# THE CORPORATE GOVERNANCE REVIEW

ELEVENTH EDITION

**Editor**
Willem J L Calkoen

THE LAWREVIEWS

THE

# Corporate Governance Review

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# PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this 11th edition, we can see that corporate governance is becoming a more vital and all-encompassing topic, especially this year with covid-19 as well as climate issues, political instability, technological change, environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, European Commission, US Securities and Exchange Commission (SEC), Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports and 17 social development goals, the media, supervising national banks, more and more shareholder activists, proxy advisory firms, the Business Roundtable and all stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working very diligently. Nevertheless, there have been failures in some sectors and trust must be regained.

How can directors do all their increasingly complex work and communicate with all the parties mentioned above? What should executive directors know? What should non-executive directors know? What systems should be set up for better enterprise risk management? How can chairs create a balance against imperial chief executive officers (CEOs)? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? Is diversity and inclusion actively being pursued? Is the remuneration policy fair? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal, inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, Business Roundtable, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust: one-on-ones. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top and work at complying with demands and trends for a better society?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances when CEOs have gradually amassed too much power, or companies have not developed new strategies and have incurred bad results – and sometimes even failure. More are failing since the global financial crisis than before, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, stewardship codes for shareholders and shareholder activists, and requirements for reporting on non-financial issues. The European Commission has developed regulation for these areas as well. We see governments wanting to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship. Business Roundtable, with about 180 signatories, has embraced stakeholder corporate governance.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in research and development. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management, with new risks entering, such as the increasingly digitalised world and cybercrime, is an essential part of directors' responsibilities, as is the tone from the top.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that this Review will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who have helped with this project. I hope this book will give you food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

**Willem J L Calkoen**
NautaDutilh
Rotterdam
March 2021

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# LUXEMBOURG

*Margaretha Wilkenhuysen and Anke Geppert-Luciani*[1]

## I OVERVIEW OF GOVERNANCE REGIME

### i Statutory framework

Luxembourg's main statutes on corporate governance include the Companies Act,[2] the EU Market Abuse Regulation[3] and the Securitisation Act.[4] The Companies Act was revamped in 2016 to modernise Luxembourg corporate law, and a consolidated version of the Act was published in December 2017, following the renumbering of its articles.[5]

Other notable statutory instruments regulating corporate governance in Luxembourg include:

*a* the Act of 30 May 2018 on Markets in Financial Instruments,[6] introducing specific provisions on transparency for shares and transaction reporting, together with the EU Regulation on Markets in Financial Instruments (MiFIR);[7]

*b* the Takeover Bid Act,[8] providing for minority shareholder protection, rules of mandatory offers and disclosure requirements for companies whose shares are admitted to trading on a regulated market in a Member State of the European Union;

*c* the Prospectus Act,[9] which requires the publication of prospectuses from companies intending to admit their shares to trading on a regulated market or to make a public offer;

1 Margaretha Wilkenhuysen is a partner and Anke Geppert-Luciani is a professional support lawyer at NautaDutilh Avocats Luxembourg.

2 Act of 10 August 1915 on Commercial Companies.

3 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 as last amended by the Act of 27 February 2018, implementing Regulation (EU) No. 596/2014, Directive 2014/57/EU and Directive 2015/2392/EU.

4 Act of 22 March 2004 on Securitisation, as last amended by the Act of 27 May 2016.

5 Act of 10 August 2016 amending the Act of 10 August 1915 on Commercial Companies. Following the renumbering of the articles of this Act, a new consolidated version of the Commercial Companies Act was published on 15 December 2017 by the Grand-Ducal Regulation of 5 December 2017.

6 Act of 30 May 2018 on Markets in Financial Instruments as last amended by the Act of 25 March 2020. The Act of 30 May 2018 implemented Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II).

7 Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012 (MiFIR). MiFIR entered into force on 2 July 2014, and its provisions are applicable since 3 January 2018.

8 Act of 19 May 2006 implementing Directive 2004/25/EC, as last amended by the Act of 18 December 2015.

9 Act of 16 July 2019 on prospectuses for securities.

*d* the Transparency Act of 11 January 2008,[10] as amended; and
*e* the Shareholder Act of 24 May 2011,[11] as 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[12] into Luxembourg law.

Furthermore, the Act of 21 July 2012[13] introduced a squeeze-out right in favour of dominant shareholders and a sell-out right in favour of minority shareholders in companies whose shares are admitted to trading on a regulated market,[14] the Act of 6 April 2013 introduced a legal regime for dematerialised securities and the Act of 12 July 2013,[15] as amended, introduced into Luxembourg law a new structure: the special limited partnership. Furthermore, in 2014, the Act on the Immobilisation of Bearer Shares[16] instituted the requirement to deposit bearer shares with a recognised depositary and allowed access by judicial and tax authorities to information on the identity of bearer shares holders. Finally, the Act of 10 March 2014[17] provides for the possibility of forming a European Cooperative Society in conformity with the provisions of Council Regulation (EC) No. 1435/2003 of 22 July 2003.

As a supplement to the general statutory law, the Luxembourg Stock Exchange (LuxSE) 10 Principles of Corporate Governance (the LuxSE Principles)[18] provide general principles, recommendations and guidelines on best practices relating to general corporate governance issues 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.[19]

10 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 27 February 2018. The Transparency Act transposes Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

11 Act of 24 May 2011 on shareholders rights in listed companies, as last amended by the Act of 1st August 2019.

12 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.

