The Shareholder Rights and Activism Review

Seventh Edition

Editor
Francis J Aquila

The Law Reviews

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

SEVENTH EDITION

Editor
Francis J Aquila

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PREFACE

In the years since the last financial crisis, shareholder activism has been on the rise around the world. Institutional shareholders are taking a broad range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company's board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism is a prominent, and likely permanent, feature of the corporate landscape. Boards of directors, management and the markets are now more attuned to and prepared for shareholder activism, and engaging with investors is a priority for boards and management as a hallmark of basic good governance.

Shareholder activism is a global phenomenon that is effecting change to the corporate landscape and grabbing headlines around the world. Although shareholder activism is still most prevalent in North America, and particularly in the United States, activism campaigns directed at non-US companies now represent almost half of global activism activity. This movement is being driven by, among other things, a search by hedge funds for diversified investment opportunities and a cultural shift towards increased shareholder engagement in Europe, Australia and Asia.

Since the fourth quarter of 2021, global activism activity has been at higher levels than the market has seen for a number of years. Looking forward, activism activity is generally expected to remain strong, although events such as the war in Ukraine are having an impact on activity levels in certain jurisdictions. Moreover, shareholder activists are expected to remain focused on environmental, social and political (ESP) considerations and corporate governance.

As shareholder activists and the companies they target continue to be more geographically diverse, it is important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. *The Shareholder Rights and Activism Review* is designed as a primer on these aspects of shareholder activism in such jurisdictions.

My sincere thanks to all of the authors who contributed their expertise, time and labour to this seventh edition of *The Shareholder Rights and Activism Review*. As shareholder activism continues to diversify and increase its global footprint, this review will continue to serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila
Sullivan & Cromwell LLP
New York
August 2022

Chapter 9

LUXEMBOURG

Margaretha Wilkenhuysen and David Al Mari[1]

I OVERVIEW

Unlike certain neighbouring countries, in Luxembourg, listed companies are often controlled by one or more major shareholders, rendering it difficult to provide examples of shareholders or investors having taken public and adversarial approaches. Probably the most memorable example of shareholder activism in Luxembourg is in relation to the ArcelorMittal merger in 2007. Furthermore, a significant number of Luxembourg companies are listed abroad and these entities often need to apply Luxembourg law as well as the rules of the foreign exchange (e.g., the New York Stock Exchange (NYSE) or Nasdaq). The Shareholder Act of 24 May 2011[2] has been amended by the Act of 1 August 2019 setting out a number of shareholders' rights and aiming to increase long-term shareholder engagement, transposing the Second Shareholders' Rights Directive[3] into Luxembourg law. This is another important step in corporate social responsibility legislation and may potentially lead to more shareholder activism in Luxembourg where, until now, shareholder engagement does not seem to be a current practice.[4]

II LEGAL AND REGULATORY FRAMEWORK

i The corporate governance regime

Shareholder activism is a prerequisite to sound corporate governance.[5] Next to the Shareholder Act, Luxembourg's main statutes on corporate governance include the 10 August 1915 Act on commercial companies (the Companies Act)[6] and the Market Abuse Regulation.[7]

1 Margaretha Wilkenhuysen is a partner and David Al Mari is a senior associate at NautaDutilh Avocats Luxembourg.
2 Act of 24 May 2011 on shareholders rights in listed companies, as last amended by the Act of 1 August 2019.
3 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (Text with EEA relevance).
4 See on the distinction between shareholder activism and acting in concert: Jenny Conrath, 'Differentiating between acting in concert and shareholder activism: a difficult task for shareholders and competent authorities', ACE 2020 3-4, p. 2.
5 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, L 184/17.
6 The Act of 10 August 1915 on commercial companies.
7 Regulation (EU) No. 596/2014 of the European Parliament and of the Council on market abuse, as complemented by the Act of 23 December 2016 on market abuse, implementing Regulation (EU) No.

Over the years, the shareholders' role has evolved and shareholders' rights have been increasingly strengthened. The first version of the Shareholder Act came into force on 1 July 2011 and implemented Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies, aiming to increase shareholders' activism and setting out a number of shareholders' rights.

The Shareholder Act applies to companies that have their registered office in Luxembourg and whose shares are admitted to trading on a regulated market in a Member State of the European Union, and to Luxembourg companies whose shares are traded on a regulated market outside the European Union if the companies have elected to opt into the rules of the Shareholder Act. After the transposition of Directive 2017/828, this scope has been extended to institutional investors and asset managers.[8]

Shareholder rights and governance in Luxembourg are statute-based, consisting primarily of the Civil Code, the Companies Act and, for listed companies, the rules and regulations of the Luxembourg Stock Exchange (LuxSE). However, the statutory law provisions only give very general governance rules or principles.

