Corporate Governance and Directors' Duties in Luxembourg: Overview

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A Q&A guide to corporate governance law in Luxembourg.

The Q&A gives a high-level overview of corporate governance trends; the main forms of corporate entities used; the main corporate governance legal framework; corporate social responsibility and reporting; board composition and restrictions; directors' remuneration; management rules and authority; directors' duties and liabilities; transactions with directors and conflicts; disclosure of information; shareholders' rights, company meetings, and minority shareholder action; and internal controls, accounts and audit.

Corporate Governance Trends

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

Many developments have recently impacted corporate governance matters in Luxembourg, including the following:

- **Financial assistance rules**. The Luxembourg legislator clarified (Law dated 6 August 2021) that the rules regarding financial assistance and the related criminal sanctions do not apply to private limited liability companies (*sociétés à responsabilité limitée*) (SARL) but apply only to:
    - public limited liability companies (*sociétés anonyme*) (SA);
    - simplified joint stock companies (*sociétés par actions simplifées*) (SAS); and
    - partnerships limited by shares (*sociétés en commandite par actions*) (SCA).

  The new law puts an end to a long-standing controversy among practitioners over the financial assistance rules provided in Articles 430-19 and 430-21 and Article 1500-7 of the Law dated 10 August 1915 on commercial companies, as amended (Companies Law).

  However, an SARL's operations that may qualify as financial assistance should still be carefully assessed in the light of the corporate interest of the company involved.
- **Remote meetings**. The legal derogations adopted during the COVID pandemic allowing shareholders to attend shareholders' meetings remotely rather than in person and allowing managers to take decisions by means of remote board meetings or circular resolutions, regardless of any contrary provision in their articles, ended on 31 December 2022. This means that from 1 January 2023 companies must comply with standard legal and statutory provisions on meetings and decisions.
- **Boards' gender balance**. Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures (Women on Boards Directive) entered into force on 27 December 2022 and must be implemented by member states by 28 December 2024. Listed companies subject to the Women on Boards Directive will have to achieve certain targets with respect to their board composition and comply with new appointment procedures and reporting requirements, subject to penalties.
- **Mobility Directive**. On 27 July 2022, draft bill 8053 was lodged with the Luxembourg Parliament for transposing Directive (EU) 2019/2121 regarding cross-border conversions, mergers and divisions (Mobility Directive) into Luxembourg law. Under the draft bill, every conversion, merger and division operation will be restructured and organised under two distinct legal regimes:
    - a general regime applicable to domestic operations (operations involving one or more Luxembourg companies) and cross-border operations that do not fall under the scope of the special regime (including cross-border operations with non-EU companies); and

- a special regime applicable to cross-border operations involving either a Luxembourg limited liability company (an SA, SAS, SARL or SCA) and at least one EU limited liability company (as foreseen by the relevant annexes in the Mobility Directive).

Under the general regime, mergers and divisions will be mainly equivalent to the current procedures provided in the Companies Law except for some amendments which aim at giving more flexibility or clarifying certain aspect of the current regime. The general regime will now expressly recognise and address the migration of companies.

Under the special regime, mergers, divisions and conversions will be subject to specific provisions relating to anti-abuse control, protection of creditors and protection of shareholders and employees.

As the transposition process is still in its infancy, the draft bills remains subject to amendments.

- **Administrative dissolution**. With the aim of eliminating empty shell companies swiftly, the legislator adopted the Law dated 28 October 2022, which entered into force on 1 February 2023 and which introduced an administrative dissolution procedure under which companies that have neither employees nor assets can be dissolved without formal judicial dissolution and liquidation if they:
  - pursue activities in breach of the criminal law; or
  - seriously infringe the provisions of the Commercial Code or the laws governing commercial companies

- **Beneficial owners register**. Further to a recent Court of Justice of the European Union judgment (*joined cases C 37/20 and C 601/20 of 22 November 2022*), the Luxembourg Business Registers (LBR), in conjunction with the Ministry of Justice, announced a general suspension of public access to the Luxembourg Register of Beneficial Owners (*Registre des bénéficiaires effectifs*) (RBE). Access to the RBE has since been progressively restored, first in favour of certain professionals within the framework of their know-your-customer obligations, and second to registered entities having filed information on their beneficial owners with the RBE.
- **Non-financial reporting**. The *Corporate Sustainability Reporting (Directive (EU) 2022/2464)* (CSRD) entered into force on 5 January 2023. The CSRD strengthens the existing rules on non-financial reporting introduced in the Accounting Directive (2013/34/EU) and the Non-Financial Reporting Directive (2014/95/EU) (NFRD). A broader set of large companies will be required to report on sustainability.

  Luxembourg is required to transpose the CSRD into national law by 6 July 2024. So far, no draft bill has been filed.

  See *EU non-financial narrative and sustainability reporting requirements* for more detail.
- **Right of establishment**. On 26 July 2023, a law to amend the Law dated 2 September 2011 regulating access to the professions of craftsman, trader, manufacturer and certain liberal professions (Right of Establishment Law) was adopted. That law entered into force on 1 September 2023.

The key changes made by the new law are, among others, the following:

- Clarification and addition of certain criteria with respect to the assessment of professional integrity (*honorabilité*).
- Introduction of the concept of "second chance" (*nouvelle chance*), pursuant to which directors (*dirigeants*) who faced bankruptcy can obtain a new business licence subject to certain conditions.
- Changes in the way the business licences are issued and have to be displayed by the business licence holders.

- Modification of conditions of presence and qualifications that the business licence holder must meet, including the following:
    - the business licence holder must be effectively and permanently involved in the day-to-day management of the business, through a physical presence on the premises;
    - the business licence holder will no longer be required to be a partner, shareholder or employee of the company. The owner of the business (if the activity is carried out in their own name) or the person registered with the Luxembourg Trade and Companies Register (*Registre de commerce et des sociétés*) (RCS) as a representative (if corporate activity is carried out) can be the business licence holder.

