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Corporate Governance

Luxembourg

Law & Practice

Bob Scharfe, Selim Souissi and Marion Lanne
Luther S.A.

Trends & Developments

Bob Scharfe and Marion Lanne
Luther S.A.

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LUXEMBOURG

Law and Practice

Contributed by:

*Bob Scharfe, Selim Souissi and Marion Lanne
Luther S.A. see p.19*



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1. INTRODUCTION

1.1 Forms of Corporate/Business Organisations

The most frequently used legal forms in Luxembourg are companies with limited liability, which represent the absolute majority of all newly established companies, where the liability of all shareholders is limited to the amounts of their contributions – this includes public limited liability companies (*société anonyme* or SA) and private limited liability companies (*société à responsabilité limitée* or SARL); and partnerships, where the liability of one or more shareholders is unlimited, joint and several – this includes partnerships limited by shares (*société en commandite par actions* or SCAs), limited partnerships (*société en commandite simple*) and special limited partnerships (*société en commandite spéciale*).

Simplified joint-stock companies (*sociétés par actions simplifiée*) are also increasingly used due to their contractual basis and simplified governance handled by its president.

This chapter will focus only on SAs, SARLs and SCAs.

1.2 Sources of Corporate Governance Requirements

The principal source of corporate governance applicable to both listed companies – whose shares are listed either on the official list of the Luxembourg Stock Exchange (LuxSE) and admitted to trading on one of the two markets of the LuxSE, either the regulated market or the multilateral trading Euro MTF market (listed companies) – and to companies whose shares are not listed, is the law dated 10 August 2015 on commercial companies, as amended (the “Companies Law”).

Additionally, certain further legal provisions apply to companies whose shares are publicly

traded, as explained further in **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**.

1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares

In addition to the Companies Law which applies to listed companies, other regulations apply.

X Principles

The X Principles of Corporate Governance of the LuxSE, as lastly revised in December 2017, (the X Principles) apply to all companies whose shares are admitted to trading on the regulated market and include:

- a series of mandatory general principles regarding the general corporate governance framework, duties and responsibilities of the board, its remuneration, its composition and appointment procedures for the members of the board of managers and the members of the special committees, financial reporting, internal control, risk management, certain shareholders’ rights and corporate social responsibility (CSR);
- recommendations, which describe the proper application of the general principles; they are based on a “comply or explain” principle and, the company which considers that a particular recommendation does not suit its situation can ask not to comply with it; and
- guidelines, which reflect the best corporate practices and are optional.

Rules and Regulations of the LuxSE

The Rules and Regulations of the LuxSE, as lastly revised in January 2020, (the “Rules and Regulations”) set out the disclosure requirements for listed companies. They are mandatory for listed companies but the LuxSE may exempt an issuer from publishing certain information in some particular cases.

The following mandatory laws and regulations also apply to listed companies with certain exceptions, as described below:

- the Luxembourg law dated 16 July 2019 relating to prospectuses for securities, as amended, implementing Regulation (EU) 2017/1129 (the “Prospectus Law”);
- the Luxembourg law dated 11 January 2008 on transparency requirements for issuers, as amended, implementing EU Directive 71/3013 (the “Transparency Law”) – such legislation applies to issuers for which Luxembourg is the home member state in accordance with the Transparency Law; and
- the Luxembourg law dated 23 December 2016 on market abuse (Market Abuse Law), as amended, implementing Regulation 596/2014 (the “MAR Regulation”) – the MAR Regulation and the texts adopted for its implementation put into place a new legal framework for the prevention, detection, investigation and the punishment of market abuse.

However, listed companies whose shares are admitted to trading on the Euro MTF are only subject to the Market Abuse Law, at the exclusion of the Prospectus Law and of the Transparency Law, which apply to the regulated market only.

Other Authorities/Laws

The Luxembourg national regulatory authority, the *Commission de Surveillance du Secteur Financier* (CSSF) has issued various circulars, recommendations and instructions related to the corporate governance in relation to entities supervised by the CSSF and applicable to listed companies.

Finally, the Luxembourg law dated 24 May 2011 relating to the exercise of shareholders’ rights in shareholders’ meetings of listed companies, as

amended by the law of 1 August 2019 (Shareholders’ Rights Law), applies to listed companies whose shares are admitted to trading on the regulated market.

2. CORPORATE GOVERNANCE CONTEXT

2.1 Key Corporate Governance Rules and Requirements

In addition to the above-mentioned laws and regulations, the articles of association (the “Articles”) of both listed companies and non-listed companies govern the decision-making process within a company at the level of the board and of the shareholders and regulate the relationship between shareholders, the company and third parties, subject to the mandatory provisions of the Companies Law.

2.2 Environmental, Social and Governance (ESG) Considerations

The X Principles provide that “the company shall define its corporate social responsibility policy with respect, including to it those responsibilities related to social and environmental aspects. It shall set out the measures taken for its implementation of that policy and shall provide for these to be adequately published.”

Furthermore, LuxSE set forth guidelines for reporting on ESG aspects dedicated to companies, issuers of sustainable debt instruments, and asset managers active in sustainable and responsible investment funds (LuxSE Guidelines) which suggest, among other to:

- determine the roles, responsibilities and capabilities within the company relevant to ESG reporting;
- align ESG reportings with the corporate strategy so that goals related to internal and

- external stakeholders and impact decision-making are properly addressed;
- engage stakeholders which is of good practice towards any relevant risk management and mitigation activity;
 - identify and understand the audience and their concerns (for instance, long term investors concerned about the effects of climate change on the activity);
 - identify the themes and define the relevant matrix for the business strategy with a link between both long-term and short-term value creation;
 - assess the relevance of performance indicators by using widely accepted indicators developed via a credible process;
 - identify the format and communication channel to ensure that investors receive relevant, easily accessible, comparable and timely information; and
 - bring ESG reporting quality up to financial grade reporting.

