LUXEMBOURG

Trends and Developments

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Legal Scope

In Luxembourg, commercial companies are governed by the law on commercial companies, dated 10 August 1915, as amended (Law 1915). Only the most commonly used forms of commercial companies in Luxembourg will be covered in this article:

- the *société anonyme* (SA – public limited liability company); and
- the *société à responsabilité limitée* (Sàrl – private limited liability company).

Given the size of this article, specific shareholders' rights in companies whose shares are admitted to listing and trading will also not be able to be taken into consideration, hence rights deriving from the following laws will not be discussed:

- the law dated 24 May 2011 on the exercise of certain rights of shareholders of listed companies;
- the law dated 19 May 2006 on takeover bids;
- the law of 11 January 2008 on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; and
- the law dated 21 July 2012 on the mandatory squeeze-out and sell-out of securities.

Incorporation

The incorporation of both the SA and the Sàrl takes place by notarial deed, which includes the articles of association of the company (the Articles) before a Luxembourg notary.

Shareholders

An SA or a Sàrl can be incorporated by one or several shareholders, who must deliver to the notary a document evidencing the existence of the funds (in the case of a cash contribution) or the value of the assets (in the case of an in-kind contribution) contributed to the share capital through, among others, a blocking certificate or a valuation report.

The minimum share capital for an SA amounts to EUR30,000, and EUR12,000 for a Sàrl. It must be fully paid up for a Sàrl while only paid up to one quarter for an SA. It must be noted that the SA and the Sàrl exist and obtain legal personality directly upon signature of the notarial deed. This means that they may both enter into agreements and operate directly thereafter.

Share Capital

The share capital may be composed of one single class of shares or may be sub-divided into several classes with different nominal values or without nominal value. Common (ordinary) shares represent a portion of the company's share capital and entitle its owner to the political and economic rights which are attached thereto. In the absence of the creation of different categories of shares, common shares are issued, thus entitling the shareholders to identical rights (political and economic).

Indeed, in the case of different categories of shares, the rights attached thereto are usually different and are detailed in the Articles and/or a shareholders' agreement, bearing in mind the question of enforceability towards third parties.

In substance, political rights mean voting rights to be exercised within the general meeting of shareholders, and economic rights refer to dividends or proceeds of liquidation. Depending on the corporate form, the Articles may adjust these economic and political rights through the issue of specific shares.

Non-voting Shares

In that respect, since 2016, an SA may issue non-voting shares in exchange for shares with more economic rights, which may not represent more than 50% of the total issued share capital. These specific supplementary economic rights must be set out in the Articles. Nevertheless, non-voting shares regain their voting rights at any general meeting resolving upon any amendments of their rights or with respect to a decrease of the share capital.

Non-voting shareholders shall receive the same documents, convening notices, reports and information that are provided to other shareholders, pursuant to Law 1915.

Profit Units

Furthermore, an SA and a Sàrl may issue profit units which do not represent the share capital of the company. The Articles shall specify the rights attached thereto. The holders thereof are not shareholders of the company and thus do not participate in the social life of the company. However, the holders of profit shares have financial rights (profits and liquidation proceeds).

Tracking Shares

Tracking shares, previously used and applied by practitioners, have been recognised and established in Law 1915 further to the amendment of Law 1915 in 2016. In essence, tracking shares represent a portion of the share capital and have the same rights as those attached to common shares, except for dividend rights, which are linked to the results of various investments or activities of the company.

Distribution of Profits

In compliance with the general principle of contractual freedom, the contracting parties are free to determine the terms and conditions they want to be bound by in the Articles, with regard to distribution of profits.

However, it is important to emphasise that, pursuant to Article 1855 of the Luxembourg Civil Code, "[an] agreement that would give one of the partners all of the profits is null and void." In other words, the above-mentioned contractual freedom cannot lead to a "lion's-share clause" being included in the Articles. Notwithstanding, only the most radical solutions are forbidden. Indeed, the "lion's-share clause" will be considered as such if it does not leave each shareholder any hope of profit and a corresponding risk. In other words, only the clause that makes profits and losses "illusory" is prohibited.