- **Foreign direct investments screening mechanism**. On 14 July 2023, a law to introduce a national screening mechanism for foreign direct investments (FDI) that are likely to undermine security or public order was adopted. That law entered into force on 1 August 2023.
- Under the new mechanism, investments made by a foreign investor (an investor from a third country outside the EU/EEA) allowing that investor to take the control of a Luxembourg entity that carries out certain critical activities must be notified by the investor to the Luxembourg Ministry of Economy before completion. The Ministry of Economy can decide to open a screening procedure further to which the Ministry will decide either to authorise the investment, prohibit it or authorise it subject to certain conditions.
- **Insolvency and reorganisation proceedings**. On 18 August 2023, which aims to modernise insolvency law in Luxembourg, was adopted.

  The key changes made by the new law are, among others, the:
    - introduction of new preventive judicial and non-judicial reorganisation procedures including: conciliation (*conciliation*), judicial reorganisation by mutual agreement (*réorganisation judiciaire par accord amiable*), judicial reorganisation by collective agreement (*réorganisation judiciaire par accord collectif*), judicial reorganisation by transfer by court decision (*réorganisation judiciaire par transfert par décision de justice*) and reorganisation by mutual agreement (*réorganisation par accord amiable*);
    - introduction of new measures aiming to identify financial difficulties of businesses at an early stage;
    - abolition of the following measures: composition with creditors (*concordat préventif de faillite*), suspension of payment (*sursis de paiement*) and controlled management (*gestion contrôlée*).

- **Accounting law**. On 28 July 2023, draft Bill 8286 was lodged with the Luxembourg Parliament which aims to revise the Luxembourg accounting law.

  The main objectives of the reform are, among others, the:
    - consolidation of the widely dispersed common law accounting provisions within a single accounting law;
    - extension of the scope of application of the accounting law to non-commercial undertakings;
    - introduction of filing requirements for special limited partnerships (*sociétés en commandite spéciales*) (SCSp);
    - introduction of the concept of "micro-enterprises" benefitting from certain simplified measures (including exemptions from providing notes to the annual accounts);

- raising of the numerical thresholds for small enterprises resulting in a larger number of companies benefitting from simplified measures applicable to small enterprises;
- introduction of a requirement for "large holding companies" (defined as those with a balance sheet total in excess of EUR500 million) to have their annual accounts audited by an approved statutory auditor (*réviseur d'entreprises agréé*);
- modernisation of the accounting regime for dissolved companies and companies in liquidation; and
- abolition of the function of statutory auditor (*commissaire aux comptes*).

Corporate Entities

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

The main forms of corporate entity in Luxembourg are currently as follows:

- Public limited liability companies (SA).
- Private limited liability companies (SARL).
- Common limited partnerships (*sociétés en commandite simple*) (SCS) and SCSp, which are frequently used in the funds industry due to their flexible governance rules and contractual freedom.
- Partnerships limited by shares (SCA).
- So far, the simplified joint stock company (SAS), introduced in Luxembourg by the company law reform of 10 August 2016, does not have the same popularity in Luxembourg as in France.

Only the SA and the SCA can issue shares to the public.

In this Q&A, unless otherwise provided, answers will be based on the SA and the SARL as these are the most commonly used forms of corporate entities in Luxembourg. In addition, unless otherwise indicated, references to "partnerships" will be collectively to an SCS, SCSp and an SCA.

Legal Framework

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

Luxembourg companies are mainly governed by the:

- Law dated 10 August 1915 on commercial companies, as amended (Companies Law).
- Law dated 19 December 2002 on the commercial and companies register and on the accounting and annual accounts of undertakings, as amended (RCS Law).
- For listed companies:
    - ten Principles of Corporate Governance of the Luxembourg Stock Exchange for listed companies (X Principles);
    - Law dated 24 May 2011 relating to the exercise of certain shareholder rights in general meetings of listed companies, as amended (Shareholder Rights Law).

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

The company's articles of association (articles) are another important source of corporate governance rules in Luxembourg. They govern (among others) the decision-making process in a company and regulate the relationship between the company's shareholders and (subject to deviations and carve-outs) towards third parties.

4. Has your jurisdiction adopted a corporate governance code?

There is no corporate governance code that applies to all companies. Listed companies should apply the X Principles. Non-listed companies can voluntarily apply the X Principles as a badge of good corporate governance and evidence of commitment to best practice.

The X Principles are a set of rules for listed companies adopted by the Luxembourg Stock Exchange in 2006 and amended three times since then. The X Principles aim to ensure the highest market standards through transparency, business ethics and controls and cover the following matters:

- Corporate governance framework.
- Board of directors' remit.
- Composition of the board of directors and of the special committees.
- Appointment of directors and executive managers.

- Conflicts of interest and business ethic rules.
- Evaluation of the performance of the board.
- Management structure.
- Remuneration policy.
- Financial reporting, internal control and risk management.
- Rights of the shareholders.

The X Principles contain rules that are of the following types:

- Mandatory without exception.
- Recommendations that can be waived if the company can explain the reasons for their non-application.
- Mere guidelines.
- Investment funds and management companies can adopt the principles of the Code of Conduct of the Association of the Luxembourg Fund Industry (ALFI Code of Conduct), which provides a framework of high-level principles and best practice recommendations for the Luxembourg funds industry. Even though the adoption of the ALFI Code of Conduct is entirely voluntary, most Luxembourg funds have adopted it.

Corporate Social Responsibility and Reporting

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

Certain non-financial information must be disclosed by large companies or groups of companies that fulfil certain materiality conditions.

The central components of the sustainability reporting requirements underpinning the EU's sustainable finance strategy are the:

- CSRD.
- NFRD.
- Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR).
- EU Taxonomy Regulation ((EU) 2020/852) (Taxonomy Regulation).

Qualifying listed companies are also subject to the Corporate Social Responsibility (CSR) recommendations contained in the X Principles.

The National Institute for Sustainable Development and Corporate Responsibility (*Institut national pour développement durable et la responsabilité sociale des entreprises - INDR*) has also published non-binding guidelines on corporate social responsibility and can give a CSR label to promote this concept.