3. MANAGEMENT OF THE COMPANY

3.1 Bodies or Functions Involved in Governance and Management

In relation to SAs and SARLs, the Companies Law provides for the principle of the separation of powers between the shareholders and the management of the company, according to which the management body has exclusive powers to manage the company's affairs and determine its strategy.

In Luxembourg SAs, the management body is represented either by a board of directors, or by a management board and a supervisory board (see **4.1 Board Structure**) which may be assisted by additional bodies and/or individual executives.

Additional Collegiate Executive Bodies

Management committee (comité de direction)

If provided for in the Articles, the board of directors may transfer its management powers to a management committee, which will manage and represent the company, save for the actions listed in **3.2 Decisions Made by Particular Bodies** (Decisions of the Additional Collegiate Executive Bodies). This option is mainly used by large-size companies with a large number of day-to-day operations.

Additional committees

The board of directors may create additional committees, which shall advise the board of directors on specific issues and report to them. It shall determine their composition and duties. While this possibility is optional for non-listed companies, listed companies whose shares are admitted to trading on the regulated market are obliged to establish special committees – such as nomination, remuneration, and audit committees – in accordance with the X Principles.

General board (conseil général)

The directors and supervisory auditors (commissaries) may together constitute the general board, the role and functions of which shall be determined by the Articles. However, this body is rarely used in practice.

Additional Single-Person Executive Bodies

Day-to-day manager

The management body may delegate the day-to-day management and the power to represent the company in this context to one (or more) directors, officers, managers or other agents, acting alone or jointly.

Managing executive officer (directeur général)

The company may delegate the management powers to the managing executive officer as an

alternative to the appointment of a management committee.

SARLs are managed by one or more managers, which may form the board of managers. They may also delegate the day-to day management and the power to represent the company to one or more managers, officers and other agents.

SCAs are managed by general partners, who have unlimited, joint and several liability for the commitments of the partnership. The delegation of management powers to a third party is possible. Partners with limited liability cannot undertake acts of management under the risk of being indefinitely and jointly and severally liable towards third parties for all acts of management performed by them.

Observers

In connection with private equity or venture capital transactions, observers are often appointed to attend and participate to board meetings without any voting rights.

3.2 Decisions Made by Particular Bodies

The board of directors or the management board in SAs are vested with the most extensive powers to achieve the company's objective, save in particular for the powers reserved by law or by the Articles to the shareholders such as:

- approval of the company's annual accounts, distribution of the annual dividends;
- appointment and removal of the directors and auditors, granting them a discharge;
- modification of the Articles;
- increase or reduction of the share capital of the company; and
- decision to put the company into liquidation.

In case of delegation of their functions to the additional collegiate or single-person executive

bodies described above, their decisional powers will be limited to the following.

Decisions of the Additional Collegiate Executive Bodies

Management committee (comité de direction)

In case of delegation to the management committee, the board loses its right to manage the company, but keeps the rights to perform the actions reserved to the board by other legal provisions (such as distribution of interim dividends, capital increase by way of authorised capital, etc) and the rights relating to the general policy of the company. The notion of "general policy" is not defined by law and shall be defined by the Luxembourg courts on a case-by-case basis. Doctrine admits that the decisions on defining the company's long-term strategies, opening or closing of the company's subsidiaries and branches, making strategic investments and issue of debt instruments belong to the company's general policy.

Additional committees

If created, additional committees review specific issues determined by the board and make their recommendations. Thus, in listed companies whose shares are admitted to trading on the regulated market, nomination committees prepare the plans for the succession of the directors by reviewing, evaluating and suggesting the candidates. The remuneration committee defines the remuneration policy for the directors.

The audit committee intervenes in the areas of financial reporting, internal control and risk management. The additional committees are not allowed to act towards third parties, their role being limited to providing internal advice to the board.

General board (conseil général)

The general board usually plays an advisory role by issuing the recommendations in relation

to major transactions to be entered into by the company. If provided for in the Articles, it may also take decisions on specific issues.

Decisions of the Additional Single-person Executive Bodies

Day-to-day manager

The day-to-day manager shall be entrusted with the capacity to take on a daily basis the decisions, which are considered to be common, routine and standard for the company taking into account its corporate purpose. Such delegation shall not cover the totality of the acts of management and excludes the decisions on operations which are considered as unusual or are of high importance for the company (either by their amounts or by their consequences).

Managing executive officer (directeur général)

If appointed, the managing executive officer shall be entrusted with identical powers as the management committee. Each manager of a SARL may carry out all operations which are necessary or useful for the company's purpose.

Any limitations to the powers of the board of directors or management board (for SAs) or board of managers (for SARLs) resulting from the Articles or from the decision of the competent corporate bodies are not valid vis-à-vis third parties, even if published.

In SCAs, the unlimited partners are vested with the broadest powers, which shall be defined by the partnership agreement. The limited partners may have an advisory or a supervisory role.

3.3 Decision-Making Processes

Board Decisions

In SAs, unless the management powers are delegated to additional bodies, decisions are taken by the board of directors or the management board, acting as a collegiate body through

deliberations in accordance with the provisions of the Articles. The board meets as often as the company's interest so requires upon the request of the chairman or the members of the board at the place and on the date indicated in the convening notice to the meeting. The notice is not required if all members of the board are present or represented and if they state they have full knowledge of the agenda of the meeting.

The board may validly deliberate and make decisions only if the majority of its members are present or represented; decisions are adopted by the simple majority of its members (save for the stricter provisions in the Articles). A member of the board may act at any meeting of the board by appointing another director as their proxy. Provisions of the law of 23 September 2020 (the COVID-19 Regulation) which are applicable until 31 December 2021 allows directors to:

- attend a meeting by virtue of telecommunication means permitting their identification; and
- adopt decisions by written circular resolutions.

Delegation

In case the board of directors or the management board delegated its powers to the management committee, the deliberation process is as set out in the Articles and, in case the Articles are silent in this regard, it shall be defined by the board. In case the board did not provide for any specific decision-making process, the rules for holding of a meeting of the board shall be applied by analogy. In SARLs and SAs, resolutions may also be passed, if permitted by the Articles, by unanimous written consent of the members.

