The Corporate Governance Review

Ninth Edition

Editor
Willem J L Calkoen

The Law Reviews

THE CORPORATE GOVERNANCE REVIEW

NINTH EDITION

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Willem J L Calkoen

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PREFACE

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

In this ninth edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. 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, most of us work for them. Most corporations aim to add value to society, and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and 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, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, more and more shareholder activists and other 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getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated.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 diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to 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 they set up for better enterprise risk management? How can chairs create a balance against imperial 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? What about diversity? Should their pay be lower? 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, 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.

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? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

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 where CEOs have gradually amassed too much power, or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well. Recently, we see that governments want 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.

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 R&D. 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 a digitalised world and cybercrime is an essential part of directors' responsibilities, as is the tone from the top. How can directors do their important work well without being petrified of attacks from shareholders, regulations and the press?

Each country has its own measures; however, the chapters of this book also show a convergence. Understanding differences leads to harmony. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where 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 *The Corporate Governance 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 helped with this project. I hope that this book will give the reader 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 our 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 2019

Chapter 15

LUXEMBOURG

Margaretha Wilkenhuysen[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 13 July 2007 on Markets in Financial Instruments, as amended,[6] introducing specific provisions on transparency for shares and transaction reporting to be applied from 3 January 2018, 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 EU;

1 Margaretha Wilkenhuysen is a partner at NautaDutilh Avocats Luxembourg Sàrl.

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 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 13 July 2007 on Markets in Financial Instruments, as last amended by the Act of 21 December 2012. This Act implemented Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID), which was repealed by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II). The latter Directive has not yet been implemented by the Luxembourg legislator, but a draft bill is currently being debated in the Luxembourg Parliament.

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 as of 3 January 2018.

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

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;

d the Transparency Act of 11 January 2008,[10] as amended; and

e the Shareholder Act of 24 May 2011,[11] setting out a number of shareholders' rights and aiming to increase shareholder activism, which remains subject to further amendment as a result of the transposition into Luxembourg law (expected mid-2019) of the Second Shareholders' Rights Directive.[12]

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] and a year later, 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. In 2013 and 2015, the accounting standards commission was reformed and certain rules regarding the annual accounts and consolidated accounts of companies were modified.[16] Furthermore, in 2014, the Act on the Immobilisation of Bearer Shares[17] 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.

Also worth mentioning is the Act of 10 March 2014[18] providing 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

9 Act of 10 July 2005 on prospectuses for securities, as last amended by the Act of 10 May 2016.

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 23 December 2016. 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 18 December 2015 and implementing Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

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 (Text with EEA relevance).

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 10 May 2016, transposing Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.

16 Act of 30 July 2013 reforming the commission of accounting principles and modifying certain rules regarding the annual accounts and consolidated accounts of companies and Act of 18 December 2015 modifying several Acts in view of the transposition of Directive 2013/34/EU. The main modifications introduced by this Act is discussed in Section III.

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

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

(LuxSE Principles)[19] 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.[20]

ii Regulatory authorities

In Luxembourg 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 Luxembourg Supervisory Commission of the Financial Sector (CSSF),[21] 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.

II CORPORATE LEADERSHIP

i Board structure and practices

Structure

Although the Act of 25 August 2006 introduced the possibility for public limited liability companies to choose a two-tier board structure,[22] the one-tier board structure[23] 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

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

20 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.

21 Further information available at http://www.cssf.lu/en/about-the-cssf/general-organisation/.

22 Article 442-1 of the Companies Act.

23 Articles 441-1 to 441-13 of the Companies Act.

supervisory board's responsibilities include the appointment and permanent supervision of the management board members, as well as the right to inspect all company transactions.[24] No person may at the same time be a member of both the management board and the supervisory board.[25] Members of the supervisory board are liable towards the company and any third party in accordance with general law.[26] However, there is no specific guidance relating to the exercise by members of the supervisory board of their duties.