Social endeavour companies must meet at least one out of the two criteria below:

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

NFRD

The NFRD requires certain large undertakings and groups to disclose information on sustainability such as social and environmental factors, with a view to identifying sustainability risks and increasing investor and consumer trust. In particular, any environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters must be disclosed to the public.

The NFRD requires companies to report both on how sustainability issues affect their performance, position and development and on their impact on people and the environment.

The NFRD was transposed by the Law dated 23 July 2016 amending the Companies Law and the RCS Law.

Large companies that meet certain conditions must include in their management report a non-financial statement including information relating to environmental issues, social and personnel matters, respect for human rights and anti-corruption in the context of the business operations and activities.

Within a group of companies, the parent company that meets certain conditions must include a similar non-financial statement in the consolidated management report.

SFDR

The SFDR was adopted to:

- Achieve more transparency regarding how financial market participants and financial advisers integrate sustainability risks into their investment decisions and investment or insurance advice.
- Harmonise the rules on sustainability-related disclosures in the EU financial sector.
- Strengthen protection for end investors and improve disclosures to them.
- Achieve the sustainable development goals (SDGs) published by the United Nations.

Under the SFDR, financial market participants (including asset managers and financial advisers) must disclose sustainability information to end investors and asset owners regarding specific matters.

Taxonomy Regulation

The Taxonomy Regulation sets up a classification system for environmentally sustainable economic activities. It requires companies within the scope of the NFRD/SFDR to disclose certain indicators about the extent to which their activities are environmentally sustainable according to the taxonomy. These indicators are complementary to the information that the companies must disclose under the NFRD and the SFDR, and companies have to report them alongside other sustainability information mandated by the NFRD/SFDR.

See also *Question 1*.

Board Composition and Restrictions

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

Structure

Under the Companies Law, an SA can be managed either as a one-tier structure with a sole director or a board of directors, or as a two-tier structure with a management board and a supervisory board. An SARL is always managed as a one tier structure with a manager or a board of managers.

Management

Subject to *Question 17*, the following applies:

- An SARL is managed by a sole manager or by a board of managers.
- An SA is managed:
    - in a one-tier structure: by a board of directors (or a sole director if it is held by a sole shareholder);
    - in a two-tier structure: by a management board which is under the supervision of a supervisory board.
- Partnerships are managed by one or more managers who are not required to be unlimited partners (in practice control over the management of partnerships is generally seen as a corollary of the unlimited liability of the unlimited partner(s)).
- In this Q&A, unless otherwise indicated, references to "directors" are either to managers of an SARL or to directors of an SA.

Board Members

Companies must have the following directors:

- SARL and SA: directors can be:
    - shareholders or third parties; and
    - natural or legal persons.
- Partnerships: the manager(s) can be appointed among the unlimited members (*actionnaires/associés commandités*) or be third parties, and can be either natural or legal persons.

In an SA, the legal person appointed as director must appoint a natural person as its permanent representative.

Employees' Representation

Employees in an SARL or an SCA have no right to board representation.

However, at least three directors and three members of the supervisory board must be appointed to represent the employees of an SA which meets at least one of the following conditions:

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

Number of Directors or Members

Companies must have the following number of directors or members:

- SA with a one tier structure:
    - the board of directors must comprise at least three directors (except where there is one shareholder when it can have only one director);
    - the minimum number is increased to nine directors if the company had more than 1,000 employees over the last three years.
- SA with a two tier structure:
    - the supervisory board must comprise at least three members (except where there is one shareholder when it can have only one director); and
    - the management board must comprise at least two members (only one member if the company has one shareholder or if its capital is less than EUR500,000).

- SARL: the management is carried out by one or more managers (in which case the articles can require the managers to form a board (*collège de gérance*)).
- Partnerships: the management is carried out by at least one manager.

The X Principles (see *Question 4*) recommend a maximum of 16 directors to ensure deliberation and decision-making.

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

General Restrictions

The general requirements are as follows:

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

Age

Any individual appointed as a director must have full legal capacity to act (that is, be an adult or an emancipated minor). A person under guardianship or curatorship or who has been banned from management or commercial activities cannot be a director.

Nationality

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

Corporate Directors

A legal person can be a director of a company, however, in the case of an SA, an individual (natural person) must be appointed as the permanent representative of the legal person acting as director.

Diversity

There are no specific diversity requirements.

Gender

There are currently no gender quotas or gender disclosure requirements for directors. The X Principles recommend that companies have an appropriate level of both genders represented on their boards of directors.

Listed companies subject to the Women on Boards Directive must achieve certain targets with respect to their board composition and comply with new appointment procedures and reporting requirements, subject to penalties.

Qualities, Qualifications

Persons accepting a mandate of directorship must ensure that they have all the necessary skills and qualities to perform their duties. For listed companies, the X Principles recommend that directors have complementary experience and knowledge useful to the company, and that such knowledge is kept up to date.

Directors of social endeavours companies or companies that undertake a regulatory activity subject to a business licence are also required to satisfy certain qualification conditions and exhibit professional integrity.

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

Recognition

A two-tier structure in an SA recognises executive directors who manage the company (management board) and the members of the supervisory board, who are in charge of controlling the management body.

The X Principles (see *Question 4*) recommend that boards include both executive and non-executive directors.

Board Composition

The Companies Law does not provide any legal requirements for board composition with respect to appointment of independent directors. The X Principles recommend that companies have a suitable number of independent directors for the nature of the company's business activities and the structure of its shareholding. At least two independent directors are recommended.

Independence

The Companies Law does not provide a legal requirement on independence but based on the X Principles, an independent director must not have any:

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

9. Are the roles of individual board members restricted?

In an SA with a two-tier structure, a member of the management board cannot be simultaneously appointed as a member of the supervisory board.

In any SA, the management and representation powers are not entrusted to each director individually but to the board of directors as corporate body. The articles can however authorise one or more directors to represent the company, either alone or jointly.

Conversely, in an SARL, each manager acting individually can act in the name and on behalf of the company. The articles may however provide that where there are several managers, these must form a board (*collège de gérance*) and authorise one or more managers to represent the company, either alone or jointly.

