The voice of corporate governance
in Luxembourg

# DIRECTORS FAQ –
# LUXEMBOURG NON-REGULATED ENTITIES

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# FOREWORD

The requirements of Directors are consistently increasing. New or updated laws and regulations on ESG or AML/KYC requirements directly impact the work of Independent Directors of non-regulated entities. In addition, a crisis like the recent Covid 19 pandemic and the war in Ukraine underline the importance of a strong governance framework to enable Independent Directors to fulfil their responsibilities and ensure the sustainability of the business of the companies .

This document is intended as a brief overview and guidance of common questions for Directors of non-regulated entities in Luxembourg. It provides an indication of the general framework of relevant company laws and regulations, as well as market practice as at the date of drafting.

Different types of vehicles have varying legal and regulatory requirements, not all of which can be covered in this document. The information provided is not intended as a substitute for legal or tax advice, but purely for guidance purposes.

The term "Entity" or "Company" in this Frequently Asked Questions (FAQ) refers to a company or partnership where relevant.

Whilst reasonable care has been taken in compiling these answers to the FAQ, ILA does not accept any responsibility and does not guarantee in any way that they will be appropriate for a particular structure, circumstance or vehicle. Readers should acquire their own professional advice in order to clarify which rules and practices apply to their individual circumstances.

We agreed that in principle the definition of a company under Luxembourg law is the basis of our subject. This already excludes associations, foundations etc. even though these may in fact be involved in financial activities and their management may benefit from following some procedures for companies.

We hope you enjoy the reading and find this guide to be useful.

*Carine FEIPEL*

Chair of ILA

*Harald THUL*

Chair of the Financial Companies Committee

# DEFINITIONS

1915 Companies Law: The Law of 10 August 1915 concerning commercial companies (as amended), consolidated by the Grand Ducal Regulation of 5 December 2017 and applicable as from 19 December 2017. This is the primary legislation governing commercial companies under Luxembourg law.

2011 Law on Business Licence for trading companies: The law specifies that the infrastructures necessary to the business activity include facilities and materials adapted to the type and the scale of the business activity. The company must also have appropriate administrative and technical structures for these activities. All documents relating to the company's activities (including accounting documents and any documents related to personnel) must be made available. The manager must be present on a regular basis.

Articles: The "*statuts*" or articles of incorporation of a company.

AIMA: The Alternative Investment Management Association is a global representative of the alternative investment industry.

Board or board of directors / managers: The management body of a Luxembourg company. In this document we use the term board to refer generally to a grouping of directors, however please note that an SCA, SCS and SCSp does not have a board in the legal sense of a collegial body whereas boards in an S.à r.l. may operate as such a board only if the articles of the S.à r.l. are structured accordingly. Where in this text reference is made to Directors this may include Managers for an S.à r.l. as the case may be.

CSSF: The "*Commission de Surveillance du Secteur Financier*" is the supervisory body of the Luxembourg financial sector.

DAC 6: Directive (EU) 2018/822 on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

Directors / Managers: The members of the board or management body of a Luxembourg company.

EBA: The European Banking Authority (EBA) is a regulatory agency of the European Union, which works to ensure effective and consistent prudential regulation and supervision across the European banking sector.

EMIR: The European Market Infrastructure Regulation ) is an European regulation that aims to address market transparency and in derivative trading.

ERM: Entity Risk Management

ESMA: The European Securities and Markets Authority (ESMA) is an independent European Union Authority that contributes to safeguarding the stability of the EU's financial system by enhancing the protection of investors and promoting stable and orderly financial markets.

EVCA : The European Private Equity and Venture Capital Association (EVCA) is a member-based, non-profit industry association that was established in 1983 in Brussels. The EVCA represents and promotes the European private equity and venture capital industry.

INREV: European Association for Investors in Non-listed Real Estate Vehicles (INREV) is a platform for the sharing and dissemination of knowledge concerning the European non-listed real estate fund market.

RCSL or Registrar of Companies: "*Registre de Commerce et des Sociétés Luxembourg*" is the Registrar of Companies who keeps the register of commerce and companies.

S.A.: Société Anonyme (public limited liability company). The "*Conseil d'administration*" is the board of directors of an S.A.

S.à r.l. : Société à responsabilité limitée (private limited liability company). An S.à r.l. is managed by one or more managers (*gérants*).

SCA: Société en commandite par actions (partnership limited by shares). An SCA is managed by one or more unlimited members or general partners (*associés commandités*).

SCS: Société en commandite simple (limited partnership - tax transparent). An SCS is managed by one or more unlimited members or general partners (*associés commandités*).

SCSp: Société en commandite spéciale (special limited partnership – tax transparent). Similar to an SCS, also managed by one or more unlimited members or general partners (*associés commandités*). Inspired by Anglo-Saxon Limited Partnerships, this vehicle has no legal personality and is suitable for a wide range of uses – an SCSp may be used as a regulated or unregulated vehicle, for example as a master/feeder fund, special purpose vehicle, joint venture, co-investment vehicle, carry vehicle or acquisition vehicle.

SOPARFI : Société de participations financières (Financial holding company).

Société de gestion de patrimoine familial ("SPF"): The SPF was launched by the Law of 11 May 2007 in order to replace the abolished Holding 1929 regime and is aimed at the private wealth holding and management activities. The object of this vehicle is limited to holding passive investments (acquisition, holding, management and disposal of financial assets excluding any type of commercial activity). Furthermore, the circle of investors is restricted to private individuals (individuals managing their private wealth or private wealth entities acting for one or several individuals, or intermediaries acting on behalf of either of the above).

The Luxembourg law of 22 March 2004 on securitizations (the "Luxembourg Securitization Law"): A securitization is a type of structured financing in which a pool of financial assets (such as loans, mortgages, etc.) is transferred to a special purpose vehicle ("SPV") that then issues equity or debt backed solely by the assets (collateral) transferred and payments derived from those assets. While the benefits of securitization may vary for different issuers and investors, the common advantages of securitization are that it provides a lower cost of capital, enables a company to convert illiquid assets into cash and transfers the risks related to defined assets to third parties.

Transfer Pricing Circular (« TP Circular ») *LIR n°56/1-56bis/1 from 27 December 2016*: Luxembourg transfer pricing rules are determined in Article 56 and 56bis of the Luxembourg Income Tax Law and §171 of the Abgabenordnung, and require that "all transactions" between a Luxembourg entity and group companies should correspond to arm's length market conditions (including business restructuring transactions).

The Circular provides additional guidance in terms of substance and transfer pricing requirements in line with the Organisation for Economic Co-operation and Development (OECD) Guidelines. Under the Circular, a group financing company should have a physical presence in Luxembourg in order to perform risk control functions. A group financing company is considered to have physical presence in Luxembourg, provided the conditions of the Circular are met.

# 1. BOARD COMPOSITION AND ORGANISATION

## 1.1. What are the different types of Luxembourg entities?

Luxembourg has 8 main structure types:

- Société Anonyme - S.A.
- Société à responsabilité limitée - S.à r.l.
- Société coopérative organisée comme une S.A. - COOPSA
- Société en commandite par actions - SCA
- Société en nom collectif - SNC
- Société en commandite simple - SCS
- Société coopérative – SC
- Société en commandite spéciale - SCSp

The two first are the most commonly used company structures in Luxembourg. For Private Equity and Real Estate structures the SCSp has been used more and more since its introduction in Luxembourg Law in 2013.

- A Luxembourg Société Européenne (SE) has to use the company structure of a Société Anonyme - S.A.

## 1.2. Are there specific qualifications required to be a director?

There are no specific qualifications or continuing education requirements for directors of unregulated Luxembourg companies. Certain persons may be excluded e.g. if banned following a previous bankruptcy.

For some types of business, a business license ("*autorisation d'établissement*") is required as some professions or activities are regulated or are subject to the operations being run by persons who have appropriate professional qualifications and repute. A degree in line with the core business of the company is needed and the relevant qualifications acceptable to the government organisation in charge of issuing the business license.

Despite the absence of general expertise requirements, directors should have relevant experience and understanding of the business and investments made by the company on whose board they are appointed to allow them to contribute positively as well as to understand their duties, responsibilities and risks and how they should be mitigated. Thus, knowledge of the relevant or similar business areas should be a pre-requisite for the directors/managers. **In line with suitability requirements for regulated entities, best practice should aim at directors meeting acceptable reputation, experience and governance criteria (cf., EBA and ESMA fit and proper requirements published on 2 July 2021).**

The appointment of independent directors can add diversity to a board via the introduction of desirable skillsets and competencies not represented or insufficiently represented on a board. It can lend additional credibility to a company vis-à-vis its investors, expand the scope of the company's business networks and give experienced, external perspectives and guidance. This is particularly important where the company may become listed or change status to a regulated company (see recommendation of "The Ten Principles of Corporate Governance of the Luxembourg Stock Exchange"; Corporate governance (bourse.lu)).

There should be a commitment from directors/managers to remain up-to-date with changes in legislation and other factors affecting the business and to remain aware of the challenges faced by the business going forward and how these are changing.

### 1.2.1. The key elements are integrity and professional experience

The company will assess the appropriateness of a candidate director and existing directors for performing the required duties.

The company should ensure that directors also have some knowledge/expertise, as appropriate, in the types of assets and liabilities as well as the operations of the company and for the sector in which it operates.

