Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Shareholders' Rights & Shareholder Activism 2023

Definitive global law guides offering comparative analysis from top-ranked lawyers

Luxembourg: Law & Practice

Philipp Mössner, Anna Lindner, Chara Papagiannidi and Maria Gusinski
GSK Stockmann SA

LUXEMBOURG

Law and Practice

Contributed by:
Philipp Mössner, Anna Lindner, Chara Papagiannidi and Maria Gusinski
GSK Stockmann SA

Contents

GSK Stockmann SA is a leading independent European corporate law firm, with more than 250 professionals across offices in Germany, Luxembourg and the UK. It is the law firm of choice for real estate and financial services, and also has deep-rooted expertise in key sectors such as funds, capital markets, public, mobility, energy and healthcare. For international transactions and projects, the firm works together with selected reputable law firms abroad. In Luxembourg, GSK Stockmann is the trusted adviser of leading financial institutions, asset managers, private equity houses, insurance companies, corporates and fintech companies, with both a local and international reach. Its lawyers advise domestic and international clients in relation to banking and finance, capital markets, corporate/M&A and private equity, investment funds, real estate, regulatory and insurance, as well as tax. The firm's advice combines an economic focus with entrepreneurial foresight.

Authors

Philipp Mössner focuses on capital markets (listed companies), banking and finance, corporate and real estate. He is admitted to the Bar in Germany (2006) and Luxembourg (2007), and holds an LLM from McGill University (Montreal) and a PhD from the University of Tübingen (summa cum laude). Philipp speaks English, French and German, and is a member of the International Bar Association (IBA), the American Bar Association (ABA) and the Canadian Bar Association (CBA).

Anna Lindner focuses on capital markets, banking and finance, corporate, restructuring and sustainable finance. She is admitted to the Bar in Germany (2015) and Luxembourg (2017), and holds qualifications from Julius Maximilians University in Würzburg and Humboldt University in Berlin. Anna undertook traineeships at two major international law firms in Berlin in the areas of insolvency administration and antitrust, and was employed at a major international law firm in Frankfurt am Main, with a focus on corporate and finance litigation. She speaks English, French and German, and is a member of the Luxembourg Banking Law Lawyers Association (ALJB).

Chara Papagiannidi focuses on capital markets, banking and finance, corporate and real estate. She is admitted to the Bar in Athens (2016) and Luxembourg (2017), and holds an LLM from the University of Luxembourg in European Banking and Financial Law. Chara speaks English, French and Greek, and is a member of the Luxembourg Banking Law Lawyers Association (ALJB).

Maria Gusinski focuses on capital markets, banking and finance, corporate and real estate. She is admitted to the Bar in Germany (2021) and Luxembourg (2022), and holds an LLM from the University of Exeter in International Commercial Law. Maria speaks English, French, Russian and German.

GSK Stockmann SA

44, Avenue John F. Kennedy
L-1855 Luxembourg

Tel: +352 271802-00
Fax: +352 271802-11
Email: luxembourg@gsk-lux.com
Web: www.gsk-lux.com

1. Types of Company, Share Classes and Shareholdings

1.1 Types of Company

Luxembourg corporate law offers a variety of different company types adapted to the needs of a global financial centre. The most commonly used company types include:

- private limited liability companies (*société à responsabilité limitée* – S.à r.l.);
- public limited liability companies (*société anonyme* – SA);
- simple partnerships (*société en commandite simple* – SCS);
- special partnerships (*société en commandite spéciale* – SCSp),
- partnerships limited by shares (*société en commandite par actions* – SCA); and
- simplified joint-stock companies (*société par actions simplifiée* – SAS).

1.2 Types of Company Used by Foreign Investors

As an international financial centre, Luxembourg corporate law offers a tool box of structuring options that are highly appreciated by foreign investors. Foreign investors make use of a variety of company types available in Luxembourg, depending on the type of investment they wish to make. The choice of corporate form largely depends on features such as the transferability of its shares/units, the required shareholder involvement for management decisions, and regulatory and tax considerations.

Funds

Being the second largest investment fund centre globally and the largest in Europe, Luxembourg is home to a variety of different fund structures. The company types available to a fund depend on the fund type. UCITS, for example, must be organised as SA, SCA or a *fonds commun de placement* (FCP). Fund types such as the SIF, SICAR, Part II Fund and RAIF can choose from among corporate structures such as S.à r.l., SA, SCS, SCSp, SCA and FCP. Alternative investment funds (AIFs) that do not fall under one of these specific fund regimes are typically organised as partnerships such as the SCS and SCSp. Any type of fund in any corporate form may be established as European Long-Term Investment Fund (ELTIF), which may be distributed to professional investors and to retail investors.