13 Act of 21 July 2012 on Mandatory Squeeze-Out and Sell-Out of Securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public.

14 Until the Squeeze-out Act came into force, a squeeze-out and a sell-out right existed only in the context of a public takeover under the Act dated 19 May 2006 implementing Directive 2004/25/EC on takeover bids.

15 Act of 12 July 2013 on Alternative Investment Fund Managers, as last amended by the Act of 8 April 2019.

16 Act of 28 July 2014 on the Immobilisation of Bearer Shares.

17 Act of 10 March 2014 amending the Act of 10 August 1915 on Commercial Companies.

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

19 As an exception, the 10 Principles do not apply to regulated investment companies with variable capital and funds, to which specific regulations apply. The fourth version of the LuxSE Principles entered into effect on 1 January 2018, and applies to annual reports for financial years as from that date. The main provisions of the LuxSE Principles are discussed in Section IV herein.

With regard to particular rules for banks and investment funds, on 7 December 2020, the Luxembourg Supervisory Commission of the Financial Sector (CSSF) published a major update of the key circulars on central administration and internal governance of banks and investment firms (Circulars 20/759[20] and 20/758[21]), which apply as of 1 January 2021.

Besides the foregoing, most Luxembourg investment funds and management companies have adhered to the principles of the Code of Conduct of the Association of the Luxembourg Fund Industry, which provides a framework of high-level principles and best practice recommendations for the Luxembourg funds industry.

### ii Regulatory authorities

Listed companies are often controlled by one or more major shareholders, rendering it impossible to rely solely on market monitoring to ensure that listed companies comply with the LuxSE Principles. Therefore, a system of monitoring involving the shareholders, the board and the LuxSE, at a minimum, is required to ensure proper observance of the principles of corporate governance.

The other main regulatory authority is the aforementioned CSSF,[22] which is in charge of promoting transparency, simplicity and fairness on the markets of financial products and services. The CSSF has jurisdiction regarding matters for which the laws or regulations in force require disclosure, whether or not the information is dealt with in the LuxSE Principles, and also has the authority to impose sanctions. The LuxSE's role in the external monitoring of compliance with the principles of corporate governance does not affect the CSSF's legal responsibility as a regulator.

As an operationally independent body, the CSSF has sufficient powers to conduct effective supervision and regulation of the Luxembourg securities market. It is funded by taxes levied from entities under its supervision. To conduct its tasks effectively, the CSSF has broad powers, including the authority to attend meetings of LuxSE entities, suspend rulings or suspend market intermediaries' decision-makers if they fail to observe legal, regulatory or statutory provisions.

Other professionals in the financial sector and private sector companies also have an indirect regulatory role through their consultative participation with the government and the legislator in the field of regulation.

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20 Circular CSSF 20/759 (in French only), Update of Circular CSSF 12/552, as amended by Circulars CSSF 13/563, CSSF 14/597, CSSF 16/642, CSSF 16/647, CSSF 17/655, CSSF 20/750 and CSSF 20/759, on the central administration, internal governance and risk management.

21 Circular CSSF 20/758 (in French only) on central administration central, internal governance and risk management.

22 Further information available at www.cssf.lu/en/about-the-cssf/general-organisation/.

## II CORPORATE LEADERSHIP

### i Board structure and practices

*Structure*

Although public limited liability companies may choose between a two-tier board structure[23] and a the one-tier board structure,[24] the latter remains by far the preferred option in Luxembourg, with a company being managed exclusively by a board invested with the broadest powers to act in the name and on behalf of the company.

In a 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 permanent supervision of the management board members, and the right to inspect all company transactions.[25] No person may be a member of both the management board and the supervisory board at the same time.[26] Members of the supervisory board are liable towards the company and any third party in accordance with general law.[27] 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.[28] Otherwise, the Companies Act requires a minimum of three directors;[29] the maximum number of directors is undefined (the LuxSE Principles advise 16 directors as a reasonable limit).[30] Although the directors are appointed by the shareholders of the company,[31] the directors choose a chair from among their members.[32] The Companies Act does not provide any specific powers to the chair of the board, although companies may choose, for example, to grant a power of representation to the chair in the articles of association. However, unlike in other civil law jurisdictions, the chair of the board does not act on behalf of the company in his or her position as chair, but rather on the basis of his or her position as director of the company.

The Companies Act provides that where a legal entity is appointed as director of a public limited liability company, it shall designate a permanent representative to exercise that duty in the name and for the account of the legal entity.[33]

As for the representation of the company, most articles of association provide that any two directors can represent the company without evidence of a board resolution (although in practice, the board may ratify actions taken previously by directors acting individually).

23 Companies Act, Article 442-1.
24 id., at Articles 441-1 to 441-13.
25 id., at Article 442-1 et seq., in particular, Article 442-2, Paragraph 3, Article 442-3, Paragraph 1, Article 442-7, Paragraph 1, and Articles 442-11 to 442-16.
26 id., at Article 442-17, Paragraph 1.
27 id., at Article 442-16.
28 id., at Article 441-2, Paragraph 1.
29 id.
30 LuxSE Principle 3, Guideline to Recommendation 3.3.
31 Companies Act, Article 441-2, Paragraph 3.
32 id., at Article 444-3, Paragraph 2.
33 id., at Article 441-3.