### 1.2.2. Sufficient time for each mandate

On both the international, EU and national political agendas there is increasing scrutiny of the number of mandates each individual director holds. Although a maximum number of mandates has not been set for unregulated entities, as opposed to regulated entities, due to the enormous variances in complexity and time required by different entities, directors should ensure they have sufficient time to fulfil each of their mandates, including but not limited to meeting attendance, preparation time and other tasks.

### 1.2.3. Residence of directors

There is no general legal requirement for directors to be resident in Luxembourg. However, Luxembourg residence may be desirable for a number of practical reasons (e.g. local representation, expertise etc). This will also allow direct knowledge of local regulations and the local market.

The Transfer Pricing Circulars however do require in principle a majority of Luxembourg resident or professionally domiciled directors.

## 1.3. How many directors are required?

Pursuant to the 1915 Companies Law, unless a higher number is set out in the articles, **a minimum of three directors (administrateurs) is generally required** for an S.A. (although a single-member S.A. can be administered by a single director), at least one manager (gérant) for a S.à r.l. and at least one general partner being an unlimited member (associé commandité) for an SCA.

The total number of directors on entities boards varies widely. **A company typically has between three and seven directors.**

Three directors/managers would seem to be the minimum for a board to be effective and to ensure an acceptable decision-making process.

The addition of a greater number of directors/managers should reflect the size and complexity of the company and its activities with both independent and executive directors/managers to ensure an appropriate balance of skills and experience at board level.

The board needs to be large enough to provide a mixture of skills, experience and to ensure an adequate level of individual contribution to discussion and debate and communication in general. Research indicates that too large boards are unmanageable and lose effectiveness.

Ideally, a board should be balanced in terms of experience, diversity (including but not limited to gender) and expertise.

### 1.4. Do we need a chairperson, a company secretary or any other official appointee of the board?

Chairperson: S.A.s must mandatorily appoint a permanent chairperson. Other company forms may or may not have a chairperson in accordance with the terms of the articles of company.

Company secretary: a company secretary may be appointed, although not legally required.

A company secretary can add value by acting as the main point of contact for the board, taking minutes of meetings and ensuring in support of the chair (if any) that the board is well run and coordinated.

If no official company secretary to the board is nominated by the board, then an employee of the company or an outside service provider generally takes this role. In practice it is important to have a support person who assists with the administration of the board, including taking minutes.

Scrutineer: the board may also enlist a scrutineer whose role is to assist in the voting process. A scrutineer collects, verifies and counts votes cast at a shareholder meeting. Scrutineers are formally appointed by the shareholder meeting, in particular for physical meetings of S.A.s.

### 1.5. Do we need a compliance officer?

The term officer is per se not a standing term under Luxembourg corporate law and practice. In unregulated structures, it is the responsibility of the board to define if a compliance officer is required and to define the areas to be complied with, such as local regulation, tax regulation, accounting regulation, VAT, fraud, corruption and moreover, the requirements can be defined according to the business relevance and the size of the company, i.e. small, medium and large.

### 1.6. Do we need a risk officer?

In unregulated structures, it is the responsibility of the board to define if a risk officer is required and to define the areas to be complied with, such as operational risks. The risks and the coverage of risks are sector and business specific and need to be addressed accordingly. The requirements may vary according to the size of the company, i.e. small, medium and large.

### 1.7. Do we need independent directors?

There is no legal requirement to appoint an independent director, however an increasing number of companies are appointing independent directors.

Unlike certain jurisdictions, there is no legal or regulatory definition of an independent director.

Employees of company service providers do not fulfil the criteria for being an independent director as such employees may have conflicts of interest.

Recommendation 3.5. of the Ten Principles of Corporate Governance of the Luxembourg Stock Exchange gives some guidance with regard to a definition of independence. The Ten Principles of Corporate Governance apply to Luxembourg companies listed on a Luxembourg regulated market but they can also be referred to as a useful source for determining best practice of other Luxembourg companies.

Note: In relation to Luxembourg companies listed on a Luxembourg regulated market, the Ten Principles of Corporate Governance of the Luxembourg Stock Exchange recommends the appointment of independent directors in listed companies and gives some guidance (see Luxembourg Stock Exchange's definition of independence in Recommendation 3.4.).

### 1.8. Are there diversity requirements (e.g. age, sex)?

There are no diversity requirements in Luxembourg law. However, boards should consider a balanced composition in terms of diversity.

In relation to listed companies, the Ten Principles of Corporate Governance of the Luxembourg Stock Exchange recommend, for example, an appropriate representation of both genders and account to be taken of the specific features of the company and its activities, and particularly the various business lines of the company and their geographic diversity (see Luxembourg Stock Exchange's definition of independence in Recommendation 3.5.).

The European Commission has proposed legislation with the objective of a 40% presence by gender among non-executive directors of listed companies. It does not apply to unlisted companies nor to small and medium-sized listed entities defined as companies with less than 250 employees and a global turnover not exceeding EUR 5 million.

### 1.9. Must one be a shareholder to become a director?

There is no legal obligation for a director to hold shares in the company of which they are a director. There is also no prohibition.

### 1.10. How are directors appointed and removed?

Appointment:

- By the shareholders. The director is appointed by shareholder resolution in accordance with the articles of association. In an S.A., the appointment would be made in the general meeting;
- A replacement director may be co-opted by the remaining directors if there is a vacancy on the board of an SA between general meetings, unless restricted by the articles. The shareholders must ratify this appointment at the next general meeting.

Removal:

- Resignation of the director
- No re-election of the director upon expiration of the term of the mandate
- Removal of the director by vote of the shareholders in general meeting
- Dissolution or insolvency of the company on whose board the directors serves
- Death or incapacity of the director
- Personal bankruptcy of the director

Publication:

- Any changes to the board must be notified to the Registrar of Companies or RCSL "Registre de Commerce et des Sociétés Luxembourg" within one month, which will publish these in the Mémorial C (i.e. the Official Gazette).

### 1.11. What due diligence should be carried out by candidate directors?

Due diligence on candidates should not only be carried out by companies appointing a director; it applies equally to candidates selecting their mandates. Directors are encouraged to conduct and record their due diligence to ensure they are familiar and comfortable with the structures and affiliates with which they will be associated.

### 1.12. Is it usual to receive an appointment letter or contract?

Appointment letters and contracts are increasingly seen in practice and are strongly recommended as they can be useful for clarifying certain issues relating to duties, remuneration, insurance, term of appointment and certain rights after termination of the appointment.

Sometimes such a letter/contract will also give the right to the director to inspect documents at the registered office after termination of the appointment.

### 1.13. Who pays the directors fees and decides on their level?

There is a wide range in remuneration levels and structures, depending on the type of mandate and the responsibilities of the directors. In practice the company typically negotiates the level of remuneration, and the shareholders vote to approve it at the next general meeting, usually at the meeting which appoints the director or extends the term of the mandate. Directors should also be entitled to claim payment of reasonable expenses, which should be agreed with the company.

Fees are normally paid by the company.

## 1.14. Will director's fees be published?

There are no general legal or regulatory requirements to list or publish detailed remuneration amounts although there is a general disclosure in annual accounts.

## 1.15. What taxes are payable in Luxembourg on director's fees?

If paid by the company and received by the directors as an individual, director's fees (known as tantièmes) will be subject to a special withholding tax of 20%. Depending on the director's personal circumstances it may be possible to set this off against other Luxembourg or foreign income tax liabilities. Social security contribution aspects should also be considered and, in any event, a tax adviser should be consulted.

Follow the circular N. 781 issued by Luxembourg tax authorities on 14th February 2017, the independent persons who supply directorship services are to be consider in the scope of the VAT (17%) and have the status of taxable persons for VAT purposes. Therefore, any Luxembourg-resident independent director will be obliged to register for Luxembourg VAT and to file the concerned return reporting.

If invoiced via a private company, they will also be subject to corporate income tax.

## 1.16. What are the engagements in terms of conflict of interest?

Any director who has, either directly or indirectly, a financial interest that is contrary to that of the company in a transaction submitted for approval to the board is obliged to inform the board of their conflict, refrain from taking part in the deliberations, abstain from voting and record his or her statement in the minutes of the meeting. A special report regarding the transactions in which one of the directors had a (potential) conflict of interest is then to be prepared and submitted at the next general meeting before voting on any resolutions.

The non-regulated entities are not subject to a specific corporate governance code or bodies of the board of directors to be put in place, but it is strongly recommended to the member of the board to be vigilant on the conflict of interest aspects.

## 1.17. What are the current regulations regarding board and shareholder meetings held remotely?

Following the issue related to the pandemic crisis of COVID-19, the Grand-Duchy of Luxembourg issued a new regulation on 20 March 2020, amended by Grand Ducal Regulation of 29 May 2020, introducing a number of measures to facilitate board and shareholder meetings held remotely.

Virtual shareholder meetings can be organized by Luxembourg-based companies even if the company's articles of association do not provide for this possibility. Shareholders are allowed to vote:

- remotely in writing or by electronic means, provided the resolutions or decisions to be taken have been published or sent to them in advance;
- by means of a person designated by the company to act as a proxy;
- by video conference or any other means of communication allowing the shareholders to be identified.

Moreover:

- proxyholders appointed by the shareholders may only participate as set forth above.
- shareholders attending as described above are deemed to be present or validly represented for the purpose of determining the quorum and majority at the meeting.

Luxembourg-based companies may also organise virtual board meetings, even if the articles provide otherwise, without the board members' physical presence being required:

- by means of circular resolutions; or
- by video conference or other means of communication allowing the board member to be identified.