Listed Companies

Companies that are listed or intend to list equity on a stock exchange are typically organised in the form of the SA or SCA due to the fungibility of shares in these company types. Issuers of debt instruments can also use the S.à r.l., which is not suitable for equity listing but can be attractive for debt listings.

Holding and Securitisation Companies

Securitisation companies and holding companies are typically set up in the form of the S.à r.l. or SA.

1.3 Types or Classes of Shares and General Shareholders' Rights

Types of Shares

The most common share type issued by the S.à r.l. and SA are ordinary shares, which may be issued with or without par value. Shares can be issued in bearer, registered or dematerialised form. However, bearer shares must be held by an authorised depositary.

Luxembourg corporate law offers flexibility in terms of the types and classes of shares a company may issue. For example, companies can opt to issue:

- preferred shares granting preferred liquidation, dividend and/or voting rights;
- tracking shares granting rights with respect to certain assets of the company only;
- non-voting shares; and
- redeemable shares.

Rights Attached to Shares

Generally, the rights attached to shares include the right to:

- receive dividends;
- attend and vote at general meetings of the company;
- receive certain company information, such as annual financial reports; and
- receive distribution and liquidation proceeds in connection with the liquidation or winding-up of the company.

Basis of Shareholder Rights

Shareholder rights are set out in the company's articles of association or, in the case of partnerships, in the limited partnership agreement. Certain statutory shareholder rights derive from the Luxembourg law of 10 August 1915 on commercial companies, as amended (LSC), or, where applicable, from the Luxembourg law of 24 May 2011 relating to the exercise of certain shareholder rights in general meetings of listed companies, as amended (Shareholder Rights Law).

1.4 Variation of Shareholders' Rights

Commercial Company Types

Unless the shareholders' rights in question are considered mandatory by law, they can be varied by means of resolutions of the general meeting of shareholders amending the articles of association.

In an S.à r.l., a majority of at least three-quarters of the share capital is required for such amendment, unless the articles of association lower this majority to more than half of the share capital. Such majority decrease is debatable based on relevant doctrine, but is common practice in Luxembourg.

In an SA, a majority of two-thirds of the votes validly cast is required. In addition, a quorum of at least one half of the share capital must be present at the meeting. If such quorum is not reached, a second meeting may be convened where no such quorum will be necessary, but the majority requirement remains unchanged.

Partnerships

In the case of limited partnerships, decisions in relation to the object, the nationality, the legal form or the liquidation of the partnership require the consent of three-quarters of the partnership interests and of all unlimited partners. For other matters, the limited partnership agreement can freely govern the approval and majority requirements of the partners. It is possible to stipulate that certain rights of the limited partners can be varied by decision of the general partner only.

1.5 Minimum Share Capital Requirements

Commercial Company Types

The minimum share capital of the S.à r.l., which is the most common limited liability company type used in Luxembourg, amounts to EUR12,000 (or the equivalent in other currencies). The minimum share capital of the SA and SCA amounts to EUR30,000. For specific fund types and regulated companies, a higher share capital may be required, irrespective of the company type used.

Partnerships

There is no minimum share capital requirement for simple partnerships (SCS) or special partnerships (SCSp).

1.6 Minimum Number of Shareholders

No minimum number of shareholders is required for the company types listed in **1.1 Types of Company**. However, partnerships like the SCS and SCSp shall have at least one general partner and at least one limited partner, who are legally distinct from each other. Shareholders may but are not required to be residents in the jurisdiction of Grand Duchy of Luxembourg.

1.7 Shareholders' Agreements/Joint Venture Agreements

Shareholders' agreements and joint venture agreements are very commonly used in Luxembourg for SAs and S.à r.l.s when several investors intend to co-invest in the same commercial company.

However, shareholders' agreements and joint venture agreements are less common for partnerships, since the limited partnership agreement is not publicly available in its entirety and typical provisions included in shareholders' agreements/joint venture agreements can be directly included in the limited partnership agreement.

