The voice of corporate governance
in Luxembourg

GETTING ON BOARD

A Guide for accepting company Directors' mandates

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FOREWORD

The objective of this second version of "A Guide for accepting a company Director mandate" (the "Guide") is to update and complete the references to the main applicable laws and regulations regarding Director mandates which have come into force since June 2014 (Guide's first edition) and to briefly outline the main principles that a Director should bear in mind when considering a mandate on a Board and throughout the duration of his appointment.

We would like to thank the contributors for the work done on the first edition of this Guide.

A Board composed of well-chosen well-informed Directors gives a company a competitive advantage in the successful pursuit of its objectives.

The purpose of this Guide is certainly not to fully deal with all items and issues pertaining to Director mandates and this Guide shall not be considered as an exhaustive document regarding the items addressed therein.

The Institut Luxembourgeois des Administrateurs's ("ILA") sectorial working groups have issued specific guidelines for the various types of companies, which we invite you to consider. We also strongly recommend to review the content of the relevant laws, regulations and circulars (i.e. CSSF/CAA/LSE etc.) mentioned herein and which are available on the relevant authority's website and to regularly connect to these websites or subscribe to their newsletters so as to be informed of any new regulations that would be applicable.

Whilst reasonable care has been taken when compiling this guide, ILA and the individual contributors do not accept any responsibility for the completeness or accuracy of its contents, in view of the constant changes in legislation, regulations and practice. Readers shall not exclusively rely on the content of the Guide and shall take their own professional advice to clarify which laws, regulations and practices apply to their individual circumstances.

ILA welcomes any suggestions and comments on this Guide from all interested parties as known issues evolve and new issues arise, for the Guide to remain useful and practical. This Guide will also be made available online and may be updated there, without issuing a new printed version.

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INTRODUCTION

The power of some modern corporations and thus their potential to be harmful, as well as beneficial, has thrown the spotlight of public attention on many aspects of corporate governance, including the role of the company Director. Legislators and regulators have been under pressure to improve the framework of rules which cover the company Director's role and to ensure more effective oversight of the company by its Board of Directors.

This makes it very important for independent Directors to choose their mandates with great care and to be fully aware of the implications of accepting a mandate. They should therefore carry out effective due diligence on the companies they consider.

ILA wishes to assist its members via this guide by inter alia:

- Stimulating ILA's members' awareness of recent and ongoing developments;
- Providing guidance on how to approach the offering and acceptance of Directorships; and
- Outlining laws and regulations relating to Directors' mandates in Luxembourg.

There is a wide variety of companies established in Luxembourg ranging from leading international names to small to medium industrial, commercial and financial sector entities. When one adds to that the vast panoply of investment funds registered in Luxembourg, and considers that their shareholder basis comes from differing international backgrounds, it is obvious that any attempt to define a single set of specific rules which could be applied to all of them would be fruitless and that only a principles-based approach coupled with more elaborate regulations for certain areas can lead to the desired result.

The assessment of what it takes to assemble a Board of Directors which can carry out its role effectively includes a judgement on the individual and collective competences of the Board members on matters ranging from their education and professional experience to knowledge of the company's business and sector of activity. It also includes a judgement on less tangible matters such as honesty, integrity, commitment and ability to act together in the best interests of the company.

Also, considering the fast evolving technologies which impact most of the companies (irrespective of their field of activity or type of industry), the Directors must evidence openness, interest and awareness for the new opportunities and related challenges that these technologies will entail for their company in order for them to take advantage thereof and comply with the obligations that may result therefrom (inter alia KYC rules, data protection implications, etc.).

The selection and composition of a well-balanced Board of Directors cannot be determined by legislation or regulation alone.

The questions that the candidate Director must ask both of him/herself and of the company before accepting an appointment, and indeed throughout the period of the mandate, are many and varied. Moreover, answers to these questions depend upon specific circumstances related to the person and the company. It also has to be borne in mind that the existing members of a Board of Directors need to question whether the new candidate is appropriate and will contribute to the Board's effectiveness. This guide seeks to outline some of the principles that Directors can apply in reaching a well-reasoned answer, appropriate to the circumstances.

GLOSSARY OF TERMS

When used in this brochure and unless otherwise defined herein, the following defined terms shall have the meaning set out hereafter.

AIF	An Alternative Investment Fund
AIFM	An Alternative Investment Fund Manager authorized pursuant to chapter 2 of the law of 12th July 2013 implementing the AIFMD in Luxembourg law (an "authorized AIFM") or A Luxembourg management company subject to article 125-1 or article 125-2 of the UCI Law
AIFMD (Alternative Investment Fund Managers Directive)	Directive 2011/61/EU of 8th June 2011 on Alternative Investment Fund Managers (establishing an internal market for AIFMs as well as a harmonised and stringent regulatory and supervisory framework for their activities) as implemented in Luxembourg law by the law of 12th July 2013
ALFI	The Association of the Luxembourg Fund Industry (*Association luxembourgeoise des fonds d'investissement*)
Articles	A company's articles of incorporation or statutes (*Statuts*)
Asbl	*Association sans but lucratif* (Non-profit association)
Asbl Law	The Law of 21st April 1928 on foundations and non-profit associations
Audit Law	The Law of 23rd July 2016 on the audit profession
Board or Board of Directors	The terms „Board" or „Board of Directors", as used in this Guide, refer to that organ of the „Management Body" (see below) of a company which has strategic and supervisory attributions, as distinct from the executive management. Although this Guide refers mainly to public limited companies (*Société anonyme*), it is intended to embrace all types of companies
CAA	The *Commissariat aux Assurances* (the supervisory authority in Luxembourg for the insurance and reinsurance sector)
Civil Code	The Code of Luxembourg laws applicable in civil matters
CRD IV	Directive 2013/36/EU of 26th June 2013 (Capital Requirements Directive) on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
CRR or Capital Requirements Regulation	Regulation (EU) N°575/2013 of 26th June 2013 on prudential requirements for credit institutions and investment firms
CSSF	The *Commission de Surveillance du Secteur Financier* (the supervisory authority in Luxembourg of the financial sector)
December Regulation	Grand-Ducal Regulation of 5th December 2017 coordinating the Company Law
Director	A member of a Board of Directors