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

Appointment of Directors

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

In an SA with a two-tier structure (see *Question 6*), the members of the management board are appointed by the supervisory board, unless the articles provide for them to be appointed by the SGM (in which case the SGM has sole authority for appointment). The members of the supervisory board are appointed in the same way as directors, that is, by the SGM.

In an SA, where there is a vacancy on the board of directors or the management board, the remaining board member(s) can co-opt a member on a provisional basis (which is mandatory if, due to the vacancy, the number of directors is lower than the legal requirement). This appointment must be confirmed at the next SGM or the supervisory board meeting.

Removal of Directors

The following rules apply when removing directors:

- SARL: subject to any contrary provisions in the articles, managers can be removed for legitimate reasons by the SGM.
- SA: directors can be removed at any time (*ad nutum*) by the SGM. Under the two-tier structure, the supervisory board members are removed in the same way as directors, and the members of the management board are removed by the supervisory board or, if the articles provide so, by the shareholders.

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

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

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

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

- SARL: term can be either limited or unlimited.
- SA: term cannot exceed six years.

Directors' Remuneration

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

Directors Employed by the Company

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

- A hierarchical relationship between the company and the employee.
- The performance of tasks that are strictly separate and distinct from the duties carried out under the corporate mandate.
- Remuneration granted to the employee.
- The employment agreement must not be concluded fraudulently or in breach of the Luxembourg laws.

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

- SARL: non-associated managers or minority shareholders and egalitarian managers (but not a sole shareholder who is also the sole manager of the company).
- SA: directors who:

- do not have the sole authority to bind the company towards third parties;
- are a member of a board composed of several members; and
- are subordinated to the board with regard to the duties to be carried out under the employment agreement.

Shareholders' Inspection

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

However, any director having a direct or indirect financial interest that conflicts with that of the company in a transaction which must be considered by the board of directors must advise the board of that fact and ensure that a statement to the effect is included in the minutes of the meeting.

The director must not take part in the deliberations on the conflicting matter. The board of directors must report, at the next SGM, on transactions in which any director has had an interest conflicting with that of the company.

Where, because of a conflict of interest, the number of members required by the articles to decide and vote on the relevant matter is not reached, the board can, unless otherwise provided for by the articles, decide to refer the decision on that matter to the SGM.

Shareholders have a general right to ask questions to the management in the context of the ordinary SGM but can also request an independent investigation (see *Question 36*).

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

Directors can be shareholders of the company but are not required to be.

The Companies Law does not provide any requirement for a director to hold shares in the company.

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

Determination of Directors' Remuneration

Apart from any salary that directors receive from the company, directors may or may not be remunerated for their mandates.

The conditions for remuneration must be detailed in the articles (in particular, the frequency of payments and the body of the company in charge of its determination).

Under the Companies Law, details of the salary, fees and benefit granted to a day-to-day manager must be disclosed at the SGM.

Remuneration can either be in the form of attendance fees (*jetons de presence*) for effective attendance at meetings, or *tantième* (representing part of the profit of the company).

The remuneration policy for social endeavour companies must provide a cap on any remuneration.

The role of shareholders is significant in monitoring and enforcing good corporate governance. Therefore, shareholders of listed companies:

- Have an advisory vote on the company's remuneration policy at each material change and at least every four years.
- Must be provided with detailed information on the directors' remuneration for the last financial year.
- Have the right to an advisory vote on the remuneration report during the annual SGM.

(*Shareholder Rights Law.*)

See *Question 3*.

The above rights gives shareholders the means to verify whether the company's interests are aligned with those of its governing bodies.

Disclosure

An SA, SAS, SARL and partnership (other than an SCSp) must in principle provide in the notes to their annual accounts (to be approved by the SGM) information about remuneration and pensions granted to directors during the relevant financial year.

The X Principles and the Shareholder Rights Law promote more transparency around directors' remuneration in listed companies.

Shareholder Approval

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

General Issues and Trends

After the global financial crisis in 2008, the following non-binding rules were published to provide guidance to companies on remuneration:

- The X Principles require securing the services of directors through fair remuneration that is compatible with the long-term interests of the company, and recommend establishing a remuneration committee consisting exclusively of non-executive directors.

- Circular 10/437 of the CSSF provides guidelines concerning remuneration policies in the financial sector to help structure variable components or bonuses granted on performance criteria.
- The ALFI Code of Conduct requires reasonable and fair remuneration for board members to be adequately disclosed.
- The Luxembourg Institute of Directors (*Institut Luxembourgeois des Administrateurs*) guidelines on executive and director remuneration.
- The Committee of European Banking Supervisors Guidelines on Remuneration Policies and Practices.

In addition, the Luxembourg Law of 23 July 2015 transposing the Capital Requirements Directive (2013/36/EU) (CRD IV), provides a cap on bonuses and full transparency on corporate governance and remuneration issues.

Management Rules and Authority

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

In an SA, the following rules apply:

- The board must be convened and held in accordance with the provisions of the articles in the company's interests. Convening notice is not required if:
  - all the directors are present or represented;
  - they state that they have been duly informed; and
  - they have full knowledge of the agenda of the meeting.
- Subject to more restrictive provisions in the articles, the board can only validly debate and take decisions if:
  - a majority of its members are present or represented; and
  - any decisions are taken by a simple majority of the directors.
- The directors, subject to any restriction in the articles, are permitted to attend the meeting using video conference or telecommunication means (Companies Law).
- The articles may permit that decisions of the board be taken by circular resolutions which must be approved and signed by all the directors.

In an SARL, each manager can take any actions necessary or useful to realise the corporate object, except those reserved by law or the articles to be decided on by the SGM. The articles may, however, provide that where there are several managers, these must form a board.

Where a board is formed, the same rules as those mentioned above for the board of directors apply.

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

Directors' Powers

The board of directors of an SA or each manager of an SARL (see *Question 9* and *Question 15*) have the power to take any action necessary or useful to realise the corporate object of the company, except those reserved by the law or the articles to the SGM (including amending the articles, approving annual accounts, changing the management and putting the company into voluntary liquidation) (Companies Law).