1.8 Typical Provisions in Shareholders' Agreements/Joint Venture Agreements

Typical Provisions

Typical provisions included in shareholders' agreements/joint venture agreements relate to:

- board composition and board procedures;
- the transfer of shares – eg, transfer restrictions, rights of first refusal, tag/drag-along rights, put and call options;
- board and shareholder reserved matters, voting thresholds and convening formalities;
- information rights of shareholders towards the company and each other;
- termination – eg, the circumstances under which the joint venture may be dissolved before the agreed-upon term;
- requirements regarding the financing of a joint venture – eg, provisions in relation to shareholder/third-party funding, the creation of ordinary and preference shares, distribution waterfall, limitations on distributions; and
- procedures in case of the dilution of a shareholder due to a capital increase or conversion of shares.

Enforceability and Publicity

Generally, shareholder agreements and joint venture agreements are enforceable inter partes – ie, not towards third parties.

Shareholder agreements are generally not available to the public. In the case of an S.à r.l. and SA, the articles of association are publicly available. Therefore, any provisions of a shareholder agreement included in the articles of association will be publicly available and can even be enforceable towards third parties.

2. Shareholders' Meetings and Resolutions

2.1 Types of Meeting, Notice and Calling a Meeting

A company incorporated in Luxembourg shall hold at least one annual general meeting (AGM) on the date stated in the articles of association of the company, where applicable, and in any case no later than six months after the end of the company's financial year.

In the case of an SA, the procedure for convening an AGM depends on the form of the issued shares. For example, the convening notice for the holders of bearer shares shall be published

at least 15 days before the AGM on the *Recueil électronique des sociétés et associations* and in a newspaper in Luxembourg. On the other hand, a shorter deadline applies if the SA consists of registered shareholders, in which case the convening notice shall be communicated to the registered shareholders at least eight days before the meeting. Finally, for listed companies, the convening period is extended to 30 days, independently of the form of the shares, in order to facilitate the exercise of voting rights for shareholders not residing in Luxembourg. These deadlines are minimum periods prescribed by law and cannot be shortened.

Regarding S.à r.l.s, the LSC is silent on the convening deadline that applies to a general meeting, which in practice is often 15 days. Such period may even be shortened, if provided for by the articles of association.

The AGM typically resolves on:

- the company's annual accounts;
- the allocation of the results and the distribution of a dividend;
- the appointment and/or renewal of the mandates of the members of the board of directors (one-tier structure) or the members of the supervisory board (two-tier structure);
- the discharge of the directors (one-tier structure), the supervisory board and management board members (two-tier structure); and
- the appointment and/or renewal of the mandate of the company's auditor.

Further items can be added to the agenda.

The board of directors may convene further general meetings at its discretion. Such meetings may take the form of an ordinary general meeting (OGM) or an extraordinary general meeting (EGM) in case of an amendment of the company's articles of association.

2.2 Notice of Shareholders' Meetings

The notice periods that apply to an AGM (see **2.1 Types of Meeting, Notice and Calling a Meeting**) also apply to the other two forms of general meetings – ie, OGM and EGM.

For listed companies, if a new convening notice is necessary because of a lack of the required quorum at the first convened meeting, and if no new item has been added to the agenda, then the convening period of 30 days is reduced to at least 17 days before the meeting.

2.3 Procedure and Criteria for Calling a General Meeting

In an SA, general meetings are usually convened by the board of directors (one-tier) or the management board (two-tier), but shareholders representing one-tenth of the corporate capital may also request the board of directors, the management board, the supervisory board or supervisory auditors, as the case may be, to convene a general meeting. In practice, the shareholders would exercise such right only in special situations – eg, when they consider their financial interests to be threatened. Once the shareholders have requested the convening of the meeting, the respective organ is obliged to convene it so that it is held within a period of one month.

In an S.à r.l, general meetings are convened by the manager(s). However, shareholder(s) representing more than half of the share capital of the company can step in and convene a general meeting, if the manager(s) has failed to proceed.

2.4 Information and Documents Relating to the Meeting

All shareholders of a company – including the holders of non-voting shares, if any – shall be notified in case of a general meeting and therefore receive the convening notice and related documentation.

Luxembourg law does not grant shareholders a continuous right to information on the management of the company. However, in order to be able to effectively exercise their voting rights, shareholders shall receive the necessary information related to the agenda items of the general meeting before the general meeting. For this purpose, the company shall make certain documents available at its registered office for shareholders' inspection, including the annual accounts, the management report and the list of shareholders who have not paid up their shares. In practice, all information is made available online. During the general meeting, shareholders have the right to ask questions in relation to the various agenda items. However, the company's management is not obliged to respond to all the questions if doing so would risk revealing confidential information.