In this respect, the Companies Act provides for three mechanisms: first, the board can adopt a decision and give specific mandates (limited in time and scope) to one or more of its members, or other individuals, to act on its behalf;[34] second, the articles of association may entitle one or more directors to represent the company for the purposes of any instrument or in any legal proceedings, either individually or jointly;[35] or, third, the board may designate a director as a general representative of the company charged with its day-to-day business (the day-to-day manager), and representing the company, individually or jointly, towards third parties for that business.[36]

Under the third option, power may be delegated to one or more directors, managers or other agents, who may but are not required to be shareholders, acting either individually or jointly.[37] Although their appointment, removal from office and powers may be specified, limited or extended by the articles of association or the competent corporate body, the Companies Act states that no restrictions to their representative powers may be validly opposed in relation to third parties, even if their appointment is published.[38] The liability of the day-to-day manager is based on the general rules relating to mandates.[39] When a member of the board is appointed as the day-to-day manager, the Companies Act requires the board to report annually to the shareholders on the salary, fees and any benefits granted to that director.[40]

A company will generally be bound by the acts of its directors or by the person entrusted with its day-to-day management, even if those acts exceed the company's corporate object, unless the company proves that the third party knew that the relevant acts exceeded the company's corporate object or could not, in view of the circumstances, have been unaware of it. The publication of a restriction to a director's powers in the company's articles of association is deemed insufficient to constitute such proof.[41]

Regarding listed companies, the LuxSE Principles distinguish between executive and non-executive managers: the former are defined as senior managers who are not board directors but who are members of a body of executives charged with the day-to-day management of the company.[42] There is no other distinction under Luxembourg law, with all board members having the same rights and obligations. A more permanent division of tasks and responsibilities between board members is possible (e.g., by providing for different classes of directors), but any such division is purely internal and is unenforceable towards third parties. However, it is possible for the board to delegate certain specific powers to individual board members or non-board members in the framework of a specific delegation of power.

In its new national plan on gender equality presented in 2020, the government aims to (1) maintain the objective of having at least 40 per cent female members on the boards of public institutions and companies in which the state is a shareholder, and (2) encourage private companies to strive for gender equality in their decision-making process.

34 Luxembourg Civil Code, Article 1984 et seq.
35 Companies Act, Article 441-5, Paragraph 4.
36 id., at Article 441-10.
37 id., at Article 441-10, Paragraph 1.
38 id., at Article 441-10, Paragraph 2.
39 id., at Article 441-10, Paragraph 5.
40 id., at Article 441-10, Paragraph 4.
41 id., at Article 441-10, Paragraph 2.
42 Luxembourg Stock Exchange, 10 Principles of Corporate Governance [LuxSE Principles], Principle 4.

According to the CSSF Circulars 20/759 and 20/758,[43] the presidents of the supervisory body of a bank and of the board of directors of an investment company must ensure that diversity aspects in terms of age, gender, geographical origin, and educational and professional background are taken into account when composing the board.

***Separation of CEO and chair roles***

*Chair's role and responsibilities*

Although the roles of chief executive officer (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, the LuxSE Principles require 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.[44] 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.[45]

***Remuneration of directors and senior management***

Directors are not employees of the company as such, and their remuneration falls under the general rules on mandates and corporate law. Generally, and unless otherwise provided by the articles of association, services rendered by the company directors are considered to be provided remuneration-free. If the articles of association authorise remuneration, the global amount to be paid to the directors will be fixed by the general meeting of shareholders, and the board will allocate that amount between board members as it deems fit.[46] The rules on conflicts of interest forbid directors from taking part in or voting on resolutions relating to their own remuneration.

Senior managers are generally employees of the company, and the Luxembourg Labour Code will be applicable as regards their relationship with the company.

The LuxSE Principles recommend establishing a remuneration committee to deal with these issues. The 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.[47]

Concerning listed companies, following the transposition of the Shareholder Directive II, 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

43 See Section I.i herein.
44 LuxSE Principle 2, Recommendation 2.4.
45 LuxSE Principle 10.
46 Companies Act, Article 442-19.
47 LuxSE Principle 7.

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.[48]

For the financial sector, CSSF Circular 10/437[49] gives guidelines concerning remuneration policies. According to the Code of Conduct of the Association of the Luxembourg Fund Industry,[50] the Board should ensure that the remuneration of board members is reasonable and fair and adequately disclosed.

***Committees***

A company's articles of association may allow for the creation of committees appointed by the board to ensure that the directors' obligations are fulfilled. The LuxSE Principles advise listed companies to establish, from among the board's members, *inter alia*:

*a* a committee to assist the board in relation to corporate policies, internal controls, financial and regulatory reporting, and risk management;
*b* an audit committee;[51]
*c* a nomination committee to nominate suitable candidates as directors; and
*d* a corporate governance committee to ensure compliance with corporate governance practice.

The articles of association will outline the number of members of each committee, their function and the scope of their powers, and the committees themselves will be appointed by and under the supervision of the board.

The LuxSE Principles require listed companies and their boards to establish such committees as are necessary for the proper performance of the company's tasks. The Principles also recommend that the board appoints as many special committees as are needed to examine specific topics and to advise the board.[52] The board itself shall remain responsible for decision-making.

