The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Luxembourg: Corporate Governance

This country-specific Q&A provides an overview to tax laws and regulations that may occur in Luxembourg.

This Q&A is part of the global guide to Corporate Governance. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/corporate-governance/

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1. **What is the typical organizational structure of a company and does the structure typically differ if the company is public or private?**

   There are a number of Luxembourg company forms which each have their own specificity in

terms of corporate governance. The below answers will only be limited to Luxembourg public limited liability companies (sociétés anonymes, "**SA**") and Luxembourg private limited liability companies (sociétés à responsabilité limitée, "**SàRL**") as these are the most commonly used forms in Luxembourg. It is to be noted that the shares of a Luxembourg SARL may not be issued by way of public offer, whereas the shares of a Luxembourg SA can.

The Luxembourg Act of 10 August 1915 on Commercial Companies, as amended from time to time, (Loi modifiée du 10 août 1915 concernant les sociétés commerciales - the "**Companies Act**") permits a SA to be organized either as a single-tier system, which consists of a board of directors (or a single director, in case of sole shareholder SA) as well as a double-tier system, which adds a supervisory board to the board of directors.

SàRLs are always organized in a single-tier system.

2. Who are the key corporate actors (e.g., the governing body, management, shareholders and other key constituencies) and what are their primary roles? How are responsibilities divided between the governing body and management?

The key corporate actors are the shareholders and the directors.

In a SA the board of "directors" has the power to perform any acts necessary or useful to achieve the corporate purpose, with the exception of those reserved by law or the articles of association to the general meeting of shareholders.

In a SàRL, each "manager" may engage in all acts necessary or expedient for achieving the company’s purpose, apart from those that by law are reserved to the general meeting of shareholders.

The board of directors of a SA has to be composed of at least 3 directors, except in certain circumstances such as, but not limited to, the single shareholder SA which may be managed by a single director.

The SàRL has to be managed by at least one manager. In case of plurality of managers, they may be organized as a board of managers in accordance with the provisions of the articles of

association and the law.

In both a SA and a SARL, the day-to-day management of the company and the representation of the company in this respect, may be delegated to one or more persons, members of the board or not.

In both the SA and the SàRL, the shareholders, in such capacity, do not actively engage in the operational aspects of the company, but have financial oversight, such as approving the increase and reduction of the company's share capital, approval of the annual accounts and distributions, appointing and removing the managers/directors and auditor, subject to the statutory majority requirements. Further to that, certain matters are reserved to the shareholders pursuant to the Companies Act and the company's articles of association.

3. What are the sources of corporate governance requirements?

The main sources of corporate governance requirements in Luxembourg are the Luxembourg Companies Act which is complemented in some aspects by the Civil Code. Further to that, listed companies are subject to the Rules and Regulations as published by the Luxembourg Stock Exchange (the "**LSE**"), such as "The Ten Principles of Corporate Governance of Luxembourg Stock Exchange" (the "**LSE Principles**"), which are revised regularly. In addition, the act of 24 May 2011 regarding the exercise of certain shareholder rights at shareholders' meetings, as amended, (the "**2011 Act**") contain certain provisions relating to corporate governance with respect to shareholders' rights at shareholders' meetings. The 2011 Act will be amended in the course of 2019 further to the transposition of the Second Shareholders' Rights Directive.

4. What is the purpose of a company?

The purpose of a company is the one set out in the object clause of its articles of association. The purpose must be lawful and in case it is with respect to a regulated activity, the company needs to obtain the required licence or authorization and additional corporate governance requirements may apply to it resulting from the specific legislation which governs the regulated activity.

5. Is the typical governing body a single board or comprised of more than one board?

As mentioned above, in the case of a SàRL, only a single tier system is provided for by law. With respect to the SA, despite the fact that both a single and a double tier systems are permitted, in the vast majority of cases, the SAs are organized as a single tier system.

6. How are members of the governing body appointed and removed from service?

The managers of a SàRL are appointed by the shareholders for a term or for an indefinite term and may be removed for cause only except if the articles of association provide otherwise.