EBA	The European Banking Authority
ECB	The European Central Bank
ECODA	The European Confederation of Directors' Associations
General Meeting	The general meeting of the shareholders of a company
IFM	Collective reference to an AIFM and a UCITS ManCo
Independent Director	A Director who does not have any conflict of interest which might impair his/her judgment because he/she is bound by a business-, family-, or other relationship with the company, its controlling shareholder or the management of either
Labour Code	The Code of Luxembourg laws applicable in matters of Labour
LFS	The Law of 5th April 1993 on the financial sector
LSE	The Luxembourg Stock Exchange
Management Body	The term "Management Body" (*„organe de direction"*), as introduced by European financial legislation applies to the Board as well as to the executive management („administration, gestion et surveillance") of a company. The present guide deals with the Board and its members, as distinct from the executive management
MiFID	Directive 2004/39/EC of 21st April 2004 on markets in financial instruments as implemented in Luxembourg law by the law of 13th July 2007
MiFID II	Directive 2014/65/EU of 15th May 2014 on markets in financial instruments as implemented in Luxembourg law by the law of 30th May 2018
PIE	A Public Interest Entity
PSF	A Professional of the Financial Sector (*Professionnel du secteur financier*) as defined in the LFS
SSM	The Single Supervisory Mechanism
Société Anonyme ("SA")	Public company limited by shares The SA is managed by a Board of Directors (*Conseil d'Administration, comprised of administrateurs*)
Société à responsabilité limitée ("SARL")	Private limited company The SARL is managed by one or more managers (*gérants*) which may form a board of managers (if provided in the Articles)
The X Principles of Corporate Governance	The X Principles of Corporate Governance published by the Luxembourg Stock Exchange applicable as of 1st January 2018
UCI Law	The law of 17th December 2010 on undertakings for collective investment
UCITS ManCo	A Luxembourg management company subject to chapter 15 of the UCI Law

GENERAL LEGAL PRINCIPLES AND GUIDELINES

The Company Law

The Company Law is the primary legislation applicable to corporate law aspects for most entities having their registered office in Luxembourg. Whilst the Company Law is the legislation of reference to the corporate law aspects covering inter alia the incorporation, contributions, capital increases, debt, issuances, liquidation, liabilities, governance, shareholder rights, equity investments, mergers, divisions, etc., specific laws (for example relating to Credit Institutions or Investment Funds) will apply in conjunction with the Company Law as an additional layer of rules.

The Company Law has been thoroughly modernized by a Law of 10th August 2016, along the principle of *"more flexibility by increasing contractual freedom for shareholders and accrued security for third parties"*. The provisions set out herein mainly refer to the rules applicable to a Société Anonyme. Different principles may apply depending on the type of company involved.

3.1. Division of powers between the Board of Directors and the General Meeting

Under Article 441-5 of the Company Law, the Board of Directors of a SA has the power to take any action necessary or useful to realize the corporate object of the company, with the exception of the powers reserved by law or by the Articles to the General Meeting.

Article 450-1 of the Company Law grants significant powers to the General Meeting and provides that it has the widest powers to adopt or ratify any action relating to the company.

The apparent contradiction existing between the powers conferred by Articles 441-5 and 450-1 of the Company Law has been resolved in Luxembourg and Belgian doctrine: due to the fact that Article 441-5 of the Company Law was inserted therein later than Article 450-1, it must be considered as overriding Article 450-1.

Therefore, the currently recognized division of competences between the General Meeting and the Board of Directors on the basis of Article 441-5 of the Company Law implies that, in Luxembourg, the General Meeting only has the powers reserved to it by law or the Articles.

Directors of companies with shareholder agreements that reserve additional powers to the General Meeting should take particular note of this.

3.2. Powers reserved to the General Meeting by law

The Company Law reserves the following matters (the list not being limitative) for the exclusive competence of the General Meeting: (i) appointment and removal of Directors (other than appointment by way of cooptation) and statutory auditors (unless a specialized law would apply i.e. LFS); (ii) approval of the annual financial statements and profits distribution; (iii) amendment of Articles; (iv) increase and decrease of the share capital, except for the authorized share capital; (v) issuance of securities convertible into shares, except within the scope of the authorized share capital; (vi) merger, de-merger (division); (vii) transfers of branch of activity or transfer of all or part of assets and liabilities all under regime of de-mergers; (viii) change of the company's corporate denomination, corporate form and nationality; (ix) increase of shareholders' engagements; (x) in the event of a loss of half the cor-

porate capital of the company, the extraordinary General Meeting must be convened to resolve on the possible dissolution of the company; (xi) liquidation of the company.

Shareholders are entitled to delegate any necessary powers to the Board of Directors in order to ensure the due execution of the decisions taken by the General Meeting.

3.3. Powers that may be reserved to the General Meeting by the Articles

In addition to the above legal restrictions (i.e. exclusive competences reserved by the Company Law to the General Meeting), powers of the Board of Directors may be limited by the Articles, thus conferring certain additional decision powers usually falling within the competence of the Board of Directors to the General Meeting.

However, despite the lack of a clearly determined legal limit for such contractual freedom and thus interference of the General Meeting in the management of a company, the potential limitation (in the Articles) cannot deprive the Board of Directors of its essential function, which is the management of the company by taking any and all actions necessary or useful to realize its corporate object and act in the best interest of the company. The Board of Directors remains legally responsible for taking such actions.

Beside the legal and possible restrictions imposed by the Articles, the Board of Directors must in any case observe and comply with the limits of the company's corporate object.

3.4. Appointment of Directors

As explained above, there is a clear distinction between the powers attributed to the Board of Directors and those belonging to the General Meeting; however, the latter remains the sole competent body to resolve upon the appointment and removal of Directors composing a Board of Directors (except in case of cooptation). This being said, the Company Law does not, however, give any details on who should, or should not, be appointed as Director.

Guidance is however available from the financial sector, where the LFS and some CSSF circulars make reference to such concepts as *"good reputation"*, *"irreproachable conduct"* or *"adequate professional experience"*.

For listed companies, principle 3 of the LSE's Ten Principles of Corporate Governance refers to the composition of the Board of Directors being of *"competent, honest and qualified persons"*.

The Company Law sets out the basis for the appointment and removal of Directors, which may be supplemented by further details in the Articles.

Beside the power to elect a Director (in a SA), the General Meeting has the right to remove a Director without cause (*ad nutum*) at any time by a simple majority vote. Such rule is of public order and the Articles cannot derogate from it in any manner. Indeed, any clause or wording that would make it more complicated or simply jeopardize the right of the General Meeting to remove a Director without cause, shall be considered as null and void (for instance the insertion of an indemnity provision for the benefit of the removed Director would be considered as null and void since it would jeopardize the right of the General Meeting to remove a Director from office without having to consider the financial consequences). In an SARL, rules are different and a removal can only occur for cause unless the Articles provide otherwise.

The Company Law does not indicate how candidates for directorship are to be nominated for appointment, however in practice the existing Board or its nomination committee identifies and proposes the candidates.