## ii Directors

The directors of a public limited liability company are appointed by the general meeting of the shareholders for a period that cannot exceed six years,[53] although they can be re-elected if the company's articles of association do not provide otherwise. They may at any time be removed from office by the general meeting of shareholders[54] without cause, by simple majority. It is also possible to provide for stricter conditions in the articles of association via a supermajority vote to appoint or revoke the directors. Another possibility is to authorise each category of shareholders to nominate candidates, among which the general meeting

48 Shareholder Act of 24 May 2011, as amended by the Law of 1st August, Articles 7a) and 7b).
49 Circular CSSF 10/437 Guidelines concerning the remuneration policies in the financial sector.
50 See Section I.i herein.
51 Should the company not have an audit committee, LuxSE Principle 8, Recommendation 8.1 requires that the board reassess the need to create an audit committee regularly.
52 LuxSE Principle 3, Recommendation 3.9.
53 Companies Act, Article 441-2, Paragraph 4.
54 Civil Code, Article 2004.

of shareholders will elect the directors. The appointment of directors of a credit institution and other professionals of the financial sector is subject to an explicit and prior approval by the CSSF.

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'.[55] Although there are no specific legal provisions regarding independent directors, it is generally understood that all directors, including independent directors, should be provided with timely information for the proper performance of their duties. As for banks, Circular 20/759 indicates that every institution must appoint at least one independent member, wheresas major banks must appoint a sufficient number of independent members.

***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 businesspersons. 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 conflicts of interest.[56]

The Luxembourg legislator has remained silent on what should be considered a company's best corporate interest. In a judgment delivered in 2015,[57] the Luxembourg District Court made some observations on this notion. It explained that it is an adaptable concept, the exact interpretation of which depends on the company concerned and the nature of its activities. For some companies, the corporate interest is aligned to the interests of a company's shareholders. For others, it includes the interest of the legal entity as a whole, including the interests of shareholders but also those of employees and creditors. The Court remarked that for companies that are used for purposes of financing 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, it should be noted that directors of listed companies are held to a number of more specific duties under the Transparency Act and the Market Abuse Regulation, in addition to the LuxSE Principles and regulations. According to 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 interest, and shall serve all the shareholders by ensuring the long-term success of the company'.[58]

55 LuxSE Principle 3, Recommendation 3.5.

56 Companies Act, Articles 441-7 and 441-12.

57 Luxembourg District Court, 23 December 2015, Nos. 145 724 and 145 725.

58 LuxSE Principle 2.

The directors' duties are owed to the company, and as such they may be held liable towards the company both on civil and criminal grounds.

They are jointly and severally liable in accordance with the general provisions on civil liability[59] and the provisions of the Companies Act,[60] both towards the company and towards all third parties, for any damage resulting from a violation of the Companies Act or of the articles of association of the company. To avoid 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.[61] 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.[62] Besides, each director is individually liable in accordance with the general provisions on tort liability.[63]

Both the company and third parties (including any shareholder or creditor with a legitimate interest) may bring an action against a director. However, shareholders may only seek compensation for a prejudice that is distinct from the company's collective damage, and that can be defined as an individual and personal damage. The possibility for a (minority) shareholder to sue a director has been given an explicit legal basis in Luxembourg law.[64]

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.

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. For listed companies, the LuxSE rules and regulations[65] provide a series of sanctions in the event that its rules are breached, including fines or compensation for damage caused to the stock market.

Directors' liability towards the company is exonerated further to cover the discharge granted to the board by the annual shareholders' meeting approving the annual accounts. This discharge is valid only 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

59 Civil Code, Articles 1382 and 1383.

60 Companies Act, Article 441-9.

61 id., at Article 441-9, Paragraph 1.

62 Civil Code, Article 1166.

63 id., at Articles 1382 and 1383.

64 See Section V.i, 'Powers of shareholders to influence the board'.

65 LuxSE rules and regulations have been substantially updated in January 2020 to take into account recent developments, in particular the Act of 16 July 2019 in prospectuses for securities; see www.bourse.lu/regulations.

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, it is important to note that proceedings initiated by third parties are not affected by such a discharge.

***Conflicts of interest of directors***

Regarding the rules relating to conflicts of interest,[66] any director who has a financial interest, either directly or indirectly, that is contrary to that of the company in a transaction submitted for approval to the board is obliged to inform the board of his or her conflict, refrain from taking part in the deliberations, abstain from voting and have his or her statement recorded in the minutes of the meeting. A special report regarding the transactions in which one of the directors had a (potential) conflict of interest is then to be prepared and submitted at the next general meeting before voting on any resolutions. If, because of a conflict of interest, the number that is required by virtue of a company's articles of association to deliberate and vote on a certain matter is not reached, the board of directors can – unless otherwise provided by the articles of association – decide to defer the decision to the company's general meeting of shareholders. The above-mentioned obligations do not apply when a decision to be taken by the board relates to the company's normal course of business and is taken under normal conditions.

For listed companies, the LuxSE Principles require directors to show integrity and commitment. It is recommended that directors of LuxSE-listed companies:

*a* inform the board of any possible conflict of interest and any other directorship, office or responsibility, including executive positions taken up outside the company during the term of the directorship;

*b* make decisions in the best interests of the company;

*c* warn the board of possible conflicts between their direct or indirect personal interests and those of the company or an entity controlled by it; and

*d* refrain from taking part in any deliberation or decision involving such a conflict (unless they relate to current operations concluded under normal conditions).[67]

## III DISCLOSURE

### i Trade and Companies Register and the ultimate beneficial owner register

The Articles of Association and amendments are filed and are published, in principle, in full in the Electronic Digest of Companies and Associations.[68]

On 1 March 2019, the law establishing a Luxembourg register of beneficial owners (the RBE Act), transposing Article 30 of the 4th Anti-Money Laundering Directive[69]

66 Companies Act, Article 441-7. The same conflict of interest regime applies, in addition to directors, members of the management board and supervisory board of public limited companies, to managers of private limited companies, delegates entrusted with day-to-day management, members of executive committees and liquidators of public limited liability companies.