Board members participating by such means are deemed present for the purpose of determining the quorum and majority.

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# 2. THE ROLE OF A DIRECTOR

## 2.1. What is the role of a director?

The board is generally entitled to do all things deemed necessary to achieve the corporate objects except for those actions that have been expressly reserved by the 1915 Companies Law or the articles for decision by the shareholders (1915 Companies Law, Art.441-5, al.1).

Accordingly, the board is in charge of all administration and management matters of the business of the company and collectively represents the company towards third parties.

Examples of items the board would be involved in include:

- Approving the strategy and business plan of the company;
- Approving material transactions including, for example, the acquisition or the disposal of assets;
- Deciding on important matters of policy, for example, accounting and valuation principles to be applied by the company;
- Holding regular meetings plus ad hoc meetings where required;
- Approving the annual report for submission to the approval of the shareholders of the company and meeting accounting deadlines;
- Convening the general meeting of shareholders;
- Proposing and declaring interim dividends (the declaration of dividends being a reserved matter for the shareholders);
- Signing audit letters e.g. engagement letters and representation letters;
- Appointing service providers and signing other material agreements;
- Ensuring compliance with regards to accounting and tax deadlines.

Directors must ensure the company applies the standard of care and diligence of a reasonable person in that (or a similar) position and circumstances.

Directors should ensure they regularly receive detailed reports (e.g. management accounts) from agents and advisers of the company to enable proper consideration of all decisions. They should monitor and supervise and should, if they cannot see to this themselves, put adequate processes in place which allow the directors to monitor and supervise the relevant business matters. They should also request further information when required.

## 2.2. Can a director delegate his/her functions?

What can be delegated?

The 1915 Companies Law allows the board to delegate the day-to-day management of a company to one or more directors or managers or to delegate specific tasks. Material business decisions may not be delegated and it is important to note that ultimate responsibility remains with the board.

To whom can it be delegated?

The 1915 Companies Law does not specifically provide for the board of managers of a private limited liability company to delegate the day-to-day management and the representation of the company in relation to such day-to-day management, unlike in the case of an SA.

Special powers may be granted to any member of the board of managers of a company. The scope of such special powers should however be restricted to certain operations or special types of operations in which the company is involved, in order to avoid that such a delegation be interpreted as a complete and general delegation of the management of the company.

The board of managers will remain liable for the management of the company towards the shareholder(s) of the Company, even though it has delegated certain of its powers. Accordingly, it is strongly recommended the board of managers control the assignments of the manager(s) to whom special powers have been granted on a regular basis and ratify acts passed on behalf of the company by such manager(s).

Delegation may be implemented inside the organisation or, more problematically (and requiring most often a greater degree of vigilance), outsourced to a third-party provider. Boards must act as a prudent person would in similar circumstances. This includes performing due diligence on service providers before their appointment as well as on-going monitoring during the relationship, such as thorough questions, visits, periodic due diligence, etc.

### What to take care of when delegating?

Internal delegation - distinct responsibilities may be attributed to different persons, however restrictions on delegation are not enforceable towards third parties even if they have been published.

The board should ideally have delegation of authority guidelines, including:

- Date and duration of the delegation;
- Circumstances of the delegation (e.g. why? Approved at board meeting dated xx, etc.);
- What has been delegated to whom? It is best practice to set out in detail the powers, roles and responsibilities of each delegate - what areas, what limits, must they act as a committee, jointly or can each act alone?
- Reporting obligations - set out what reporting is expected in return, including what reporting is expected from delegates at board meetings, in between meetings and following any significant event;
- Any other relevant details regarding the delegation.

Third party arrangements - outsourcing - In addition to the above, it is recommended that all outsourcing arrangements are set out in a legal agreement. Such agreement should clearly set out:

- Roles and responsibilities of the delegates, including their reporting obligations (including obligations to disclose and seek approval of all sub-delegations);
- Duties are either to achieve certain results or, depending on the services, to act in accordance with the due skills and care of a normal businessman in the pursuit of the objectives;
- Access protocols to enable due diligence exercises;
- The board has unrestricted access to information;
- The delegate should not retain documents and has the obligation to return them to the board at the end of the outsourcing job, unless agreed otherwise;
- Confidentiality;

- Non-compete;
- Detailed operating procedures and/or service level agreements;
- A break-up clause;
- AIFM Directive In relation to certain structures which are part of alternative investments, certain items will be required to be outsourced, such as valuation to an external valuer;
- On-going monitoring.

The board must retain control over delegated duties e.g. via regular upward reporting to the board and ensuring that delegated tasks are managed in accordance with applicable law and regulations, the articles, the contracts and are in the best interests of the company.

Periodic due diligence regarding outsourced responsibilities and performance reviews should also be undertaken. This requirement may extend beyond the company's direct service providers to sub-service providers (e.g. prime brokers or sub-custodians who may hold assets). Although there may be issues in gaining access to sub-providers both initially and on an on-going basis for monitoring, a certain amount of effort should be expended for assurance that indirect service providers can be relied on. Where possible, agreements should contain provisions allowing access to sub-providers.

## 2.3. What sort of internal controls should the board have?

Internal board policies and guidelines are recommended. Even if it is not required by law and regulation, the implementation of internal policies and guidelines is recommended, as, no or at best minimum guidelines are set out in the articles and/or the 1915 Companies Law (e.g. quorum, participating by telephone etc.).

The board should maintain a sound system of internal control and compliance designed to safeguard shareholders' investment and the company's assets. The board should develop over time its own set of internal functioning procedures and guidelines.

The board should ensure the establishment of effective systems and controls for compliance with applicable requirements and standards under relevant laws and regulations. Best practice is to compile all of these in a «Procedures manual».

A procedures manual would be considered best practice for all entities. It should be reviewed at least annually and as often as necessary and updated as required to cover all controls, including financial, operational and compliance controls and risk management.

More detail on the functioning of the board is given in section 3. More detail on board policies is given in section 2.4. below.

## 2.4. Our group already has board policy and corporate governance guidelines for entities outside of Luxembourg. Can the board simply apply these?

As long as they do not conflict with Luxembourg laws and regulations a director/board may, with the necessary changes, make use of other guidelines. The board should still develop specific board guidelines for Luxembourg entities to help avoid breaches of Luxembourg laws or regulations.

To complement and fill-in the legally required policies, guidance is often sought (and may even be adopted into board policy and procedures) from other relevant, recognised sources, such as professional guidelines in other countries. Good places to start include:

- Local directors' institutes e.g. the Luxembourg Institute of Directors (ILA);

- Overseas trade associations, specialist industry bodies, such as the European Venture Capital Association (EVCA), the European Association for Investors in Non-listed Real Estate Vehicles (INREV) or Alternative Investment Management Association (AIMA);
- Standards boards such as the Accounting Standards Board, and the UK Financial Reporting Council.

A more detailed list of useful links is given in Section 6. below.

As a result of the «8th Audit Directive» (EU Directive 2006/46/EC), listed entities must adopt a corporate governance code. Adoption of such a code by unlisted entities depends on the individual circumstances of each company.

## 2.5. How can board members ensure ESG aspects of new transactions and ongoing activities are considered?

### How does the board oversee ESG?

ESG strategy should be aligned with business strategy and focus on material risks and business drivers, the full board needs to understand the ESG aspects. If this is a new area of focus for the board and the company, directors may need to assign detailed oversight to specific committees to help the ESG strategy launch smoothly. Ultimately, ESG issues will be relevant to all committees.

As the board determines where ESG oversight will be assigned, it should consider the following questions:

- Is there a specific committee with the capacity, interest and skills to take the lead on overseeing the company's overall ESG efforts? If not, will the full board take this responsibility or should a new committee be created?
- How will the committees stay aligned and up to date on ESG considerations? Have committee charters and proxy disclosures been updated to transparently disclose to shareholders and other stakeholders the board's allocation of ESG oversight responsibility?

### Board oversight and investors' expectations:

Investors are continuing to expect more and more transparency from boards in how they oversee particular topics. ESG oversight is no exception. Boards can find a number of ways to provide shareholders with the information they seek.

- Robust disclosure in the proxy statement describing the board's oversight efforts;
- Updates to board committee charters to address committee oversight responsibilities related to ESG;
- Additional information about directors' skills that enhance their contribution to ESG oversight efforts.

In any case ESG should be always on the board's agenda. Directors are also much more likely to say that disclosing a company's efforts on ESG-related issues should be a priority for management and this should be the case.

The following additional aspects should be taken into account when integrating ESG into board oversight responsibilities:

- Strategy: Are ESG risks and opportunities integrated into the company's long-term strategy? How is the company measuring and monitoring its progress against milestones and goals set as part of the strategy?
- Messaging: Do ESG messaging and activities align with the company's purpose and stakeholder interests?

- Risk assessment: Have material ESG risks been identified and incorporated into the Enterprise Risk Management (ERM)? Has the board allocated the oversight of these risks to the full board or individual committees?
- Reporting: What is the best communication platform to use for the company's ESG disclosures?

For further details on ESG please refer to ILA brochure on this specific subject.

# 3. FUNCTIONING OF THE BOARD AND TECHNOLOGY

## 3.1. Are there rules on how the board should function?

The 1915 Companies Law sets out how the management bodies should operate.

The articles usually set out the basic rules regarding meetings of the board (convening, voting majorities etc.).

More detailed internal rules regarding the board's functioning and deliberations are recommended - see Section 2 above.