The directors of a SA are appointed by the shareholders for a limited term of up to six years, renewable, and may be removed at any time without cause.

With respect to qualifying listed companies, the LSE Principles indicate that the company shall establish a formal procedure for the appointment of members of the board of directors.

7. Who typically serves on the governing body and are there requirements that govern board composition or impose qualifications for directors regarding independence, diversity or succession?

There are no formal qualifications or requirements governing the composition of the board of a SA or a SàRL.

With respect to qualifying listed companies, the LSE Principles indicate that the Board shall be composed of competent, honest, and qualified persons and that a certain number of directors of a company are sufficiently independent meaning that a director must not have any significant business relationship with the company, close family relationship with any member of the executive management, or any other relationship with the company, its controlling shareholders or members of the executive management which is liable to impair the independence of the

director’s judgment. The choice of the directors shall take account of the specific features of the company. The board shall be large enough for its members to contribute experience and knowledge from different fields and for changes in its composition not to create undue disruption.

8. What is the common approach to the leadership of the governing body?

The board may choose from among its members a chairman who chairs the meetings of the board.

In a SA unless otherwise provided in the articles of association and insofar as a chairman has been elected, the chairman has a casting vote in case of a tie vote.

With respect to qualifying listed companies, the LSE Principles indicate that the board shall appoint a chairman, who shall prepare the agenda for board meetings, ensure that the procedures relating to board meetings, preparation of meetings, deliberations, and for taking and implementing decisions, are correctly applied and take the necessary steps to create a climate of trust within the board, contributing to open discussion, the constructive expression of the opinions of each of its members, and support for decisions taken by the board. In addition, the LSE Principles indicate that the decision-making process shall allow each director to express his point of view and that no single director or group of directors shall dominate the board’s decision-making process.

9. What is the typical committee structure of the governing body?

The Companies' Act provides that in a SA, the board of directors may decide to create committees, whose composition and remit it shall fix and which shall carry on their activities under its responsibility.

In addition, the law of 23 July 2016 on the audit profession (Loi du 23 juillet 2016 relative à la profession de l'audit) requires an audit committee for public interest companies ("entités d'intérêt public"), such as listed companies, and credit and insurance/reinsurance institutions and which shall be composed of non-executive members of the board, and or the supervisory

board or members designated by the general assembly of shareholders.

With respect to qualifying listed companies, the LSE Principles indicate that the board shall establish special committees necessary for the proper execution of its remit. In this respect, the LSE principles recommend that the board ensures that special committees are set up in order to review specific issues determined by the board, and to advise the board on these issues. In this respect, it is indicated that committees shall be composed in such a way to ensure that the membership of the committee is renewed to some degree, and to avoid undue reliance on particular individuals.

10. How are members of the governing body compensated?

Compensation of the members of the board is up to the general meeting of shareholders (or sole shareholder as applicable). If there is no provision in the articles of association governing the remuneration and no remuneration is contractually agreed, the mandate will be without remuneration.

For qualifying listed companies, the LSE Principles indicate that the company shall establish a fair remuneration policy for its directors and the members of its executive management that is compatible with the long-term interests of the company. The remuneration must reflect the level of quality and skills required of members of the board and must be structured in such a way as to protect the company against taking excessive risks.

11. Are fiduciary duties owed by members of the governing body and to whom are they owed?

Members of the board are under the obligation to act in the best interest of the company and they owe their fiduciary duties to the company.

For qualifying listed companies, the LSE Principles further indicate that the board as a collective body shall act in the corporate interest, shall serve all the shareholders by ensuring the long-term success of the company and the directors shall exercise the mandate with integrity and commitment and shall make decisions in the company’s interest and independently of any conflict of interest.

12. Do members of the governing body have potential personal liability? If so, what are the key means for protecting against such potential liability?

Members of the board do not contract any personal liability in relation to the engagements of the company. They are however responsible towards the company for the execution of their mandate and shall be liable for faults committed in their management. The board is jointly and severally liable for damages resulting from a breach of the Companies Act and the articles of association.

13. How are managers typically compensated?

Compensation of the members of the daily management of the company is entirely left up to the board. If the daily manager is however one of the board members of the company, the board is obliged to annually report on his remuneration and other expenses.