Composition of the board

The board is composed of appointed members (the company's directors). The Companies Act requires a minimum of three directors;[27] the maximum number of directors is undefined (the LuxSE Principles advise 16 directors as a reasonable limit).[28] While the directors are appointed by the shareholders of the company,[29] the directors choose a chair from among their members.[30] 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.[31] This provision technically only applies to public limited liability companies. However, in an interlocutory decision delivered in 2013, the District Court of Luxembourg recognised the applicability of this provision to a partnership limited by shares.[32] In particular, the Court concluded that the obligation to appoint a permanent representative of a legal person to a board of a public limited liability company also applies to the legal person of a general partner of a partnership limited by shares. This decision was implicitly upheld in a judgment of the District Court pronounced in 2015.[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).

In this respect, the Companies Act provides for three mechanisms: 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] 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 the board may designate a director as a

24 Article 442-1 et seq. of the Companies Act, in particular, Articles 442-2, Paragraph 3, 442-3, Paragraph 1, 442-7, Paragraph1, and Articles 442-11 to 442-16.
25 Article 442-17, Paragraph 1 of the Companies Act.
26 Article 442-16 of the Companies Act.
27 Article 441-2, Paragraph 1 of the Companies Act.
28 LuxSE Principle 3, Guideline to Recommendation 3.3.
29 Article 441-2, Paragraph 3 of the Companies Act.
30 Article 444-3, Paragraph 2 of the Companies Act.
31 Article 441-3 of the Companies Act.
32 Luxembourg District Court, 21 December 2013.
33 Luxembourg District Court, 23 December 2015, Nos. 145 724 and 145 725.
34 Article 1984 et seq. of the Luxembourg Civil Code.
35 Article 441-5, Paragraph 4 of the Companies Act.

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] While 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: executive managers 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. It is, however, 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.

Finally, the European Commission has proposed legislation with the objective of attaining a 40 per cent presence of women among non-executive board member positions in publicly listed companies.[43,44] Luxembourg is currently reported as having an average of less than one in 10 female board members, with over half of the largest companies having no women on their boards at all.[45]

36 Article 441-10 of the Companies Act.

37 Article 441-10, Paragraph 1 of the Companies Act.

38 Article 441-10, Paragraph 2 of the Companies Act.

39 Article 441-10, Paragraph 5 of the Companies Act.

40 Article 441-10, Paragraph 4 the Companies Act.

41 Article 441-10, Paragraph 2 of the Companies Act.

42 LuxSE Principle 4.

43 European Commission, Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM/2012/0614 final – 2012/0299 (COD). The Directive would be based on Article 157(3) TFEU, which ensures the application of the principle of gender equality in employment and occupation.

44 At the same time, the European Business School's Women on Boards Initiative published its Global Board Ready Women list online, which contains 8,000 board-ready young graduate women: http://europa.eu/rapid/press-release_IP-12-1358_en.htm.

45 European Commission, The gender pay gap situation in the EU.

Separation of CEO and chair roles: chair's role and responsibilities

While the roles of CEO and chair tend to be separated in practice, there are no legal provisions or guidelines pertaining to a separation of roles or responsibilities.

For listed companies, the LuxSE Principles requires that the chair prepares the board meeting agendas after consulting the CEO, and ensures that the procedures for preparing meetings, deliberations, decision-making and the implementation of decisions are correctly applied.[46] Under this non-compulsory guideline, the chair should ensure the proper application of the rules of governance and provide advice to the board.

Luxembourg law does currently not provide for a specific procedure for direct communication between the CEO or the chair and the shareholders.

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.[47]

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.[48] 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.

Concerning listed companies, the LuxSE Principles recommend establishing a remuneration committee to deal with these issues. The LuxSE Principles state that the company must 'secure the services of qualified directors and executive managers by means of a fair remuneration policy that is compatible with the long-term interests of the company', thereby introducing a sustainable aspect rather than concentrating on short-term gains.[49]

Committees

The 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;[50]

c a nomination committee to nominate suitable candidates as directors; and

46 LuxSE Principle 2, Recommendation 2.4.

47 LuxSE Principle 10.

48 Article 442-19, Paragraph 1 of the Companies Act.

49 LuxSE Principle 7.

50 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.