## 3.2. When or how often does a board meeting need to be held?

The board should meet at the registered offices of the company as often as is necessary for the company to be properly managed and to enable the board to exercise its powers. As a result, the frequency of board meetings will differ in accordance with the specific needs of the company, its current business needs and conditions. A minimum of four board meetings annually is generally held to constitute best practice. The annual accounts must be discussed and approved at board level.

Specific board committees may be created to deliberate on specific ad hoc issues. They generally function as advisory committees of the board doing preparatory work and where the board takes the formal decisions. It needs to be mentioned that formal binding decisions have to be taken be the board as the relevant decision making body.

## 3.3. How is a board meeting called?

This is usually set out in the articles. The board should ensure the convening notice always contains a formal and specific agenda of all matters the board will review, discuss and approve with sufficient supporting documentation made available in advance so that the board members can assess the agenda items with the underlying documents and facts in their overall context ahead of the actual board meeting. Board members should be treated equally and have access to the same information and documentation.

A sample agenda can be found in the appendix.

## 3.4. What information can a director expect to receive?

The board should be supplied in a timely manner (if possible, at least five working days in advance. However, subject to urgent matters, which require immediate attention, this period can be shortened as there is no legal requirement as to the minimum number of days) with information in a form and of a quality appropriate to enable it to discharge its duties. Each director is entitled to receive copies of all information and documents transmitted to the board.

Directors should normally review all company documents. However, the board may have delegated certain functions, and only request a list of related agreements with one or more sample full agreements attached for review.

Luxembourg has strict confidentiality laws, particularly in the financial sector, but also set out as a general principle of Luxembourg company law. Directors must take care to ensure that no information received is divulged to third parties or used for any other purposes. The disclosure of information to shareholders by a director is a sensitive issue and merits, depending on the circumstances, caution. Under specific circumstances sensitive information should not be disclosed to shareholders.

Examples of documents likely to be supplied to the board, and which the board should have the opportunity to comment on, include:

- Review of corporate documents (extract from the Registrar of Companies);
- Review and approval of the last minutes;
- Review and approval of budgets and business plans;
- Review and approval of the management accounts;
- Review and approval of financial statements (once per year);
- Status of Luxembourg tax & VAT compliance;
- Review of company activities / investment portfolio;
- Review of delegated activities;
- Review of bank mandates and signature lists;
- Review of large payments;
- Review of large liabilities (in particular if they are outside the ordinary course of business);
- Cash flow forecast (12 months);
- Legal compliance;
- New agreements (if applicable);
- Related party transactions (if applicable);
- Accounting treatment changes (if applicable);
- On-going supervision - between scheduled board meetings;
- Options include ad hoc telephone meetings, circular resolutions (i.e. resolutions in writing) or delegation to (sub-)committees and/or service providers/directors;
- It is important to remember, however, that whilst a board may delegate certain activities and decisions, it cannot avoid responsibility for those decisions. Any significant decisions taken should be reported to the board in writing at the next scheduled meeting so that they can be ratified.

### 3.5. If a director wants more information – can they demand it?

If a director does not feel that information provided by the relevant parties is enough, they should make further enquiries and requests from appropriate parties (typically the chairperson, the CEO and other executives).

It is acceptable for the board and even, under specific circumstances, certain board members, in the execution of its duties, to take independent legal advice at the company's expense.

### 3.6. Can a director still access information after termination of their appointment?

It is recommended that this is dealt with in an appointment letter - see section 1.10. above.

### 3.7. Do meetings need to be held in Luxembourg?

Not pursuant to Luxembourg law. Often there are reasons making it desirable to hold the majority of board meetings in Luxembourg. Luxembourg companies should have their domicile i.e. central administration in Luxembourg. It must be ensured that major decisions are taken in Luxembourg, even in special situations like the COVID 19 pandemic.

### 3.8. Can a director attend by proxy, telephone or videoconference?

Usually the articles expressly allow this, however, they should be checked. The right of representation (by proxy) is possible provided that the articles do not prohibit it (the right to be represented is implicit). If the articles do not expressly allow it, board attendance by telephone or videoconference is questionable.

Proxies - the articles usually also set out that a director may represent one or more of their fellow directors at a board meeting. A proxy (or power of attorney) cannot be granted to a non-director for board attendance. There are no substitute or delegate directors under Luxembourg law.

Telephone attendance - such meetings tend not to be as effective as physical meetings given that there is typically less interactivity between board members. Conference calls are generally initiated from the board meeting in Luxembourg. They are deemed to be held at the registered office of the company (see article 444-4 bis (3) of the 1915 Companies Law in respect of an SA). Nevertheless, special situations like the COVID 19 pandemic might prevent the board to hold a physical meeting. In these cases, preference should be given to videoconferences instead of pure telephone conferences.

### 3.9. Can a director bring an adviser to meetings?

A board meeting is a private meeting - a director may only invite a third party (such as service providers or advisers) to attend a board meeting (i) for information and advisory purposes, and (ii) if ALL the directors present at that meeting agree to this. The third party cannot vote and may only comment if invited to do so.

### 3.10. What is the quorum for meetings and voting?

In the absence of a special rule or a higher number set out in the articles the usual rules in respect of an S.A. are:

- Quorum - at least half of the directors must be present or represented.
- Votes - a decision is passed if a majority of those directors present or represented vote in favour (unless the articles provide for a greater majority).
- Chair's casting vote - unless there is a provision to the contrary in the articles, where there are equal votes the chair gets a casting vote (see Article 444-4 bis (2) of the 1915 Companies Law).
- Circular resolutions (i.e. resolutions in writing) - need to be taken unanimously (all directors must sign). Circular resolutions cannot systematically replace face-to-face meetings.

### 3.11. Must there be a chairperson?

The 1915 Companies Law requires the board of an S.A. (see Article 444-3 bis of the 1915 Companies Law) to elect a chairperson from among the directors,. The 1915 Companies Law does not, however, otherwise detail the chairperson's functions or powers. There are no legal provisions in respect of chairs that apply to a S.à r.l..

### 3.12. Can a director still vote if they have a conflict of interest?

The 1915 Companies Law (Article 441-7) states that directors cannot vote on decisions where they have a conflict of interest to that of the company unless these are in the ordinary course of business. Generally, a director will still be able to vote on decisions taken in the ordinary course of business and under normal conditions. The articles of the company should be checked in relation to the type of decision to be made.

In cases where there is a real/potential conflict of interest, the director of an S.A. must (1) inform the board, (2) abstain from participating at the deliberation, (3) abstain from voting, (4) ensure the conflict is mentioned in the minutes and the board must (5) inform the next general meeting of shareholders of the conflict and the resolution passed in respect of the matter where the director was conflicted before any other business is voted by the shareholders at the meeting. Although the 1915 Companies Law does not mention specific provisions for S.à r.l. or other organisations, ILA considers that the same principles should be applicable.

cf: ILA Code of Conduct

### 3.13. Are there limitations on what the board can decide?

The board is generally entitled to do all things deemed necessary to achieve the corporate objects except for those actions that have been expressly reserved by law or the articles for decision by the shareholders. The articles may contain restrictions.

### 3.14. Should the board keep minutes?

Yes - board meetings should always be evidenced by minutes.

- Significant legal status - minutes can and are often used in litigation and disclosed in court, to regulators and to auditors. They are to serve as evidence of genuine discussion and decision-making, and as prima facie evidence that directors are doing their job (properly). They are a record of the decisions taken.

- Reviewed & commented on before signing - After a meeting the minutes should, once drafted, be circulated to all directors for review and comments, and then for the final minutes to be signed by such persons as mentioned in the articles. It is best practice for the minutes to be drafted shortly (within a couple of days) after a board meeting so that there are good recollections of the directors in respect of the facts and the resolutions passed at the meeting. In quite a number of companies minutes of the previous board meeting are approved and signed only at the subsequent board meeting. Nevertheless, as a best practice, minutes should be circulated as soon as possible after the meeting to ask participants to comment as memories are still present shortly after the meeting.

- Detail - It is good practice for each separate item/decision to be dealt with in a separate point. It is also good practice to set out a table of action points to be followed up at the beginning of the next meeting (e.g. action, when arisen, due by, who is responsible - see Appendix A).

- Board secretary - a board may appoint a corporate secretary or equivalent to take minutes (see section 1.4. above).

### 3.15. Must there be performance evaluations of the board?

There is no legal requirement for performance evaluations of the board. As a result performance evaluations are not yet widely carried out for Luxembourg company boards, although this correspond to best international corporate governance practice and are part of the recommendations under the Luxembourg Stock Exchange`s Ten Principles.

Sample questionnaires may be requested from the ILA Secretariat.

### 3.16. What are the signatory powers of the board and of directors generally?

The board of a S.A. or S.à r.l. is a collegial body, the general principle being that individual members have no powers to bind the company.

The articles usually set out the signature and representation powers of directors as well as whether such powers are sole or joint. The board should pay attention to its own delegation guidelines and keep track of persons to whom it has delegated representation powers.

### 3.17. What reporting or communication obligations exist for directors?

In addition to the company-level reporting required, directors also have individual responsibilities. It is impossible to list all possibilities, however some examples of reporting or communication obligations may include:

- Directors must report to the shareholders at least annually plus ad hoc reporting following a significant event.

- There are various reporting obligations in the 1915 Companies Law regarding items, which must be published at the Registrar of Companies, and/or in the Mémorial C.

Directors should also check their board's guidelines or policies and ideally incorporate any reporting obligations into those guidelines.