3.5. Responsibility of Directors

The Company Law deals with issues related to the responsibility of the Directors in carrying out the mandate granted to them and states that *"Directors shall be liable to the company in accordance with general law for the execution of the mandate given to them and for any misconduct in the management of the company's affairs"*[1].

Although the Company Law does not expressly address issues on who should be appointed as a Director, competences, skills required or time to be committed, Directors' duties and responsibilities shall be based on the general rules set out in the Civil Code regulating execution of an agency mandate (*"mandat"*). To this end, Article 1137 of the Civil Code makes reference to the concept of the *"bon père de famille"* who should be attentive and take reasonable care in carrying out his/her duties. The concept of reasonable care is to be considered in the light of the Directors' professional qualification and experience.

In general, the Board of Directors retains responsibility for the execution of its mandate, but it may delegate various activities to the executive management. Case law has established that where such delegation is made, the Board of Directors fulfills its responsibilities by issuing clear formal instructions to the executive management, ensuring adequate resources are available and monitoring the activity delegated. In that context it is worth mentioning that where the Board has established or appointed a management committee or a managing executive officer, the liability of these persons is substantially the same as those of the Board.

Directors or members of the management committee or a managing executive officer are ultimately responsible for both their actions and their omissions. Liability could arise from breaches of any type of law or regulation.

3.6. Duty of Confidentiality

The Company Law imposes an obligation of confidentiality on Directors, even after they have ceased to hold office. They have a duty not to disclose information, the disclosure of which might be prejudicial to the company's interests, except where such disclosure is required or permitted by a legal or regulatory provision or is in the public interest.

3.7. Conflicts of interest

A proposal for appointment as a company Director requires careful consideration both by the entity proposing a candidate (the "Proposer"), before making the proposition, and by the candidate, before accepting it.

The first consideration is to identify whether there is any conflict, or perceived conflict, arising from the candidate's existing commitments or personal circumstances. The early identification of a conflict situation can avoid much wasted time for all concerned.

Openness and transparency at this stage in the process is essential, so that there can be clear agreement between the parties on whether any circumstances prevent the pursuit of the discussions on a potential appointment. If the candidate already has existing Director's mandates with other companies, and where any doubts of compatibility exist, these companies may need to be consulted on whether they agree that the new mandate would be compatible with the already existing mandates. Disclosure to the Proposer of the candidate's other professional commitments and directorships is also appropriate to help assess whether any type of conflict exists.

Article 441-7 of the Company Law defines a conflict of interest when a Director has a direct or indirect financial interest conflicting with that of the company in a transaction which has to be considered by the Board of Directors.

1 English translation of Luxembourg company law by Philippe Hoss (Elvinger Hoss Prussen)

In a broader context, other types of conflict may constitute an inhibiting factor in the decision as to whether to offer a Director's mandate. For example, the image and reputation of the company (to which the Director shall be appointed) or even the business sector in which it is engaged may be viewed by other parties as presenting a conflict with the Director's existing obligations or interests.

If a potential conflict is identified, both parties should discuss the situation with all the facts on the table and try to agree whether a conflict actually exists or is likely to occur. It may be possible to resolve the potential conflict completely, or to take steps to mitigate it to the extent that all parties agree that the circumstances are sufficiently transparent and manageable. If no solution can be found, the candidate may have to decide that the best option is to decline the offer.

Alternatively, having determined that he/she has no potential conflict, the candidate then needs to decide whether it is right for him/her to accept the offer and his/her candidacy, bearing in mind the fact that the responsibilities and duties of a Director are in general the same for all directorships, whether of large or small companies, commercial profit seeking companies or non-profit charitable entities. Another important dimension is that all Directors bear similar responsibility for their individual and collective action as a Board of Directors, whether they are executive, non-executive or independent Directors. Indeed, the Board of Directors is a collegial body.

The candidate therefore needs to carry out due diligence to establish whether he/she and the company are well matched and to assess whether he/she can commit sufficient time and expertise to the task.

3.8. Due diligence by the Director

3.8.1. Role and obligations of a Director

The objective of due diligence is to understand the proposed role of the potential Director and his/her expected contribution to the company and to the Board, as well as to satisfy the candidate that the "tone at the top" of the company and the corporate governance framework (if any) are appropriate and applied as should be expected. It is just as important that the company can fulfill the candidate's expectations, as whether the candidate can fulfill the company's expectations and his/her legal duties.

Some of the elements described hereafter may or may not be available, depending on the size of the company offering the directorship, or on how it is structured. It is a matter of judgement as to how detailed the due diligence by the candidate needs to be, but the key matters on the operation of the company and the mutual expectations should be given consideration in all circumstances.

It is recommended always to carry out a certain level of due diligence in a strictly objective manner, irrespective of, for example, the apparent prestige attached to the appointment, prior knowledge of the company or personal acquaintance with some of the other Directors or the executive management of the company.

A number of questions need to be asked by the candidate/potential Director about the reasons for the offer, for example:

Why have I been asked to become a Director?
Am I replacing someone? Why did he/she leave?
Can I bring added value to the company and its Board of Directors?
Do I have relevant industry knowledge or special skills required by the company?
What are the main duties/assignments of the Board of Directors role I am offered?
Do I have a thorough understanding of the company's business, strategy and risks?
If not, will the company provide an induction course which will permit me to obtain this understanding?
What are a Director's responsibilities and their potential consequences?

What is the current financial position of the company?
What are the main risks the company faces? How are they managed?
Is the company compliant with all obligations under Company Law?
What is the company's activity and request information of companies in the group (structure chart)?
What are the current topics, transactions?

The candidate should also try to find out as much as he/she can about the company, using all available sources, such as, but not limited to the company's website and information available on the website of the Luxembourg trade and companies register (rcsl.lu). Indeed, the company's website is useful to establishing how transparent the company is with its stakeholders – for example, what type of information is freely available (e.g. Articles, annual reports, General Meeting documents, short biographies of the members of the Board, details of the major shareholder of the Company, recent press releases etc.).

Before accepting a position, it is advisable for the potential Director to meet either with the chairman of the Board, and where there is one, also with the nomination committee and/or the recruitment consultant. The candidate should prepare thoroughly for such meetings and raise questions he/she may have not only regarding the company's business and how it is performing, but also corporate governance aspects such as:

Does the company have a clear written corporate ethical code/code of conduct?
Which board committees exist, if any? (E.g. audit committee, remuneration committee, risk/compliance committee, valuation committee, investment committee, management committee, managing executive officer)
Who are the existing Board/committee members and what are their roles and attributes?
Are there any independent Board members?
Is there a corporate governance agreement?
Is there a shareholder agreement limiting rights or imposing additional obligations on the Board?
Is there an appropriate balance of executive/non-executive Directors?
How many Board/committee meetings are held in a normal year?
Is there a dominant shareholder in the Company that may exercise influence on the Board's operation?
Is there a dominant member of the Board or of executive management?
Does the Board have access to external expert advice, if necessary?
Does the Board regularly assess its membership and performance?
How much happens between meetings that requires Directors' attention?
What is the background of other Board members? How long have they served?