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 appoint as many special committees as are needed to examine specific topics and to advise the board.[51] The board itself shall remain responsible for decision-taking.

ii Directors

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'.[52] While 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.

Liability of directors

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[53] and the provisions of the Companies Act,[54] 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.

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.[55]

The Luxembourg legislator has remained silent on what should be considered a company's best corporate interest. In a judgment delivered in 2015,[56] the Luxembourg

51 LuxSE Principle 3, Recommendation 3.9.
52 LuxSE Principle 3, Recommendation 3.5.
53 Articles 1382 and 1383 of the Luxembourg Civil Code.
54 Article 441-9 of the Companies Act.
55 Articles 441-7 and 441-12 of the Companies Act.
56 Luxembourg District Court, 23 December 2015, Nos. 145 724 and 145 725.

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 other companies, it includes the interest of the legal entity as a whole, including the interests of shareholders but also those of employees and creditors. The 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 regulations and principles. 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'.[57]

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.[58]

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 for the period covered by the accounts presented to and approved by the general meeting of shareholders, provided that they do not contain any omission or false statement of a material fact. Although a discharge given by the general meeting of shareholders extinguishes the board members' liability towards the company, it is important to note that proceedings initiated by third parties are not affected by such a discharge.

The company as well as third parties (including any shareholder or creditor with a legitimate interest) may bring an action against a director. Shareholders may, however, 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 recently been given an explicit legal basis in Luxembourg law.[59]

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. Whereas, under contractual liability, only reasonably foreseeable damage is to be repaired (except in cases of fraud), under tort liability all damage caused by the misconduct must be repaired. To elude collective liability, a director must prove that he or she has not taken part in the breach of the Companies Act or of the

57 LuxSE Principle 2.

58 Article 1166 of the Civil Code.

59 See Section V.

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.

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

The directors of a public limited liability company are appointed for a period that cannot exceed six years,[60] 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[61] 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 of shareholders will elect the directors.

Conflicts of interest of directors

Regarding the rules relating to conflicts of interest,[62] any director who has, either directly or indirectly, a financial interest 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 record his or her statement 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 company's 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 take 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).[63]

60 Article 441-2, Paragraph 4, of the Companies Act.

61 Article 2004 of the Luxembourg Civil Code.

62 Article 441-7 of the Companies Act. 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.

63 LuxSE Principle 5, Recommendations 5.1 and 5.2. For further recommendations, see Recommendations 5.3 to 5.8.

III DISCLOSURE

i The ultimate beneficial owner register

On 15 January 2019, the law establishing a Luxembourg register of beneficial owners (RBE Act), transposing Article 30 of the 4th AML Directive[64] was published. The RBE Act entered into force on 1 March 2019. Entities that fall within its scope have six months (i.e., until 1 September 2019) to comply with the Act's provisions. 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 only required to provide the name of the market on which their securities are traded.

On 15 February 2019, a Grand Ducal Regulation on registration requirements, administrative fees and access to information in the Luxembourg register of beneficial owners (RBE Regulation) was adopted. The RBE Regulation entered into force on 1 March 2019. Entities registered with the Luxembourg Trade and Companies Register that fall within the scope of the RBE Act must register their ultimate beneficial owners (UBO) information via an online platform managed by the Luxembourg Business Registers in French, German or Luxembourgish. A substantiated request to restrict access to UBO information on file can be submitted at the same time or, under certain conditions, at a later stage.

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 has a majority of the shareholding or voting rights in another entity; 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; 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.[65]

On 18 December 2015, Parliament passed an act implementing Directive 2013/34/EU.[66] This act made various changes to the preparation of the annual accounts of Luxembourg companies. Among other things, it changed the rules that are used to determine the size of a company. Depending on whether a company can be categorised as small, medium or large, various financial reporting obligations apply to it, 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. In addition, the disclosure requirements for small companies was changed, and a principle of materiality was introduced, as a result of which information that is considered immaterial may be omitted from the annual accounts.