Regarding share registers, every shareholder of an S.à r.l. has the right to inspect the company's share register, but this right does not apply to shareholders of an SA.

2.5 Format of Meeting

The articles of association of a company may authorise the shareholders to participate in a general meeting by way of video conference or by way of telecommunication means permitting their identification. This applies to both SA and S.à r.l.

2.6 Quorum, Voting Requirements and Proposal of Resolutions

As mentioned in **1.4 Variation of Shareholders' Rights**, **2.1 Types of Meeting, Notice and Calling a Meeting** and **2.2 Notice of Shareholders' Meetings**, two different kinds of meetings are commonly held in Luxembourg:

- (ordinary) general meetings, where no quorum is required; and
- EGMs, where special quorum requirements apply and a Luxembourg notary must be present.

In an SA, an EGM shall not validly deliberate unless more than half of the company's share capital is represented. If this condition is not satisfied, a second meeting may be convened, in the manner prescribed by the articles of association of the company and the LSC. The second meeting shall validly deliberate regardless of the proportion of the capital represented.

An S.à r.l applies a different mechanism than the SA with regards to the holding of general meetings and does not distinguish between quorum and majority requirements. Mostly, resolutions are passed by either half or three-quarters (in case of an EGM) of the corporate capital (please refer also to **2.7 Types of Resolutions and Thresholds**).

2.7 Types of Resolutions and Thresholds

With respect to the SA, the resolutions at an AGM or OGM are adopted by a simple majority of the votes validly cast by shareholders duly present or represented. The holding of an EGM is necessary in case of:

- any changes to the corporate object or the articles of association (Article 450-3 of the LSC);

- capital increases and reductions (Articles 420-22 and 450-5 of the LSC);
- the redemption of shares (Article 430-15 of the LSC);
- the exclusion of shareholders' preferential subscription rights and the creation of authorised share capital (Articles 420-26 (5) and 420-22 of the LSC); and
- any merger (Articles 1021-3 and 1022-1 of the LSC), division (Article 1031-3 of the LSC) or liquidation of the company (Article 1100-2 of the LSC).

Resolutions are adopted only if a quorum of 50% of the share capital is present or represented and it is approved by at least two thirds of the votes cast.

For an S.à r.l., AGM or OGM agenda items are adopted by shareholders representing more than half of the corporate capital. The articles of association may even set out a higher majority requirement. The resolutions of an EGM are validly passed when adopted by shareholders representing three-quarters of the corporate capital, unless the articles of association lower this majority to more than half of the share capital (please refer also to **1.4 Variation of Shareholders' Rights**).

2.8 Shareholder Approval

Please see **2.1 Types of Meeting, Notice and Calling a Meeting** and **2.7 Types of Resolutions and Thresholds**.

2.9 Voting Requirements

Shareholders can participate and vote in a general meeting in the following ways:

- in person by raising their hands, unless the articles of association of the company provide for specific rules concerning the voting procedure – eg, having a secret ballot or a roll call vote;
- by appointing a third person, who does not need to be a shareholder;
- by electronic means, if permitted by the articles of association; or
- from a remote location in advance of the general meeting, by correspondence or by electronic means, using a form made available by the company and if permitted by the articles of association.

In principle, one share entitles the holder to one vote, and weighted voting rights within the same share class are generally not allowed. However, Luxembourg law is flexible in structuring different share classes, profit units and the rights attached.

2.10 Shareholders' Rights Relating to the Business of a Meeting

In principle, the agenda of a general meeting is set by the company's management. However, one or more shareholders who together hold at least 10% of the subscribed capital in an SA may request that one or more additional items be put on the agenda of the general meeting. This request shall be sent to the registered office by registered mail at least five days prior to the holding of the meeting. For listed companies, the above percentage is reduced to 5%.

The rules for an S.à r.l are more flexible since only the articles of association of the company would set out the specific rules governing the convening of the meeting and any shareholder's right to add items to the agenda of a general meeting.

2.11 Challenging a Resolution

Dissenting shareholders may seek to invalidate a shareholder decision that has been taken at a general meeting if:

- there was a procedural irregularity that may have influenced the outcome of the decision;
- there was a breach of the rules governing general meetings where there is a fraudulent intent;
- the adopted decision is flawed by any other abuse of power or misuse of power;
- the exercise of voting rights at a general meeting is suspended by legislation other than the LSC and where, without such unlawfully exercised voting rights, the quorum and majority requirements for decisions by a general meeting would not have been met; or
- any other cause provided for by the LSC exists.