For qualifying listed companies, the LSE Principles further indicate in the same manner as for the board members, that the remuneration must reflect the level of quality and skills required of members of the executive management and that the remuneration must be structured in such a way as to protect the company against taking excessive risks. Furthermore, the criteria for as well as the various factors entering directly or indirectly into the remuneration in favour of members of the executive management shall be subject to the approval of the annual general meeting of shareholders.

14. How are members of management typically evaluated?

The evaluation of the members of the daily management is left to the board, who may, subject to the articles of association and the mandatory provisions of the Companies Act, terminate the daily management delegation with or without cause. There is consequently an implicit evaluation mechanism foreseen.

For qualifying listed companies, the LSE Principles further indicate that the board shall set up a

body responsible for the effective executive management of its business. It shall clearly define the assignments and duties of the executive management and shall delegate to it the powers required for the proper discharge thereof. Furthermore, the board shall establish critical procedures for assessing and reviewing the operation and performance of the executive management as a whole and of each of its members.

15. Do members of management typically serve on the governing body?

There is nothing formally preventing members of the board to serve as daily managers of a company and it is not uncommon that managers are appointed as person in charge of the companies' daily management.

16. What are the required corporate disclosures, and how are they communicated?

Luxembourg law only provides for specific disclosure obligations rules for listed companies, whose shares are admitted for trading at the Luxembourg stock exchange. These disclosure rules particularly relate to transparency obligations in relation to, inter alia, the company's governance structures, as well as other policies, such as risk management.

In addition, all Luxembourg companies must be registered with the register of trade and companies (registre du commerce et des sociétés), and must publish their articles of association, managers/directors, share capital, shareholders (in the case of a SàRL) as well as changes therein, mergers (proposal) and annual accounts.

As of 1 March 2019, all entities registered with the Luxembourg register of trade and companies need to including civil and commercial companies, branches of foreign companies, Luxembourg common investment funds (F.C.P.) and other types of investment funds such as the UCITS, SICAR, RAIF and SIF must register their ultimate beneficial owner(s) ("UBO(s)") information via an online platform managed by the Luxembourg Business Registers. A substantiated request to restrict access to the UBO(s) information on file can be submitted at the same time or, under certain conditions, at a later stage. There is nevertheless an exception for companies whose securities are admitted to trading on a qualifying regulated market ("Qualifying Listed Entities"). The information to be provided includes the ultimate beneficial owner 's first and last name,

nationality, date and place of birth, country of residence and national identification/registration number, and the nature and scope of the interest held in the Entity. Qualifying Listed Entities are only required to provide the name of the market on which their securities are traded.

Furthermore, both the Companies' Act, the 2011 Act and a number of other legislations provide for certain requirements with respect to provision and or/disclosure of certain information to the shareholders and/or third parties.

17. How do the governing body and the equity holders of the company communicate or otherwise engage with one another?

The shareholders and the board of management of the company both have the right to be present at the general meeting of the shareholders.

The board can, convene general meetings of shareholders. The board must convene a shareholders' meeting at the request of shareholders representing at least one tenth of the share capital of a SA or half of the share capital of a SàRL.

In addition, one or more shareholders representing ten per cent or more of the share capital or ten per cent or more of the votes attaching to all the existing shares may submit written questions to the governing body on one or more of the company's management transactions and, as the case may be, those of controlled companies. In the latter case, the request must be assessed having regard to the interests of the companies included in the consolidation obligation. A copy of the answer must be sent to the person in charge of legally auditing the accounts. Furthermore, according to the 2011 Act, with respect to qualifying listed companies, each shareholder has the right to ask questions with respect to the points on the agenda of a meeting.

In case of transactions within the remit of the board of directors involving conflict of interest, any such transactions in which a director might have had a conflict of interests with the company shall be specially reported at the next general meeting before any other resolution is put to a vote.