64 4th AML Directive (2015/849/EU).

65 Article 1711-1 of the Companies Act.

66 Act of 18 December 2015 modifying several Acts in the view of the transposition of Directive 2013/34/EU.

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.

LuxSE-listed and Euro MTF-traded companies are additionally subject to the internal LuxSE rules and regulations, 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 impacts outside the jurisdiction, unless the impacts 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.[67]

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.[68] 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.[69] 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.

Auditors' role and authority, and independence

The Audit Act[70] 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 upon fulfilment of certain criteria.[71] 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

67 See Section I.ii.

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

69 LuxSE Principle 9.

70 Act of 23 July 2008 on the Auditing Profession.

71 Article 7 of the Act of 23 July 2008 on the Auditing Profession.

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.[72]

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.[73]

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.

In Luxembourg, 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 LuxSE Principles consist of three sets of rules: general principles (comply), recommendations (comply or explain) and guidelines. The general principles form the structure upon 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. While possible, in practice, such meetings will depend on, inter alia, the size of the company, its structure, and the number and geographic location of shareholders and directors.

IV CORPORATE RESPONSIBILITY

While the majority of CSR is still soft-law based, there are several codified rules on this matter, which are mainly applicable to listed companies.

Most importantly, 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.[74] This new LuxSE Principle forces companies to define their

72 Articles 61 to 87 of the Act of 23 July 2008 on the Auditing Profession.

73 Articles 19 to 20 of the Act of 23 July 2008 on the Auditing Profession.

74 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.

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 regularly address and review the non-financial risks of companies, including social and environmental risks.

Besides the LuxSE Principles, the Act of 5 December 2007 implementing, among others, the Directive on annual and consolidated accounts,[75] includes a provision on corporate governance practices that listed insurance companies should apply.[76] 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.[77] 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.

In addition, the implementation of Directive 2007/36/EC into Luxembourg law by the Shareholder Act marked an important step in Luxembourg CSR legislation.[78] The Shareholder Act goes beyond the Directive's requirements, and aims to increase shareholders' active participation in their companies by enabling them to exercise their voting rights, ensuring their right to place items on shareholders' meetings' agendas and to ask questions.[79]

While CSR commitments displayed on participating companies' websites have no legal basis and are, therefore, 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.

75 Directive 2006/46/EC of the European Parliament and of the Council 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 (Text with EEA relevance).

76 Article 85-1 et seq. of the Companies Act of 5 December 2007.

77 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).

78 The Shareholder Act applies to companies that have their registered office in Luxembourg and whose shares are admitted to trading on a regulated market in a Member State of the European Union, as well as to Luxembourg companies whose shares are traded on a regulated market outside the European Union if those companies have elected to opt in to the rules of the Shareholder Act.

79 See Section V.i.

i Compliance policies and whistle-blowing

The CPND, Luxembourg's national commission for data protection published guidelines on the rules to be respected by Luxembourg entities putting a whistle-blowing policy in place.[80] This guideline is largely based on the Article 29 Group's Opinion 1/2006 on the application of EU data protection rules to internal whistle-blowing schemes in the fields of accounting, internal accounting controls, auditing matters, the fight against bribery, and banking and financial crime.[81] Notably, a company must notify the CNPD of the implementation of a whistle-blowing policy further to Articles 12 and 13 of the Act of 2 August 2002 on the Protection of Persons with Regard to the Processing of Personal Data.[82] The CNPD provides guidelines to ensure that the whistle-blowing policy is perceived to support rather than replace efficient management and CSR.