In SARLs, the decisions shall be adopted in accordance with the procedure established by the Articles. In case the latter are silent, the rules provided for SAs shall apply.

The decision-making process in SCAs is regulated by the partnership agreement.

4. DIRECTORS AND OFFICERS

4.1 Board Structure

In SAs, the management may be organised under a one-tier or a two-tier structure. In a one-tier structure, which is the most common for both listed and unlisted companies, companies are managed by the board of directors, whereas in a two-tier structure by the management board acting under the supervision of the supervisory board.

Such possibility does not exist for SARLs and SCAs.

4.2 Roles of Board Members

The management body shall act and take the decisions as a collegial body. There are a few exceptions to this rule, such as companies with a single director, delegation of the daily management to the day-to-day management or an authorisation given to one or more directors to represent the company in legal proceedings.

In accordance with the Companies Law, the board of directors or the management board and the supervisory board may elect a chairman among their members. The role of the chairman differs depending on whether the chairman has been appointed in a listed or an unlisted company.

In unlisted companies the chairman does not have a particular role. They preside over the board discussions, has a casting vote (unless otherwise provided for in the Articles) and may have general powers of representation of the company. In listed companies whose shares are admitted to trading on the regulated market, and

in accordance with the X Principles, the chairman prepares the agenda for the board meetings after consulting the chief executive officer (CEO) or the senior independent director, and ensures the proper application of the internal procedures.

4.3 Board Composition Requirements/ Recommendations

Number of Directors

An SA with a one-tier structure shall have a board of directors composed of at least three members (only one for a single-shareholder company). Companies with two-tier structures shall appoint at least three members to the supervisory board (only one for a single-shareholder company) and at least two members on the management board (one for companies with one shareholder or if the company's share capital is less than EUR500,000). In practice, companies (be they listed or unlisted) often have an odd number of directors in order to avoid deadlock caused by a tie vote.

Boards with an even number of directors often give a casting vote to the chairman. Companies employing at least 1,000 employees over the last three years must appoint at least nine directors.

In listed companies whose shares are admitted to trading on the regulated market the created special committees shall be composed of at least three members. Companies Law does not fix the maximum number of directors. However, pursuant to the X Principles, 16 directors is considered as a reasonable limit.

Qualities and Qualifications

Company shareholders and employees may be appointed as directors. Nevertheless and pursuant to the recommendation of the X Principles, each director shall avoid any direct or indirect conflict of interest with the company or any subsidiary controlled by the company (see **4.5**

Rules/Requirements Concerning Independence of Directors).

Even if the Companies Law does not provide any requirements regarding the director's skills or abilities, the general duty of skills has been confirmed by Luxembourg courts. Persons accepting a mandate of directorship shall ensure that they have all necessary skills and qualities to perform their duties.

For listed companies whose shares are admitted to trading on the regulated market, the X Principles provide that directors shall be honest and have complementary experience and knowledge useful to the company, knowledge that shall be kept up-to-date.

Gender, Nationality and Age

There are no gender quotas, or nationality restrictions for the members of the management body. The directors shall have full legal capacity to act. Persons under guardianship or curatorship are not allowed to manage a company.

The X Principles recommend companies to have an equal number of male and female board members and an appropriate representation of geographical origin on their boards of directors. It is further recommended to include in the CSR report the gender balance as CSR performance indicator.

Natural or Legal Entities

A company may be managed by a legal entity (or legal entities), in which case such entity shall appoint a permanent representative to exercise the relevant duties in the name and for the account of the legal entity (applicable only to SAs).

Incompatibility

Except specific cases where a special authorisation may be obtained, Luxembourg public or

military servants, notaries, the company's auditors and members of the Luxembourg judicial order are prohibited from being directors in a Luxembourg company.

In addition, the X Principles recommend directors to limit the number of their other professional commitments (especially offices held at other companies) in order to dedicate sufficient time and attention to fulfil their duties properly, which shall depend on the nature, size, and complexity of the relevant company's business.

4.4 Appointment and Removal of Directors/Officers

In SAs with one-tier structures, the members of the board of directors are appointed and removed by the shareholders. In SAs with two-tier structures, the members of the management board are appointed and removed by the supervisory board. The Articles may also give an exclusive competence to the shareholders to appoint/dismiss members of the management body. The term of the mandate of the board members (for both structures) cannot exceed six years.

In case of vacancy of a director, the remaining directors may co-opt a new director on a temporary basis, which shall be approved by the shareholders at the next general meeting. The chairman is appointed and dismissed internally by the directors. The shareholders can also revoke him.

In SARLs, the members of the board of managers are appointed and dismissed by the general meeting of the shareholders for a limited or unlimited period of time. Except if allowed by the Articles, the managers cannot be dismissed without a legitimate reason.

The X Principles further recommend the establishment of a formal procedure for the appoint-

ment of directors and the establishment of a nomination committee, composed of non-executive directors, to assist in the selection of directors, made amongst a list of candidates submitted by the board of directors which shall take account of the specific features of the company.

4.5 Rules/Requirements Concerning Independence of Directors

The question of independence is not regulated by the Companies Law. For listed companies whose shares are admitted to trading on the regulated market, the X Principles recommend having at least two independent directors, who do not have any significant business relationship with the company, close family relationship with any member of the executive management, or any other relationship with the company, its controlling shareholders or executive managers. The companies shall draft a detailed list of criteria in order to assess the independence of the directors.

Any director having a direct or indirect financial interest in a transaction that conflicts with the company's interest shall declare such conflict at the relevant board meeting, abstain from taking part in the deliberation and cause a record of his/her statement to be included in the minutes of the meeting. A special report shall be made at the next general meeting of the shareholders or to the management body detailing the conflict of interest concerning the member of the management committee, the managing executive officer.

According to the X Principles, in listed companies whose shares are admitted to trading on the regulated market, the director being in a situation of conflict of interest shall disclose such conflict to the chairman and then submit it to the audit committee or the statutory auditor.