As we can see, there are a lot of matters a potential Director should take into account. It is not possible to include an exhaustive list. Indeed, these questions vary according to the candidate's interests and objectives, the company's structure, etc.

If the candidate is expected to be a member of the audit committee, he/she might wish to speak to the internal and external auditors to get their views on the financial and internal controls of the company and on the risk management processes and reporting by the executive management.

Similarly, it would be informative to discuss the conduct of Board meetings with other Directors, and also with the company secretary (if any), to deal with questions such as:

How and when are Board documents distributed?
Is there an appropriate agenda and minutes of meetings?
Do Board meetings last long enough to deal with the issues arising?
Does everybody contribute or does a vocal minority dominate the discussions?
Is there a balance between the contributions from the Board and from the executive management or does the CEO run and dominate the Board meetings?

Are the concerns and suggestions of the Board adequately addressed and followed up diligently by the executive management?
What areas have the Directors identified for improvement?
Do they feel that the Board has the right mix of competences and expertise?
Do the Directors discuss the executive management's performance in a closed (to executive management) session?
Is there a regular program of training being offered to the Board to keep it up to date with the latest developments (business related, legal, governance) or is this left to the individual Directors?
Does the company offer appropriate D&O cover and indemnification to the Board?
Is the Directors' remuneration fair and appropriate? (See below)
Will the governance of the company's business be led by an independent Board member?

If the company is listed on a stock exchange or is a regulated entity, the candidate should also have and obtain a good understanding of the company's obligations linked to such a listing or its regulated activities and the obligations and risks resulting therefrom.

The Directors shall constantly follow evolutions in legislation and participate in training courses to be aware of the company's obligations and their own obligations.

3.8.2. Fair and appropriate remuneration

As part of the due diligence process, the candidate should also consider whether the remuneration offered is commensurate with the expected time commitment to be made and responsibility assumed by the Director. For example, the following bodies all stress that a Directors' remuneration policy should be clear, fair and set out in a transparent manner and should reflect the responsibilities and time commitment undertaken.

- The regulatory authorities of the financial sector (see below);
- The LSE (in its 8th Principle of the Ten Principles of Corporate Governance, applicable to listed companies);
- ALFI (in its Code of Conduct, applicable to investment funds and their management companies);

A clear remuneration policy as proposed in these documents, which also indicates that the remuneration of non-executive Directors should not be performance related, will help the potential Director in his/her assessment of whether the remuneration proposed is reasonable. The reasonable character of the Director's remuneration can be measured on the basis of the financial situation of the company. To this effect, CSSF circular 10/437 states *"where remuneration is performance-related, its total amount shall be based on a combination of the assessment of the performance of the individual and the business unit concerned and the overall results of the financial undertaking"* (Section II, point 2.10). Moreover, *"the procedures for determining remuneration within the financial undertaking shall be clear and documented and shall be internally transparent"* (Section II, point 2.15).

To the extent that these matters can be dealt with in written terms of reference, the easier it will be for the Director candidate to determine whether he/she should accept the directorship.

It should also be clear that all Directors should, during the course of their mandate, continue to ask themselves some of the questions set out herein. If the answers give rise to any concerns, these should be escalated as appropriate (for example be drawn to the attention of the chairman, a senior Director, the CEO or the Company secretary or even discussed with outside legal counsel).

3.9. Assessment of time commitment

3.9.1. The principle of sufficient time commitment

One common theme which is to be found in most of the recent rules or guidelines intended to improve corporate governance through a more effective oversight of a company by its Board of Directors, is that Boards of Directors and their individual members need to commit sufficient time to their task in order to enable them to perform their function properly and to understand the business for which they have responsibility. This is clearly now a generally accepted principle which finds expression for instance in CSSF circular 12/552: *"The Board of Directors shall have the overall responsibility for the institution. It shall ensure the execution of its activities and preserve business continuity by way of sound central administration and internal governance arrangements, pursuant to the provisions of this circular"*. The circular also states that the members of the Board shall ensure that their personal qualities enable them to properly perform their Director's mandate, with the required commitment and availability.

This approach may be seen as fitting into the overall rule, well enshrined in Luxembourg law, according to which Directors must act under the principle of "bon père de famille". This civil law concept has been interpreted as the requirement for a given Director to apply the care, skill and diligence that would be exercised in the same situation by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by that Director in relation to that company, and (b) the general knowledge, skill and experience that Director actually has.

The application in practice of this principle is, however, no simple matter as each step involves some degree of judgement.

The need for the exercise of judgement in determining the number of mandates to be accepted by a Director is already recognized in certain EU Directives and Regulations relating to the financial sector (see Section IV below for additional details):

- Article (91) (3) of CRD IV states that *"the number of directorships which may be held by a member of the management body at the same time shall take into account individual circumstances and the nature, scale and complexity of the institution's activity"*.
- Article 9 of MIFID II requires that the members of the management body are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their functions.
- Article 21 of the AIFMD Level 2 Regulation 231/2013 indicates *"the governing body of the AIFM possesses adequate collective knowledge, skills and experience to be able to understand the AIFM's activities, in particular the main risks involved in those activities and the assets in which the AIF is invested"*.

As will be described more fully in Section IV, the CRD IV adds a limitation on Directors of credit institutions *"that are significant in terms of their size, internal organization and the nature, the scope and the complexity of their activities"*. Furthermore, as also described below, CSSF circular 18/698 imposes a limitation on Directors of an IFM, both in terms of the number of mandates and the number of hours of professional activity.

Whilst the application of a hard cap on the number of mandates has been proposed by EU legislators in certain specific and limited areas of the financial services industry, they appear to recognize the difficulties of applying such a limitation on a wider basis. It is therefore up to the individual Director to assess his/her time availability and commitment when considering taking on a new mandate and to reassess this regularly throughout the life of his/her directorships.

On a personal level, the Director first needs to decide upon his/her overall time availability for directorship roles. There are several elements to be considered, all of which are subject to personal judgement and which can vary significantly from one individual to another, for example:

- The total number of hours per year that the individual wishes to devote to "work" as opposed to "personal time". This is a matter of personal lifestyle choice or circumstances and can lead to huge variances in the overall available time. An individual may decide, at least for a limited number of years, to devote all of his/her waking hours to work, whereas another might wish to place a very low limit on his/her working time.
- The time required for other work-related roles which the Director occupies (if any), such as an executive or management role within a company, a role in a professional firm or in an individual consultant's capacity.