The nullity of a decision by a general meeting must be declared by court order.

The action for nullity shall be brought against the company. The applicant may apply in summary proceedings for the provisional suspension of the implementation of the contested resolution. The suspension order and the judgment ordering the nullity of the resolution shall become effective as from the decision ordering them.

2.12 Institutional Shareholder Groups

There are no particular rights attributed to institutional shareholders or other shareholder groups, other than the standard rights granted to all shareholders – eg, the right to information (please see **2.4 Information and Documents Relating to the Meeting**). However, institutional shareholders/other shareholder groups may be granted additional rights depending on the percentage of their shareholding. For example, shareholders holding at least 10% of the company's share capital can:

- request that one or more additional items be put on the agenda of any general meeting of an SA (please see **2.10 Shareholders' Rights Relating to the Business of a Meeting**);
- request the board of directors to convene a general meeting (please see **2.3 Procedure and Criteria for Calling a General Meeting**);
- request to postpone a general meeting for four weeks;
- request information on management decisions with respect to operations of the company and its subsidiaries; or
- bring an action against the directors (one-tier structure) or the members of the management board or the supervisory board (two-tier structure), as the case may be, on behalf of the company.

2.13 Holding Through a Nominee

Luxembourg legislation does not specifically govern nominee shareholding, but provides for a form of split between legal and beneficial ownership similar to a trust structure of common law countries. In particular, Luxembourg recognises a fiduciary agreement based on which a person, the settlor (*fiduciant*), transfers the ownership of the asset to the fiduciary (*fiduciaire*), who will be in a position to exercise ownership rights and re-transfer the asset to a named person at the end of the contract. However, it is up to the fiduciary agreement to determine the conditions under which the fiduciary shall exercise any voting rights attached to shares of the settlor as well as related information obligations towards the settlor.

2.14 Written Resolutions

Written resolutions cannot be passed in an SA. For an S.à r.l., however, the holding of a general meeting is not compulsory, unless:

- such company has more than 60 shareholders;
- the shareholders shall decide on the dissolution of the company;
- the company's articles of association shall be amended; or
- the meeting has been convened by shareholder(s) representing more than half of the company's share capital.

In all other cases, the shareholders can vote in writing without holding a meeting. In particular, shareholders shall receive the precise wording of the text of the resolutions or decisions to be adopted, and shall give their vote in writing. Written resolutions shall fulfil the same majority requirements applicable to the voting in general meetings in order to be passed (please refer also to **2.7 Types of Resolutions and Thresholds**).

3. Share Issues, Share Transfers and Disclosure of Shareholders' Interests

3.1 Share Issues

In an SA, new shares to be subscribed for in cash have to be offered on a pre-emptive basis to existing shareholders in the proportion of the capital represented by their shares. This pre-emption right can be limited by resolution of the general meeting of shareholders. Such resolution can also be passed in advance – eg, in connection with the approval of authorised share capital or employee-participation schemes.

The articles of association of an S.à r.l may provide for pre-emption rights similar to the ones in an SA.

3.2 Share Transfers

The existence and nature of legal and regulatory restrictions on the transfer or disposal of shares depends on the company type.

- In an SA, there are typically no transfer or disposal restrictions applicable to the shares, unless these have been specifically agreed among shareholders or unless regulatory provisions require certain restrictions.
- In an S.à r.l, the shares are freely transferable among existing shareholders. However, the transfer of shares to non-shareholders may only be made with the prior approval given in a general meeting of shareholders representing at least three-quarters of the share capital of the company, unless the company's articles of association provide for a lowered majority of half of the company's share capital.

3.3 Security Over Shares

Shareholders are entitled to grant security interest over their shares. Pledges over shares of a company are the most commonly used form of security and are governed by the law of 5 August 2005 on financial collateral arrangements, as amended (Collateral Law). Restrictions or prior approval requirements may apply, if provided by the relevant articles of association and/or a shareholders' agreement.

3.4 Disclosure of Interests

Pursuant to Article 8(1) of the law of 11 January 2008 on transparency requirements for issuers, as amended (Transparency Law), a shareholder who acquires or disposes of shares of an issuer whose shares are admitted to trading on a regu-

lated market and for which Luxembourg is the home member state and to which voting rights are attached shall notify the issuer of the proportion of the voting rights held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 33 1/3%, 50% and 66 2/3%.