4.6 Legal Duties of Directors/Officers

The scope of duties and obligations of directors set out above is likely to vary depending on the nature of their relations with the company and of their status within the company (whether they are executive, non-executive, independent or paid directors).

Duty to Manage Carefully and Wisely

In ordinary business circumstances, directors are expected to manage carefully and wisely (*en bon père de famille*) by providing due care to the management of the company's business. This shall not necessarily consist of in-depth and exhaustive care but of "informed care" – ie, in accordance with what is usually expected from a "reasonable" director put in the same circumstances. In the context of the COVID-19 pandemic, such duties were increased in particular with regards to the monitoring of the company's finances.

Duty of Loyalty

Directors have a duty of loyalty that consists in "general and absolute duty to ensure that the general interest of the company prevails over their personal interest" which implies for directors:

- to put the company's interests over their own;
- to avoid any situation of conflict of interest;
- not to take undue advantage of their position to the detriment of the company; and
- not to exercise any activity which competes, directly or indirectly, with the activity of the company they manage.

Duty of Diligence

The duty of diligence is a legal obligation of directors to perform their functions with care, diligence and in good faith, as an ordinarily prudent and diligent (ie, "reasonable") director placed in the same circumstances.

Subject to such duty, directors are expected to:

- exercise their functions personally;
- act in full knowledge and seek out all necessary information; and supervise other directors or persons to whom the board delegated its functions (in particular, the day-to-day manager or the management committee).

Duty of Skills and Availability

Directors shall have all the necessary skills, qualities and availability in order to exercise their functions and to keep them up-to-date.

Accepting a mandate of director while being aware of an inability to exercise it properly may be considered as a fault of management, entailing a lack of seriousness in the performance of their functions. Accepting a mandate while not being able to assume the function, being passive in the exercise of the mandate, or never attending the meetings of the board are a few of the management faults that may be attributed to directors.

Considering those duties, Luxembourg courts decided that “the acceptance of a fictive mandate of director and the lack of care in the preparation of annual accounts by refraining from any participation in the life-cycle of the company, imposed on any person that has accepted the functions of director, is a management fault”.

Duty of Confidentiality

Directors shall keep material non-public information about the company and its performance confidential.

The X Principles further specify that any information received in their capacity as directors shall not be used for any other purpose than for fulfilling their mandate.

4.7 Responsibility/Accountability of Directors

Directors owe their duties to the company, its shareholders, employees, creditors, third parties, national authorities and regulators.

Based on the X Principles, the listed companies whose shares are admitted to trading on the regulated market are subject to additional duties and responsibilities related to social and environmental aspects.

4.8 Consequences and Enforcement of Breach of Directors’ Duties Liability

Directors are liable to the company for the execution of their mandates and for any misconduct in the management of the company’s affairs, meaning for management errors (*faute de gestion*) or infringement of the general duty of care that would not have been committed by a normally prudent and diligent director, and that could have been avoided easily. Such breach may be enforced only by the company upon a collective decision of the shareholders – the individual shareholders cannot sue the directors solely.

The company’s shareholders, acting individually or on behalf of the company, and third parties can enforce a breach by the members of the board of directors or the management board, the managing executive officer of their management duties for all damages (caused to the individual shareholder, the company or to third parties) resulting from the violation of the Companies Law or the Articles, unless the directors were not responsible for such breach and reported it first to the general meeting. In such case the directors shall be jointly and severally liable both towards the company and any third parties.

Additionally, directors may be liable to the shareholders, acting individually and not on behalf of

the company, as well as to third parties, for the prejudice caused by their fault on the basis of the tortious liability.

Criminal Liability

Directors may also be held criminally liable in different cases (eg, offences relating to the normal running of the company, misuse of corporate assets and powers, offences under general criminal law). Luxembourg criminal law admits criminal liability of a corporate body. Companies are criminally liable for the offences committed on their account and for their interest by their corporate bodies or representatives (including de facto directors). The public prosecutor may choose to sue either the company, its representatives, or both of them.

Liability Towards Tax Authorities

Based on the law dated 22 May 1931, should the company fails to comply with its tax payment obligations, directors may be personally held liable towards Luxembourg tax authorities, even for the period before they took their duties.

Bankruptcy

A company's bankruptcy, if caused as a result of the serious and characterised misconduct of a director, may involve a responsibility of the directors.

Consequences

Consequences for the directors vary depending on the nature, type of alleged faults and damages: obligation to indemnify the party which suffered a damage, fines, imprisonment, prohibition from exercising a mandate or conducting the business or even personal extension of the bankruptcy to such director.

4.9 Other Bases for Claims/ Enforcement against Directors/Officers

Additionally, Luxembourg directors or officers can be liable for any breach of securities laws,

environmental, health, safety, antitrust, tax, or e-commerce laws, as well as the anti-money laundering and processing of personal data laws.

Besides, under the law dated 13 January 2019 transposing the Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "RBE Law") (see **6.3 Companies Registry Filings**) directors can be held criminally liable for the failure to file with the register of beneficial owners (RBE) the information on their company's beneficial owners (fines from EUR1,250 to EUR1.25 million).

The liability of a director or officer to the company (but not to third parties) can be contractually limited. However, director and officer insurance cannot cover criminal, tax or administrative penalties, or damages resulting from gross negligence and wilful misconduct.

4.10 Approvals and Restrictions Concerning Payments to Directors/ Officers

In SAs with one-tier structures, the shareholders fix the amount and modalities of payment of the directors' remuneration either in the Articles, or by taking separate resolutions. In case the Articles are silent on this subject and no decision has been taken by the shareholders, the board may decide itself on the amount of its remuneration. In such case, further approval and ratification by the general meeting of the shareholders will be required.

In SAs with two-tier structures, the type and amount of remuneration of the management board are determined by the supervisory board. The type of remuneration and the amount of fees payable to the members of the supervisory board are determined by the shareholders in the Articles or in separate resolutions. The remuneration

of the management committee, the managing executive officer and the day-to-day manager shall be determined by the Articles. In case of the absence of such provisions in the Articles, it shall be determined by the board.