As a supplement to the general statutory law, the LuxSE's 10 Principles of Corporate Governance (the LuxSE Principles), revised for the last time in December 2017 (fourth edition),[9] provide guidelines on best practice on corporate governance for all companies listed on the LuxSE and all Luxembourg companies whose shares are admitted to trading on a regulated market operated by the LuxSE.[10] Luxembourg companies listed abroad often find inspiration in these principles of good governance. The LuxSE Principles refer to general corporate governance issues, such as duties of the management board, the management structure, conflicts of interest provisions, remuneration and reporting issues. They also aim to enable the shareholders of listed companies to be actively involved in the companies' activities. The LuxSE Principles are highly flexible and adaptable to the activity, size and culture of individual companies. They consist of general principles that must be complied with (i.e., compliance) and recommendations that, although obligatory in principle, may be deviated from when justified in specific circumstances, provided that adequate explanation is provided (i.e., comply or explain). The recommendations are supplemented by guidelines on how a company should implement or interpret them. The obligation to comply or explain does not apply to the guidelines, which are indicative but not binding.

ii The market for publicly traded companies and Luxembourg-based companies traded abroad

Many companies' shares are traded on the LuxSE, but there are also a number of entities whose shares are listed on a regulated market within the European Union, other than the LuxSE, such as Euronext or the Warsaw Stock Exchange, and also on the NYSE or Nasdaq. In the case of Luxembourg entities listed abroad, their board needs to reconcile and combine the Luxembourg rules with the rules of the exchange, which in some cases may be challenging.

596/2014, and Directives 2014/57/EU and 2015/2392/EU.

8 Article 1 (5) of the Shareholder Act.

9 Available at www.bourse.lu/corporate-governance.

10 As an exception, the LuxSE Principles do not apply to regulated investment companies with variable capital and funds, to which specific regulations apply.

iii Corporate bodies

The Companies Act and the Shareholder Act provide in general the rules and the framework for shareholders to become active. The Companies Act contains the provisions on the governance of commercial companies, including the powers and responsibilities of the board of directors and the shareholders.

iv The board of directors

Structure

Although public limited liability companies may choose between a two-tier board structure[11] and a one-tier board structure,[12] the latter remains by far the preferred option in Luxembourg, with the company being managed exclusively by a board of directors invested with the broadest powers to act in the name and on behalf of the company.

In the two-tier system, a company is managed by two bodies: the management board, charged with the day-to-day management of the company, and a supervisory board. The supervisory board's responsibilities include the appointment and the permanent supervision of the management board members, as well as the right to inspect all company transactions.[13] No person may at the same time be a member of both the management board and the supervisory board.[14] Members of the supervisory board are liable towards the company and any third party in accordance with general law.[15] However, there is no specific guidance relating to the exercise by members of the supervisory board of their duties.

Composition of the board in a one-tier board structure

The board is composed of appointed members (the company's directors). A public limited-liability company can be managed by one director as long as it has a sole shareholder.[16] Otherwise, the Companies Act requires a minimum of three directors;[17] the maximum number of directors is undefined (the LuxSE Principles advise 16 directors as a reasonable limit).[18] Although the directors are appointed by the shareholders of the company,[19] the directors choose a chair among their members.[20]

Even if director nomination is typically made via the company's nomination committee, one or several shareholders holding together at least 5 per cent of the votes for listed entities falling within the scope of the Shareholder Act or 10 per cent for the other entities, as the case may be, have the right to amend a notice to the shareholders' meeting and add the nomination of directors for election.[21]

11 Article 442-1 of the Companies Act.
12 Articles 441-1 to 441-13 of the Companies Act.
13 Article 442-1 et seq. of the Companies Act, in particular, Articles 442-2(3), 442-3(1), 442-7(1), and 442-11 to 442-16.
14 Article 442-17(1) of the Companies Act.
15 Article 442-16 of the Companies Act.
16 Article 441-2, Paragraph 1 of the Companies Act.
17 Article 441-2(1) of the Companies Act.
18 LuxSE Principle 3, guideline to Recommendation 3.3.
19 Article 441-2(3) of the Companies Act.
20 Article 444-3(2) of the Companies Act.
21 Article 4 of the Shareholder Act.

Although no general legal obligations are in place, the LuxSE Principles require that listed companies' boards have a sufficient number of independent directors (the number depends on the nature of the company's activities and share ownership structure), defining independent directors as not having 'any significant business relationship with the company, close family relationship with any executive, or any other relationship with the company, its controlling shareholders or executive managers which is liable to impair the independence of the director's judgement'.[22] Although there are no specific legal provisions regarding independent directors, it is generally understood that all directors, including independent directors, should be provided with information in good time for the proper performance of their duties.

Separation of CEO and chair roles – the chair's role and responsibilities

Although the roles of CEO and chair tend to be separated in practice, there are no legal provisions or guidelines pertaining to a separation of roles or responsibilities. For listed companies, a Recommendation of the LuxSE Principles requires that the chair prepares the board meeting agendas after consulting the CEO and ensures that the procedures for preparing meetings, deliberations, decision-making and the implementation of decisions are correctly applied.[23] Under this non-compulsory guideline, the chair should ensure the proper application of the rules of governance and provide advice to the board.