The notification requirement by a shareholder to the issuer also applies to a natural person or legal entity to the extent it is entitled to acquire, dispose of or exercise voting rights in any of the specific cases set out in Article 9 of the Transparency Law, and/or to a natural person or legal entity who holds, directly or indirectly, specific financial instruments as set out in Article 12 of the Transparency Law. Exemptions may apply under certain circumstances in case of clearing and settlement, market making, stabilisation and voting rights held in a trading book.

The notification to the issuer shall be effected as soon as possible, but not later than six trading days in case of a transaction and four trading days if the breakdown of voting rights has changed. The information to be notified by the shareholder to the issuer in accordance with the above shall simultaneously be filed with the Luxembourg financial regulatory authority, the *Commission de Surveillance du Secteur Financier* (CSSF).

4. Cancellation and Buybacks of Shares

4.1 Cancellation

Shares of a company can be cancelled on a mandatory or voluntary basis. For this purpose, an EGM, acting in accordance with the conditions prescribed for the amendment of the articles, shall be convened and resolve on the cancellation of the shares and subsequent reduction of the subscribed capital.

4.2 Buybacks

An SA may acquire its own shares, either itself or through a person acting in its own name but on the company's behalf, subject to the following conditions.

- The authorisation to acquire shares shall be given by the general meeting of the shareholders, which shall determine the terms and conditions of the proposed acquisition and in particular the maximum number of shares to be acquired, the duration of the period for which the authorisation is given and which may not exceed five years and, in the case of acquisition for value, the maximum and minimum consideration. The board of directors or the management board, as the case may be, shall ensure that the conditions mentioned in the following two points are respected at the time of each authorised acquisition.
- The acquisitions – including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf – may not have the effect of reducing the net assets below the amount mentioned in Article 461-2, paragraphs 1 and 2 of the LSC.
- Only fully paid-up shares may be included in the transaction.
- The acquisition offer must be made on the same terms and conditions to all the shareholders who are in the same position, except for acquisitions that were unanimously decided by a general meeting at which all the shareholders were present or represented. Listed companies may repurchase their own shares on the stock exchange without an

acquisition offer having to be made to the shareholders.

In addition, a management report shall be drawn up by the board of directors and submitted to the company's annual general meeting of the shareholders, indicating the main reasons and terms and conditions of any share buyback carried out in the financial year just ended.

It is also possible for an S.à r.l. to buy back its own shares, subject to certain conditions, similarly to an SA.

5. Dividends

5.1 Payments of Dividends

Dividends of an SA or S.à r.l. are subject to and paid following approval of the annual financial statements and respective resolution by the shareholders at the AGM. However, each year at least one-twentieth of the net profits shall be allocated to the creation of a legal reserve. This allocation shall cease to be compulsory when the legal reserve has reached an amount equal to one-tenth of the corporate capital, but shall become compulsory again if the legal reserve falls below such one-tenth.

No interim dividends may be paid unless the articles of association authorise the board of directors or the management board, as applicable, to do so. In addition, any such payment shall be subject to the following conditions:

- interim accounts shall be drawn up, showing that the funds available for distribution are sufficient;
- the amount to be distributed may not exceed the total profits made since the end of the last financial year for which the annual accounts have been approved, plus any profits carried forward and sums drawn from reserves available for this purpose, less losses carried forward and any sums to be placed to reserve pursuant to requirements of the law or of the articles of association;
- the decision of the board of directors or the management board, as applicable, to distribute an interim dividend may not be taken more than two months after the date at which the interim accounts have been drawn up; and
- in their report to the board of directors or the management board, as applicable, the (internal or external) auditor shall verify whether the conditions are satisfied.

6. Shareholders' Rights as Regards Directors and Auditors

6.1 Rights to Appoint and Remove Directors

The initial directors of an SA (one-tier structure) are appointed by the constitutive document of the SA. Following incorporation, directors are appointed and can be removed at any time by decision of the general meeting. The members of the management board of an SA (two-tier structure) are appointed by the supervisory board and may be removed by the supervisory board, or by the general meeting if such is provided by the articles of association.

The term of office of any director or member of the management board may not exceed six years, but they may be re-appointed after the expiration of such term (unless the articles of association provide otherwise). Both the appointment and removal of a director or management board member shall be filed with the Luxembourg trade and companies Register

and published with the *Recueil Electronique des Sociétés et Associations* in order to be valid vis-à-vis third parties.