Pursuant to the X Principles, listed companies whose shares are admitted to trading on the regulated market must structure the directors' remuneration in such a way as to protect the company against taking excessive risks. The shareholders shall approve the criteria for the directors' remuneration, as well as the various factors having an impact on the remuneration of the board members and the executive management. The X Principles recommend establishing a remuneration committee which will assist the board in drafting the remuneration policy.

4.11 Disclosure of Payments to Directors/Officers

The global amount of the emoluments granted during the company's financial year to the members of the management and supervisory bodies shall be disclosed in the notes to the company's accounts.

The X Principles recommend listed companies, whose shares are admitted to trading on the regulated market of the LuxSE, to place regularly on the agenda of the general meeting of the shareholders an item concerning the remuneration of the directors.

5. SHAREHOLDERS

5.1 Relationship between Companies and Shareholders

Further to the contribution of funds, assets or even services (in the form of industry) to the company, shareholders obtain certain financial and political rights and obligations towards the

company, which depend on the legal form of the company.

In SAs and SARLs, the liability of the shareholders is limited to the amounts of their contributions, and their impact on the strategic direction and the operations of the company is limited to the powers expressly reserved by law or by Articles. The main powers belong to the management body.

SCAs are constituted by the general partners, who have unlimited, joint and several liability for the company's duties and by limited partners, who are liable up to the amount of their contributions (unless they perform the acts of management).

Shareholders

Fair and equal treatment of shareholders is one of the key principles of corporate governance and also of the Companies Law. The X Principles and the Shareholders' Rights Law require that companies respect the rights of their shareholders and ensure that all their shareholders, majority or minority, receive equal treatment. Additionally, the X Principles oblige companies to define a policy of active communication with their shareholders.

5.2 Role of Shareholders in Company Management

In SAs and SARLs, shareholders can only appoint or revoke the management and must abstain from carrying out acts of management. Otherwise, they may be held liable as de facto directors under some circumstances. Their involvement in the company's management is limited to the functions reserved to them by law.

The Articles may provide for some additional functions, such as, for example, approval of the company's major transactions. However, any limitations to the powers of the management

body are not valid vis-à-vis third parties, even if published.

Shareholders

Shareholders may control the management body during the annual general meetings by asking questions regarding the company's operations and management during the financial year. Apart from that, the shareholders representing at least 10% of the corporate capital or votes, acting together or individually, may ask the management body in writing about acts of management, the company's operations or the transactions of one of the company's affiliated entities.

Certain matters must be reported to the shareholders by the management board. For example, transactions where the director or the manager is faced with a direct or indirect financial interest conflicting with that of the company must be presented to the shareholders in a special report at the next general meeting.

Additionally, in SAs, if, as a result of losses, the company's net assets fall below half of the corporate capital, the management body shall convene a general meeting in order to decide on a possible dissolution of the company with a majority of the votes cast (and with one-quarter of the votes cast if the net company's assets fall below one-quarter of the corporate capital).

Role of the Shareholders in Partnerships (SCAs)

As described in **3.1 Bodies or Functions Involved in Governance and Management**, SCAs are usually managed by one or more general partners who are jointly and severally liable for the obligations of the company. Each manager may take any actions on behalf of the company which are necessary or useful in order to fulfil the corporate object. Limited partners shall be prohibited from carrying out acts of management. However, they may execute the

documents on the manager's behalf acting as a proxy without incurring an unlimited and joint and several liability.

5.3 Shareholder Meetings

Annual General Meetings

SAs must hold at least one annual general meeting within six months following the end of the company's financial year (in case of the newly incorporated companies, the Companies Law allows holding the first annual general meeting within 18 months following the incorporation).

SARLs with less than 60 shareholders are not obliged to hold general meetings without a physical presence – instead, their shareholders may send their votes in writing using a voting form.

The COVID-19 Regulation allows general meetings to be held without a physical presence through:

- remote vote in written or electronic form, provided that the full text of the resolutions to be taken has been published or communicated to them;
- proxyholder designated by the company; or
- videoconference or any other means of telecommunication allowing for their identification.

Shareholders or members participating by such means are deemed to be present for the computation of the quorum and majority at such meeting. The annual general meetings resolve upon the approval of the annual accounts, distribution of profits, dividend allocation, appointment and dismissal of the members of the management bodies and auditors, etc. In SAs, the decisions are adopted by the simple majority of the votes cast, regardless of the number of shares represented. In SARLs, decisions are adopted by the simple majority of the corporate capital, and, if that figure is not reached at the first meeting, by

a majority of the votes cast irrespective of the portion of capital represented.

Extraordinary General Meetings

Extraordinary general meetings are convened in order to resolve on the amendments of the Articles. In SAs, the decisions are taken with a two-third majority of the votes of the shareholders present or represented if, upon the first call, at least 50% of the share capital is present or represented. Failing such quorum, the resolutions can be passed by the same two-thirds majority, regardless of the portion of capital represented. In SARLs the resolutions are adopted by shareholders representing three-quarters of the corporate capital. Articles may increase the quorum and majority requirements provided by the Companies Law.

Convening Meetings and Agenda Items

In SARLs, general meetings may be convened by the manager(s), the supervisory board (if created), or shareholders representing more than one-half of the share capital. In SAs, shareholders' meetings may be convened by the board of directors, the management board or the supervisory board (if any) and the internal auditors. Regarding general meetings in SCAs, the Companies Law provides its partners with significant flexibility regarding the establishment of the corporate governance rules.

The shareholders of SAs, SARLs and SCAs representing at least 5% of the share capital can convene shareholders' meetings in case of merger and demerger in the merged and split companies. Additionally, in SAs and SCAs shareholders representing at least 10% of the share capital may convene the general meeting by written request, ask to put one or more additional items on the agenda and/or require a prorogation of the general meeting.

According to the X Principles, shareholders of listed companies whose shares are admitted to trading on the regulated market, and holding at least 5% of the share capital, should be able to ask for items to be put on the agenda of the general meetings.