### 3.18. What are board committees? If the committee makes a recommendation, does this mean the rest of the board does not need to consider the matter further?

Board committees are simply sub-sets of the board - certain tasks may be delegated for efficiency reasons. Their purpose and functioning are usually contained in formal terms of reference defined by board decision, although these could also be in the Articles.

Board committees may include an appointment & remuneration committee, audit committee, valuation committee and/or investment committee. There may also be ad hoc committees to deal with a specific circumstance or issue.

Note, however, that even if a board committee has made a recommendation to the board regarding a particular matter, each director must properly consider each proposal before voting on the matter. As mentioned earlier, the final decision remains with the board.

### 3.19. To what extent can electronic signatures be used?

Wet ink, written signatures are not necessarily required for valid execution under the laws of the Grand Duchy of Luxembourg. Agreements are validly made according to the Luxembourg Civil Code where legally competent parties reach agreement, either orally, electronically or physically. Directors and other stakeholders should bear in mind though that, in line with Luxembourg e-Commerce Act, no person may be obliged to sign electronically, so that a co-contracting party is entitled to refuse to sign electronically.

Not all electronic signatures will however have the equivalent probative value of a hand-written signature. A differentiation has to be made between the (simple) electronic signature (e.g., electronic copy of a handwritten signature on a document), the advanced electronic signature and the qualified electronic signature. These different types can be summarized as follows:

1. Simple e-signatures ("SES") (e.g. an electronic copy of a handwritten signature on a document) are already widely used in transactional, commercial, licensing and intangible property transfer agreements;

2. Advanced e-signatures ("AES"), which require (a) a unique link to the signatory; (b) capability of identifying said signatory; (c) creation via means that is solely under the signatory's control; and (d) encryption to prevent tampering or alteration; and

3. Qualified e-signatures ("QES"), a specific digital signature implementation that has met certain government specifications, including using a secure signature creation device, and certified as 'qualified' by either that government or a government contracted third party;

Advanced and Simple electronic signatures will be prima facie admissible in evidence before a Luxembourg Court, but will have a lower evidential weight than a Qualified electronic signature. Their validity will need to be established by the claimant and additional evidence will need to be provided.

For Advanced electronic signatures, the electronic signature system (logs…) can provide elements to demonstrate trustworthiness of the signature.

Only Qualified electronic signatures are considered equivalent to a handwritten, wet ink signature and benefit automatically from an EU wide recognition and have the benefit of a reverse burden of proof in case of litigation.

When opting to use electronic signatures, it is important to strike the right balance between convenience and security.

E-signatures are not appropriate execution replacements for all circumstances. There are cases that require wet ink signatures. These include, amongst others, deeds of incorporation or migration, the amendment of articles of association, or contracts that concern the transfer of real, tangible property. Therefore, the possibility to use

electronic signatures should always be confirmed in advance as legal restrictions may apply, depending on the transaction and the requirements of the counterparty.

As a side note, if the e-signatory is not present in Luxembourg when executing corporate documents, such as board minutes and resolutions, it is important to also bear in mind the tax rules. There might be an adverse effect when assessing the place of effective management and control of the Luxembourg entity.

After having fully signed the electronic document, Board members should be aware that the electronic version of the electronically signed document represents the "original" of the document. Printing of the electronically signed document may be useful for their personal records, but the printed document does not benefit from the electronic mechanisms that permit to protect the integrity of the document, nor from the means to check the validity of the various electronic signatures contained therein.

Depending on the nature of the electronically signed document, the proper storage or archiving must be considered. Simple storage in corporate folders might be appropriate for some less important documents, whilst high-stake documents might need to be protected by long term electronic archiving which ensures the probative value of the signatures and the document.

### 3.20. What are the key elements for valid virtual board meetings?

Based on the Grand Ducal regulation of 20 March 2020 regarding the implementation of special and temporary rules concerning company meetings, virtual board meetings are accepted in Luxembourg.

The way board and shareholders meetings are conducted and held has undergone a significant transformation. The industry trend has moved away from physical meetings to digital meeting platforms, making it more flexible for participants to join.

Digital solutions can be key enablers to hold these meetings efficiently, in a secure way and in compliance with rules and regulations.

There are various solutions available on the market to allow companies to manage all aspects of organising and running their remote meetings in which attendees can exercise their rights and place their votes on a secure portal. The IT solutions allow the directors to have access to consistently structured and formatted documents at any time (instead of various versions, distributed in several email or printed and filed in an inconsistent way).

IT solutions can also enhance data security. Paper documents bearing confidential information can get misplaced. With the use of a board portal platform, documents do not need to be printed. These board meeting solutions have strict security measures in effect, so only participants have access to meeting resources. Of course IT security needs to be kept up to date.

The collaboration of the board is imperative to keep board meetings as short as possible and at the same time ensure that all board members actively participate in the meeting.

These solutions can be used for presenting, sharing files, making annotations, writing sticky notes, drawing freehand diagrams, all contributing to the enhanced quality and effectiveness of meetings.

Last-minute changes are unavoidable and directors should always be kept up to date when these occur. With virtual board meeting platforms, everyone is informed of the latest developments and changes, allowing the board members to quickly adapt to unexpected circumstances.

A robust online voting process is also an essential feature of the digital meeting tools and the traceable and transparent online voting results are also differentiating these tools from commonly used video conference call solutions such as Skype, Webex, Zoom or similar platforms.

## 3.21. How far online tools can support the work of a director?

Recently the roll out and use of online client portals have been increasing on the market. These online accessible virtual, centralized data platforms have the objective to ensure a clear view of the entire portfolio of legal entities that belong to the same group in a secure portal environment. The access to all relevant regulatory, corporate, accounting as well as legal information and documents concerning the entities in which they are board members in one application supports the directors in their governance duties.

There are also online tools available to track the tax and other regulatory filings of legal entities. These are also beneficial for directors, by providing a dashboard overview and a drill down function to quickly find key data and status of important tax and regulatory filings.

# 4. REGULATORY OBLIGATIONS AND DEADLINES

## 4.1. What are the responsibilities in relation to DAC 6?

### 4.1.1. What is the scope?

In the framework of action 12 of BEPS linked to Mandatory Disclosure rules ("MDR"), the EU Commission decided to update the directive on administrative cooperation ("DAC") to obtain information on transactions that could potentially be tax aggressive. Assessing whether a transaction is tax aggressive requires very subjective analysis, whereas objective and factual information is requested. This is why DAC 6 does not ask a subjective analysis ; instead, it requests that transactions are reported if certain criteria are met. Criteria are in a nutshell (for Luxembourg transposition):

- geography: cross border transactions i.e. an arrangement involving two Member States or a Member State and a third party;
- taxes in scope: EU taxes as mentioned in DAC 1 and mentioned in the Luxembourg law of 29 March 2013 which are in a nutshell all taxes except VAT, excise duties and social security contribution;
- timing: transactions that closed after 25 June 2018;
- hallmarks: there are 5 categories of hallmarks that are notably linked to cross-border transactions, automatic exchange of information and transfer pricing. Some hallmarks require a main benefit test. This test is satisfied if it can be established that the main benefit (or one of the main benefits) which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is a tax advantage.

### 4.1.2. Who is concerned?

As mentioned above, the aim of DAC 6 is to capture transactions which could potentially be tax aggressive. In that respect, it requires so called "intermediaries" to report transactions which meet the cumulative criteria mentioned in the Directive (and therefore mentioned in the Luxembourg law transposing it) and which entails an indication of tax evasion. The so called intermediaries - are, defined as any person that designs, markets, organizes or makes available for implementation or manages the implementation of cross-border arrangements that need to be reported under DAC 6. Such intermediaries, or so-called promoters, include notably Audit Companies, accounting and law firms, as well as private bankers, wealth planners, trust companies, etc.

It also includes any person who - having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services - knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement.

Notably, this definition may also include all types of banks, insurance companies, trust companies, investment funds as well as their satellites such as transfer agents, management companies, promoters, etc.

In some cases, when there are no intermediaries at all (because the client is implementing the transaction by himself), or no EU intermediaries or intermediaries which cannot report (see below § on the legal professional privilege), the reporting duty rests with the "concerned taxpayer" who is the person who benefits from the

transaction. Independent directors can also be concerned as they participate to the boards approving a transaction and therefore could have (needs to be analysed on a case by case basis) the necessary information as well as the knowledge to apprehend them. Being part of a board, it is "assimilated" for DAC 6 purposes to the concerned taxpayer. In that respect, he needs to ensure that DAC 6 is a topic discussed during the board meeting to ensure that an analysis has been properly done.

These intermediaries also must either:

(i) be a Luxembourg tax resident ;
(ii) have a Luxembourg permanent establishment through which the services with respect to the arrangement are provided;
(iii) be incorporated in, or governed by the laws of Luxembourg or
(iv) be registered with a professional association related to legal, taxation or consultancy services in a in Luxembourg .

Finally, a legal professional privilege can apply to some specific intermediaries, meaning that these reporting obligations do not apply to them. Instead, they are obliged to notify another intermediary. Or, in the case that no other intermediary exists, they must notify the relevant taxpayer, which is any person to whom either a reportable cross-border arrangement is made available for implementation, or is ready to implement a reportable cross-border arrangement, or has implemented the first step of such an arrangement. In Luxembourg, the legal privilege concerns lawyers, chartered accountants registered to OEC and auditors registered to IRE.