For listed companies, according to the LuxSE Principles, companies should 'establish a policy of active communication with the shareholders' and allow shareholder dialogue with the board and the executive management.[24]

Liability of directors

Directors must act in the best corporate interests of the company, and are obliged to comply with the Companies Act and with the company's articles of association. This includes the obligation to act as reasonably prudent business persons. They must manage the company's business in good faith, with reasonable care, in a competent, prudent and active manner, at all times in the company's best interests, and must refrain from doing anything that does not fall within the scope of the company's corporate objectives. The Companies Act also imposes certain general duties on directors, including the general management of the company, representation of the company towards third parties and upholding their duty to avoid any conflict of interests.[25] Above all, when making decisions, the directors must respect the duties imposed by the Companies Act and by the company's articles of association.

The Luxembourg legislature has remained silent on what should be considered a company's best corporate interest. In its judgment delivered in 2015,[26] the Luxembourg District Court made some observations on this notion. It explained that it is an adaptable concept of which the exact interpretation depends on the company concerned and the nature of its activities. For some companies, the corporate interest is aligned with the interests of a company's shareholders. For other companies, it includes the interest of the legal entity as a whole, including the interests of shareholders but also those of employees and creditors. The

22 LuxSE Principle 3, guideline to Recommendation 3.5.
23 LuxSE Principle 2, guideline to Recommendation 2.4.
24 LuxSE Principle 10.
25 Articles 441-7 and 441-12 of the Companies Act.
26 Luxembourg District Court, 23 December 2015, Nos. 145 724 and 145 725.

court remarked that for financing companies and pure holding companies, the interest of the company's shareholders will be of overriding importance as the focus of the company's activities is on the rate of return of its investments.

However, directors of LuxSE-listed companies are held to a number of more specific duties under the Transparency Act[27] and the Market Abuse EU Regulation,[28] in addition to the LuxSE regulations and principles. In terms of the LuxSE Principles, the board of a listed company is bound by a fiduciary duty to its company and shareholders, and 'shall act in the corporate interests and shall serve all the shareholders by ensuring the long-term success of the company'.[29]

Directors are jointly and severally liable in accordance with the general provisions on civil liability and the provisions of the Companies Act,[30] towards both the company and all third parties for any damage resulting from a violation of the Companies Act or of the articles of association of the company. The company as well as third parties (including any shareholder or creditor with a legitimate interest) may bring an action against a director for violation of the articles or the Companies Act. To elude collective liability, a director must prove that he or she has not taken part in the breach of the Companies Act or of the articles of association of the company; that no misconduct is attributable to him or her; and that he or she reported the breach at the first shareholders' meeting following his or her discovery or knowledge of the breach. With regard to mismanagement, every director is individually liable.[31]

In the event of misconduct, according to prevailing doctrine and case law, the shareholders' meeting must decide whether to make any claim against a director in connection with faults committed by the director in the performance of his or her functions. Creditors of a company may, under certain circumstances, institute action on behalf of the company if the latter fails to do so and if that failure harms the company's creditors.[32]

Besides, each director is individually liable in accordance with the general provisions on tort liability, provided the director's act or omission caused direct, personal harm to the applicant and the damage suffered does not result from directorial misconduct or a violation of the Companies Act or the company's articles of association.[33]

If the shareholders have suffered collective damage, it is up to the shareholders' meeting to demand compensation, in which case an action must be brought by the shareholders' meeting on behalf of the company (an action initiated by a single shareholder will be dismissed). The legal basis for the action differs depending on whether the proceedings are invoked by the company or by third parties. Shareholders may only seek compensation for a prejudice that is distinct from the company's collective damage, and that can be defined

27 Act of 11 January 2008 on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as last amended by the Act of 23 December 2016.

28 Regulation (EU) No. 596/2014 of the European Parliament and of the Council on market abuse as complemented by the Act of 23 December 2016 on market abuse, implementing Regulation (EU) No. 596/2014, and Directives 2014/57/EU and 2015/2392/EU.

29 LuxSE Principle 2.

30 Article 441-9(2) of the Companies Act.

31 Article 441-9(1) of the Companies Act.

32 Article 1166 of the Civil Code.

33 Articles 1382 and 1383 of the Civil Code.

as individual or personal damage. The possibility for a (minority) shareholder representing at least 10 per cent of the votes to sue a director has been given an explicit legal basis in Luxembourg law (since the reform in 2016).[34]

Any action by the company has a contractual basis, whereas an action by third parties will be brought on the grounds of tort liability. Under contractual liability, only reasonably foreseeable damage is to be repaired (except in cases of fraud), whereas under tort liability, all damage caused by the misconduct must be repaired.