67 LuxSE Principle 5, Recommendations 5.1 and 5.2. See also Recommendations 5.3 to 5.8.

68 Companies Act, Article 100-10. By derogation from this, extracts of the instruments or the deeds establishing a partnership (*société en nom collectif*), limited partnership (*société en commandite simple*) and special limited partnership (*société en commandite spéciale*) shall be published.

69 Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

entered into force.[70] The RBE Act applies to entities registered with the Luxembourg Trade and Companies Register, including civil and commercial companies, branches of foreign companies, Luxembourg common investment funds, and other types of investment funds, such as the UCITS, SICAR, RAIF and SIF. 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 or registration number, and the nature and scope of the interest held in the entity. Qualifying listed entities are required only to provide the name of the market on which their securities are traded.

By the Act of 10 July 2020, Luxembourg established a register of *fiducies*[71] and trusts.[72] Trustees and fiduciaries are obliged to obtain and hold information regarding the identity of the beneficial owners of the trust or fiducie and must submit these to a central register.

### ii Financial reporting and accountability

Every company must file all company accounts annually under the Companies Act, which imposes consolidated accounting for all Luxembourg-based companies where the company (1) has a majority of the shareholding or voting rights in another entity, (2) is a shareholder or member in another entity and has the right to approve or appoint a majority of the members to the administrative, management or supervisory body of the entity, (3) or is a shareholder or member of another entity and solely controls a majority of shareholders' or members' voting rights in the entity, further to a shareholder or member agreement.[73]

Depending on whether a company can be categorised as small, medium or large, various financial reporting obligations apply, such as the obligation to draw up consolidated annual accounts or the obligation to use a certain structure of balance sheet and profit and loss account.

The LuxSE Principles additionally require that a set of rules be drawn up to regulate the behaviour and the notification obligations relating to transactions of a company's securities, and to specify which transaction information should be made public. These rules should also place the appointment of a compliance officer, charged with monitoring compliance to the rules, under the responsibility of the board. Principle 8 requires directors to 'establish strict rules, designed to protect the company's interests, in the areas of financial reporting, internal control and risk management'. This includes creating, where relevant, an audit committee to discharge the board from its responsibilities of risk management, internal control and financial reporting. The effectiveness of the company's financial reporting, internal control and risk management system must also undergo regular scrutiny.

70 The law is complemented by the Grand Ducal Regulation on registration requirements, administrative fees and access to information in the Luxembourg register of beneficial owners (RBE Regulation) adopted on 15 February 2019.

71 The law defines *fiducies* as a fiduciary contract subject to the amended law of 27 July 2003 relating to trusts and fiduciary contracts.

72 The law defines trusts by referring to the Hague Convention of 1 July 1985, which was approved by the amended Luxembourg law of 27 July 2003 relating to trusts and fiduciary contracts.

73 Companies Act, Article 1711-1.

Companies listed on the LuxSE or trading on the Euro MTF[74] are additionally subject to the internal LuxSE rules and regulations,[75] which contain a number of disclosure rules primarily derived from the Transparency Act as well as the Market Abuse Regulation. Legal obligations do not specifically include effects outside the jurisdiction, unless they influence the financial reporting obligations, in which case they must be reported.

The CSSF is responsible for verifying LuxSE-listed companies' reports and may issue administrative and criminal sanctions in cases of failure to report or misrepresentation, in particular under the Transparency Act. The company's corporate governance charter should also be made available on its website. In practice, companies publish press releases and past information in addition to regulated information.[76]

### iii Auditors' role and authority, and independence

The Audit Act[77] and Luxembourg legislation exclusively reserve statutory audits to statutory auditors and to audit firms that have been approved by the CSSF. Access to the auditing profession is regulated by the Audit Act, and the titles 'auditor' and 'audit firm' are exclusively granted by the CSSF to applicants on fulfilment of certain criteria.[78] The CSSF also administers a database of statutory auditors, approved statutory auditors, audit firms, approved audit firms, trainee statutory auditors and candidates to the audit profession, including third-country auditors and audit entities registered pursuant to Article 12 of the Audit Act. Registered auditors and registered auditing firms must also be members of the Luxembourg national auditing organisation, the Institute of Registered Auditors, which is charged with enforcing the strict application of the rules of the auditing profession and members' respect of their professional obligations.[79]

The question and definition of the independence of auditors remain unresolved. Under the Luxembourg definition, the requirement for registered auditors and registered auditing firms to be independent from the entity they are reviewing translates as auditors being prevented from being directly or indirectly associated with the decision-making process of the entity reviewed. The auditor is also prevented from auditing the accounts if there is any form of direct or indirect relationship, be it financial, business, employment or other, including the provision of additional services other than audit, between the registered auditor, the registered auditing firm or its network and the entity under review.[80]

### iv The comply or explain model and mandatory disclosure

The comply or explain approach, recommended by the Organisation for Economic Co-operation and Development and the European Commission, is favourably received by company boards and investors.

The LuxSE Principles were drafted to be highly flexible and adaptable to the size, structure, exposure to risks and specific activities of each company. The Principles consist of three sets of rules: general principles (comply), recommendations (comply or explain) and

74 A multilateral trading facility and exchange-regulated market.

75 See footnote 65, above.

76 See Section I.ii herein.

77 Act of 23 July 2016 on the Auditing Profession, as last amended by the Act of 25 March 2020.

78 id., at Article 7.