In case of a vacancy of the office, the remaining members may appoint a replacement on a provisional basis, unless the articles of association provide otherwise. The general meeting shall make the definitive appointment.

The managers of an S.à r.l. shall be appointed by the constitutive document and subsequently by the general meeting. Contrary to an SA, they can be appointed for a limited or unlimited period of time, and a manager may be removed for legitimate reasons only, unless otherwise provided for in the articles of association.

6.2 Challenging a Decision Taken by Directors

Shareholders may contest a decision taken by the board of directors and bring an action for nullity against the company if a decision of the board was adopted, for example, with formal irregularities while convening the meeting, or if the board adopted a resolution on a matter reserved to the shareholders by law or by the articles of association. Please also see **2.11 Challenging a Resolution**.

6.3 Rights to Appoint and Remove Auditors

Auditors are appointed and removed by the general meeting of shareholders. Before the end of their term, auditors may only be dismissed for proper grounds.

7. Corporate Governance Arrangements

7.1 Duty to Report

Companies incorporated under Luxembourg law must draw up a management report of the board of directors or of the management board, as applicable, which must include at least a fair review of the development of the company's business, its performance and its position, together with a description of the principal risks and uncertainties that it faces. For a company whose securities are admitted to trading on a regulated market of an EU member state, the management report shall include a corporate governance statement as a specific section of the management report, containing the following details, amongst others:

- at least a reference to the corporate governance code to which the company is (voluntarily) subject;
- all relevant information about the corporate governance practices applied beyond the requirements under law;
- a description of the main features of the company's internal control and risk management systems in relation to the financial reporting process;
- the composition and operation of the administrative, management and supervisory bodies and their committees; and
- a description of the diversity policy applied in relation to the company's administrative, management and supervisory bodies with regard to aspects such as age, gender or educational and professional backgrounds.

Shareholders may inspect the management report at the company's registered office eight days before the general meeting of the share-

holders of the company in relation to the approval of the company's annual accounts.

In addition, companies (Issuers) listed and/or admitted to trading on the Official List of the Luxembourg Stock Exchange (LuxSE) are subject to the X Principles of Corporate Governance of the LuxSE (X Principles). Pursuant to the X Principles, Issuers are required to:

- disclose a Corporate Governance Statement in their annual reports, which describes all major events concerning their corporate governance; and
- publish a corporate governance charter describing the main aspects of its corporate governance policy, notably the company's structure, the internal regulations for the board of directors, its committees and the executive management, and other important points (eg, concerning remuneration).

Finally, the Issuer shall disclose its directors' remuneration in a remuneration report and a remuneration policy (Articles 7bis, 7ter of the Shareholder Rights Law). Such disclosures shall be made publicly available on the Issuer's website for a period of ten years (reports) or for at least as long as they are applicable (policies).

8. Controlling Company

8.1 Duties of a Controlling Company

A controlling shareholder does not owe any particular duties to the minority shareholders under Luxembourg law. Nevertheless, shareholders must generally act in good faith and not abuse their dominant position in the company in order to impose a decision that is contrary to the interests of the company.

9. Insolvency

9.1 Rights of Shareholders If the Company Is Insolvent

In the case of bankruptcy, all measures of enforcement against the company are, in principle, suspended subject to certain limited exceptions for creditors that are secured by mortgages (*hypothèques*), pledges (*gages*) or financial collateral arrangements governed by the Collateral Law. Shareholders are treated as subordinated creditors and will be paid pro rata out of the remaining proceeds, if any, unless they have other contractual arrangements in place as creditors. The concept of equitable subordination is not recognised under Luxembourg law.

10. Shareholders' Remedies

10.1 Remedies Against the Company

Shareholders' legal remedies against the company are generally limited. In particular, a shareholder could make a claim against the company due to the breach of an agreement between the company and such shareholder (contractual liability), or to invoke the company's extra-contractual liability (tort liability) based on Articles 1382 and 1383 of the Luxembourg Civil Code. Shareholders can also make a claim against the directors or on behalf of the company, subject to certain conditions, as described in **10.2 Remedies Against the Directors** and **10.3 Derivative Actions**.

10.2 Remedies Against the Directors

Shareholders may take direct enforcement actions against the board of directors or the supervisory board/management board of an SA in the following cases.

- If such entities are responsible for a breach of the applicable law or the articles of association of the company. This action can also be sought by a single shareholder if they have suffered a distinct violation differing from all other shareholders.
- Shareholders can seek civil enforcement actions against members of the board of directors or the supervisory board/management board in case of fault (tortious conduct). This action can also be sought by a single shareholder based on Articles 1382 and 1383 of the Civil Code. However, the person(s) invoking it must have suffered personal damage.
- Finally, criminal offences may give rise to enforcement actions by the shareholders.