In addition, provisions relating to the alarm bell procedure[35] set out a specific liability regime for directors who fail to convene a general meeting of shareholders if the company's net equity drops by 50 per cent or more of its share capital to resolve upon either liquidation of the company or the continuation of the company's activities and measures to be taken to improve its solvency (e.g., injecting additional equity or granting a shareholder loan). If the company's net equity drops by 75 per cent or more of its share capital, the shareholders' decision is adopted by a qualified majority of one quarter of all shares present or represented. In the event of violation of these specific provisions on net equity drop, the directors can be held personally and jointly and severally liable to the company for all or part of the increase in the loss suffered by the company.[36]

Directors are discharged from their liability towards the company if approved by the annual shareholders' meeting approving the annual accounts. This discharge is only valid for the period covered by the accounts presented to and approved by the general meeting of shareholders, provided that they do not contain any omission or false statement of a material fact. Although a discharge given by the general meeting of shareholders extinguishes the board members' liability towards the company, proceedings initiated by third parties are not affected by this discharge.

The statute of limitations for civil liability claims against the directors is five years from the date on which the act was committed, except in the case of fraud.[37]For listed companies, the LuxSE rules and regulations provide a series of sanctions in the event its rules are breached, including fines or compensation for damage caused to the stock market.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

In line with the developments in EU law, over the years, shareholders rights have gradually increased. Luxembourg law offers a comprehensive framework for more transparency, accountability and increased shareholder rights, especially in listed companies. By transposing the Second Shareholder Rights Directive into Luxembourg law, shareholders rights have been further strengthened, in particular with regard to the possibility of expressing their view on directors' remuneration and the need to approve important transactions with related parties to a shareholders' vote. Institutional investors, asset managers and proxy advisers must now also meet transparency requirements. Furthermore, minority shareholders have additional rights further to the changes to the Companies Act in 2016. It is too early to assess whether these changes will lead in practice to more public campaigns led by activist shareholders.

34 Article 444-2 of the Companies Act.

35 Article 480-2 of the Companies Act.

36 Article 480-2 of the Companies Act.

37 Article 1400-6 of the Companies Act.

However, it is certain that boards will now, after the transposition of Second Shareholder Rights Directive into Luxembourg law, more than ever have to take into account the potential involvement and action from their shareholders, including minority shareholders.

It remains also to be seen in how far shareholders of special purpose acquisition companies (SPACs) will or will not become activists. Due to its attractive corporate and regulatory environment, Luxembourg plays actually a more and more important role on the rising European SPAC market. In February 2021, Lakestar SPAC I SE, a Luxembourg-incorporated SPAC, was listed on the Frankfurt Stock Exchange. This trend was confirmed in 2021, with a number of Luxembourg-incorporated SPACs being listed on foreign stock exchanges, such as Euronext Amsterdam.

Last but not least, environmental, social and governance (ESG) issues have also become an important topic in Luxembourg companies and their boards. Both financial and institutional investors demand companies to take into account ESG issues. However, as far as we know this global trend has not yet led to a (publicly known) activist campaign in Luxembourg.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

There are very few publicly available examples of shareholder activism in Luxembourg listed companies. The most prominent example was the takeover of Arcelor by Mittal Steel, which was only finally made possible following the pressure of the shareholders. This concrete example, however, is already 15 years old, since the takeover took place in 2006.[38]

A more recent example is Deer Park Road's investment in a Luxembourg-based company in 2017.[39]

As a side note, Luxembourg hosts a number of funds that invest in companies worldwide and are active as shareholders in these entities. As an example, Active Ownership is a fund based in Luxembourg that managed to replace certain members in the supervisory board of STADA[40] and became the most important shareholder of Agfa.[41]

V REGULATORY DEVELOPMENTS

i Contact with, and identification of, shareholders

One of the main objectives of the Second Shareholder Rights Directive and the amended Shareholder Act is to give listed companies the right to identify their shareholders and, at the end, to improve the communication between the companies and their shareholders. Intermediaries, even those in third countries, are required to provide the company with information on shareholders identity.[42] They must also provide the shareholders with information to facilitate the exercise of shareholder rights.[43] According to Directive 2017/828, Member States may provide for companies having a registered office in their

38 See www.nytimes.com/2006/06/26/business/worldbusiness/26arcelor.html?pagewanted=all&mcubz=1.

39 See www.nasdaq.com/article/deer-park-road-management-invests-in-altisource-portfolio-solutions-cm767338.

40 See www.reuters.com/article/us-stada-shareholders-aoc-idUSKCN1111AD.

41 See www.agfa.com/corporate/investor-relations/shareholder-structure.

42 Article 1(a) Shareholder Act.

43 Article 1(c) Shareholder Act.

territory to be only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights. This percentage shall not exceed 0.5 per cent. Luxembourg does not use this option, meaning that all shareholders can be identified.[44]

ii Shareholder rights and powers

Shareholder meetings and equality of voting rights

The Shareholder Act aims, inter alia, to strengthen the exercise of minority shareholders' voting rights in listed companies to improve the corporate governance of the companies. The Shareholder Act explicitly refers to a principle of equal treatment of shareholders.[45] This principle is limited to the participation of shareholders at the general meeting of shareholders and the exercise of their voting rights at that meeting.[46]

In 2016, the Companies Act amended the previous rule that one vote is in principle attached to one share, henceforth allowing the company to provide for different voting rights for different shares. For example, it is now possible to provide for the issuance of non-voting shares with supplementary economic rights and to provide for the issuance of shares with different nominal value, effectively tying the number of votes per share to the relative nominal value of the shares (thus creating shares with multiple voting rights).