5.4 Shareholder Claims

The directors of the company may be exposed to shareholders' claims on the following bases.

For management errors:

- not attending the meetings of the board;
- accepting the mandate while not being able to assume such function;
- entering into a contract that is unfavourable to the company terms.

For violation of the Articles or the Companies Law:

- acting outside the company's object;
- non-respect by the director of the regime of company's representation towards third parties, as established by the Articles;
- non-convening of the general meeting of shareholders (ie, if the company's net assets fall below certain thresholds);
- non-presentation of the annual accounts/management report to the general meeting of shareholders.

As described above in **4.8 Consequences and Enforcement of Breach of Directors' Duties**, shareholders can initiate a claim against directors either collectively (upon a collective decision of the shareholders for damages caused to the company), or individually (upon the decision of any individual shareholder for independent and distinct damage caused to them).

5.5 Disclosure by Shareholders in Publicly Traded Companies

Transparency Law

The Transparency Law requires listed companies whose shares are admitted to trading on the regulated market to publish certain regulated information, such as annual and half-yearly reports (see **6.1 Financial Reporting**) and further information on a continuous basis.

On this latter point, in accordance with the Transparency Law, shareholders are subject to a disclosure obligation of major shareholdings, when they acquire or dispose of shares or depositary receipts representing shares of an issuer to which voting rights are attached. The shareholder shall make a notification in this respect to the issuer and to the competent authority if the acquisition or the disposal results in the thresholds of voting rights of 5%, 10%, 15%, 20%, 25%, 33.33%, 50% or 66.66% of the total number of voting rights being reached or crossed either upwards or downwards.

The same notification obligations and the same thresholds apply to shareholders being natural persons or legal entities entitled to acquire, to dispose of or to exercise, voting rights and to shareholders holding specific financial instruments that result in an entitlement to acquire shares with attached voting rights.

Market Abuse Law

The Market Abuse Law stipulates that complete and effective public disclosure of any inside information must be published on both the company's website and the LuxSE's website.

The Rules and Regulations further provide that listed companies whose shares are admitted to trading on the Euro MTF shall inform the public, as soon as it comes to its notice, of changes to the structure (holders and breakdown of holdings) of the major holdings of its capital as com-

pared to the capital structure that was previously made public in this respect. If applicable, the issuer shall inform the public in Luxembourg, at the latest within nine calendar days, whenever it comes to their notice of the acquisition or disposal by a natural person or legal entity of a number of shares if the holding thereof becomes higher or lower than 10%, 20%, 33.33%, 50% and 66.66% of the total voting rights (Article 1001 of the Rules and Regulations).

6. CORPORATE REPORTING AND OTHER DISCLOSURES

6.1 Financial Reporting

Pursuant to the Transparency Law, issuers whose home member state (as this term is defined in the Transparency Law) is Luxembourg and whose securities are admitted to trading on the Regulated Market of the LuxSE shall publish the following reports.

- Annual financial report, at the latest four months after the end of each financial year. The Transparency Law requires that the financial statements be audited. In addition, a management report and statements made by the persons responsible within the issuer shall be published along with the annual financial report.
- Half-yearly report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at least three months thereafter.
- Issuers which are active in the extractive or logging of primary forest industries within the meaning of Article 41(1) and (2) of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statement, consolidated financial statements and related reports of certain types of undertakings (the "Accounting Direc-

tive”) shall also prepare an annual report on payments to governments, at the latest six months after the end of each financial year.

The issuers shall ensure that their reports remain publicly available for at least ten years. Please note that for half-yearly financial reports published before 15 May 2016, this delay is only of five years.

Cross-Border Arrangements

Pursuant to the Law of 21 March 2020 implementing the Directive (EU) 2018/822 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6 Law), certain intermediaries have to report cross-border arrangements presenting a strong risk of tax avoidance or abuse.

6.2 Disclosure of Corporate Governance Arrangements

The X Principles provide that listed companies whose shares are admitted to trading on the regulated market shall draw up a corporate governance charter to be published on the company’s website. This shall describe the main aspects of their corporate governance policy, especially their structure, the internal regulations for the board, their committees and the executive management, as well as other important points such as remuneration policy.

Additionally, the X Principles provide that a statement on corporate governance shall be included in the annual report. This statement shall primarily provide factual information on the governance of the company and on the operation of the governing bodies during the year just ended, including any changes that have occurred – for example, the appointment of new directors, the appointment of committee members and the remuneration report.

The board shall also ensure that the corporate governance charter and the statement on corporate governance in the annual report are accurate and complete.

6.3 Companies Registry Filings

The amended law, dated 19 December 2002, on the Luxembourg Trade and Companies Register as well as company accounts and financial statement (RCS Law) sets out all information required to complete filing with the Luxembourg Trade and Companies Register (RCS). This includes all legal information such as the trade name or the corporate name, the social object, the share capital, the executive board membership information, the auditor, the authorised signatories and any other such data.

Companies are required to file the following documents with the RCS: the annual accounts (balance sheet, profit and loss account, legal annex), the balance of the accounts as resumed in the minimum standard chart of accounts (where applicable), the management report (where applicable), the financial auditor statement (where applicable), any other documents relating to the annual accounts (proposal for allocation of profit, profit allocation, list of authorised agents, the person(s) in charge of auditing the accounts, etc).

Public Access to Documents

The RCS Law stipulates what documents filed with the RCS can be viewed by the public. In general, documents filed with the RCS but not published in the *Recueil Électronique des Sociétés et Associations* (RESA) cannot be viewed by the public. All registrations, filings and communications required by law must be submitted to the RCS within one month from the event which makes them necessary.

Since the RCS is a public body, anyone making a request may view any registered document

and obtain a copy thereof; any information or document published at the RCS is made publicly available on its website.

Differently to SAs, the shareholding of SARLs is public.