In addition, the members of the board of directors or the supervisory board/management board are liable towards the company for the execution of their mandate and the faults committed during the execution of such mandate. A claim for mismanagement can be initiated by the company following a decision taken in a general meeting of the shareholders. However, shareholders can also bring an action against a director on behalf of the company, subject to certain conditions (please see **10.3 Derivative Actions**).

The above also applies for an S.à r.l.

10.3 Derivative Actions

Shareholders can bring an action against the directors or the members of the management board or the supervisory board, as the case may be, on behalf of the company for mismanagement. This minority action may be brought by one or more shareholders holding at least 10% of the voting rights at the general meeting that decided upon the discharge of the directors. The shareholders initiating the action must not have voted in favour of granting such discharge. If the action is successful, the minority shareholders will enable the company to obtain compensation for the loss suffered by the company. The minority action is available to shareholders of an SA, SCA or SAS, but not to shareholders of an S.à r.l.

11. Shareholder Activism

11.1 Legal and Regulatory Provisions

There is no specific regulation concerning shareholder activism. However, Luxembourg law provides certain minority rights to shareholders, notably:

- shareholders holding at least 5% of an issuer's subscribed capital have the right to put items on the agenda of the general meeting and to table draft resolutions for items included or to be included on the agenda of the general meeting (Article 4 of the Shareholder Rights Law);
- shareholders holding at least 10% of the votes at the general meeting having resolved on the discharge may bring a minority action against the directors, the members of the management board or the supervisory board on behalf of the Company (Article 444-2 of the LSC);
- shareholders owning at least 10% of the share capital or voting rights are entitled to request information on management decisions with respect to operations of the company and its subsidiaries, and may apply to have one or more experts appointed if the management does not respond (Article 1400-3 of the LSC); and
- shareholders representing at least 10% of the capital have the right to request the convening of a general meeting (Article 450-8 of the

Companies Law) or the adjournment of any general meeting (Article 450-1 (6) of the LSC).

The involvement of institutional investors as well as activist shareholders is encouraged by policy makers and considered a fundamental requirement to achieve good corporate governance within corporations. Under the Shareholder Rights Law, institutional investors shall develop and disclose their engagement policy and publicly disclose how their equity investment strategy aligns with the profile and duration of their liabilities and how it contributes to the medium- and long-term performance of their assets.

11.2 Aims of Shareholder Activism

The key aims of activist shareholders may vary depending on their long-term or short-term interests in the company. For example, short-term activist shareholders may focus more on maximising their short-term financial interests, whereas long-term investors may seek to monitor the company's corporate governance structure and address any corporate deficiency issues.

11.3 Shareholder Activist Strategies

Activist shareholders may follow different strategies depending on whether they pursue short-term or long-term shareholder engagement, such as:

- requesting comprehensive information before or at a general meeting;
- proposing additional items on the agenda of a general meeting (eg, to remove current directors and to nominate new directors);
- convening a general meeting;
- criticising the company's management and performance publicly and/or during a general meeting;
- short-selling the company's shares; or
- acting in concert with other shareholders for a hostile takeover.

11.4 Recent Trends

ESG matters are increasingly important to all industries/sectors, as is climate change-related risk planning. There has been particular focus on real estate companies suffering from the current economic situation, especially with respect to their debt financing, portfolio and annual financial statements. Given the size of the Luxembourg market, no particular trends could be identified, but companies targeted by activist shareholders generally vary in terms of market capitalisation.

11.5 Most Active Shareholder Groups

Given the small size of the Luxembourg equity capital markets, no particular trends could be identified, but short-sellers are currently more active than others.

11.6 Proportion of Activist Demands Met

No relevant information is publicly available in Luxembourg in this respect.

11.7 Company Prevention and Response to Activist Shareholders

Issuers are nowadays focusing more on enhancing the direct communication with their shareholders in order to identify and manage their expectations. However, when a communicative strategy fails, issuers may rather solicit the support of the company's long-term investors, who are usually negative about the activities of short sellers and therefore co-ordinate on adopting defensive strategies. Such strategies often aim to protect the company's board – for example, by setting up a maximum number of directors in the board and/or by increasing the majority required for the dismissal and/or replacement of the company's directors.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com