Transfer of Shares

The acquisition of shares is possible throughout the lifetime of the company, depending on various circumstances as well as the form of company issuing those shares. Becoming a shareholder shall take place either through a share-capital increase or through the acquisition of shares.

Indeed, the company may increase its share capital, which will be carried out by holding an extraordinary general meeting of shareholders before a Luxembourg notary, under the conditions required for the amendment of the Articles or, depending on whether it is provided in the Articles, by means of a resolution of the management organ (board of directors). This authorisation must be granted by the general meeting of shareholders in advance and shall be valid for a maximum period of five years; it may be renewed once or on several occasions by the general meeting of shareholders.

Alternatively, a third party may become a shareholder through the acquisition of shares. Usually, the transfer of shares is performed under private seal, but it can be performed by a notarial deed. The transfer will be valid between the parties from the date of the transfer agreement; however, only the record in the shareholders' register establishes the ownership of the shares vis-à-vis third parties and the company. Therefore, the transfer must be notified to the company, in accordance with Article 1690 of the Luxembourg Civil Code.

This general rule applies to registered shares; there are, however, specificities regarding bearer or dematerialised shares (which can only be issued by an SA). As far as bearer shares are concerned, the transfer will become effective as of its recording in the shares register held by the depositary. Conversely, without going into the details in this article, dematerialised shares are transferred by book-entry transfer.

Transferability Restriction

For an SA, shares shall be freely transferable, unless provided otherwise in the Articles or in a shareholders' agreement. Given the nature of the Sàrl, shares are freely transferable between shareholders but are subject to a transfer restriction to third parties, thus requiring the approval of shareholders representing at least 75% of the share capital.

In addition to the aforementioned legal rules, the Articles or shareholders' agreement may provide for restrictions on the free transferability of shares, such as the prior-consent requirement, pre-emption or lock-up clauses, tag-along clauses, and call or put options. These provisions are a matter of contractual freedom and may be more restrictive than Law 1915, provided that they do not result in the absolute inalienability of the shares. Consequently, it is imperative that an exit mechanism for shareholders wishing to dispose of their shares is provided.

Further to the amendment of Law 1915 in 2016, lock-up clauses are valid but must be limited in time. Therefore, since 2016, pre-emptive, approval and lock-up clauses are valid for a maximum 12-month period and shall automatically be reduced to 12 months if contractually fixed to a longer period of time.

Principle of Equal Treatment of Shareholders

Given this explanation and the possibility to have different categories of shares, the question is how to know whether shareholders shall be treated equally. As a matter of fact, the principle of equal treatment of shareholders, even though recognised and applied, is not explicitly recognised in Law 1915 per se (except in one article governing share buy-back programmes). In summary, within the same category, shareholders must be treated equally. As a consequence, as previously mentioned, the Articles may themselves provide for different categories of shares, entitling their holders to different rights; this shall not violate the principle of the equal treatment

rule as long as, within each category, the rights are identical.

As previously mentioned, the voting right is closely linked to the status of shareholder and is of paramount importance to express the shareholders' view within the general meeting of shareholders. It must be noted that, pursuant to Law 1915, the board of directors of an SA has the powers to take any action necessary or useful to realise the corporate purpose of the company, with the exception of the powers reserved to the general meeting of shareholders by law or by the Articles.

Matters to be Discussed at the General Meeting of Shareholders

Law 1915 reserves the following matters to the exclusive competence of the general meeting of shareholders:

- appointment and removal of directors and statutory auditors;
- approval of the annual financial statements and profit distribution;
- amendment of the Articles;
- increase and decrease of the share capital, except for the authorised share capital;
- issuance of securities convertible into shares, except within the scope of the authorised share capital;
- merger or demerger;
- transfers of assets, branch of activity or all assets and liabilities under a regime of demergers;
- change of the company's corporate denomination, corporate form and nationality;
- increase of shareholders' engagements;
- in the event of a loss of half the corporate capital of the company, the extraordinary general meeting of shareholders must be convened to resolve on the possible dissolution of the company; and
- liquidation of the company.