Filing with the RBE

Pursuant to the RBE Law, all entities registered with the RCS (except for those whose securities are traded on certain regulated markets) have to file some information with the register of beneficial owners (name, date and place of birth, nationality, country of residence, professional or personal address, national identification number, and nature and extent of the beneficial interest held in the relevant entity). Unless a specific exemption is obtained, such information are accessible to the general public (save for the address and the national identification number).

7. AUDIT, RISK AND INTERNAL CONTROLS

7.1 Appointment of External Auditors

SAs, SCAs and SARLs shall appoint an external auditor (*réviseur d'entreprises*) only if their balance sheets after two consecutive years exceed the limits of at least two of the following criteria:

- a balance sheet total of EUR4.4 million;
- a net turnover of EUR8.8 million; and
- the average number of employees at 50.

If these thresholds are not reached, SAs, and SARLs with more than 60 shareholders must be supervised by one or more internal auditors (*commissaires aux comptes*); in SCAs the supervision of the company must be entrusted to the supervisory board, appointed by the shareholders and composed of at least three auditors.

According to the Rules and Regulations, listed companies must have their accounts verified by an independent auditor. The audit report has to be sent to shareholders together with the management report and the financial statements before the annual general meeting is held.

7.2 Requirements for Directors Concerning Management Risk and Internal Controls

The board shall protect the company's interests in relation to financial reporting, internal control and risk management. In this respect, the X Principles recommend the establishment of three committees among the members of the board of directors. According to recommendation 8.3 of the X Principles, the audit committee should be composed exclusively of non-executive directors, at least half of whom are independent directors.

The audit committee is responsible for assisting the board of directors "in the discharge of its responsibilities in the areas of financial reporting responsibilities, internal control and risk management", and in particular for helping it in "monitoring the reliability and integrity of the financial information provided by the company". The establishment of an internal audit function is recommended, which can be entrusted to an external expert.

In the context of the sanitary crisis, the boards also have to manage risks with regards to the criminal liability that the company faces from health and safety legislation.

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investment funds and financial institutions to private equity firms, have placed their trust in the firm's interdisciplinary legal advice. Luther employs over 420 lawyers and tax advisers, is present in ten German economic centres and has ten international offices in European and Asian financial centres.

AUTHORS



Bob Scharfe is a partner and heads the banking, finance and capital markets practice at Luther's Luxembourg office. He advises banks, multinational corporations, and private equity

firms on a wide range of banking and financing matters, capital markets, structured finance, securitisation and insolvency law aspects, and structuring private equity investments through Luxembourg. He also has solid experience in general corporate law. He is a member of the Luxembourg Bar.



Selim Souissi is a partner and a member of the corporate law/M&A practice at Luther's Luxembourg office. He advises multinational groups of companies, private equity firms,

alternative asset management companies, family offices, medium-sized businesses, and individuals on mergers and acquisitions, financings and refinancing, buyouts, and structuring and implementing management packages. He has also gained experience in advising individual clients and HNWI on patrimonial issues. Selim is admitted to the Luxembourg Bar and Paris Bar.



Marion Lanne is a managing associate and a member of the banking, finance and capital markets practice at Luther's Luxembourg office. She gained solid experience in insurance and regulatory matters while working for renowned insurance

companies in Luxembourg as a legal counsel and legal and product manager. She focuses on a wide range of banking, finance, insurance and capital markets matters.

Luther S.A.

inscrite au Barreau de Luxembourg
Aerogolf Center
1B, Heienhaff
L-1736 Senningerberg
Luxembourg

Tel: +352 27484 1
Fax: +352 27484 690
Email: luxembourg@luther-lawfirm.com
Web: www.luther-lawfirm.lu

Luther.

Trends and Developments

Contributed by:

Bob Scharfe and Marion Lanne

Luther S.A. see p.24

Overview of the Sustainable Landscape in Luxembourg

In line with the transition initiated almost a decade ago and accelerated by COVID-19, further steps have been taken during the past months towards a more sustainable and social responsible economy, which aims to consider the environmental, social and governance (ESG) aspects of a product, policy or process.

Indeed, in addition to the numerous legislative measures (which we will touch upon below), sectoral initiatives related to ESG considerations are flourishing across Europe, such as the publication in July 2020 by the Association for Financial Markets in Europe of the first set of recommendations and best practices with regard to ESG due diligence and disclosures, for the European high-yield market.

Sustainability as a key trend in Luxembourg

In the sustainable economy sector, Luxembourg positions itself as a pioneer and Luxembourg financial market actors have been tackling ESG issues over the past 15 years.

In 2007 already, the Luxembourg Stock Exchange (LuxSE) listed the world's first green bond issued by the European Investment Bank, labelled "Climate Awareness Bond". Launched in 2016, the Luxembourg Green Exchange (LGX) displays, as of today, more than 388 green bonds. LGX is a digital platform exclusively dedicated to sustainable finance which displays information related to securities which comply with the LGX's eligibility criteria and is currently the world's largest platform for sustainable securities.

In September 2020, Luxembourg, as the first European and triple-A country to do so, listed the first sustainability bond on the regulated market of the LuxSE. The proceeds of the bond are used to finance and refinance social and environmental projects, such as electric public transportation.

In 2017, the X Principles of Corporate Governance of the LuxSE (the "X Principles"), which set out the general principles, recommendation and guidelines to be followed by all companies whose shares are admitted to trading on the regulated market of the LuxSE, have been updated to include a ninth principle related to corporate social responsibility. Pursuant to this ninth principle, "the company shall define its corporate social responsibility policy with respect, including those responsibilities related to social and environmental aspects. It shall set out the measures taken for its implementation of that policy and shall provide for these to be adequately published". To comply with such principle, companies, whose shares are admitted to trading on the LuxSE's regulated market, are requested to report CSR information, either in a dedicated CSR report or within their management reports. Further guidelines geared towards companies, issuers and asset managers have been released by the LuxSE to enhance transparency in ESG reporting.