In addition, in 2011, the Labour Code was amended to encourage whistle-blowing. The Labour Code now 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,[83] whether committed by their employer, any other person senior in rank to them, their colleagues or any third party in relation to the employer.[84]

ii CSR for other stakeholders and employees

Non-shareholders

Under Luxembourg law, directors are neither legally required to take the company's impact on non-shareholders into account; nor are they prevented from doing so. One of the guidelines in the LuxSE Principles suggests that the board draws up a code of business ethics and defines the values of the company.[85] It is also recommended for a company to show its CSR performance indicators in the form of a comparison over time. For example, the significant indicators could include subcontracting and relations with suppliers.[86]

In practice, an increasing number of private companies are taking social criteria into account in their decision-making and disclosing such information to the marketplace (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 the social and environmental impacts of their operations into account, both on a national and international level). This consideration may extend to other companies or business partners, but on a voluntary basis only.

80 National Commission for Data Protection of the Grand-Duchy of Luxembourg, 'Whistleblowing systems and ethical lines', 15 March 2011.

81 Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime.

82 Act of 2 August 2002 on the Protection of Persons with Regard to the Processing of Personal Data, as last amended by the Act of 23 July 2016.

83 Articles 245 to 252, 310 and 310-1 of the Luxembourg Criminal Code.

84 Article L271-1 of the Luxembourg Labour Code.

85 LuxSE Principle 2, Guideline 3 to Recommendation 2.3.

86 LuxSE Principle 9, Guideline to Recommendation 9.4.

Employees

The Labour Code[87] 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 employing over 1,000 employees over a three-year period; and all companies established in Luxembourg in which the state retains a financial participation of over 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.[88] 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,[89] 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 joint company committee, a joint employer–employee body, aimed at improving industrial relations in the workplace.[90] The law requires the company's managing director to inform and consult the joint committee at least once a year on the company's current and prospective staffing needs and on any training, refresher training or retraining implications for employees. The law authorises the joint committee to deliver an opinion on economic and financial decisions that could have a serious effect on the structure of the company or on employment levels. The committee also has the right to take part in joint decisions on a number of issues concerning human rights, such as:

a the introduction or running of technical equipment intended to monitor the behaviour and performance of employees at work;

b the introduction of, and alterations to, measures relating to occupational health and safety and the prevention of workplace accidents;

c the drawing up of, and amendments to, general criteria affecting the selection of staff for promotion, transfer and dismissal, and at the recruitment stage; and

d the drawing up of, and amendments to, general criteria used in staff assessments.[91]

Unlike in some other European countries, there is no legally backed trade union workplace presence in Luxembourg, although trade unions have a substantial range of rights in the election and operation of employee delegations. Unions also have important rights in joint company committees, and to our knowledge the majority of employee representatives are union members.

Despite an increasing number of non-discrimination laws, including a new equal treatment chapter in the Labour Code[92] implementing Directive 2000/78/EC, there is no binding anti-discrimination legislation currently in place specifically targeting non-discrimination on company boards.

87 Article L426-12 of the Labour Code.

88 Article L411-1 of the Labour Code.

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

90 Article L421-1 et seq. of the Labour Code.

91 Article L423-1 of the Labour Code.

92 Chapter V (equal treatment), Articles L241-1 to L254-1 of the Labour Code.

V SHAREHOLDERS

i Shareholder rights and powers

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.[93] This principle is limited to the participation of shareholders at the general meeting of shareholders and the exercise of their voting rights at that meeting.[94] The Shareholder Act has amended the previous rule that one vote is in principle attached to one share, henceforth allowing the company to provide for different voting rights for different shares.

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]

The powers of shareholders to influence the board

The Companies Act reserves the management of a company to its board.[96] 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.

Shareholders do, however, control the appointment of the board (and, therefore, its composition) via a majority decision of over 50 per cent to appoint a new director.[97] 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 a period of up to four weeks.[98]

In addition, 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.[99]

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.[100]

Under the Shareholder Act, in addition to the right to ask questions orally during a meeting, shareholders may have the right to pose written questions about the items on the agenda before the meeting is held. If provided for in a company's articles of association,

93 Article 2 of the Shareholder Act.
94 Article 2 of the Shareholder Act.
95 LuxSE Principles, Principle 10.
96 Article 441-5 of the Companies Act.
97 Article 441-2, Paragraph 3 of the Companies Act.
98 Article 450-1(6) of the Companies Act.
99 Article 4 of the Shareholder Act.
100 Article 7 of the Shareholder Act.