Also, to be taken into consideration are such matters as:

- The resources available to the Director.Although the responsibilities of a Director may not be delegated, Directors may be supported in order to make certain tasks easier or quicker. These may include:

  access to professionals who assist the Director in the analysis of figures or reports, the review of specific topics or help in keeping on top of regulatory changes,
  personal access to industry or legal databases which can quickly provide reliable and up-to-date information,
  access to IT infrastructure which provides efficiency in the work process, confidential data storage and mobility,
  access to a personal assistant who takes care of printing, scanning and posting items, arranging meetings, invoicing, etc.

3.9.2. Time required to fulfill the role of Director – nature, scale and complexity of the business

The language used by both legislator and regulator reflects the existence of a wide variety in the time requirement for the role of Director of entities which may on the one hand encompass large multi-entity groups operating on an international scale and on the other hand small private companies which have very little activity from one year to another.

The frequency of Board meetings will differ in accordance with the specific needs of each company, its current business needs and conditions.

The Boards of operational companies or major groups may meet on a monthly basis, and may require a substantial time commitment, both in terms of attendance at Board meetings and for adequate preparation and follow up. Membership of Board committees, such as audit, remuneration, compliance, valuation, investment or risk committees can entail a further time commitment on the part of the Director.

The role of Chairman, both of the Board and of Board committees, is generally recognized as requiring a greater time involvement than simple membership. In operational entities, Board chairs may require double the time commitment of other Directors, and committee chairs 50% to 100% more than other members. In supervisory Boards, the additional time requirement may be less.

At the other extreme, a small company with little activity may very well be adequately managed with only a few Board meetings each year and little further time commitment on the part of the Directors. Similarly, numerous entities within the same group structure and as part of the same business operation may reasonably be considered together with a relatively low time commitment allocated to

each individual entity.

It follows that the amount of time involved will differ greatly between mandates, and it is impossible to set a "one size fits all" figure on how many mandates are appropriate for any one person.

In all cases, however, it is necessary to remember that a Director has on-going duties and responsibilities towards the company throughout the mandate. Also, in situations of market stress, or when the company is undergoing a period of particularly increased activity, such as an acquisition or take-over, or as a result of some major difficulty with one or more of its operations, Directors can expect their involvement to increase significantly. It is therefore prudent for a Director to maintain some spare time capacity to be able to deal with unusual situations in a timely and effective manner.

The method chosen to estimate such spare time capacity might range from a general percentage applied to the total time estimated for all Board mandates held, to a specific assessment for each mandate based upon the general nature and risks of the business concerned.

3.10. Self-assessment of time commitment

As stated above, a high degree of personal judgement is necessary to evaluate the time requirement and time availability which may apply to an individual appointment.

ILA recommends that a self-assessment should be carried out by Directors both at the time any Board appointment is being considered, and on a regular annual basis. The self-assessment should take into account various factors such as those below for each mandate:

(i) The number of Board meetings to be held in any year;
(ii) The time required for attendance at and preparation for each Board meeting;
(iii) The time required for attendance at and preparation for any meetings of committees of the Board;
(iv) The time necessary to fulfill additional duties such as Board chair, committee chair and/or Committee member;
(v) The additional time required for Company matters between regular Board meetings;
(vi) The nature and complexity of the entity and the business;
(vii) The availability (or lack) of resources to support the Director in carrying out his/her functions;
(viii) The professional skills, training and experience of the individual may result in variances in the time requirements;
(ix) The time to be allocated to induction and training; and
(x) The additional time to be allocated for dealing with unusual situations.

On each annual review, it is recommended that Directors reflect on each mandate and the time it required in the previous year in order to better adjust expectations for the next period.

On completion of a self-assessment, the Director will be in a position to compare the total time required against the total time he/she is willing and able to dedicate to directorship appointments, and conclude accordingly.

3.11. Due diligence by the company

The due diligence conducted by the company to which the candidate shall be appointed is an important element in the proposal to a candidate Director, as existing Directors should be satisfied that the new candidate is suitable both as an individual and as a complement to the Board's existing composition. This being said the ultimate decision to appoint or not a candidate as a Director is of the competence of the General Meeting (except in case of cooptation). As there is a wide variety of company types in Luxembourg – from large listed companies, to banks large and small, investment funds and both

large and smaller privately-owned companies - varying degrees of formality may be appropriate in the methods of choosing members of the Board.

For larger companies and those considered as PIE, before appointing a new Director to its Board, the company's nomination committee (or in case the company does not have such a committee, the Board or an ad hoc committee created for that purpose) should reflect on the composition of the existing Board and on which additional competences are required to best permit the Board and its committees to fulfill their responsibilities and operate effectively.

Consideration should also be given to whether the appropriate balance is achieved in terms of executive and non-executive/independent Directors. This can be a delicate task, especially when the company is majority – or wholly – owned and the potential Director is nominated/imposed by the shareholder. The profile for a new Director should be determined by taking into consideration the interest and needs of the company. An independent Director, who is not related financially to the company or its shareholder(s), can be indispensable to represent effectively the company's own interests (as distinct from those of its shareholders) as well as the interests of other stakeholders. Concerning the financial sector, the CSSF provides useful guidance in its circular 12/552: *"an independent director shall be a director who does not have any conflict of interest which might impair his/her judgement because he/she is bound by a business – family or other – relationship with the institution, its controlling shareholder or the management of either".*

Having determined an ideal profile for a new Director, the Board should use appropriate means to come up with a list of potential candidates, such as the creation of an internal committee, or use of external databases, consultants or executive search firms. Depending on the number of potential candidates, it may be advisable to carry out initial due diligence on the candidates early in the process. A detailed CV, including all current Board mandates, is essential, but will not be enough to determine the most suitable candidates. Additional diligence should be done through the use of all available media, but also through obtaining references in the same way as for any other senior appointment. Press searches will assist in determining certain reputational risks as a Board member in the news for the wrong reasons may also damage the company's brand – even if his/her conduct does not relate to the company.

Once the number of candidates has been reduced to a short list, the nomination committee (or other appropriate person or group) should meet or have a call with all remaining candidates in order to evaluate each candidate and whether he/she is indeed an ideal fit for this company's Board. They should not only probe his/her qualifications and background, but also find out whether he/she has sufficient time to commit to the duties of this Board (and Board Committees, where appropriate). Remuneration should also be discussed at this stage in order to ensure that there is an alignment between the expectations of the candidate and the proposed compensation.