In addition to these exclusive competences reserved to the general meeting of shareholders, powers of the board of directors may equally be contractually limited by the Articles, thus conferring certain additional decision-making powers that usually fall within the competence of the board of directors upon the general meeting of shareholders. However, any such potential limitation cannot lead to the board of directors being deprived of its essential function, which is the management of the company, by taking any and all actions necessary or useful to realise its corporate purposes.

General Meetings

General meetings may be convened at any time by the management body. The board of directors shall convene the general meeting for an SA. That said, a general meeting may equally be convened by the statutory auditor or one or several shareholders representing at least 10% of the share capital. In such a case, the board of directors must convene the general meeting so that it is held within one month upon written request of the shareholders, indicating the agenda.

For a Sàrl, in the absence of a contrary provision in the Articles, each manager may convene the general meeting without the other managers being able to make an objection. Shareholders representing more than 50% of the share capital may also convene a general meeting at any time.

Participation Rights

As long as the nature of the shareholder is properly evidenced, any shareholders have the right to participate in general meetings of sharehold-

ers, regardless of the number of shares they hold. They can participate by attending meetings in person, or by appointing a proxy.

Right of Information

Shareholders intending to participate in any general meeting have a right of information for the purpose of exercising their voting right duly informed; thus, Law 1915 provides for certain formalities to be performed in due time to that effect. A convening notice must be filed with the Luxembourg register of commerce and companies, as well as being published in the electronic official gazette and in a local newspaper at least 15 days prior to the captioned general meeting.

In the context of an annual general meeting, for instance (which must be held at least once a year for an SA, within six months after the end of the financial year), shareholders may consult certain documents such as the annual account, the management report and the report of the statutory auditor at the registered address of the company; shareholders may even obtain a copy thereof upon request.

Rights to Ask Questions

In the same context as previously mentioned, shareholders participating in a general meeting have a right to ask questions. However, this right is not unlimited. Indeed, questions must be related to the agenda of the general meeting, and the management cannot answer questions that would be detrimental to the company's interest (such as revealing pending confidential discussions, business secrets, etc) or, more simply, that would breach a confidential obligation. Furthermore, the shareholders cannot abuse their right to ask questions.

From a pragmatic perspective, it is recommended that shareholders intending to ask questions consider posing those questions to the management in advance, so that answers may be prepared for the general meeting; moreover, this could allow duly informed directors to participate in the general meeting, considering that there is no obligation for them to attend.

Inclusion of a Request Statement in the Minutes

The shareholders also have the right to request that a statement (in relation to the items on the agenda) be included in the minutes of the general meeting; this is particularly appropriate in the case of potential litigation to evidence disagreement with certain resolutions that have been adopted by a majority of shareholders. In the same context, shareholders shall be entitled to obtain a copy of the captioned minutes of the general meeting concerned.

Inclusion of a Specific Item on the Agenda

In addition to the aforementioned right to convene a general meeting of shareholders, it must be emphasised that shareholders representing at least 10% of the share capital of the company may also request of the management that a specific item be included on the agenda of the captioned general meeting. This right obviously includes the right to suggest the wording of the new proposed resolution. For practical reasons, any such request must be made at least five days prior to an already convened meeting.

Request Postponement of a General Meeting

Shareholders representing 10% of the share capital of a company may also request that a general meeting be postponed; in such a case, the management must postpone the general meeting by four weeks. The general meeting must be reconvened by the management with the same agenda, and no meeting can be held in the meantime with the same agenda items.

Individual Judicial Proceedings

In terms of litigation rights, one or several shareholders are entitled to exercise individual judicial proceedings (ie, actio ut singuli), on the basis of tortious liability, if the litigious actions of the directors had a direct and personal impact on the shareholders. In other words, shareholders who suffered from a direct and personal damage caused by the actions of directors are entitled to exercise the actio ut singuli. Any such judicial proceeding linked to the damage exclusively suffered by the shareholder must remain separate from the damage suffered by the company taken as a whole.

Exercise of Judicial Proceedings

In the case of a potential director's liability on the basis of any misconduct in the management of the company, the general meeting of the shareholders – acting as a corporate body and representing the company – is entitled to decide to exercise the actio mandati (ie, judicial proceeding) before the Luxembourg commercial court, on the basis of the contractual liability of that director.