DAC 6 is therefore an area which an independent director needs to take into account by at least asking whether the transaction/structure has been analysed from a DAC 6 point of view..

### 4.1.3. What information must be reported?

The DAC 6 reporting is done either via an online form or via an xml file. Both include the following:

- Identification of intermediaries and relevant taxpayers: names, place of tax residence, TIN. Also identification of associated enterprises participating in the arrangement;
- Details of hallmark(s) that make the cross-border arrangement reportable;
- A summary of the arrangement, including the name by which it is known and an adequate description of the relevant business activities;
- The date on which the first stage of the reportable cross-border arrangement was implemented or will be implemented;
- Details of the national provisions of the concerned countries that form the basis of the arrangement;
- The value of the reportable cross-border arrangement;
- The EU member state of the relevant taxpayer(s) and any other EU member state(s) likely to be concerned by the arrangement;
- The identity of any other person likely to be affected by the cross-border arrangement, indicating to which member state(s) this person is linked.

#### 4.1.4. What are the deadlines?

All DAC 6 reporting (except for the backlog) needs to take place within 30 days beginning, whichever occurs first, on (i) the day after the reportable cross-border arrangement is made available for implementation; (ii) the day after the reportable cross-border arrangement is ready for implementation; or (iii) when the first step in the implementation of the reportable cross-border arrangement has been made.

### 4.2. What are the applicable FATCA/CRS filing deadlines

Any entity classified as a Reporting Financial Institution is required to file a FATCA and CRS reporting by June 30 of the year following the fiscal year.

The Reporting Financial Institution is required to produce a XML reporting and to report the information directly to the Luxembourg Tax Authorities. The Luxembourg Tax Authorities will, in its turn, report the information to the relevant Tax Authorities (IRS for FATCA purposes and any other relevant Tax Authorities for CRS).

The reporting is exclusively done via a secured channel. The transmitters offering this service to file the XML reporting are:

- Six Payment Services (Europe) S.A. with their service and helpdesk SOFiE (Secured Online File Exchange), or
- FUNDSQUARE, a branch of the Luxembourg Stock Exchange with its E-FILE service.

In case of non-compliance observed following an inquiry performed by the Luxembourg tax authorities, a Reporting Financial Institution can be fined up to EUR 250,000 + 0.5% of the amounts that have not been communicated. In addition, in case reporting obligations are not met (no reporting or late reporting), the Reporting Financial Institution may have to pay an administrative penalty of EUR 10,000.

### 4.3. What are the Luxembourg tax filing deadlines

Corporate income tax returns need to be filed by 31 May. From a practical perspective, the Luxembourg tax authorities generally tolerate filings by 31 December.

Withholding tax returns need to be filed within 8 days after the income is made available.

The filing deadline for the monthly/quarterly VAT returns is the 15th of the month following the declaration period. Taxable persons required to file monthly or quarterly must also file an annual recapitulative statement before 1 May of the following year. Annual VAT return is due by 28 February.

### 4.4. What are the responsibilities with respect to the UBO[1] Register ?

#### 4.4.1. What is the registration deadline?

All new entities must register within one month from the time when the registered entity becomes aware or should become aware of the event that requires the registration or amendment.

#### 4.4.2. Who is considered a UBO?

A UBO is defined as any natural person who ultimately owns or controls the entity or any natural person for whom a transaction is executed or an activity realized. In the case of companies, this includes any natural person who ultimately owns or controls the company through direct or indirect ownership of a sufficient percentage of the

[1] UBO : Ultimate Beneficial Owner

shares or voting rights or ownership interest in that company, including through bearer shareholdings, or through control via other means. A person may be a UBO based on the ownership criterion and/or on the control criterion.

A direct or indirect shareholding of more than 25 percent held by a natural person in a Luxembourg company is an indication that the ownership criterion is met. This does not mean that a person who owns a shareholding of 25 percent or less is automatically not a UBO, since that person may exercise actual control via other means. If, after having exhausted all possible means and provided there are no grounds for suspicion, no UBO can be identified, or if there is any doubt that the person(s) identified are the UBOs, the natural person(s) holding the position of senior management is/are considered as UBO.

### 4.4.3. What information has to be provided?

The following adequate, accurate and current information about the UBO must be provided to the register:

- Last and first name
- Date and place of birth
- Nationality
- Country of residence
- Precise private or professional address
- National identification number for natural persons (or foreign equivalent)
- Nature and scope of the beneficial interest held

Listed companies in which securities are admitted to trading on a regulated market in the Grand Duchy of Luxembourg or in another member state of the European Economic Area or in a third country that imposes equivalent requirements to those laid down in the European Parliament and Council directive 2004/109/CE of 15 December 2014 will benefit from a more flexible regime.

The filing must be accompanied by supporting documents:

- A copy of an original identification document of the UBO with translation in French, German or Luxembourgish, if the original document is not written in Latin characters
- For listed companies: the name of the regulated market on which their securities are admitted to trading
- Requesting restricted access: written request duly justified (exceptional circumstances)

### 4.4.4. Who has access to the information?

The national authorities have access to current and historical information as well as to deleted entries. Credit institutions and other financial institutions as well as bailiffs and notaries acting in their capacity as public officials may require additional information to be provided in the form of extracts. A free online access to less detailed information is available to the general public.

Registered entities are obliged to verify the accuracy of the information published on the BO register.

### 4.4.5. What are the penalties?

Fines can range between €1,250 and €1,250,000 and can be imposed on an entity that fails to comply with its obligations (different type of failures). The same fines can apply to a UBO that fails to provide the information requested by the entity.

### 4.4.6. Who can enter data into the register?

The Luxembourg entity, its representatives or a notary on behalf of the entity. The responsibility for keeping the data up to date remains with the Luxembourg entity.

### 4.4.7. How is the filing performed?

The information is submitted via a secured electronic means to the Luxembourgish Business Register LBR website or on-site. The filing must be performed in French, German or Luxembourgish.

### 4.4.8. Appointment of Responsible Persons for AML and CTF (CSSF FAQ 25/11/2019)

Regulated Investment structures are obliged to follow CSSF's FAQ of 25th November 2019, and have to appoint both a "Responsable du respect des Obligations" (RR) and a "Responsable du contrôle du respect des obligations" (RC) to oversee compliance with Luxembourg Anti Money Laundering (AML) and Countering the Financing of Terrorism (CFT) requirements.

In practice, the CSSF expects that any Luxembourg regulated fund designates:

(i) one of its governing body's members or the governing body (e.g. board of directors) in its entirety as RR (as a collegial and ultimate management body, it is in any case responsible for AML/CTF matters); and

(ii) a member of the governing body or a third-party appointee (e.g. from the staff of the IFM of the fund) as RC who will be in charge of the day-to-day AML/CTF tasks. In cases where the RC is a third-party appointee, the CSSF provides additional guidance on the formalisation of the contractual relationship with the RC. In addition, the CSSF clarifies that the RC can, in exceptional circumstances, be located abroad if the IFM of the fund is not domiciled in Luxembourg.

The CSSF also clarifies the conditions applicable to the persons in charge of AML/CFT, in particular the CSSF requests that both the RR and the RC be knowledgeable on the investments and distribution strategies of the Fund/services offered by the IFM and that both be available without delay when contacted by Luxembourg's competent AML/CFT authorities.

The RC shall have access to all internal documents and systems required for performing its tasks. This condition is particularly relevant where an RC is not physically in Luxembourg on an on-going basis.

Important to note that while the FAQ is only applicable to entities subject to the CSSF's supervision, unregulated vehicles may nevertheless wish to take its provisions into account since they are subject to the AML Law as well.

## 4.5. What is the meaning of EMIR?

The European Market Infrastructure Regulation (EMIR) is a regulation that aims to address market transparency and in derivative trading, it deals with three topics:

- Licencing of Clearing houses, the ones that perform the clearing of derivatives between counterparties and of trade repositories;
- The transparency of the data for all trades, on exchange and OTC (off exchanges);
- Rules on handling of derivatives by the different stakeholders so as to limit risks spreading and improve management.

EMIR if it applies principally to Clearing houses, banks and financial institutions has an indirect impact on nearly all stakeholders financial and non-financials alike. The date of application of EMIR was 2014, it has experienced a significant review in 2019, to simplify it a little mostly for non-financials.

### 4.5.1. What is the scope?

The scope of EMIR is all derivatives trades, be they OTC or on exchange for all derivatives products dealt either/and by EU counterparties and on EU derivatives products. The reach of the regulation is thus pretty large and the levels of obligations goes from internal management measures linked to for example dispute management to add-ons and margining requirements to support and guarantee trades.

### 4.5.2. What type of reporting is required by EMIR?

EMIR introduced a new way of reporting transactions, with the creation of the concept of TR (trade repositories). These TRs are aggregating trades by "markets" on a bilateral basis (Bank A – Bank B), the purpose of this is to limit reporting developments at NCA (national competent authorities, the CSSF for example), and to build, in an ideal world, a view of an aggregated market at EU level.

The reporting is complex with more than 60 fields to report. Key difficulties to fill in are the two fields UTI and UPI, which stands for Unique Trade/Product Identifier. There were no guidelines on how and who should propose these numbers which lead to a very low degree of reconciliation cross TR. Thus missing one of the objectives of EMIR.

### 4.5.3. What information needs to be reported?

The information about the quality and qualification of the trade, namely name of product, underlying, currency, counterparties, timeline needs to be reported.