Unless otherwise provided by the articles in accordance with the Companies Law (see *Question 9*), the board of an SA, or each manager for an SARL, represents the company with regard to third parties.

Restrictions

Any limitation to the powers conferred on the board of an SA or on the managers of an SARL, resulting either from the articles or from a decision of the competent corporate bodies, is not enforceable against third parties even if it is published. This applies in particular to any clause requiring prior approval from the shareholders for certain important reserved matters that are within the directors' competence.

Under the Companies Law, the articles can authorise one or more directors to represent the company either singly or jointly. A clause to that effect is enforceable against third parties.

Any director having a (direct or indirect) financial interest that is opposed to the company's own interest and is subject to the vote of the board, must declare it and abstain from taking part in the deliberation at the board meeting.

The existence of any conflict of interest must be reported to the SGM (or to the board of directors for conflicts of interest concerning a member of the management committee/the managing executive officer).

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

In an SA and SARL, the daily management can be delegated to one or more directors, officers, managers or other agents, who can but are not required to be shareholders, acting either alone or jointly.

The articles can authorise the board of directors of an SA to delegate its management powers to a management committee or a managing executive officer (*directeur général*), but this delegation must not comprise the general policy of the company or the entirety of the actions expressly reserved to the board by the Companies Law.

The management committee/managing executive officer remains under the supervision of the board. Setting up a management committee or appointing a managing executive officer are alternative options.

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

The delegations of powers for non-listed companies are not mandatory.

As regards listed companies, the X Principles (see *Question 4*) recommend setting up special committees, ideally composed of four members, to review specific issues.

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

Director's Duties and Liabilities

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

Directors are subject to certain duties which derive from the ordinary law for the execution of the mandate under Articles 1984 et seq. of the Luxembourg Civil Code which are the following:

- To manage carefully and wisely: directors are expected to manage carefully and wisely (*en bon père de famille*) by performing their function with the care and the diligence that the company can reasonably expect from any normally prudent and diligent director placed in the same circumstances.
- Of loyalty: directors have a general and absolute duty to ensure that the general interest of the company prevails over their personal interest. The Luxembourg courts have affirmed that directors who compete, directly or indirectly, with the company they manage and those who divert the clientele of this company for the profit of a rival personal company are in breach of their duty of loyalty.
- Of skill: while the Companies Law does not provide for any specific skill or ability required to be a director (see *Question 7*), persons that intend to perform a function of director must only accept the role if they think they have the necessary skills and qualities to do so. They must have the necessary skills when they accept the role and must keep the skills and knowledge up-to-date.

- Of availability: any director must demonstrate their availability and commitment by devoting the necessary time to perform their function.

Apart from liability resulting from the insolvency of the company (see *Question 21*), directors can be held liable:

- Towards the company (*action ut universi*), the shareholders acting on behalf of the company (*actio ut singuli*) and towards one or several shareholders acting individually on their behalf (for any specific and distinct damage caused to them) for any damage caused by a breach of their management duties or of the law or the articles.
- Towards third parties or individual shareholders for any damage resulting from a breach of the law or the company's articles or from a fault separable from their functions.
- In addition to the civil liability that directors incur, they can also be held personally and criminally liable for offences provided for in the Companies Law, in the Criminal Code (*Code Pénal*), the Labour Code (*Code du Travail*) or in other specific texts and can be subject to a prison sentence and/or a fine.

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

Under the Companies Law and the Criminal Code, directors may be liable for the following main specific offences:

- Failure to submit the annual accounts to the SGM within the legal deadline (punishable by a fine of EUR500 to EUR25,000).
- Failure to publish the financial statements of the company within the legal deadline (punishable by:
    - a fine of between EUR500 and EUR25,000;
    - in cases of fraudulent intent, by a fine of between EUR5,000 and EUR125,000 and/or imprisonment of between one month and two years).
- Fraud relating to subscription or payments, or purchase of bonds, shares or other securities by simulating or publishing false information (punishable by imprisonment of between one month and five years and a fine of between EUR250 and EUR30,000).
- Manipulation of the market price of shares, bonds and other securities (punishable by imprisonment between one month and two years and a fine of between EUR5,000 and EUR125,000).
- Forgery of the annual accounts with fraudulent intent or intention to harm (punishable by imprisonment (*réclusion*) and a fine of between EUR5,000 and EUR250,000).
- Misuse of company assets (punishable by imprisonment of between one year and five years and/or a fine of between EUR500 and EUR25,000).

- Failure, knowingly, to keep a share register or to appoint a depository or to deposit bearer shares (punishable by a fine of between EUR5,000 and EUR125,000).

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

The CSSF can impose administrative and criminal sanctions including:

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

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

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

- Prohibition of between one year and 20 years from exercising a mandate or commercial activity.
- Extension of the insolvency proceedings to the director (*extension des procédures de faillite*).
- Liability for the settlement of the company's debts (*action en comblement de passif*).
- A prison term of between one month and two years for a "negligent" bankruptcy where, for example, the director has not declared the cessation of payments within the legal timeframe or kept complete and regular accounts.
- A prison term of between five and ten years for fraudulent bankruptcy where, for example, the director has deliberately deleted information in the books or concealed assets of the company.

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

Directors can be subject to the following penalties:

- A prison term of between eight days and six months and a fine of between EUR251 and EUR100,000 for any violation of the Law dated 3 December 2014, as amended, on the environment, in particular for any company that fails to handle waste management.
- A prison term of between eight days and six months and/or a fine of between EUR251 and EUR750,000 for any violation of the Law dated 18 July 2018, as amended, on the protection of nature and natural resources.
- A prison term of between eight days and six months and/or a fine of between EUR251 and EUR125,000 for any violation of the Law dated 10 June 1999, as amended, on classified establishments.
- A prison term of between eight days and one month and a fine of between EUR251 and EUR50,000 for any violation of the Law dated 28 May 2009, as amended, on the application of Regulation (EC) 689/2008 on the export and import of hazardous chemicals.

Under the Labour Code, any employer (to whom the director is assimilated) must ensure the health and safety of its employees in relation to their work and prevent any professional risks. Failure to do so can subject the director to a prison term of between eight days and six months and a fine of between EUR251 and EUR25,000.