For qualifying listed companies, the LSE Principles indicate the company shall define a policy of active communication with its shareholders and shall establish a related structured set of practices. This includes procedures that guarantee the shareholders the power to play their role

fully at meetings and to enter into dialogue with the board and the executive management and that relevant questions raised by shareholders before or during a shareholders'' meeting receive the appropriate answers (provided that they are not likely to cause serious harm to the company, its shareholders or staff).

18. Are dual or multi-class capital structures permitted and how common are they?

The Companies Act provides for multiple types of shares to be issued by a company, such as redeemable shares, non-voting shares (in the case of a SA) and various others.

19. What percentage of public equity is held by institutional investors versus retail investors?

N/A.

20. What matters are subject to approval by the shareholders and what are the typical quorum requirements and approval standards? How do shareholders approve matters (e.g., voted at a meeting, written consent)?

The amendment of the company's articles of association, approvals of annual accounts and distributions, liquidations, dissolutions, mergers (except in certain circumstances), appointment and removal of board members and auditors are exclusively reserved to the shareholders' decision.

With respect to a SA, the general quorum requirements for meetings called for amendments to the articles of association, is the presence or representation of half the shareholders on first call. On second call, there is no quorum and the decisions at both meetings are adopted at a 2/3 majority of the votes cast, if no other provisions have been agreed in the company's articles of association. Where there exist two or more classes of shares and the deliberations of the general meeting are susceptible of amending their respective rights, the deliberations must, in

order to be valid, fulfil the presence and majority requirements within each class as required by the preceding sentence. For decisions not involving a change to the articles of association, there are no quorum requirements and the decisions are adopted at a majority of the votes cast, except where otherwise required by the Companies' Act. The shareholders' decisions in a SA may be adopted at meetings. The articles of association may authorise any shareholder to vote by correspondence using a form whose details are set down in the articles of association or to participate at the meeting by way of conference call or video conference, subject to the provisions of the Company's Act.

With respect to a SàRL, and unless otherwise provided in the articles of association, shareholders representing three-quarters of the share capital may amend all and any provisions of the articles of association. Where there exist two or more classes of shares and the general meeting’s deliberations are such as to alter their respective rights, the deliberations must, in order to be valid, for each class fulfil the quorum and majority conditions laid down in the preceding sentence. Decisions not amending the articles of association are validly taken if adopted by shareholders representing more than one-half of the company’s share capital. Unless otherwise provided in the articles of association, if this figure is not reached at the first meeting or in the first written consultation, the shareholders are called to a second meeting or are consulted a second time, by recorded delivery post, and the decisions are taken by a majority of the votes cast, regardless of the portion of the capital that is represented. Except for amendment of the articles of association, it is not obligatory to hold shareholders' meetings if the number of shareholders does not exceed 60. The articles of association may authorise any shareholder participate at the meeting by way of conference call or video conference, subject to the provisions of the Company's Act.

21. Are shareholder proposals permitted and what requirements must be met for shareholders to make a proposal?

One or more shareholders of a SA who together possess at least ten per cent of the share capital may require the incorporation of one or more new items on the agenda of any general meeting. Such request is to be sent to the registered office by recorded delivery letter at least five days before the shareholders' meeting is held.

In addition, according to the 2011 Act, with respect to qualifying listed companies, shareholders holding more than 5% of the share capital have the right to add new points on the agenda of a meeting and proposed resolutions under the procedure and conditions set out by the 2011 Act.

22. May shareholders call special meetings or act by written consent?

The board must convene a shareholders' meeting at the request of shareholders representing at least one tenth of the share capital of a SA or half of the share capital of a SàRL.

Shareholders generally have the power to call extraordinary meetings where this is necessary in order to approve capital increases or decreases for example or in order to amend the company's articles of association.

23. Is shareholder activism common and what are the recent trends?

Shareholder activism was for a very long time not very common in Luxembourg, but market liberalization has led to a diversification of shareholders, which in turn also resulted in increased awareness of shareholders and concerted action.

24. What is the role of shareholders in electing the governing body?

The shareholders have the authority to appoint the managers of a SàRL and the directors of a (single tie system) SA. Where a directorship filled by the general meeting of shareholders becomes vacant, the remaining directors thus appointed may temporarily fill the vacancy unless the articles of association provide otherwise.