### 4.5.4. What are the deadlines for EMIR Reporting?

The regulation has been in force since August 2014, the update since June 2019, there are also some stages regarding implementation and extension of products required for mandatory clearing, which has as consequence to force trading of products concerned.

# 5. LIABILITIES

## 5.1. What is the practical exposure stemming from a director's management duties and responsibilities?

Until recently, few directors had been brought to court in Luxembourg as most cases were dealt with in out of court settlements. As a result, there is little case law in this matter. It may be important to consult a lawyer to receive tailored legal advice.

In the past, focus has been more on mismanagement issues. More recently, regulatory fines have become common for late and incomplete reporting.

## 5.2. As a director, what types of liability are there?

Directors are ultimately responsible both for their actions and their omissions. Liability could arise from breaches of any type of law or regulation - e.g. the 1915 Companies Law, accounting rules, tax laws, insolvency regulations, employment law, environmental regulations, health and safety, planning regulations etc…and trigger in particular civil liability, criminal liability, tax liability and liability towards the relevant authorities.

The 1915 Companies Law governs the general duties and responsibilities of directors and it is this law, which also sets out the main liabilities of directors. Directors face two main types of liability - contractual liability towards the company and liability in tort towards the company and third parties.

Because of divergent legal entities and structures of entities, plus self-managed structures as well as those using management companies, there may be differing liabilities applicable. Directors should always seek independent legal advice. Some of the main liabilities include:

- Individual (or collective) contractual liability to the company for mismanagement (art.441-9, al.1). The directors must act as a normally prudent and diligent person in the same position would. Any director found liable would have to indemnify the company for foreseeable loss (except in cases of fraud). Appropriate risk management should be set up to ensure regular review of risks. Examples could include errors in the annual reports or incorrect valuations.

- Joint liability to the company or third parties for breaches of the 1915 Companies Law or the articles (art.441-9, al.2). Liability is only incurred as a result of wrongdoing, whether through action or negligence. An example would be acting in breach of the company's objects.

- Quasi tortious liability (individual liability of that director) - this principle of "responsibilité aquilienne" applies generally if a person commits a fault (whether by act or omission) that causes a loss to the company or a third party who has dealt with the company. The party bringing the action must prove the wrongdoing of the director(s) has caused them specific and personal loss, distinct from that suffered by the company.

- Tax liability: the manager of a S.à r.l. or the executive director of a S.A. (the other directors are not jointly liable) must meet the tax obligations of the company and notably carry out the payment of taxes due by the company. However, the liability is committed only in case of fault of the manager/executive director (the non payment of taxes must not be considered ipso facto as a fault). Certain breaches of the 1915 Companies Law may also incur criminal liability for directors (Art. 1500-1 to 1600-5). Most often, these are limited to fraudulent acts on the part of the directors, but not always. Examples include:

- Not filing accounts within the statutory deadline;

- Not convening a shareholders meeting after a request made by 10% of shareholders;
- For fraudulent reasons, not publishing the accounts or making misrepresentations in accounts;
- Issuing shares without receiving payment for them;
- Improper use of corporate assets;
- Money laundering compliance;
- Insolvency liabilities;
- Agency liability for delegates of the management body;
- Delegates are liable vis-à-vis the management body;
- Delegates are liable vis-à-vis third parties for quasi-tortious liability;
- The management body has an obligation to monitor its delegates and may also be liable vis-à-vis the company for acts/omissions by delegates if not authorised to delegate or if the person appointed was incompetent. If so, it may also take action against the delegate.

### 5.3. What practical steps can be undertaken to limit liability?

- Consider meeting regularly throughout the year and attend all board meetings when possible;
- Document all decisions (ensure there is evidence that issues have been properly considered). Consider also whether the discussions and the basis for the decision require documenting or not - although minutes are usually records of decisions taken there can be situations where it will be important to also summarize the discussion or note a dissenting vote;
- Think about how each document may look if viewed critically, in particular when read out later in a court. Where appropriate, documents should be reviewed by legal counsel and professional advice should be sought pro-actively and at an early stage, whenever required;
- Understand and document what the service providers think their roles and responsibilities are, ensure there are no gaps and know who is doing what and who is responsible for what. Overlaps may also be the cause of confusion and should be avoided. You may wish to consider appointing a company secretary to assist with the management and coordination of the tasks.

### 5.4. What if a director voted against a decision – could he still be held responsible?

In principle, yes. Ultimately, this is for the court to decide. Directors should ensure the minutes of the meeting expressly set out their objections to certain matters or even to consider resigning or «whistle blowing». As a general rule, directors should actively disassociate themselves from decisions and board actions, which they do not support. Independent legal advice should be obtained.

Where, for example, there has been a breach of the 1915 Companies Law or of the articles, a director can avoid liability only if there is no fault on their part and they denounce the actions to the first meeting of shareholders that follows their becoming aware of the infraction(s) (art. 441-9).

## 5.5. Does the designated person of a company that is a corporate director have a different liability?

A representative of a corporate company has the same rights, duties and liabilities as if appointed a director directly in his/her own name. The company represented will however, be jointly liable with the director.

Representing a company may lead to certain conflicts of interest.

## 5.6. What happens if the company gets into significant difficulties?

Significant issues could include, for example, the board can no longer function, if the company has become insolvent.

The directors will need to take actions as to call a shareholders meeting or to file for insolvency.

(Art. 437 of the Code de Commerce). The filing for insolvency needs to occur within 30 days of the company having become insolvent i.e. where the company was no longer able to pay its liabilities when they fell due and where the company ceased to be creditworthy.

Although the general liability rules apply, continuing to trade where the company has ceased to meet its financial obligations will likely be judged as faulty behaviour by those directors. In addition, article 495-1 of the Code de Commerce provides that where a director's gross negligence has caused or contributed to the company's insolvency, the court may decide that the director(s) must bear part of the debts of the insolvency from their personal estate.

Eventually the company may be declared insolvent or be placed in mandatory liquidation. Depending on the circumstances, there will be an insolvency receiver or, as the case may be, court appointed liquidator and the courts seeking to apportion blame and claiming damages from those involved.

# 6. INDEMNITIES, INSURANCE AND TAX MATTERS FOR INDEPENDENT DIRECTORS

## 6.1. In my home country, directors get an "indemnity/hold harmless" agreement? Can they ask the Luxembourg company for the same?

An indemnity can be asked for, however, it is not automatic.

Indemnities cannot cover gross negligence, tort, criminal liabilities or fraud. In case where the company may be insolvent an indemnity may be of limited value. Therefore, it may be important that there is adequate D&O insurance cover in place.

## 6.2. What is the "annual discharge"?

Each year the shareholders in the general meeting may, by special vote, grant "discharge" to the directors. This discharge has the effect of liberating the directors from contractual liability towards the company (but not towards third parties) for the financial period for which the accounts are being approved (i.e. the previous year).

However, this is conditional on the accounts containing no omission or false information regarding the real situation of the company. In certain cases (e.g. breaches of law or the articles), these facts also need to have been expressly set out in the notice convening the shareholders meeting.

If there is no accusation of fault, it is customary for a director to request a "discharge" when resigning or being removed as a director.

## 6.3. Auditor's letters of representation and engagement letters with other service providers

### Auditors' letter of representation

Before signing the audit report, the auditors will seek a letter of representation from the company's directors. The exact contents will vary depending on the nature of the company, however it will typically cover items such as (i) an acknowledgement of responsibilities, including in respect of internal controls and for assessing fraud risk, (ii) that all appropriate books and records have been made available, (iii) that all material transactions have been properly recorded, (iv) that investments and other financial instruments have been valued in accordance with law, (v) that all related party transactions and all contingent liabilities have been disclosed to the auditors.

It is important for the directors to review carefully not only the accounts, but also the contents and context of each auditors' letter.

The directors increasingly request «representation comfort letters» from the company and other service providers (where applicable) as to the delegated areas covered. The service providers should review the accounts and be asked to provide directors with details of any significant matter arising from that financial period and respond to any queries the directors may have. This needs to be built into the timetable for the approval of the accounts to ensure that the directors receive the necessary comfort and have sufficient time to carry out their reviews effectively.

In the context of a holding company, the directors should request an internal representation letter from the subsidiaries to ensure that no elements should be taken into account in the accounts of the holding, nor should be included in the holding's representation letter.

Letters of engagement with auditors and other service providers

Always read proposed letters of engagement carefully. Question the provisions (what is said to be standard often is not). For example, certain specific limitations of liabilities may not be in the best interests of the company and its shareholders for the directors to accept.

## 6.4. What professional directors and officers indemnity insurance (D&O cover) is available against all these liabilities?

It is strongly recommended that directors should never accept a mandate unless they are insured by the company. A Luxembourg-based policy is preferable. It must cover Luxembourg and all countries where the company is located/operates.

It is also in the company's best interests to have adequate D&O cover for directors, as where the insurance cover does not apply, directors may call on the company's assets for indemnification having an indemnity from the company itself.

Recommendations include:

- Each director should receive a copy of the policy and check each year that it is up-to-date and renewed. It is also standard to receive an additional one-page summary of the policy from the insurer.
- The directors should negotiate the policy - policies are highly technical and are also extremely varied in terms of amount, terms and exclusions.
- In complicated cases, the company may consider employing an insurance broker specialised in D&O insurance, who understands the risk profile of the company, and who will undertake a process of due diligence regarding the company. Following this, the broker should highlight the differences between the various D&O products on offer.
- The directors should review the policy in detail for coverage retentions, significant exclusions etc. Entities should also consider employing a specialist insurance lawyer to review the D&O products on their behalf. Directors need to review and consider the impact of each exclusion.
- When considering the amount, remember this is an aggregate amount for all the company directors each year, so in the case of disagreement between them and each appointing its own lawyers, this amount may erode quickly.
- The policy may need to cover not only the cost of protracted and complicated litigation and/or investigations brought by investors and/or regulators, but also cover potential and collateral damages as well as penalty awards.