Action Against the Board of Directors

In addition to the preceding points, since 2016 an action may be brought against the directors on behalf of the company by one or more (minority) shareholders (or holders of profits' units) who, at the general meeting which decided upon the discharge of those directors (ie, the annual general meeting), owned securities with the right to vote at such a meeting representing at least 10% of the votes attaching to all such securities. This is a clear extension of the actio mandati, which was not recognised until 2016, and aims to reinforce the right of minority shareholders to act against the board of directors.

Questions to the Management Body

In the same vein, as far as a right of information is concerned, since 2016 one or more shareholders representing at least 10% of the share capital or 10% of the votes attached to all existing securities may – either individually or by acting together in any manner whatsoever – ask the management body questions in writing on one or more act(s) of management of the company. In the absence of any answer within a period of one month, these shareholders may apply to the judge presiding in the chamber of the District Court dealing with commercial matters and sitting in matters of urgency to appoint one or more experts instructed to submit a report on the act(s) of management targeted in the written question.

If the captioned application is accepted by the Court, it will determine the scope of the assignment and the powers of the experts.

Suspension of Voting Rights

Shareholders have rights, but also duties, hence the Articles of an SA may provide that the board of directors may suspend the voting rights of each shareholder who is in default of their obligations under the Articles or their deed of subscription or deed of commitment. The suspension of voting rights is temporary and is imposed on the defaulting shareholder. The purpose of suspending voting rights is to sanction the defaulting shareholder; thus, if the cause justifying the suspension of voting rights disappears because it has been remedied by the defaulting shareholder, the voting rights shall be restored accordingly.

Voluntary Contractual Waiver of Voting Rights

As previously mentioned, the voting right is intrinsically attached to the shares and represents the ultimate way for shareholders to influence the

company's life. However, since 2016, shareholders may resolve to waive their voting rights contractually. Law 1915 recognises the validity and enforceability of such voluntary waivers of voting rights. Consequently, each shareholder, in their personal capacity, may undertake not to exercise all or part of their voting rights for a limited period of time, or indefinitely. This choice will validly bind the waiving shareholder, as well as the company, upon its notification thereof.

It must be emphasised that this waiving right is a personal act, so it is not attached to the share in the case of a transfer; in other words, the new shareholder acquiring shares from a waiving shareholder is not bound by that waiver and shall be able to exercise fully their voting right attached to the acquired shares.

Rights for Shareholders to Challenge Resolutions

Finally, the aim of this article is to raise the right for shareholders to challenge the resolutions adopted in a general meeting under certain circumstances. Indeed, since 2016, any decision adopted in a general meeting shall be void in the following circumstances:

- where the captioned resolution is flawed as a result of a formal irregularity, if the applicant evidences that this irregularity may have influenced their decision;
- in the event of a breach of the rules relating to its operation or in the event of deliberation on an issue that was not on the agenda where there is a fraudulent intent;
- where the adopted decision is flawed by any other abuse of power or misuse of power;
- in the case of the exercise of voting rights that are suspended pursuant to a legal provision not included in Law 1915 and where, without those unlawfully exercised voting rights, the quorum and the majority requirements for decisions by a general meeting would not have been met; and
- for any other reasons provided for in Law 1915.

The captioned nullity must be declared by court order. However, a shareholder who voted in favour of the captioned resolution is barred from pleading the nullity thereof, unless that shareholder's consent was flawed, or if the person explicitly or implicitly waived their right to avail themselves of that nullity, unless the nullity resulted from a public policy rule.

Considering the need for security and stability, Law 1915 further provides that, where the avoidance is likely to prejudice rights acquired in good faith by a third party towards the company, based on the meeting's decision, the court may decide that the avoidance is not to have any effect vis-à-vis those rights, subject to the applicant's right to damages, as the case may be.

In conclusion, this article aims to give a non-exhaustive overview of shareholders' rights in Luxembourg, given the absence of any specific catalogue thereof in Law 1915. All of the aforementioned subjects should be analysed individually for more specificities and assessment made on a case-by-case basis for a tailor-made pragmatic implementation.

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