25. Are shareholder meetings required to be held annually or otherwise, and what information needs to be presented?

At least one shareholder meeting must be held per year, in order to approve the annual accounts of the company, decide the allocation of the results and potentially give discharge to the board members.

26. Do any organizations advise or counsel shareholders on whether to approve matters?

N/A

27. What role do other stakeholders, including debt holders, employees, suppliers and customers and the government, typically play in the corporate governance of a company?

Usually members of the executive committee, such as the chief executive officer, are employees of the company. They are consequently directly involved in the daily management of the company.

Unless otherwise provided in the articles of association, bond holders may attend general meetings, but only with a consultative voice. Debt holders generally do not have voting rights at shareholders' meetings.

Suppliers, customers and employees usually are the subjects of policies implemented by the company, such as KYC polices, or due diligence examinations in order to avoid damage to the company. In certain large companies or companies in which the State has a significant stake, employees have representatives on the board that count for 1/3 of the board composition.

The government is rather passive in terms of corporate governance of the company and does not explicit specific norms to the company but leaves it to the company itself to ensure compliance with the legislation in force and will sanction breaches through its administrative or criminal enforcement authorities if necessary.

28. What consideration is given to environmental and social issues, including climate change, sustainability and product safety

issues, and are there any legal disclosure obligations regarding the same?

Corporate Social Responsibility concerns are very important to undertakings in Luxembourg. While the Companies Act is silent on any Corporate Social Responsibility obligations, qualifying listed companies are subject to the Corporate Social Responsibility recommendations contained in the LSE Principles as well as the provisions in this respect applicable to the content of the management report as contained in the Act of 19 December 2002 concerning the register of trade and companies, as well as the accounting and annual accounts of companies (loi du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises). Similar provisions apply to certain public interest companies of a large size.

29. How are the interests of shareholders and other stakeholders factored into decisions of the governing body?

Under Luxembourg law, the shareholders are in principle not taken into account in relation to decisions taken by the board which has to act in the best interest of the company. This being said, the shareholders have the right to act on behalf of the company in case of bad management of the company or breach by the board of the Companies' Act or the articles of association. They also are the body corporate that has authority to approve the annual accounts and the allocation of the annual results. In addition, an action may also be lodged against the directors of a SA (or members of the board of management or supervisory board in case of double tier system SA), as the case may be, on behalf of the company by minority shareholders, under the conditions provided for by the Companies' Act. Finally, the board must comply with the equal treatment of shareholders principal in certain circumstances provided for by law.

For qualifying listed companies, the LSE Principles indicate that the board as a collective body shall act in the corporate interest and shall take into account the interests of all stakeholders in their deliberations.

30. Do public companies typically provide earnings guidance on either a quarterly or annual basis?

According to the LSE Principles, listed companies shall form a remuneration committee which is

to articulate policies for the remuneration policy of management or directors. Remuneration of management or directors, from an accounting perspective, is solely recorded on a global basis.

31. May public companies engage in share buybacks and under what circumstances?

Safe for circumstances where buybacks are necessary to prevent imminent harm to company, public companies may buy back their own shares only upon the approval of the general meeting of shareholders, which shall lay down the general conditions for such acquisition, such as the maximum number of shares to be offered, the period within which the shares may be acquired, which may not be longer than five years, and in the case of acquisition against consideration, the maximum and minimum amounts of consideration. Further to that, the company may only buy back fully paid up shares. Finally, the offer for acquisition of such shares must be made to all shareholders that are in the same situation, except for publicly qualifying to that effect listed companies or where the approval of the general meeting was unanimous.

Such buyback may not cause the company's net asset value to drop below its share capital plus reserves whose distribution is proscribed by law or the articles of association. Such amount is further reduced by the amount of uncalled subscribed share capital where that is not booked on the assets side of the balance sheet.

32. What do you believe will be the three most significant issues influencing corporate governance trends over the next two years?

1. The European Commission's company law package and the modernization of company law
2. Oversight of implementation of an increasing amount of policies
3. Transparency and anti-money laundering obligations