into another social form with unlimited liability.
- In a private limited liability company, shareholders representing at least 75% of the share capital must approve any *inter vivos* transfer of shares to non-shareholders (the articles can lower this majority down to half of the share capital).
- If, as a result of losses in a public limited liability company, net assets fall below half of the corporate capital, the general meeting must resolve on the possible dissolution of the company with a majority of the votes cast. If, as a result of losses, net assets fall below a quarter of the share capital, dissolution can take place if approved by a quarter of the votes cast at the meeting.

35. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

In public and private limited liability companies, simplified joint stock companies and partnerships limited by shares, shareholders representing at least 5% of the share capital can:

- In the case of a merger, require a shareholders' meeting in the merged company to be convened.
- In the case of a demerger, require a shareholders' meeting in the split company to be convened.

In public limited liability companies and partnerships limited by shares:

- Shareholders representing at least 5% of the share capital can, in listed companies, request that one or more items be put on the agenda of a general meeting.
- Shareholders representing at least 10% of the share capital can:
  - ask for a prorogation of a general meeting;
  - require the management body to convene a general meeting; and
  - request that one or more items be put on the agenda of a general meeting.

Minority shareholder action

36. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

The main actions that minority shareholders can bring include:

- Shareholders representing at least 5% of the share capital of a public limited liability company can, in the context of an increase of the share capital of the company by way of a contribution in kind, require a valuation of the contributed assets by an approved statutory auditor.
- Shareholders representing at least 10% of the share capital can:
  - ask for an explanation or information in writing from the management body about a specific transaction and, in the absence of an answer, request a judge to appoint an assessor; and
  - bring an action on behalf of the company against the management or supervisory board.

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

37. Are there any formal requirements or guidelines relating to the internal control of business risks?

The Law dated 23 July 2016 relating to the disclosure of non-financial and diversity information by certain large undertakings and groups compels the largest companies and groups of companies to disclose non-financial information concerning company policy, risks and performance relating to social, environmental and employee matters, respect for human rights, anti-corruption and bribery matters in one of the following:

- The annual management report published each financial year.
- A non-financial statement document filed to the Electronic Companies and Associations Register (*Recueil Electronique des Sociétés et Associations*) (RESA).
- On the company's website.

In addition, the ten values of corporate governance provide recommendations with respect to internal control and risk management for listed companies.

38. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

In addition to their possible civil liability, directors are liable under the Law dated 10 August 2016 modernising the companies law dated 10 August 1915, as amended (Companies Law) and the Criminal Code:

- To a fine from EUR500 to EUR25,000 for failing to submit the annual accounts, the consolidated accounts or the management report to the general meeting within six months from the end of the financial year, or failing to publish them with the Electronic Companies and Associations Register (*Recueil Electronique des Sociétés et Associations*) (RESA).
- To imprisonment from one month to two years and a fine from EUR5,000 to EUR125,000 if, with fraudulent intent, they fail to publish the annual accounts, the consolidated accounts and the management report with the RESA in the timeline provided by the Companies Law.

39. Do a company's accounts have to be audited?

Both public and private limited liability companies and simplified joint stock companies with more than 60 shareholders must be supervised by one or more internal auditors (*commissaires*).

A partnership limited by shares is supervised by a board of three internal auditors (except where an approved statutory auditor (*réviseur d'entreprises*) is appointed).

However, an approved statutory auditor must audit the accounts of public and private limited liability companies, simplified joint stock companies and partnerships limited by shares if two of the following thresholds are reached during two consecutive financial years:

- The total balance sheet exceeds EUR4.4 million.
- Net profits exceed EUR8.8 million.
- The company has at least 50 employees.

40. How are the company's auditors appointed? Is there a limit on the length of their appointment?

Auditors are appointed by the general meeting of the shareholders. Their mandates cannot exceed six years. The approved statutory auditor is bound to the company by a fixed-term service agreement. The mandate is renewable.

41. Are there restrictions on who can be the company's auditors?

Luxembourg law is silent on the competence, qualifications and independence of internal auditors. Approved statutory auditors must be authorised by the Supervision Commission of the Financial Sector and must be registered in the public register of the approved statutory auditors' association.

42. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

According to the Law of 23 July 2016 related to the audit profession, an approved statutory auditor cannot:

- Be involved in the decision-making process of the audited company.
- Have a substantial and direct interest in the company.

Auditors must abstain from any transaction involving a financial instrument issued by it, guaranteed or otherwise supported by it.

43. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

Auditors have obligations and must conduct their mission as a reasonably diligent professional. Auditors are liable:

- In contract, to the company and third parties for any damage resulting from the breach of a legal provision or of the company's articles. A discharge can be granted by the general meeting for any offences in which auditors have not participated, provided that they have performed their functions

in the normal course of their duties and the offences were reported to the board.

- In tort, for wrongful misconduct provided that the interested party proves a fault, a loss and a causal link.
- In criminal law, if they actually participate in the preparation or execution of a criminal offence.

44. What is the role of the company secretary (or equivalent) in corporate governance?

Luxembourg law does not set out rules on company secretaries. However, the Luxembourg Institute of Directors (*Institut Luxembourgeois des Administrateurs*) edited the Luxembourg Company Secretarial & Governance Practice to provide guidelines under which a company secretary must:

- Ensure that the company has a viable corporate governance model and complies with the applicable law.
- Provide professional advice and guidance to directors and shareholders.

ONLINE RESOURCES

Legilux

Description. This is the official website of the Luxembourg government (only in French) containing in particular the Mémorial which is the official gazette of the Grand Duchy of Luxembourg divided into:

- **Mémorial A:** containing Luxembourg laws, Grand Ducal decrees, and European Union directives.
- **Mémorial B:** containing administrative instructions, directive or governmental/grand-ducal/ministerial decrees and edicts.
- **Mémorial C:** containing special publications for companies and associations (replaced from 1 June 2016 by the *Recueil Electronique des Sociétés et Associations* (*https://www.rcsl.lu/mjrcs/jsp/IndexActionNotSecured.action?time=1513260473448&loop=2*)).

W *http://legilux.public.lu*

Practical Law **Contributor profiles**

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Recent transactions

- Advising Carlyle on the closing of the acquisition of ADB SAFEGATE group active in the airport performance providing sector.
- Advising the Altice Group on the closing of the acquisition of Teads, the inventor of outstream video advertising and no. 1 online video advertising marketplace in the world.
- Advising the Altice Group on the sale of Coditel Brabant and Coditel SARL, its Belgium and Luxembourg subsidiaries to Telenet Group BVBA.