If the conclusion is that no candidate adequately fits the criteria required, the process will need to be restarted.

If on the other hand a suitable candidate is identified, the required approvals from regulators (if any) shall be requested, and the onboarding process (including appropriate induction) shall be launched in view of the formal appointment to take place.

LEGAL AND REGULATORY FRAMEWORK FOR SPECIFIC ENTITIES

4.1. Credit institutions, investment firms and Professionals of the financial sector

4.1.1. Credit institutions

The appointment of members of the Board of Directors of a credit institution is subject to very detailed rules and in particular to explicit and prior regulatory approval. No Board member of a credit institution may take up his/her functions if he/she is not in possession of this formal approval.

It is therefore imperative for both the credit institution and the potential appointee to familiarize themselves in depth with the applicable regulations, procedures and forms which are available on the CSSF website.

The most relevant legal texts in this context are the CRD IV Directive (2013/36/EU), the LFS, the EBA Guidelines on the assessment of the suitability of members of the management body and key function holders (EBA/GL/2012/06) and CSSF circular 12/552 on central administration, internal governance and risk management, all in their latest version or any replacement or new regulations or guidelines.

A useful document issued by the CSSF is the *"Procédure prudentielle de nomination des titulaires de fonctions clés auprès des établissements de credit"*, published in French on www.cssf.lu and valid as from 30th June 2017, insofar as it refers to Directors (administrateurs).

4.1.1.1. Competent authority

The CSSF is the single point of entry for all applications pertaining to the appointment (and the departure) of Board members of credit institutions.

For new credit institutions, seeking to obtain a banking licence, the assessment of the initial proposed Board members takes place in the framework of the licensing procedure, with a first instruction by the CSSF and a final decision by the ECB (European Central Bank).

For less significant credit institutions which already hold a banking licence, the CSSF is sole competent to assess and approve new Board members, according to rules set by the SSM, with the ECB exercising its oversight and guiding function over the process.

For significant credit institutions which already hold a banking licence, the CSSF transmits the file to the ECB via the latter's Joint Supervisory Team, and the CSSF and the ECB jointly participate in the assessment according to ECB procedures. The ECB gives the final approval.

4.1.1.2. Due diligence by the credit institution and by the candidate

Before submitting to the CSSF a file for the approval of a new Board member, a bank must make its own internal evaluation of the candidate. This evaluation has to follow written principles, policies and procedures supposed to guarantee that the candidate is "fit and proper". The evaluation shall enshrine the conclusions of the competent internal body on the reputation, honorability, knowledge, skills, experience, independence (absence of conflicts of interest) and availability of the candidate.

Significant credit institutions have to establish a nomination committee, composed of non-executive Board members. This committee is in charge of identifying, evaluating and recommending candidates for Board positions.

In addition to the individual evaluation of the candidate, the credit institution has to ensure that the Board as a whole will be well diversified and will possess a sufficiently wide range of knowledge, skills and experience to be able to understand the credit institution's activities, including the main risks. Credit institutions and their nomination committees are required to engage a broad set of qualities and competences when identifying members as candidates to the Board and for that purpose to put in place a policy promoting diversity on the Board. In significant credit institutions, the nomination committee will also periodically assess the quality and performance of the Board and its members, individually and collectively.

The candidacy file has to be submitted to the CSSF with the "Fit and Proper Questionnaire" duly filled out by both the bank and the candidate, together with all the required annexes.

The candidate to a Board position shall, on his/her own initiative, notify to the CSSF any substantial changes to the information on which the authority based its approval.

4.1.1.3. Availability – limitation of mandates

Credit institutions shall devote adequate human and financial resources to the induction and training of Board members. All Board members shall commit sufficient time to perform their functions in the credit institution.

The number of directorships which may be held by a member of the Board at the same time shall take into account individual circumstances and the nature, scale and complexity of the credit institutions' activities.

Unless representing an EU Member State, members of the Board of a significant bank shall not hold more than one of the following combinations of directorships at the same time:

(a) one executive directorship with two non-executive directorships;

(b) four non-executive directorships.

The following shall count as a single directorship:

(a) executive or non-executive directorships held within the same group;

(b) executive or non-executive directorships held within:

(i) institutions which are members of the same institutional protection scheme provided that the conditions set out in Article 113(7) of Regulation (EU) No 575/2013 are fulfilled; or

(ii) undertakings (including non-financial entities) in which the institution holds a qualifying holding.

Directorships in organisations which do not pursue predominantly commercial objectives shall not count for the purposes of the above limitation.

Competent authorities may authorize Board members to hold one additional non-executive directorship. Competent authorities shall regularly inform the EBA of such additional authorizations.

4.1.1.4. Powers and responsibility of the Board

By using the term "Management Body" („*organe de direction*"), which applies to the Board as well as to the executive management („*administration, gestion et surveillance*"), the law vests both bodies with the competence and responsibility to run the credit institution. Whereas the Board has an overall strategic and supervisory role, the executive management is in charge of applying the strategies set by the Board in running the day-to-day business of the institution.

The Board thus has the overall responsibility for the credit institution. It approves and oversees the implementation of its strategic objectives, risk strategy and internal governance. It has oversight over the integrity of the accounting and financial reporting systems, including controls and compliance, as well as over the process of disclosure and communications. It shall monitor the credit institution's governance arrangements, periodically assess their effectiveness and take appropriate steps to address any deficiencies.

Each Board member shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the executive management where necessary and to effectively oversee and monitor executive management decision-making.

As a general rule, the chairman of the Board of a credit institution must not exercise simultaneously the functions of CEO of the same credit institution.

4.1.1.5. Remuneration of Board members

As a general principle, enshrined in the LFS, remuneration policies and practices of a credit institution have to allow and promote a sound and effective risk management. This entails that remuneration incentives must be aligned with that objective and must not encourage risk-taking beyond the level tolerated by the credit institution's strategy.

The LFS as well as CSSF's circular 11/505 (principle of proportionality), circular 14/585 (ESMA Guidelines on remuneration under MiFID) and circular 17/658 (EBA Guidelines on sound remuneration policies) deal with remuneration policies, without establishing specific rules regarding the remuneration of Board members. CSSF circular 10/437, which has established guidelines on remuneration policies for all entities subject to CSSF supervision, has been superseded by the more recent texts mentioned above as regards credit institutions.

A Board member's remuneration should be clear and fair, set out in a transparent manner and reflect the Director's responsibilities and time commitment. Remuneration of non-executive Directors should be reasonable and not be performance-related.