79 id., at Articles 61 to 87 of the Act of 23 July 2016.

80 id., at Articles 19 to 20 of the Act of 23 July 2016.

guidelines. The general principles form the structure on which good corporate governance should be based and are drafted in a sufficiently broad manner to enable all companies to be able to adhere to them, whatever their particular features. Without exception, all Luxembourg-based listed companies must apply the Principles.

At the same time, the comply or explain system allows companies to deviate from the recommendations when justified by companies' specific circumstances, provided that adequate explanation is provided. Given this flexible comply or explain approach, shareholders, and in particular institutional investors, have a paramount role in the thorough evaluation of a company's corporate governance. They should carefully examine the reasons provided by a company whenever it is found to have departed from the recommendations or failed to comply with them, and make a reasoned judgement in each case.

The possibility of one-on-one meetings of directors with shareholders is not regulated by Luxembourg legislation. Although possible, in practice, these meetings will depend on, *inter alia*, the size of the company, its structure, and the number and geographical location of shareholders and directors.

## IV CORPORATE RESPONSIBILITY

Corporate responsibility and corporate social responsibility (CSR) becomes more and more important for Luxembourg companies. Following the National Action Plan on the implementation of the United Nations Guiding Principles on Business and Human Rights of 2018–2019,[81] Luxembourg is now working on a National Action Plan on CSR and aims to raise awareness of the importance of CSR.

Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups was transposed into national legislation by the law of 23 July 2016. It imposes an obligation on certain companies identified by national authorities as 'public interest entities' exceeding an average number of 500 employees during the financial year, including listed companies, banks, insurance companies and other companies, to include information in their annual management report with respect to human rights. The goal is to help investors, consumers and policymakers to assess the non-financial performance of these companies and encourage them to develop responsible business conduct.

Furthermore, when publishing its revised LuxSE Principles in December 2017, the LuxSE added a new Principle on CSR to this document, introducing mandatory disclosure of companies' CSR commitments.[82] This latest LuxSE Principle forces companies to define their policy on CSR aspects. It specifies the measures for the implementation of policies and how to give them adequate publicity. In particular, companies will have to integrate CSR aspects into their long-term value creation strategy and describe how the CSR approach contributes to this goal. In this regard, companies are to present the CSR-related information in a report that assesses the sustainability of the activities and that provides clear and transparent non-financial information in support thereof. Moreover, the board of directors will have to address and review the non-financial risks of companies regularly, including social and environmental risks.

81 See https://maee.gouvernement.lu/dam-assets/directions/d1/pan-entreprises-et-droits-de-l-homme/2018-2019/PAN-LU-entreprises-et-DH-2018-2019-EN.pdf

82 See LuxSE Principle 9. This fourth version of the LuxSE's Principles entered into effect on 1 January 2018, and applies to annual reports for financial years as from that date.

Besides the LuxSE Principles, the Act of 5 December 2007 implementing, among other things, the Directive on annual and consolidated accounts,[83] includes a provision on corporate governance practices that listed insurance companies should apply.[84] This provision requires listed companies in the insurance field to dedicate a specific section in their management report to their obligatory and voluntary adhesion to corporate governance codes, as well as all other information purporting to their corporate governance practice.

Moreover, the Transparency Act requires listed companies to publish information regarding their share capital and all regulated information (including financial reporting and shareholding) on their websites, and the Market Abuse Regulation stipulates that complete and effective public disclosure of any inside information must be published on both the company's and the LuxSE's websites.[85] Listed companies must also publish their corporate governance charters on their websites. In practice, listed companies tend to publish not only regulated information but also all past and present press releases and corporate information.

Although CSR commitments displayed on participating companies' websites have no legal basis and, therefore, are not subject to legal enforcement, the unique nature and size of the Luxembourg marketplace has increased the effect of peer pressure on companies. The importance of CSR is gathering momentum, as demonstrated by the increasing number of companies opting to follow institutional CSR recommendations or drawing up and publishing their own guidelines (e.g., the CSR commitments published on the websites of several major Luxembourg-established companies, such as SES and ArcelorMittal, which publicly declare that they will take into account the social and environmental effects of their operations, on both a national and an international level).

However, since reporting on non-listed companies' social impacts remains on a soft-law basis, there are few legal consequences in cases of misrepresentation or failure to report. Some companies have put internal procedures in place to address complaints that an employee failed to comply with an internal code of conduct.[86] It cannot be excluded that a violation of a CSR obligation may potentially be alleged by a third party if a company does not respect one of its CSR engagements, the publication of which is now mandatory under the LuxSE Principles.[87] However, so far there is no case law or doctrine in the field, and such a claim would depend on the third party being able to prove its personal interest or damage in the claim.

83 Directive 2006/46/EC of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings.

84 Act of 5 December 2007, Article 85-1 et seq.

85 This means whenever an issuer, or a person acting on its behalf, discloses any inside information to a third party in the normal exercise of business (simultaneously in the event of intentional disclosure, promptly in the event of unintentional disclosure).

86 See, for example, PricewaterhouseCoopers' corporate governance procedure at www.pwc.lu.

87 LuxSE Principle 9.

### i Whistle-blowing

Luxembourg companies do not have a legal obligation to put a whistle-blowing policy in place. Currently, whistle-blowing policies are in place only for some specific sectors, but with the transposition of the Directive on the protection of whistle-blowers,[88] the protection will be substantially extended.