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

A new competition law was enacted on 24 November 2022. This law transposed into domestic law the ECN+ Directive ((EU) 2019/1) and aims to overhaul the previous competition legislation in Luxembourg.

The new law, which entered into force on 1 January 2023, repealed and replaced the Law on competition dated 23 October 2011.

When rendering a decision on the merits of a case, the Luxembourg competition authority can impose fines on companies and associations of companies for a breach of the applicable provisions.

The fines must be proportionate to:

- The gravity and duration of the acts committed.
- The situation of the sanctioned company or of the group to which the company belongs.
- Any possible repetition of practices prohibited by law.

The maximum amount of the fine that can be imposed is 10% of the amount of the worldwide turnover before tax achieved during the last closed financial year.

Under the Criminal Code, any person who, by any fraudulent means, decreased or increased the price of foodstuffs or goods or of public papers and effects is subject to a prison term of between one month and two years and a fine of between EUR500 and EUR25,000.

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

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

- Directors can be personally liable for paying to the direct tax authorities the tax debts of the legal person they represent where there has been a failure by the company to comply with its tax obligations and misconduct by the directors (Article 103 and following of the general tax law of 22 May 1931 as amended (*Abgabenordnung*)).
- Any infringement of the provisions relating to payment or collection of social security contributions and incorrect, incomplete or misleading information is subject to penalties, including:
    - a prison term of between eight days and three months;
    - a fine of between EUR251 and EUR6,250; and
    - a prison term of between one month and five years and a fine of between EUR251 and EUR15,000 for acting with fraudulent intent.

    (Social Security Code).
- The non-authorised exploitation of a company is an offence. Penalties are:
    - for natural persons, a prison term of between eight days and three years and/or a fine of between EUR251 and EUR125,000;
    - for legal persons, a fine of between EUR500 and EUR250,000

    (Right of Establishment Law).
- Directors who knowingly breach their obligation to comply with money laundering provisions are subject to a fine of between EUR1,250 and EUR1,25 million (Law of 12 November 2004 against money-laundering and the financing of terrorism).
- Anyone who fraudulently intends to produce, sell, obtain, hold, import, diffuse or dispose of a computing device in violation of the law of 14 August 2000 on electronic commerce as amended (E-Commerce Law) can be liable to a prison term of between four months and five years and a fine of between EUR1,250 and EUR30,000 (Criminal Code).
- Registered entities and their beneficial owners that fail to provide the required information on beneficial ownership, or registered entities which provide knowingly inaccurate information or file late such information with the RBE, are liable to a fine of between EUR1,250 and EUR1.25 million (Law of 13 January 2019, as amended (RBE Law)).

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

A director's liability to the company can be contractually limited, but their liability towards third parties cannot.

Directors receive a discharge from the annual ordinary SGM approving the annual accounts for their management of the company, including any irregular acts or management faults.

A discharge validly voted by the SGM can exonerate the directors from liability for irregular acts or management faults committed during the relevant financial year. The discharge has however no effect against:

- Third parties.
- Shareholders if they are not in a position to correctly assess the importance of the fault/misconduct.
- Shareholders who did not vote in favour of the discharge.

In practice, the company typically takes over the responsibility for fees and expenses incurred in any litigation relating to a director's civil liability by way of an indemnity letter. This does not apply to criminal liabilities.

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

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

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

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

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

Transactions with Directors and Conflicts

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

Any director having a direct or indirect financial interest that conflicts with that of the company in a transaction which must be considered by the board of directors must advise the board of that fact and ensure that a statement to the effect is included in the minutes of the meeting.

The director must not take part in the deliberations on the conflicting matter. The board of directors must report, at the next SGM, on transactions in which any director has had an interest conflicting with that of the company.

As an exception, where the company comprises a single director, any transactions made between the company and its director who has an interest conflicting with that of the company only has to be mentioned in the minutes.

Where, because of a conflict of interest, the number of members required by the articles to decide and vote on the relevant matter is not reached, the board can, unless otherwise provided for by the articles, decide to refer the decision on that matter to the SGM.

The above does not apply where the decision of the board of directors or by the single director relates to ordinary business entered into under normal conditions.

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

Apart from the transactions in which a director has a conflict of interest (see *Question 28*), most of the restrictions on transactions between third parties and the company also apply to transactions between third parties and a director.

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

- The transaction is realised on fair market conditions, especially with regard to interest received and security granted by the company.

- The transaction is submitted for prior approval by the SGM, which must be provided with a written management report indicating the:
    - reason for the transaction;
    - benefit to the company of entering into the transaction;
    - conditions and risks; and
    - financial conditions.

- The aggregate financial assistance granted to third parties will not result in the reduction of the net assets below the subscribed capital plus non-distributable reserves.

If these conditions are not met, a director can be subject to a prison sentence of between one month and two years and/or a fine of between EUR5,000 and EUR125,000.

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

There are no specific restrictions on the purchase or sale by a director of the shares and other securities of the company of which they are a director. The general restrictions on the redemption of own shares apply to all shareholders, whether or not they are a director in the issuing company.

Disclosure of Information

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

The Public

All Luxembourg commercial companies must be registered with the RCS where they must file certain information/documents under the liability of the members of their management body. The RCS is open to the public which therefore has free access to the information on it and any changes made to it, including, among others, the:

- Address of the registered office.
- Corporate name and legal form.

- Share capital amount.
- Identity and address of the directors and auditors.
- (For an SARL): identity and address of the shareholders along with the number of shares held by each of them.
- Articles (and any amendments to them).
- Annual accounts.

Companies registered with the RCS must file information on the RBE on their ultimate beneficial owner(s) (UBO(s)) or in the absence of any UBO, on their senior managing officials. This includes the nature and scope of the interest they hold in the entity and their:

- Name.
- Nationality.
- Date and place of birth.
- Country of residence and national identification/registration number.

There is however an exception for companies whose securities are admitted to trading on a qualifying regulated market, which are only required to provide the name of the market on which their securities are traded.