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.[101]

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.[102] Any shareholder representing at least 10 per cent of the company's share capital or voting rights, or both, can ask the board of directors or management body questions about the management and operations of the company or one of its affiliates, without the need for extraordinary circumstances. If the company's board or management body fails to answer these questions within one month, the 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.[103]

Certain matters must also be reported to the shareholders, such as any director's conflict of interest relating to voting on a resolution.[104]

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.[105]

Decisions reserved to shareholders

The Companies Act provides that a company's management board has the most extensive powers to perform all actions necessary or appropriate to fulfil the company's corporate objective,[106] with the exception of the actions specifically reserved by law to the shareholders' meeting. Such 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.

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.

101 Article 3(2) of the Shareholder Act.

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

103 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.

104 Article 441-7, Paragraph 2 of the Companies Act.

105 Article 444-2 of the Companies Act.

106 Article 441-5 of the Companies Act.

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.[107]

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.[108]

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 such additional protection in favour of minority shareholders, whether in the articles of association or otherwise, is common in Luxembourg, particularly among international joint ventures and groupings that use a Luxembourg company structure to promote mutual business activities.[109]

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 type of arrangements need to be limited in time. However, it does set out three types of voting arrangements that are null and void: a shareholders' agreement that violates the provisions of the Companies Act or that is contrary to a company's corporate interest; 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 an undertaking by a shareholder to those same companies or corporate organs to approve proposals made by the company's corporate bodies.[110] If votes are cast at a general meeting of shareholders pursuant to an invalid voting arrangement, the votes shall be considered null and void along with any resolutions taken, unless the votes did not affect the final outcome.[111] While the use of shareholders' agreements does allow for discretion and flexibility, any compulsory implementation of this type of arrangement remains at risk.

107 Article 100-22 of the Companies Act.

108 Article 5 of the Squeeze-out Act.

109 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).

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

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

Benefits for long-term shareholders

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

Shareholder approval of board decisions

While 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.

ii Shareholders' duties and responsibilities

Controlling shareholders' duties and liability

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

In addition, the controlling shareholders are notably prevented from dictating or imposing an increase of the other shareholders' obligations without their prior consent, although this principle has been considerably attenuated by the Squeeze-out Act, which 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.[112]

Institutional investors' duties and best practice

While institutional investors must bear in mind potential reputational repercussions relating to their investments, there are no particular duties imposed specifically on institutional investors and no requirement for institutional investors to specifically consider third-party impacts in their investment decisions. However, a number of Luxembourg-based investors have signed the United Nations-supported Principles for Responsible Investment.[113] The first of these six principles is to incorporate environmental, social and corporate governance considerations into investment analysis and decision-making processes. Furthermore, a growing number of investors – while not being signatories to the Principles for Responsible Investment – are taking the private initiative to take such risks into account.

Code of best practice for shareholders

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

iii Shareholder activism

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

112 Article 5 of the Squeeze-out Act.

113 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.

iv Takeover defences

Takeover bids are covered by the Luxembourg Takeover Bid Act.[114] The scope of this Act is limited to companies whose shares are traded on a regulated market in one or more Member State 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' interest.

In the absence of a specific provision in a company's articles of association requiring shareholder approval, the board may adopt defensive measures (e.g., issuing new shares within the limits of authorised capital or selling key assets) without the approval of the shareholders, provided that these measures are taken in the best interests of the company. The board may not prohibit the shareholders from accepting an offer. It should be noted, however, that measures aimed at frustrating bids in the long term are not generally deemed to be admissible under Luxembourg legislation. It would, therefore, not be possible to repeat defensive measures whenever the bid is repeated or to take defensive measures that have a long-term effect.

Shareholder and voting rights plans, and similar measures

As a general rule, any increase of a Luxembourg company's share capital is decided upon by the general meeting of shareholders. However, the articles of association of a Luxembourg public limited liability company may authorise the board of directors to increase the share capital up to a designated amount in one or more instalments.[115] The authorisation to do so is only valid for a period of five years, but may be renewed by the general meeting of shareholders.[116] 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.