In addition, the LuxSE Principles provide that 'the company shall respect the rights of its shareholders and shall ensure that they receive equal treatment. The company shall define a policy of active communication with its shareholders and shall establish a related structured set of practices.'[47]

Pursuant to the Shareholder Act, listed companies must give at least 30 calendar days' notice before holding a meeting[48] (notwithstanding particular requirements under the Takeover Bid Act).[49] By doing so, Luxembourg's parliament has imposed a longer notice period than the minimum 21-day notice period required under Directive 2007/36/EC. Should the quorum not be met at the first meeting, a second meeting must be convened at least 17 calendar days before the meeting is held.[50] The convening notice must be published in the Electronic Digest of Companies and Associations, a Luxembourg newspaper and other media in a manner that ensures the effective distribution of the information to the public throughout the European Economic Area.[51] If all the shares are registered, convening notices may be sent by registered letter to the shareholders, members of the board (or the management board and the supervisory board) and the statutory auditors. The Shareholder Act requires that, in addition to the agenda, date and place of the general meeting to be held, convening notices must also include the following:

44 Article 1(a) Shareholder Act.
45 Article 2 of the Shareholder Act.
46 Article 2 of the Shareholder Act.
47 LuxSE Principle 10.
48 Article 3(1) of the Shareholder Act.
49 Act of 19 May 2006 implementing Directive 2004/25/EC, as last amended by the Act of 18 December 2015.
50 Article 3(1)(2) of the Shareholder Act.
51 ibid.

a a clear description of the shareholders' rights to put items on the agenda and to bring forward draft resolutions, the procedure for voting by proxy and a form to be used for such purpose and, if provided for in the company's articles of association, the procedure to vote by electronic means;
b the postal and email addresses that can be used to obtain documents in relation to the meeting;
c where applicable, a copy of the 'record date' as defined by the Shareholder Act (i.e., the date by which shareholders must register their shares to participate and vote at the general meeting). The date for listed companies is set at midnight CET on the 14th calendar day before the meeting. The shareholder must notify the company at the latest by such date of its intention to participate in the meeting; and
d the company's website address, which must contain all of the above information, as well as a full copy of the draft resolutions.[52]

The Shareholder Act and the Companies Act allow distance voting by shareholders in advance of the meeting, provided that the company expressly recognised this possibility and has outlined the related requirements in its articles of association. The Shareholder Act details the content of the ballot paper, which must include, inter alia, the full identity of the shareholder, the content of the vote cast in advance, the agenda of the meeting and the deadline before which the ballot paper must be received.[53] From now on, when votes are cast electronically a confirmation of receipt of the vote must be sent within two months of the vote.[54]

The Shareholder Act imposes that proxy voting be offered to shareholders, under certain conditions, with the proxy holder having the same rights as the shareholder. The company has no obligation to verify that the proxy holder votes in accordance with the shareholder's instructions.[55]

The Companies Act provides that the board of directors may temporarily suspend the voting rights of the shareholders who are in breach of the articles of association of the company or of their initial deed of subscription or commitment until the breach has been remedied.[56]

Transparency of directors' remuneration and approval of material transactions with related parties

Although the Companies Act does not set out any specific areas in which board decisions must be approved by the shareholders (with some exceptions such as directors' conflicts of interests where decisions may, in certain cases, be deferred to the shareholders),[57] the articles of association of the company may provide that all or certain board decisions must be ratified by the shareholders. It is, however, quite uncommon in listed entities for the board to need approval or seek ratification of its decisions that do not fall in the scope of statutory shareholder rights.

52 Article 3(3) of the Shareholder Act.
53 Article 6 of the Shareholder Act.
54 Article 1(c) (2) of the Shareholder Act.
55 Article 8 of the Shareholder Act.
56 Article 450-1 of the Companies Act.
57 Article 441-7 of the Companies Act.

The LuxSE Principles recommend establishing a remuneration committee to deal with these questions relating to directors' remuneration. The LuxSE Principles state that the company must 'secure the services of qualified directors and executive managers by means of a fair remuneration policy that is compatible with the long-term interests of the company', thereby introducing a sustainable aspect rather than concentrating on short-term gains.[58]

Concerning listed companies, following the transposition of the Second Shareholder Directive, shareholders must now be informed in detail of the remuneration of directors and the company's remuneration policy. Companies must prepare a management remuneration policy describing all components, criteria, methods and modalities applied to determine the fixed and variable remuneration of the directors. Shareholders have an advisory vote on this policy, unless the company's articles of association provide for a binding vote. The remuneration policy must be submitted to the general meeting of shareholders for approval each time there is a significant change thereto and at least every four years. In addition, companies must prepare a report for the annual general meeting on the remuneration and benefits granted to directors.[59]

Besides, under the Shareholder Act, shareholders must approve material transactions with related parties (this is not applicable to companies that are not within the scope of the Shareholder Act). With regard to the definition of 'material transaction', Luxembourg Law takes into account the nature of the transaction as well as the position of the related party.[60]