The Labour Code encourages whistle-blowing and provides that no disciplinary action may be taken against employees on the mere grounds of their protest against or refusal of something that they consider in good faith to constitute an unlawful taking of interest, corruption or undue influence as defined under the Luxembourg Criminal Code,[89] whether committed by their employer, any other person who is senior in rank to them, their colleagues or any third party in relation to the employer.[90]

### ii CSR and employees

The Labour Code[91] introduced a legal requirement for employee representatives on certain company boards. This legal obligation is limited to public limited liability companies fulfilling two criteria: all companies established in Luxembourg and with more than 1,000 employees over a three-year period; and all companies established in Luxembourg in which the state retains a financial participation of more than 25 per cent, or that exercise a state-awarded concession.

Despite the lack of a more general legal requirement concerning representation on company boards, it should be noted that employees in Luxembourg workplaces with more than 15 employees have a legal right to representation at work.[92] The central element of workplace representation is the workers' representatives concerned with workers' everyday concerns and directly elected by all employees. As a result of the adoption of the Act of 23 July 2015,[93] workers' representatives saw their duties increased and were given a larger say in certain decision-making processes. The scope of their right to information was also enlarged.

In larger companies employing an average of 150 or more workers over a three-year period, the Labour Code provides for a common decision-making process of the employer and the workers' representatives, for example with regard to decisions relating to the introduction or running of technical equipment intended to monitor the behaviour and performance of employees at work.

88 Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law.

89 Criminal Code, Articles 245 to 252, 310 and 310-1.

90 Labour Code, Article L271-1.

91 id., at Article L426-1.

92 id., at Article L411-1.

93 Act of 23 July 2015 amending the Labour Code and the Social Security Code.

## V SHAREHOLDERS

### i Shareholder rights and powers

***Shareholders' meetings and equality of voting rights***

The Shareholder Act came into force on 1 July 2011 aiming, *inter alia*, at strengthening the exercise of minority shareholders' voting rights in listed companies to improve the corporate governance of such companies. The Shareholder Act explicitly refers to a principle of equal treatment of shareholders.[94]

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'.[95]

Pursuant to the Shareholder Act, listed companies must give at least 30 calendar days' notice[96] before holding a meeting[97] (notwithstanding particular requirements under the Takeover Bid Act). 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.[98] 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.[99] In the event that 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:

*a* a clear description of the shareholders' rights to put items on the agenda and to table draft resolutions, the procedure for voting by proxy and a form to be used for that purpose and, if provided for in the company's article of association, the procedure to vote by electronic means;

*b* 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 Central European Time on the 14th calendar day before the meeting. The shareholder must notify the company at the latest by this date of its intention to participate in the meeting; and

*d* the company's website address, which must contain all the aforementioned information, as well as a full copy of the draft resolutions.[100]

The Shareholder Act allows distance voting by shareholders in advance of the meeting, provided that the company has expressly recognised this possibility and has outlined the

94 Shareholder Act, as amended, Article 2.

95 LuxSE Principles, Principle 10.

96 By doing so, Luxembourg's Parliament has imposed a longer notice period than the 21 -days required under Directive 2007/36/EC.

97 Article 3(1) of the Shareholder Act as amended.

98 id., at Article 3(1), Paragraph 2.

99 id.

100 id., at Article 3(3).

related requirements in its articles of association.[101] 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.[102] From now on, when votes are cast electronically, a confirmation of receipt of the vote must be sent within a maximum of two months after the vote.[103]

The Shareholder Act requires proxy voting to 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 shareholders' instructions.[104]

***Powers of shareholders to influence the board***

The Companies Act reserves the management of a company, in principle, to its board.[105] 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.

However, shareholders do control the appointment of the board (and, therefore, its composition) via a majority decision of more than 50 per cent to appoint a new director.[106] 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[107] and may request the addition of items to the agenda of the shareholders' meeting.

As for listed companies, the Shareholders Act acknowledges the right of any shareholder or group of shareholders holding at least 5 per cent of the capital to ask for items to be included in the agenda for the general meeting, and to lodge draft resolutions concerning the items on the agenda of the meeting.[108]

Furthermore, during the annual general meeting, the shareholders can question the board on all aspects of a company's management, accounting and so forth throughout the year, and may withhold the granting of discharge. The right of shareholders to ask questions during the meeting and to receive answers to their questions is legally enshrined.[109]

Under the Shareholder Act, in addition to the right to ask questions verbally 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.[110]

101 id., at Article 6.
102 id., at Article 1(6), 5.
103 Shareholder Act, Article 1c).
104 id., at Article 8.
105 Companies Act, Article 441-5. Since 2016, according to Article 441-11 of the Companies Act, the articles of association can authorise the directors to delegate their powers of management to an executive committee or chief executive officer.
106 id., at Article 441-2, Paragraph 3.
107 id., at Article 450-1(6) .
108 Shareholder Act as amended, Article 4.
109 id., at Article 7.
110 Shareholder Act, Article 7(2).

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 questions and answers 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 a meeting.[111] Any shareholder representing at least 10 per cent of a company's share capital or voting rights, or both, can put questions about the management and operations of the company, or one of its affiliates, to the board of directors or management body, without the need for extraordinary circumstances. If the company's board or management body fails to answer these questions within one month, the shareholders 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.[112]

Certain matters must also be reported to the shareholders, such as any director's conflict of interest relating to voting on a resolution.[113]

Furthermore, if a minority shareholder of a public limited liability company finds that directors and members of its management and supervisory boards 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, the holders of founders' shares, or both, representing 10 per cent or more of the company's voting rights.[114]

***Decisions reserved to shareholders and approval of material transactions***

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 objectives,[115] 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 and the allocation of the company's results, which are reserved to the company's shareholders.