On 22 November 2022, access to the RBE by the public was suspended and has been then progressively restored to certain professionals and to registered entities (see *Question 1*).

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

Both the Companies Law and various other laws require the provision and or/disclosure of certain information to the public and/or regulatory bodies.

Shareholders

Both the Companies Law and other laws require the provision and or/disclosure of certain information to shareholders. Under the Companies Law, these requirements include, for example, the following for an SA and an SARL:

- Each shareholder has the right to inspect the shareholders' register at the registered office of the company.
- Before the holding of the SGM called to approve the annual accounts for the ended financial year, any shareholder has the right to inspect at the registered office of the company or to request from the company all documents relevant to this meeting (management report, financial statements, auditor report and so on).
- (SA only): in the case of amendments to the articles, shareholders have the right to inspect the text of the proposed amendments and the draft amended articles before the meeting which will decide on the amendments.
- Mergers and demergers: the common draft terms, annual accounts and management report(s) must be made available to the shareholders at least one month before the meeting at the registered office of the company or on request.

- One or more shareholders representing at least 10% of the share capital or 10% of the voting rights can ask for information/explanations in writing to the management body for clarification on one (or more) management transactions. If there is no answer from the management body within one month from the request, the requesting shareholders can request the commercial court to appoint one or more experts to issue a report on the transactions referred to in the initial written request.

Listed Companies

Listed companies must disclose the following:

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

(Law of 11 January 2008 on transparency requirements for issuers of securities, as amended).

Shareholder Rights

Company Meetings

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

Subject to certain exceptions or adjustments, shareholders usually have exclusive competence to resolve on the following matters (among others):

- Operations regarding the share capital (for example, increase or decrease).
- Dissolution of the company.

- Conversion into another legal form.
- Appointment of directors and auditors.
- Approval of the annual financial statements and allocation of profits.
- Any amendment to the articles.
- Approval of share transfers to non-shareholders (in an SARL).

In an SA, an SGM must be held when needed to decide on any of the matters falling within the competence of the shareholders under the law or the articles. At least one SGM must be held each year within six months of the financial year end to approve the annual accounts.

In an SARL, decisions must be taken by the shareholders as often as needed and, in any case, at least once a year, within six months of the financial year end to approve the annual accounts. Decisions can be taken by written (or circular) resolutions. SGMs are however required to be held in the following cases:

- Where the number of shareholders is more than 60.
- For amendments to articles.
- When shareholders representing more than half of the share capital convene one.
- The articles of companies may provide for the right of the shareholders to participate in the SGM by videoconference or other means of telecommunication that ensures their identification. In an SARL, at least one shareholder or their representative must be physically present at the registered office during the meeting.
- The articles may also authorise shareholders to vote by correspondence through voting forms.

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

Notice

All notice requirements must be set out in the company's articles:

- **SARL.** SGMs are convened by the managers, the supervisory board (if any), or by shareholders representing more than half of the capital. There are no specific provisions in the Companies Law on convening SGMs except that registered letters are compulsory if the shareholders must be convened or consulted a second time. Meetings must be convened with reasonable notice.
- **SA.** The board of directors, management board, supervisory board (if any) and the internal auditors (*commissaires*) can convene the SGM. Shareholders representing at least 10% of the share capital can also require the board of directors to convene an SGM.

- The convening notices for every SGM must:
    - contain the agenda;
    - take the form of announcements filed with the RCS and be published on the Luxembourg electronic compendium of companies and associations (*Recueil Electronique des Sociétés et Associations*) (RESA) and in a newspaper published in the Grand Duchy of Luxembourg at least fifteen days before the SGM.

  The convening notices must be communicated to registered shareholders at least eight days before the meeting by post unless the addressees have individually agreed to receive the convening notices by other means. No proof need be given that this formality has been complied with.

  Where all the shares of the SA are in registered form, for any SGM the convening notices can be communicated at least eight days before the meeting by registered letters only, without prejudice to other means of communication which must be accepted on an individual basis by their addressees and to warrant notification. In this case, the convening notices do not need to be published on the RESA or in a newspaper.
- If all shareholders are present or represented at an SGM, they can unanimously waive the convening formalities for the meeting.

Attendance

Any shareholder, whether or not they have the right to vote, must have access to the SGMs and is entitled to participate in discussions and ask questions during the meeting.

In an SA, the following can also attend:

- Bondholders (unless otherwise provided for in the articles).
- Holders of profit shares (*parts bénéficiaires*) (only if permitted by the articles).
- Directors.
- Members of the management and supervisory boards.
- Internal auditor.

The SGM can also invite any other person (for example the statutory auditor) to attend the meeting.

Shareholders can attend SGMs in person, through a proxy or by using video conference or other telecommunication means permitting their identification (if the articles allow for this).

Voting Requirements

Each shareholder can take part in collective decisions irrespective of the number of shares they own. Unless shares are issued without voting rights, each shareholder has voting rights commensurate with its shareholding.

Where shares do not have an equal value, or where there is no indication of value, each share (unless otherwise provided for in the articles) carries the right to a number of votes proportionate to the share capital represented by it, with one vote being allocated to the share that represents the lowest proportion.

In an SA and SARL, shareholders can waive their voting rights temporarily or definitively. The management body can suspend a shareholder's voting rights where there has been a breach of provisions of the articles or of any separate agreement.

Voting arrangements are allowed, subject to certain conditions.

Majority and Quorum

The following apply for ordinary SGMs:

- In an SARL, decisions are adopted by shareholders representing more than half of the share capital. If half of the share capital is not present or represented at the first meeting or consultation, the shareholders will be convened or consulted a second time (by registered letter), and the decisions are taken by a majority of the votes cast, irrespective of the portion of the capital represented.
- An SA has no quorum conditions. Decisions are adopted by a majority of the votes cast irrespective of the number of shares represented.

The following apply for extraordinary SGMs:

- In an SARL, decisions are taken by shareholders representing at least 75% of the share capital.
- In an SA, deliberations require at least 50% of the share capital to be present or represented. Decisions are adopted by at least two-thirds of the votes cast. If the quorum is not reached, minutes will be drawn up to record that fact and a new meeting can be convened and resolutions can be passed by the same two-thirds majority, regardless of the portion of the capital represented.