The powers of shareholders to influence the board

The Companies Act reserves the management of the company, in principle, to its board.[61] Should a shareholder be directly involved in the management of the company, he or she may be deemed a de facto director and face civil or criminal liability, or both, and generally be liable under the same circumstances as the appointed directors. This may prove particularly delicate in a bankruptcy scenario where the directors and de facto directors could be declared bankrupt[62] or held liable in whole or in part, jointly or severally, for the company's outstanding debts.[63]

Shareholders do, however, control the appointment of the board (and, therefore, its composition) via a majority decision of over 50 per cent of the capital to appoint or revoke directors.[64] In addition, shareholders representing 10 per cent of a company's share capital may force the board to postpone a general meeting of shareholders for up to four weeks.[65]

Furthermore, during the annual general meeting, the shareholders can question the board on all aspects of the company's management, accounting and so forth throughout the year, and may withhold granting discharge. The Shareholder Act and the Companies Act expressly lay down that shareholder right in relation to the items on the agenda of the meeting.[66]

58 LuxSE Principle 7.
59 Articles 7(a) and (b) of the Shareholder Act of 24 May 2011, as amended.
60 Article 7(c) of the Shareholder Act as amended.
61 Article 441-5 of the Companies Act.
62 Article 495 of the Luxembourg Commercial Code.
63 Article 495-1 of the Luxembourg Commercial Code.
64 Article 441-2(3) of the Companies Act.
65 Article 450-1(6) of the Companies Act.
66 Article 7 of the Shareholder Act.

Under the Shareholder Act, in addition to the right to ask questions orally during a meeting, shareholders may have the right to pose written questions about the items on the agenda before the meeting is held. If provided for in a company's articles of association, questions may be asked as soon as the convening notice for the general meeting is published. The company's articles of association will furthermore provide the cut-off time by which the company should have received the written questions.[67]

Apart from several specific circumstances (e.g., in the case of confidential information), the company must answer any questions addressed to it. Should several questions relate to the same topic, the company may publish a detailed question and answer document on its website, in which case the chair should draw the shareholders' attention to the publication.

The Companies Act also allows shareholders to submit questions to management outside of a meeting.[68] Any shareholder representing at least 10 per cent of the company's share capital or voting rights can ask the board of directors or management body questions about the management and operations of the company or one of its affiliates, without the need for extraordinary circumstances. If the company's board or management body fails to answer these questions within one month, the shareholder may petition, as in summary proceedings, the president of the district court responsible for commercial matters to appoint one or more independent experts to draw up a report on the issues to which the questions relate.[69]

Certain matters must also be reported to the shareholders, such as any director's conflict of interest relating to voting on a resolution.[70]

Furthermore, if a minority shareholder finds that directors and members of its management and supervisory boards of a public limited liability company are negligent or simply not diligent in the performance of their duties, it may sue them. Such an action may be brought by one or more shareholders or the holders of founders' shares representing 10 per cent or more of the company's voting rights.[71]

Decisions reserved to shareholders

The Companies Act provides that a company's management board has the most extensive powers to perform all actions necessary or appropriate to fulfil the company's corporate objective,[72] with the exception of the actions specifically reserved by law to the shareholders' meeting. These actions include, inter alia, any amendments to the company's articles of association; the approval of annual accounts; the allocation of the company's results; and the dissolution and opening of the liquidation of the company, which are reserved to the company's shareholders.

67 Article 7(2) of the Shareholder Act.

68 Article 1400-3 of the Companies Act. This new management evaluation procedure, inspired by French law, was introduced to the Companies Act by the Act of 10 August 2016.

69 Luxembourg District Court, 18 November 2016, No. 1809/2016. This judgment clarified the scope of application of this provisions, and, in particular, the questions that can be asked by the shareholders and the answers provided by the management that are to be considered satisfactory.

70 Article 441-7(2) of the Companies Act.

71 Article 444-2 of the Companies Act.

72 Article 441-5 of the Companies Act.

Rights of dissenting shareholders

The Companies Act currently recognises only a few rights of action on behalf of the company in favour of individual shareholders.

Seeking invalidation of a shareholder decision by dissenting shareholders is only possible on the basis of five grounds specified in the Companies Act:

a procedural irregularity that influenced or could have influenced the outcome of the decision;

b violation with fraudulent intent of the rules governing general meetings;

c an ultra vires act or abuse of power affecting the decision;

d exercise at a general meeting of voting rights that have been suspended by legislation other than the Companies Act, provided the quorum or majority required to adopt the decision would not have been met but for the unlawful exercise of these voting rights; and

e any other cause provided for by the Companies Act.[73]

In addition, minority shareholders enjoy a sell-out right under certain conditions. According to the Act of 21 July 2012 on the mandatory squeeze-out and sell-out of securities (the Squeeze-out Act),[74] in the event of an individual or legal entity acquiring at least 95 per cent of the share capital of the company and subject to certain conditions, the remaining minority shareholders are entitled to exercise a sell-out right within three months of the required notification and publication of the acquisition.[75]