Although the Companies Act does not set out any specific areas in which board decisions must be approved by the shareholders, the articles of association of a company may provide that all or certain board decisions must be ratified by the shareholders.

Besides, shareholders must approve material transactions with related parties. 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.[116]

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

112 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.

113 Companies Act Article 441-7, Paragraph 2.

114 id., at Article 444-2.

115 id., at Article 441-5.

116 Shareholder Act as amended, Article 7c).

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

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

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

*d* the 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.[117]

In addition, minority shareholders enjoy a sell-out right under certain conditions. According to the Squeeze-out Act, 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.[118]

Nevertheless, 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 order rules. Providing this 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.[119]

In this respect, the use of shareholders' voting 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 has been 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: (1) a shareholders' agreement that violates the provisions of the Companies Act or that is contrary to a company's corporate interest; (2) an undertaking by a shareholder to vote in accordance with instructions given by the company itself, a subsidiary or any corporate organ of those entities; and (3) an undertaking by a shareholder to those same companies or corporate organs to approve proposals made by the company's corporate bodies.[120] If votes are cast at a general meeting of shareholders pursuant to an invalid voting arrangement, the votes (and any resolutions taken) shall be

117 Companies Act, Article 100-22.

118 Squeeze-out Act, Article 5.

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

120 Companies Act, Article 450-2(1).

considered null and void, unless the votes did not affect the final outcome.[121] Although the use of shareholders' agreements does allow for discretion and flexibility, any compulsory implementation of this type of arrangement remains at risk.

***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 these types of facilities may be included in a shareholders' agreement or incorporated into the articles of association, or both.

### ii Shareholder 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 grants the right to force the acquisition of shares held by minority shareholders by shareholders controlling at least 95 per cent of the share capital.[122]

***Institutional investors' duties and best practice***

Institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy. They shall also publicly disclose annually how this policy has been implemented.[123] Institutional investors, asset managers and proxy advisers are all bound by accrued transparency obligations.

Furthermore, a number of Luxembourg-based investors have signed the United Nations-supported Principles for Responsible Investment.[124] The first of these six principles is to incorporate environmental, social and corporate governance considerations into investment analysis and decision-making processes. In addition, a growing number of investors – although not signatories to the Principles for Responsible Investment – are taking a private initiative to take these 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.

### iii Shareholder activism

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

121 id., at Article 450-2(2).

122 Squeeze-out Act, Article 5.

123 Shareholder Act, Article 1e) .

124 For further information, see 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.

As stated in Section II, in listed companies, shareholders are entitled to have a say on pay. Shareholders must be informed in detail of the remuneration of directors and the company's remuneration policy, on which shareholders have an advisory vote, unless the company's articles of association provide for a binding vote.

### iv Takeover defences

Takeover bids are covered by the Luxembourg Takeover Bid Act.[125] 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 this question as yet. In implementing any defensive measures, the board has an obligation to act in good faith with respect to the shareholders' interests.

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 adopted in the best interests of the company. The board may not prohibit the shareholders from accepting an offer. It should be noted, however, that measures with the aim of 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 adopt 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 by the general meeting of shareholders. However, the articles of association of a public limited liability company may authorise the board of directors to increase the share capital up to a designated amount in one or more instalments.[126] The authorisation to do so is valid only for five years, but may be renewed by the general meeting of shareholders.[127] 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 the third 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.

125 Act of 19 May 2006 implementing Directive 2004/25/EC, as last amended by the Act of 18 December 2015.

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

127 Companies Act, Article 420-22.

***Staggered boards***

Directors of a 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.[128] 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.

### v Identification of and contact with shareholders

One of the main objectives of the Shareholder Rights Directive[129] is to give listed companies the right to identify their shareholders and, in the end, to improve communication between companies and their shareholders. Intermediaries, even those in third countries, are required to provide a company with information about shareholders' identity.[130] They must also provide the shareholders with information to facilitate the exercise of shareholder rights.[131]

## VI OUTLOOK

We have not dealt with the various measures taken by the Luxembourg government, in particular, to allow companies holding board and shareholder meetings while respecting social distancing during the covid-19 pandemic. It is not unlikely that the pandemic will change aspects of corporate governance in the future; for example, once the pandemic is over, the legislator may more easily accept virtual participation in meetings and modify the law accordingly.

What is sure is that the covid-19 pandemic and the raised awareness of climate change have reinforced a trend we had already observed last year, that corporate responsibility and, in particular, environmental aspects have become more important and influence more and more corporate governance.

128 id., at Article 441-2, Paragraph 4.

129 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

130 Shareholder Act as amended, Article 1a).

131 id., at Article 1b).

**Appendix 1**

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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 made a partner in 2007.

Ms Wilkenhuysen publishes and speaks regularly 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.

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Further, Ms Geppert-Luciani contributes to various newsletters and publications, and she coordinates and assists on projects focused on know-how, business development and innovation. Ms Geppert-Luciani is a qualified German lawyer, admitted to both the Saxon Bar and the Luxembourg Bar (Liste I). Besides the two German state examinations, she holds a master's in European law from the University of Paris I, Panthéon-Sorbonne (2005) and a certificate in international human rights law from the University of Nottingham (2016). Prior to joining NautaDutilh, Ms Geppert-Luciani worked as a legal officer and law clerk with the European Court of Justice. She also practised as a senior associate at another reputable law firm in Luxembourg.

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