Staggered boards

Directors of a Luxembourg public limited liability company shall be appointed for a term of office that may not exceed six years. However, directors may be removed from office by

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

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

116 Article 420-22 of the Companies Act.

the general meeting of shareholders at any time and without stating reasons.[117] 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 Contact with shareholders

Pursuant to the Shareholder Act, listed companies must give at least 30 calendar days' notice before holding a meeting[118] (notwithstanding particular requirements under the Takeover Bid Act). By doing so, Luxembourg's Parliament has imposed a longer notice period than the 21-day notice period required under Directive 2007/36/EC. Should the quorum not be met at the first meeting, a second meeting must be convened at least 17 calendar days before the meeting is held.[119] The convening notice must be published in the electronic compendium 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.[120] 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 of the above information, as well as a full copy of the draft resolutions.[121]

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 related requirements in its articles of association. The Shareholder Act details the content of the ballot paper, which must include, inter alia, the full identity of the shareholder, the content of the vote cast in advance, the agenda of the meeting and the deadline before which the ballot paper must be received.[122]

117 Article 441-2, Paragraph 4 of the Companies Act.
118 Article 3(1) of the Shareholder Act.
119 Article 3(1), Paragraph 2 of the Shareholder Act.
120 Article 3(1), Paragraph 2 of the Shareholder Act.
121 Article 3(3) of the Shareholder Act.
122 Article 6 of the Shareholder Act.

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.[123]

VI OUTLOOK

While corporate governance is currently in general voluntary, a growing number of institutional guidelines and codes are being developed, and the government is working towards promoting corporate governance on a national level.

Luxembourg is attempting to deal with the potential consequences of a Brexit scenario without any agreement. On 31 January 2019, the Finance Minister introduced Bill No. 7401 on measures to be taken in relation to the financial sector in the event the United Kingdom leaves the European Union without reaching an agreement on the final terms of its withdrawal. The Bill is currently pending before the Finance and Budget Committee of the Luxembourg Parliament. In the event of a no deal scenario, it would enter into force on 29 March 2019.

Furthermore, along with the other Member States, Luxembourg will have to implement the Second Shareholders' Rights Directive[124] by mid-2019, which includes various amendments to the initial Shareholders' Rights Directive. On 4 February 2019, the Justice Minister introduced Bill No. 7402 to amend the current Shareholder Act by transposing the Second Shareholders' Rights Directive. The main purpose is to enhance and harmonise the corporate governance of listed companies across the EU. The new measures will have a particular focus on encouraging a long-termist view among shareholders and increasing transparency.

123 Article 8 of the Shareholder Act.

124 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (Text with EEA relevance).

Appendix 1

ABOUT THE AUTHORS

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Margaretha (Greet) Wilkenhuysen is a partner in the corporate practice of NautaDutilh Avocats Luxembourg. She specialises in cross-border corporate transactions, with a particular focus on mergers and acquisitions, joint ventures and international corporate restructurings and corporate finance. Her clients include major international corporations, and she has represented both domestic and international clients in a variety of high-end transactions. Her extensive experience and knowledge resulted in her being nominated from 2011 to 2019 as a 'Leading Lawyer' in *IFLR1000*.

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

Ms Wilkenhuysen is a frequent writer and speaker, and has published various books and articles (e.g., *Due Diligence* (2011 – new edition), *Cross-Border Mergers* (2011) and *Capital Directive* (2014)) and The Shareholders Rights & Activism (Edition 3) (*The Law Reviews*, 2018), and the Luxembourg chapter of *The Corporate Governance Review* (Law Business Research, editions 2012–2019). She has also published an article on cross-border mergers in *Un siècle d'application de la loi du 10 août 1915 concernant les sociétés commerciales* (2015). She is also a member of the International Bar Association, the European Private Equity and Venture Capital Association and the Duke Alumni Association.

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