However, the extension of the protection of minority shareholders by stipulating provisions in the company's articles of association (e.g., the right of a minority coalition to propose directors, provisions for a more stringent majority for certain decisions, approval clauses or share transfer restrictions) is well recognised insofar as the arrangement does not conflict with Luxembourg's public policy rules. Providing such additional protection in favour of minority shareholders, whether in the articles of association or otherwise, is common in Luxembourg, particularly among international joint ventures and groupings that use a Luxembourg company structure to promote mutual business activities.[76]

In this respect, the use of shareholders' agreements of a purely contractual nature is far more common than providing for relevant provisions in the articles of association. Since the amendment of the Companies Act in 2016, the use of shareholders' agreements is now explicitly recognised in Luxembourg law. The Companies Act does not state that these types of arrangements need to be limited in time. However, it does set out three types of voting arrangements that are null and void:

a a shareholders' agreement that violates the provisions of the Companies Act or that is contrary to a company's corporate interest;

b an undertaking by a shareholder to vote in accordance with instructions given by the company itself, a subsidiary or any corporate organ of such entities; and

73 Article 100-22 of the Companies Act.

74 Act of 21 July 2012 to squeeze-out and sell-out in respect of companies whose securities are or have been admitted to trading on a regulated market or have been the subject of a public offer.

75 Article 5 of the Squeeze-out Act.

76 For further analysis on minority shareholders rights, see Marc Elvinger, 'Les minorités en droit des affaires: rapport luxembourgeois', *Annales du droit luxembourgeois*, No. 15 (2005).

c an undertaking by a shareholder to those same companies or corporate organs to approve proposals made by the company's corporate bodies.[77]

If votes are cast at a general meeting of shareholders pursuant to an invalid voting arrangement, the votes shall be considered null and void along with any resolutions taken, unless the votes did not affect the final outcome.[78]

Although the use of shareholders' agreements does allow for discretion and flexibility, any compulsory implementation of this type of arrangement remains at risk. Indeed, the most prominent issue with shareholders' agreements lies with the delicate balance between their confidentiality and the enforceability of their terms. For example, it will generally not be possible to enforce the terms of a shareholders' agreement against third parties (as per the principle of privity of contracts), unless the knowledge thereof by the third party can be proven or the litigious provisions thereof were reflected in the articles of association of the company and were therefore publicly available.

Benefits for long-term shareholders

The Companies Act does not provide for any specific benefits (e.g., extra votes or dividends) for long-term shareholders, although such facilities may be agreed upon in a shareholders' agreement or incorporated into the articles of association, or both.

iii Shareholders' duties and responsibilities

Controlling shareholders' duties and liability

All shareholders have certain obligations by law, including the payment of shares, a proportional contribution to any losses suffered by the company and an obligation of loyalty.

In addition, the controlling shareholders are notably prevented from dictating or imposing an increase of the other shareholders' obligations without their prior consent, although this principle has been considerably attenuated by the Squeeze-out Act, which granted the right to force the acquisition of shares held by minority shareholders to shareholders controlling at least 95 per cent of the share capital.[79]

The controlling shareholders should also be aware that, in cases of abuse of majority, resolutions that favour the majority shareholders at the expense of the minority shareholders and that are contrary to the corporate interest of the company may be cancelled by judicial decision. Both criteria must, however, be met, as a breach in equality of the shareholders may still be compatible with the corporate interest of the company, and a sole breach of the corporate interest would not be sufficient as it is not for the courts to assess opportunities presented by strategic and economic decisions.[80]

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77 Article 450-2(1) of the Companies Act.

78 Article 450-2(2) of the Companies Act.

79 Article 5 of the Squeeze-out Act.

80 Luxembourg Commercial Court, 13 July 2018, Nos. 100/18 and 43424.

Institutional investors' duties and best practice

Institutional investors as well as asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy. They shall also, on an annual basis, publicly disclose how this policy has been implemented.[81] Institutional investors as well as asset managers and proxy advisers will be bound by accrued transparency obligations.

In addition, it is of note that a number of Luxembourg-based investors have signed the United Nations-supported Principles for Responsible Investment.[82] The first of these six principles is to incorporate environmental, social and corporate governance considerations into investment analysis and decision-making processes. Furthermore, a growing number of investors – though not being signatories to the Principles for Responsible Investment – are taking the private initiative to take such risks into account.

Code of best practice for shareholders

Luxembourg has no official code of best practice for shareholders, although companies may draw up internal codes of best practice for their shareholders.

iv Shareholder activism

Shareholder activism is not a defined notion under Luxembourg law, and neither derivative actions nor proxy battles are common practice in Luxembourg.

v Takeover defences

Takeover bids are covered by the Takeover Bid Act. The scope of this act is limited to companies whose shares are traded on a regulated market in one or more Member States of the European Union. Although Luxembourg law admits the principle of defensive measures, there has been no case law specifically covering the question as yet. In implementing any defensive measures, the board has an obligation to act in good faith with respect to the shareholders' interest.