Focus on the European regulation on sustainability-related disclosures in the financial services sector

Brief overview

One of the major developments in the ESG sector at the European level has been the adoption of the European regulation on the establishment

of a framework to facilitate sustainable investment, which entered into force on 12 July 2020 (Taxonomy Regulation) amending the European regulation on sustainability-related disclosures in the financial services sector of 27 November 2019 (SFDR), which both form part of a more global package of legislative measures stemming from the action plan of the European Commission on financing sustainable growth and the development of a renewed sustainable finance strategy (Action Plan).

The Taxonomy Regulation establishes a common classification system to help investors, companies and issuers to invest in projects that have a substantial positive impact on the climate and environment.

Building on the common language established by the Taxonomy Regulation and in order to enhance transparency and inform end investors, SFDR lays down harmonised rules with regard to the way that ESG aspects are integrated in the practices and processes of and disclosed by:

- the financial market participants, including:
 - (a) the insurance undertakings making available insurance-based investment products (IBIP);
 - (b) the investment firms or credit institutions providing portfolio management, manufacturers of pension products;
 - (c) the alternative investment fund manager (AIFM); and
 - (d) the management companies of an undertaking for collective investment in transferable securities (UCITS management company); and
- the financial advisers, including:
 - (a) the insurance undertaking or intermediary providing insurance advice with regard to IBIPs; and
 - (b) credit institution, investment firm, AIFM providing investment advice, an AIFM or

an UCITS management company providing investment advice.

The main features of the SFDR are:

- drafting and publication on the relevant websites of written policies on the integration of sustainability risks, ie, an ESG event or condition that, if it occurs, could have a negative material impact on the value of the investment, in the investment decision-making process or investment/insurance advice process, to be maintained up to date;
- inclusion in financial advisers and market participants' processes, including the remuneration policy, and assessment on a continuous basis of all relevant sustainability risks that may have a relevant material negative impact on the financial return of an investment or advice, at all times in compliance with the requirement to act in the best interest of the investor; and
- harmonisation of ESG disclosures requirements for a financial product, including in pre-contractual information and periodical reports.

Should a financial adviser or market participant not deem sustainability risks to be relevant to its products, clear and concise explanation of the reasons therefor shall be published on its website, while respecting certain conditions.

The Luxembourg financial market participants and advisers are getting ready

The content, methodologies and presentation of sustainability-related disclosures will be further specified by level 2 regulation technical standards (RTS), whose elaboration has been delayed due to the unprecedented economic and market stress caused by the COVID-19 crisis. Eventually, on 2 February 2021, and following a consultation paper published on 23 April 2020, the three European Supervisory Authorities (ESAs)

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published their final report on draft RTS, which shall be endorsed by the European Commission as a next step.

Although these draft RTS have not yet been voted and are not expected to apply before 1 January 2022, most of the provisions of the SDFR have already been applicable as from 10 March 2021.

Financial advisers and financial market participants shall henceforth also deal with the sustainability risks, and among others, AIFM and UCITS management companies are required to update their investment process and policies, and therefore the UCITS prospectus or issuing documentation. In order to address their needs, the Luxembourg financial markets supervisory authority, the *Commission de Surveillance du Secteur Financier* (CSSF), implemented, from 16 December 2020 to 28 February 2021, a temporary fast track procedure to facilitate the submission for visa stamps of UCITS prospectus or issuing documentation which have been updated to reflect changes required under SFDR, in case such updates were not considered material according to the relevant CSSF circular.

The CSSF has not yet specified whether this fast track procedure will once again be made available to AIFM and UCITS management companies who will need to further update their UCITS prospectus or issuing documentation to comply with the requirements as further detailed in the RTS and in the delegated acts to be adopted in relation with the Taxonomy Regulation.

What's coming up in Luxembourg?

In the current context of COVID-19, finance actors' awareness has been raised around the role they may play in defeating a worldwide health crisis and climate issues at large. In this context, Luxembourg keeps building a favour-

able environment to successfully address these challenges.

Among the main initiatives, the Luxembourg Sustainable Finance Initiative (LSFI) has been launched in 2020 and its first achievement has been to formulate the Luxembourg Strategy for Sustainable Finance, in line with the main recommendations of the Roadmap for Sustainable Finance jointly issued in 2018 by, among others, the government of Luxembourg, financial stakeholders and the United Nations Environment Programme Finance Initiative.

In order to help the core financial sectors' transition toward increased sustainability, the LSFI recommends acting on three fronts:

- raising awareness and actively promoting the Luxembourg-based initiatives to develop Luxembourg's role as an international hub for sustainability finance;
- unlocking potential and further leverage Luxembourg international financial centre's expertise by making available material such as professional training, standards and best practices; and
- setting up a framework, including key performance indicators and a data working group, to measure Luxembourg core financial sector's progress from one year to another.

Actors in Luxembourg will therefore benefit from increased visibility and a greater access to informational resources, which shall greatly profit the finance industry, among others, where demand for financial products meeting ESG criteria is growing. LGX displayed almost 900 sustainable securities at the end of 2020, totalling EUR388 billion, issued by 150 issuers in more than 30 countries and no slowdown is expected in 2021.

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AUTHORS



Bob Scharfe is a partner and heads the banking, finance and capital markets practice at Luther's Luxembourg office. He advises banks, multinational corporations, and private equity

firms on a wide range of banking and financing matters, capital markets, structured finance, securitisation and insolvency law aspects, and structuring private equity investments through Luxembourg. He also has solid experience in general corporate law. He is a member of the Luxembourg Bar.



Marion Lanne is a managing associate and a member of the banking, finance and capital markets practice at Luther's Luxembourg office. She gained solid experience in insurance

and regulatory matters while working for renowned insurance companies in Luxembourg as a legal counsel and legal and product manager. She focuses on a wide range of banking, finance, insurance and capital markets matters.

Luther S.A.

inscrite au Barreau de Luxembourg
Aerogolf Center
1B, Heienhaff
L-1736 Senningerberg
Luxembourg

Tel: +352 27484 1
Fax: +352 27484 690
Email: luxembourg@luther-lawfirm.com
Web: www.luther-lawfirm.lu

Luther.