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

Under the Companies Law, specific voting majorities for certain operations are required, for example:

- SA and SARL: the unanimous consent of the shareholders is required to increase their commitments or convert the company into another legal form with unlimited liability.
- SARL: shareholders representing at least 75% of the share capital must approve any transfer of shares made *inter vivos* to non-shareholders (the articles can lower this majority to half of the share capital).
- SA: if, as a result of losses, the company's net assets fall below half of its corporate capital, the SGM must resolve on the possible dissolution of the company. This decision will be passed with the majority of the votes cast. If, as a result

of losses, the company's net assets fall below the quarter of its share capital, dissolution can take place if approved by a quarter of the votes cast at the meeting.

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

For an SA, SAS, SCA or SARL, shareholders representing at least 5% of the share capital can:

- In a merger, require an SGM of the absorbing company to be convened to decide whether to approve the merger.
- In a demerger, require an SGM of the recipient company to be convened to decide whether to approve the demerger.

For an SA and SCA:

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

Minority Shareholder Action

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

The main actions that minority shareholders can bring include:

- Shareholders representing at least 5% of the share capital of an SA can, in the context of an increase of the share capital of the company by way of a contribution in kind, require a valuation of the contributed assets by an approved statutory auditor.
- Shareholders representing at least 10% of the share capital or 10% of the voting rights can ask for information/ explanations in writing to the management body for clarification on one (or more) management transactions. If there is no answer from the management body within one month from the request, the requesting shareholders can request the commercial court to appoint one or more experts to issue a report on the transactions referred to in the initial written request.
- Shareholders of an SA representing at least 10% of the voting rights can bring an action on behalf of the company against the management or supervisory board.

Internal Controls, Accounts and Audit

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

The largest companies and groups of companies must disclose non-financial information concerning company policy, risks and performance relating to social, environmental and employee matters, respect for human rights, anti-corruption and bribery matters in one of the following:

- The annual management report published each financial year.
- A non-financial statement document filed with the RESA.
- On the company's website.

(Law dated 23 July 2016 relating to the disclosure of non-financial and diversity information by certain large undertakings and groups).

In addition, the X Principles provide recommendations with respect to internal control and risk management for listed companies.

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

In addition to any potential civil liability, directors can be held personally and criminally liable for:

- Failing to submit the annual accounts, the consolidated accounts or the management report to the SGM within six months from the end of the financial year.
- Failing to publish any of the above on the RESA within the legal deadline.

On conviction for one of the above, directors will be subject to a fine of between EUR500 and EUR 25,000 or, where there is fraudulent intent, to a prison term of between one month and two years and/or a fine of between EUR5,000 and EUR125,000.

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

An SA, SAS and an SARL with more than 60 shareholders must be supervised by one or more internal auditors (*commissaires aux comptes*).

An SCA is supervised by a board of three internal auditors (except where an approved statutory auditor (*réviseur d'entreprises agréé*) is appointed).

However, an approved statutory auditor must audit the annual accounts of an SA, SAS, SCA or SARL if two of the following thresholds are reached during two consecutive financial years:

- The total balance sheet exceeds EUR4.4 million.
- Net profits exceed EUR8.8 million.
- The average number of full-time staff employed exceeds 50 employees.

The supervision by a statutory auditor ceases to be required when the company no longer exceeds these criteria for two consecutive financial years.

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

Auditors are appointed by the SGM. The mandates of the internal auditors cannot exceed six years and are renewable. While the approved statutory auditor must be appointed for a fixed term, the Companies Law does not expressly provide for any minimum or maximum term for which they must be appointed. In practice, however, approved statutory auditors are appointed for a one-year term, renewable.

Approved statutory auditors are subject to specific legislation and set of ethical rules which may affect the duration of their mandate.

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

Luxembourg law does not set any obligation in terms of competence or qualifications for the internal auditors who are part of the corporate bodies of the company. In practice, the internal auditors are usually a shareholder or an employee of the company or a trusted person of the shareholders.

Statutory auditors must be chosen from the statutory auditors that have been approved and authorised by the CSSF and registered in the public register of the approved statutory auditors' association. The activities of a statutory auditor must meet certain legal requirements in terms of qualification, professional integrity and independence and are incompatible with any other activity which may affect the auditor's professional independence (see *Question 42*).

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

The Law of 23 July 2016 related to the audit profession, as amended, provides for certain restrictions to ensure the independence of statutory auditors when they audit the accounts of a company.

In particular, when carrying out a statutory audit of the accounts, the statutory auditor must:

- Not be involved in the decision-making process of the audited entity.
- Ensure that their independence will not be affected by any existing or potential direct or indirect conflicts of interest or business or other relationships.
- Refrain from owning or having a substantial and direct interest in an audited entity, or from any transaction involving a financial instrument issued, guaranteed or otherwise supported by an audited entity.

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

Auditors have obligations and must perform their duties as a reasonably diligent professional. Auditors are liable:

- In contract: to the company and third parties for any damage resulting from the breach of a legal provision or of the company's articles. The SGM can discharge the internal auditors for liability for any offences in which they have not participated if they have performed their functions in the normal course of their duties and the offences were reported to the board.
- In tort: for wrongful misconduct, if the interested party proves a fault, a loss and a causal link.
- In criminal law: if the auditor participated in the preparation or execution of a criminal offence.

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

Luxembourg law does not recognise the concept of company secretaries and there is no equivalent role.

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Areas of Practice. Member of the Corporate/M&A practice of Luther's Luxembourg office. Advises major multinational groups and private equity investors on both domestic and international transactions (mergers and acquisitions, joint ventures, private equity), group restructuring or reorganisation and corporate governance issues. Extensive experience in the field of national and cross-border mergers and acquisitions and structuring investments through Luxembourg companies, in share deals or assets deals.

Languages. French, English

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RESOURCE HISTORY

Law stated date updated following periodic maintenance..

This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 1 August 2023.

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