In the absence of a specific provision in a company's articles of association requiring shareholder approval, the board may adopt defensive measures (e.g., issuing new shares within the limits of authorised capital or selling key assets) without the approval of the shareholders, provided that these measures are taken in the best interests of the company. The board may not prohibit the shareholders from accepting an offer.

However, measures aimed at frustrating bids in the long term are not generally deemed to be admissible under Luxembourg legislation. It would not be possible, therefore, to repeat defensive measures whenever the bid is repeated or to take defensive measures that have a long-term effect.

Shareholder and voting rights plans, and similar measures

As a general rule, any increase of a Luxembourg company's share capital is decided upon by the general meeting of shareholders. However, the articles of association of a Luxembourg public limited liability company may authorise the board of directors to increase the share

81 Article 1(e) Shareholder Act.

82 Further information available at www.unpri.org. The principles are an investor initiative in partnership with the United Nations Environmental Programme Finance Initiative and the United Nations Global Compact.

capital up to a designated amount in one or more instalments.[83] The authorisation to do so is only valid for five years, but may be renewed by the general meeting of shareholders.[84] As an inducement for an existing shareholder to purchase more shares, it may be decided to abandon any payment of share premium. Beyond that, there is no possibility for a company to offer a discount on the par value of shares to be issued.

White knight defence

In Luxembourg practice, the board of any company that is the subject of a takeover bid may seek out a third party with the purpose of such party making a counter-offer that is more favourable to the company. It can do so without the need for approval by the company's shareholders.

Staggered boards

Directors of a Luxembourg public limited liability company shall be appointed for a term of office that may not exceed six years. However, directors may be removed from office by the general meeting of shareholders at any time and without stating reasons – this is a mandatorily applicable rule that cannot be deviated from.[85] As a result, a staggered board does not constitute a major obstacle for a hostile acquirer holding sufficient shares to make changes to the composition of the board.

VI OUTLOOK

After the transposition of the Second Shareholders Rights Directive into national law in 2019, Luxembourg law offers an even more comprehensive legal framework for transparency, accountability and increased shareholder rights, especially in listed companies. Although campaigns of activist shareholders do not seem to be a standard practice in Luxembourg, time will tell whether the changes in Luxembourg law will lead to more campaigns led by activist shareholders.

It is certain that boards will, in any case, have to be aware of potential involvement and action from their shareholders. In this context, it is yet to be seen whether the aftermath of the covid-19 pandemic, the climate crisis and the related higher prioritisation of environmental, social and governance (ESG) matters will lead to more activist campaigns.

83 As a result of the entry into force of the Luxembourg Act of 10 August 2016, the articles of association of Luxembourg private limited liability companies may now also include an authorisation to the board of managers to issue shares, provided that the shares so issued are either issued to existing shareholders or to a third party that has been approved in accordance with the law.

84 Article 420-22 of the Companies Act.

85 Article 441-2(4) of the Companies Act.

Appendix 1

ABOUT THE AUTHORS

MARGARETHA WILKENHUYSEN

NautaDutilh Avocats Luxembourg

Margaretha (Greet) Wilkenhuysen is a partner and heads NautaDutilh's corporate practice in Luxembourg. She specialises in cross-border corporate transactions, with a particular focus on mergers and acquisitions, joint ventures and international corporate restructuring. She also has extensive experience in corporate finance and the provision of corporate governance advice to listed companies. She represents both domestic and international clients in a wide range of high-end transactions. Her extensive experience and knowledge resulted in her being nominated as a 'Leading Lawyer' by *IFLR1000* since 2011.

Ms Wilkenhuysen received her law degree from the University of Leuven in 1991, a master's degree in business and tax law from the University of Brussels in 1993 and an LLM from Duke Law School in North Carolina in 1996. She joined NautaDutilh in 1997 and was named partner in 2007.

Ms Wilkenhuysen is a frequent writer and speaker, and has published various books and articles on selected topics of corporate law. She is a member of the International Bar Association, the European Private Equity and Venture Capital Association, and the Duke Alumni Association.

DAVID AL MARI

NautaDutilh Avocats Luxembourg

David Al Mari is a senior associate in NautaDutilh's corporate practice. He advises clients on a wide range of corporate matters including cross-border mergers and acquisitions, private equity, corporate governance and corporate finance. His practice also includes restructuring and insolvency.

David is admitted to the Luxembourg Bar and holds a master's degree in business law from the University of Strasbourg (2013) and in international business law from the University of Montpellier (2014). He also holds a bachelor's degree in law from the Lille law school (2012). In addition, David completed the *Cours complémentaires en Droit Luxembourgeois* (CCDL) (2016).

Prior to joining NautaDutilh, David worked as an associate in another reputed law firm in Luxembourg.

NAUTADUTILH AVOCATS LUXEMBOURG

2 rue Jean Bertholet
Luxembourg 1233
Luxembourg
Tel: +352 26 12 29 1
Fax: +352 26 12 29 90
greet.wilkenhuysen@nautadutilh.com
david.almari@nautadutilh.com
www.nautadutilh.com

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