4.1.2. Investment firms and Professionals of the financial sector

For the non-credit institutions belonging to the other professionals of financial sector governed by the LFS and supervised by the CSSF, ranging from so-called "CRR Investment Firms" to "Support PFS", the same general principles when it comes to Board members and Board composition as for credit institutions apply. Directors must be approved by the CSSF and they must be proven to be "fit and proper" and commit sufficient time to their function.

The stringency and detail of those requirements vary in proportion to the category of the professional concerned, with CRR Investment Firms closely aligned with the requirements for credit institutions, although without ECB and SSM involvement.

With fewer specifications provided by national or EU laws, CSSF circulars, such as circular 12/552 on governance and circular 10/437 on remuneration, must be followed by candidates for a Board position.

4.2. Undertakings for Collective Investment (UCI) and IFMs

The most relevant legal texts applicable to the main categories of UCI are the law of 17th December 2010 on undertakings for collective investment ("UCITS" and "Part 2 Funds"); the law of 13th February 2007 on Specialized Investment Funds ("SIF") and the law of 23rd July 2016 on Reserved Alternative Investment Funds ("RAIF"). All such investment funds, except RAIFs, are subject to the prudential supervision by the CSSF and shall be referred to hereafter as "UCIs".

All candidates wishing to act as Directors of regulated UCIs, as well as IFMs, must be approved in advance by the CSSF. They must be proven to be fit and proper and commit sufficient time to their function. This approval involves the Director submitting a file to the CSSF, containing:

- a "declaration of honor";
- a recent *curriculum vitae* (dated and signed by the candidate);
- a copy of the passport or the identity card;
- a recent extract of the criminal register of all the jurisdictions in which the candidate has resided in the five years preceding the date of the application. Each extract must not be older than 3 months; and
- a full list of the candidate's other mandates as a Director (including in non-regulated entities) and other professional activities, as well as an estimation of the time commitment for each mandate.

A template of the declaration of honor and the list of mandates and other professional activities is expected to be available on the CSSF's website shortly.

CSSF circular 18/698 (the "Circular") states that a Director of an IFM must have "the competences and adequate professional experience considering the type of concerned UCI(s) and the investment strategies of the managed UCI(s)". For authorized AIFMs, the CSSF will in particular consider the experience of the Director in the strategies for which the authorized AIFM has been licensed under Annex IV of Regulation 231/2013.

The Circular also states that the adequate professional experience can be demonstrated for example by the Director "through having already performed similar activities to a high level of responsibility and autonomy".

The Circular furthermore considers that the Board shall present a collective composition of its members allowing the Board to fully meet its responsibilities, by ensuring adequate representation of professional capacities and personal qualities of the members. The Circular clarifies that the Board, as a collective body of an IFM should have a perfect understanding of all the activities and the associated risks encountered by the IFM and the UCI(s) it manages, as well as the economic and regulatory environment in which the IFM operates.

Among other requirements on the individual and collective qualifications of a Board member and the organization of the Board, the Circular also expressly states that each member of the Board of Directors of any IFM, self-managed UCI or internally managed AIFM must "dedicate the required time and attention to his/her duties" and that he/she must "limit the number of other professional engagements to the extent necessary" for the proper performance of these tasks.

The Circular indicates two cumulative conditions that must be met by a Director of an IFM:

(1) the number of hours dedicated by a Director of an IFM to the performance of his/her professional activities must not exceed 1,920 hours per year; and
(2) the number of mandates in regulated entities and operational companies must not exceed 20.

It is the responsibility of each Director to ensure that he/she continuously complies with the above limits.

However, the Circular allows certain derogations to these limits under specific circumstances and the CSSF may grant a specific derogation if it is satisfied that the conditions laid down in the Circular for granting such derogation are met. For example, it is foreseen that the CSSF may grant a derogation where a Director is a member of the boards of several funds having the same promotor.

Although the Circular does not seem to apply to those Directors who only hold mandates in Boards of UCIs, it cannot be excluded that the CSSF will extend the limits of the Circular also to such Directors.

Where a Director would exceed one of the above thresholds, the request for a derogation by the CSSF must include the organizational measures the Director intends to put in place in order to be able to perform his current and additional tasks. The number, size, complexity etc. of the mandates of the Director are also to be considered in this respect.

Generally speaking, in view of the great number of IFMs and UCIs operating in Luxembourg and therefore the number of related directorships, some specifications are required as regards the assessment of time to be devoted by a Director.

To that end, a distinction may be drawn between a UCI or IFM where the Board has a role in making individual investment decisions and those where most asset management functions have been delegated and the Board acts in a supervisory and strategic role. Where the Board is mainly supervising delegates, the time commitment may be reduced, and more emphasis put on items such as delegated reporting, on-going diligence and ensuring that the Board's strategy and other decisions are respected.

Moreover, a UCI may be structured as one legal vehicle with many sub-funds, or as several separate legal entities with only one or few sub-funds each depending on the choices of the UCI's initiator. In such case the Board composition will often be identical for all those entities and the delegates such as depositary, central administration and accounting functions, asset manager, etc. will be the same for all those entities. As a result, Board meetings may sometimes be held together and in that case will review the supervision and reporting applicable across the whole range of funds. For such "fund families" by looking at substance over form, it will appear that a single legal entity with 100 sub-funds will require a greater time commitment than 4 legal entities with only a few sub-funds. The complexity of the investment strategy, the distribution focus and other factors will also impact the degree of attention required and consequently limit the number of mandates deemed acceptable for a Director.

One must however always bear in mind that each entity is legally distinct and the Directors must consider/vote appropriately for each legal entity without taking into account the interests of the other group entities. The same may be said of the interests of the investors in the different sub-funds of one legal entity.

With the introduction of the latest update to the UCITS framework by Directive 2014/91/EU ("UCITS V") and related delegated legislation, the European legislator has introduced a requirement that a minimum number of Directors shall be considered as independent Directors on the Board of a UCITS in the sense of the European legislation.

There exists also extensive regulation on the remuneration rules applicable to members of the board of an IFM, a self-managed UCI and an internally managed AIFM, introduced both by UCITS V and the AIFMD.

