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Judicial suspension of a decision taken at a General Meeting: procedural details in Luxembourg

The life of a company is not always a smooth ride. The "affectio societatis" (i.e. the willingness of the partners to work together) of the first few months can sometimes disintegrate and dissension can arise between the partners. General meetings can be the perfect forum for expressing these disagreements, but they can also be a means of maneuvering to exclude a partner or increase his influence over the company.

Luxembourg law provides that any shareholder who feels aggrieved may apply to a court to have a decision taken at a general meeting set aside in certain cases listed in Article 100-22 (1) of the Law of 10 August 1915 on commercial companies, as amended (hereinafter the "**LSC**"). These cases include deliberations on topics which, for fraudulent purposes, were not included on the agenda, or decisions taken by a person who did not have the authority to do so.

Such annulment must be sought through the courts, in the context of main proceedings, which can be very lengthy, with the result that the decision may already have produced effects that could be irremediable.

In order to remedy this risk, the Luxembourg legislator has expressly provided for the possibility for an aggrieved partner, until the decision is annulled, to request the suspension of the execution of the decision of the general meeting. Article 100-22 (3) of the LSC provides that "The applicant for nullity may apply in summary proceedings for the provisional suspension of the execution of the contested decision". By referring to the "applicant for nullity", the text may lead to confusion, as it suggests that it would be necessary to have already brought an action for nullity in order to apply for such a suspension at the same time. However, Luxembourg case law holds that it is not necessary for an action for nullity to have been brought in order to be able to apply for suspension by way of summary proceedings.[1]

1 Court of Appeal, 27 April 2022, decision number CALL-2022-00312 and CAL-2022-00313

The text also specifies that the action must be directed against the company, which facilitates the task of the plaintiff, who does not have to consider which parties should be involved (shareholders, directors, etc.).

It should be noted that the Luxembourg District Court recently confirmed that article 100-22 (3) is not an independent legal basis for summary proceedings. As a consequence, anyone wishing to seek suspension of the decision of the general meeting must comply with the conditions set under the articles specific to summary proceedings, i.e. in particular articles 932, para. 1 and 933, para. 1 of the New Code of Civil Procedure (hereinafter the "**NCPC**").[2]

Under these provisions, the summary proceedings judge may only take temporary measures (such as suspending a general meeting decision) if (i) there is a manifestly unlawful disturbance or imminent harm, or (ii) the applicant's claim cannot seriously be disputed.

As a matter of principle, it is generally considered that the courts should only intervene cautiously in the corporate life of a company as long as its organs are in a position to function normally.[3]

Proof of the existence of a manifestly unlawful disturbance or imminent harm may be difficult to provide, as it will be necessary to demonstrate an undisputed infringement of a right or that irreparable harm is about to occur, it being understood that the defendant may claim to be within his rights and put forward arguments that could constitute a serious dispute. Such a challenge will then require an in-depth examination of the dispute, which the summary proceedings judge cannot do insofar as he remains the judge of the obvious and the indisputable.

In the event of doubt, the judge may not grant the application for suspension. As a result, these summary proceedings are likely to succeed only in flagrant and urgent cases, in particular if the company's corporate management is no longer assured, if the corporate bodies are paralysed or if there is a proven risk of action against the company's corporate interests, and provided that the applicant acts quickly.

It should be noted that it is possible to use a specific procedure consisting of asking the first president of the District Court for authorisation to issue a writ of summons at very short notice (article 934, para. 2 of the NCPC) in order to obtain a decision more quickly. This procedure undeniably saves time and is perfectly suited to the urgent nature of a request for suspension of a general meeting decision.

Your contact persons

Mathieu Laurent
Avocat à la Cour, Partner
Luther S.A. Luxembourg
T +352 27484 1
mathieu.laurent@
luther-lawfirm.com

Grégory Maricle
Avocat, Senior Associate
Luther S.A. Luxembourg
T +352 27484 1
gregory.maricle@
luther-lawfirm.com

2 District Court, 6 October 2023, decision number TAL-2023-07128

3 E. PENNING, « Le référé ordinaire en droit luxembourgeois », Bull. Cercle Fr. Laurent, IV, 1989, p. 55, n° 45

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