- Often excluded are:
    - US claims and litigation made in the US or the enforcement of US decisions in other territories, US ERISA claims and/or claims under the US securities Act of 1933 or US Securities Exchange Act of 1974;
    - Fraud;
    - Claims related to money laundering (actual or alleged), claims related to market fluctuations and investment performance, claims by major shareholders, market abuse, punitive damages exclusions, regulator claims exclusions;
    - Bankruptcy/insolvency are often excluded, yet you are most likely to need the cover following an insolvency event;
- Sometimes the Luxembourg directors are included in the company's group insurance cover. Important issues to consider include in relation to group cover:
- Although there may be higher overall coverage levels, often these are for all actions worldwide and per annum. If for example, there has been a significant claim elsewhere in the group, that year's director coverage may already have been used up - meaning there is no insurance left for that year (it is applied on a first come, first served basis). Some insurance policies provide for a ring-fenced part for independent directors.
- If group entities prejudice the cover (e.g. not pay the premium, commit a breach or a fraud), there will be no cover and local directors will not necessarily be aware of this.
- In the case of a dispute, claims through an insurer in a foreign jurisdiction rather than in the company's home jurisdiction may not be convenient.
- Company level cover will be easier to monitor & control, although it may be more costly than simply adding the company to the group's existing D&O policy. Additionally, if a director leaves a company on bad terms he may have difficulty getting access to the policies.
- Price varies enormously, depending on parties involved, experience, etc. Often larger groups have better negotiating power and are perceived by the insurers as being a lower risk.
- Consider tail insurance on termination of a company.
- The director should make sure that they have cover after resignation or termination as a director for any loss caused by action or omission, which occurred during the time they were a director.
- Best practice is to also have additional second ranking insurance in case the group/ company insurance is not sufficient. Directors normally need to arrange this themselves, although it may be billable to the company.
- Beware of insurance deductibles (franchises).
- Be aware of the difference between the company's indemnity insurance and the director's individual D&O insurance (which are usually mutually exclusive).

It is advisable to obtain policies combining both professional indemnity and D&O policies to ensure there is no gap in the coverage.

The level of any cover, which will be limited, will depend on the size and complexity of the company.

The insurance will often only cover the defence costs, not any fines or penalties which may ultimately be levied. One should be aware of whether damages, which may be awarded, are covered by the policy or not.

## 6.5. What are the actions required to be protected from fraud and cyberattacks?

There isn't a specific law and regulation issued by the supervisory authority concerning the actions to be undertaken by the directors.

The 3Commission de Surveillance du Secteur Financier (CSSF) has issued several circulars in the last years warning about the risks of fraud and cyberattacks and describe the potential guideline to be adopted. In particular the recent circular 20/740 that warns about the spreading of fraud and cyberattacks due to the COVID-19 pandemic.

The key elements of fraud and cyberattacks prevention and handling are:

- Putting in place an appropriate fraud protocol for investigation;
- Assessing the necessary level of involvement by the Board through:
  - Monitoring based on Management's reporting;
  - Decision making;
  - Leading the investigation.

# 7. BIBLIOGRAPHY

Luxembourg regulators and governmental bodies

- Commission de Surveillance du Secteur Financier (CSSF) - www.cssf.lu
- The Ten Principles of Corporate Governance of the Luxembourg Stock Exchange - www.bourse.lu/corporate-governance
- Luxembourg Business Registers (including the UBO register)- https://www.lbr.lu/
- Chamber of Commerce - www.cc.lu

Industry associations

- AIMA - Alternative Investment Management Association (Hedge Funds) - www.aima.org
- ALFI - The Luxembourg Association of Investment Funds (ALFI) - www.alfi.lu
- EFAMA - The European Fund and Asset Management Association - www.efama.org
- IIFA - International Investment Funds Association - www.iifa.ca
- Luxembourg For Finance - http://www.luxembourgforfinance.lu/
- INREV - European Association for Investors in Non-listed Real Estate Vehicles - www.inrev.org
- Invest Europe – (former European Private Equity and Venture Capital Association, EVCA) - www.investeurope.eu
- LPEA - Luxembourg Private Equity Association - www.lpea.lu
- Overseas trade associations, e.g. Bundesverband Investment and Asset Management (BVI)

Directors and other corporate governance institutes

- The Luxembourg Institute of Directors (ILA) – www.ila.lu
- European Corporate Governance Institute - www.ecgi.org
- Institute of Directors (England) - www.iod.com

Useful publications can be found on the sites of various local law firms, accounting firms, trust companies etc.

# 8. APPENDICES

## A.1. Example board meeting agenda – (Depending on structure of company, current issues etc.)

Below are items relevant to regular board meetings. Entities may also have transactional board meetings at short notice and often with pre-prepared agenda/minutes and draft documentation to enable decisions to be taken swiftly.

Although it will not always be possible, try to send board papers electronically to board members at least one week in advance. Receiving board packs only at the meeting is too late.

### 1. Legal and corporate

- Constitution of the meeting (cf. notice, chair, quorum, agenda, waiver of notice/consent to short notice)
- Review of corporate documents (Company extract from RCSL)
- Declarations from any directors having opposing interests to those of the company
- Approval of the previous board minutes
- Review of circular resolutions signed in the period
- Review of minutes of committees
- Review list of agreements signed since the last board meeting or under negotiation
- Any changes to the articles, minutes of meetings of shareholders
- Tax, legal and regulatory review - any major legal, regulatory or fiscal changes affecting the company
- (consider inviting the external counsel and auditors at least once per year)

### 2. Investment Management

- Investment reports
- Investment valuations

### 3. Compliance

- Compliance report (including any compliance breaches)
- Compliance with own investment policy or restrictions (if applicable) KYC/AML compliance
- Updates to procedures manual

### 4. Business and operations update

- Management accounts
- Cash flow forecasts
- Account balances

- Large payments made since last meeting
- Budget
- Human resources

5. Any other business

- Action points (see also table in A.3. below)
- Other

6. Date of the next meeting

### A.2. Checklist of some other non-exhaustive potential items to consider

- Review of board delegations and delegation guidelines
- Audit and financial statements
- Auditor engagement letter
- Year-end report
- Representation letter to the auditor and from service providers
- Report from auditors - invite potentially once a year
- Discuss accounting principles
- Question auditors before signing off accounts
- Management letter from auditor
- Insurance coverage review
- Remuneration
- Review of compliance with corporate governance guidelines

## A.3. Sample action points table

Luxembourg Company XYZ

Action points outstanding from the board of directors' meetings

As at XX 20XX (date)

| | Action point | Ref. Board papers - date | Responsibility | Due by | Status |
|---|---|---|---|---|---|
| 1. | | | | | |
| 2. | | | | | |
| 3. | | | | | |

## A.4. Sample template: Status of agreements

| **Luxembourg company**<br>**Overview of agreements & contracts***<br>**Investments related agreements* | **Status** | **Date** | **Comments** |
|---|---|---|---|
| xxx | Completed & signed | | |
| xxx | Final, ready for use | | |
| xxx | Final | | |
| ***Borrowing agreements*** | ***Status*** | ***Date*** | ***Comments*** |
| xxx | | | |
| xxx | | | |
| xxx | | | |
| ***Administrative agreements*** | ***Status*** | ***Date*** | ***Comments*** |
| xxx | | | |
| xxx | | | |
| xxx | | | |
| ***Legal agreements*** | ***Status*** | ***Date*** | ***Comments*** |
| xxx | | | |
| xxx | | | |
| xxx | | | |

*The proposed contents are indicative only and will depend on the nature of the company*

## A.5. List of potential clauses for a director's appointment letter

The proposal of director mandate can be documented as a letter or an agreement written and signed by the future director and the chair of the Board or any other person who can legally bind the company. Its purpose is to determine the main terms of the future director mandate within a Luxembourg commercial company. It is essential to note that it shall not be considered as a management agreement or an employment contract. Confidentiality, remuneration and indemnity arrangements may be documented separately. In addition, nothing in this letter shall be taken to exclude or vary the terms of the articles of association as they apply to you as a director of the Company.

This document is not intended to be a prescriptive template. It reflects the growing practices of Luxembourg companies and can be adapted to suit either the director's or the company's circumstances. The aim is to provide future directors with a checklist which could be used for reviewing a letter/agreement proposed by the company or for drafting such a document, while keeping in mind that this kind of document is not mandatory and that the company and/or director can fully consider that the law applicable in this respect is sufficient for the purposes of the exercise of its director mandate.

List of potential clauses for a director's appointment letter

- Appointment
- Duties of the director
- Board attendance
- Frequency of meetings
- Confidentiality
- Conflicts of interest
- Liabilities
- Transparency of other mandates/business activities
- Remuneration, including taxation aspects
- D&O insurance and indemnification
- Access to information, also after termination of the appointment
- Right to consult legal counsel or other advisers at the cost of the appointing company
- Termination
- Data protection
- Non exclusivity clause
- Non-compete
- Applicable law and jurisdiction
- Assignment
- Amendment

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