4.2.1. ALFI Code of Conduct for Luxembourg Investment Funds (June 2013 edition)

A considerable number of Luxembourg UCI Management Companies and UCI have adopted the ALFI Code of Conduct. Although it does not deal specifically with the issue of how much time is needed for a Director to commit to any particular mandate, certain principles and recommendations in the ALFI Code of Conduct require Directors to evaluate their commitment. The following principles, for example, invite Directors to reflect on the commitment to a mandate:

- The Board should ensure that high standards of corporate governance are applied at all times
- The Board should ensure that it is collectively competent to fulfill its responsibilities
- The members of the Board are expected to understand the activities of the fund and devote sufficient time to their role
- The Board should conduct a periodic review of its performance and activities

- The Board should act with due care and diligence in the performance of its duties
- Board members should regularly attend and participate actively at Board meetings
- The Board should ensure the remuneration of Board members is reasonable and fair and adequately disclosed
- The remuneration of Board members should reflect the responsibilities of the Board, the experience of the Board as a whole and be fair and appropriate given the size, complexity and investment objectives of the fund

4.3. Insurance and Reinsurance Undertakings

The Law of 7th December 2015 on the insurance sector incorporates the provisions of the EU Solvency II Directive and requires that the members of the Board of an insurance/reinsurance undertaking are fit and proper to execute their tasks, i.e. have adequate competences and experience.

Such law further requires, among other things, that the Board of an insurance/reinsurance company ensures the establishment of adequate systems of governance and risk management.

As such, the Board is also required to supervise, through reporting processes, the output of the four key functions that the law prescribes, namely: risk management, compliance, actuarial and internal audit. The Board also has to approve several reports before their communication to the regulator or the public, such as the ORSA (Own Risk and Solvency Assessment) and the Solvency and Financial Condition Report. It must further define the risk appetite of the undertaking.

The CAA circular 99/1 contains rules on the appointment and approval of Directors of insurance undertakings: any change in the composition of the Board of an insurance company must be submitted to the CAA within 15 days. The circular lists the information to be provided to the CAA in that respect. The composition of the Board must be such that it ensures the proper management and supervision of the company. As such, the circular states that the main qualifications needed in an insurance undertaking – legal, tax, accounting and actuarial – should be represented at the level of the Board. Where a company does not employ a full-time actuary, the presence at the level of the Board of a Director with sound knowledge in actuarial sciences is required. The regulator further mentions that, whilst this is not mandatory, the presence of a Luxembourg resident Director knowledgeable about the local legal and tax environment might be helpful in dealing with the Luxembourg authorities.

4.4. Listed companies

4.4.1. "X Principles of Corporate Governance" issued by the LSE

The LSE issues and regularly revises its "X Principles of Corporate Governance" which are applicable to companies incorporated under Luxembourg law and whose shares are listed on a regulated market operated by the LSE, except for regulated UCIs, to which specific regulations apply.

The LSE points out, however, that "given their flexibility, the X Principles can easily be used as a reference framework for any company incorporated under Luxembourg law…"

The X Principles are divided in three layers of rules:

- **The Principles**, which are broad in scope and are mandatory, without exception, for all companies to which the Principles apply;
- **The Recommendations**, which describe the proper application of the Principles. Companies have to comply with the Recommendations or explain why they are departing from them ("comply or explain"); and
- **The Guidelines**, which provide advice on the appropriate manner for a company to implement or interpret the Recommendations, and reflect "best practices". The Guidelines are optional

and are therefore not subject to the obligation to "comply or explain".

The following Recommendations and Guidelines are relevant to the appointment decision for Directors:

4.4.1.1. Appointment

Every Director shall undertake to dedicate the time and attention required to his/her duties, and to limit the number of his/her other professional commitments (especially offices held at other companies) to the extent required for him/her to be able to fulfill his/her duties properly. The number of offices held shall depend on the nature, size, and complexity of the company's business (recommendation 5.9).

The company shall publish information on the Director's appointments within other listed companies in its annual report and on its website every year.

The Director shall keep the secretary of the Board informed of any subsequent change in his/her commitments.

Every Director shall inform the Board of any other directorship, office or responsibility, including executive positions that he/she takes up outside the company during the term of his/her directorship (recommendation 5.2).

A Director should not accept more than a limited number of directorships in other companies.

A full-time Executive Director should not accept more than two other directorships as a non-executive Director in a listed company. No Executive Director should act as chairman of the board of more than one listed company.

4.4.1.2. Remuneration

The 7th Principle states that *"the company shall establish a fair remuneration policy for its Directors and the members of its Executive Management that is compatible with the long-term interests of the company."*

The principle is then developed in a number of recommendations which indicate how the company's remuneration policy is to be drawn up in a set of simple, transparent and precise rules which are to be described in the company's corporate governance statement in the annual report. *"These criteria shall be in line with the company's medium and long-term goals, and shall take account of its performance and effective and potential development, its results and the wealth created for the company and its shareholders, and of the performance of the Board or the Executive Management respectively"* (furthermore recommendation 7.13). *"Individuals shall not be involved in the adoption of decisions regarding their own remuneration"*.

"The criteria for Directors' remuneration as well as the various factors entering directly or indirectly into the remuneration in favor of members of the Board and the executive management shall be subject to the approval of the Annual General Meeting of Shareholders" (recommendation 7.5).

"The remuneration of Non-Executive Directors shall be proportional to their responsibilities and the time devoted to their functions" (recommendation 7.6), and the related Guideline proposes that the remuneration of non-executive Directors should not be performance-related or take the form of long-term incentive plans or benefits in kind.

4.4.1.3. Other applicable regulations, directives or laws (not limitative) of importance to Directors of listed companies

- Law 11th January 2008 on transparency requirements
- Regulation (EU) N° 596/2014 on market abuse
- Internal Rules of the Luxembourg Stock Exchange
- Law of 19th May 2006 on takeovers (as amended).

4.5. Non-profit organizations

In Luxembourg, non-profit organizations are governed by the Asbl Law.

The Asbl Law only specifies that the Articles for a non-profit association must set out the mode of appointment and the powers of its Directors. Article 4 of the Asbl Law requires a general meeting of members for the appointment and removal of Directors. There are no provisions relating to time commitment.

The Board of Directors is in charge of the association's management and has full power of representation in judicial and extrajudicial acts (Article 13 of the Asbl Law).

As is the case for companies, Directors of associations/foundations are responsible for any faults committed in their management of the association (Article 14 of the Asbl Law). The responsibilities of the Directors of non-profit associations are therefore no less important due to their non-profit status. Again, the circumstances will be relevant: being on the Board of a non-profit association which has hundreds of employees and real operations will also involve heavy responsibilities, so that the appropriate time commitment may also be significant.

Directors wishing to join the Board of a non-profit association, either association or foundation, may usefully refer to the ILA "guide of good governance for non-profit organizations" where they can find recommendations on the best practices in such entities.

SPECIFIC BOARD APPOINTMENTS

5.1. State appointed Directors

State appointed Directors are in a very different position compared to all other Directors in Luxembourg as their appointment, functioning and liability is regulated by the Law of 25th July 1990 relating to State appointed Directors.

Where the State or a public legal entity is a shareholder, and that shareholder proposes Directors for appointment within the Board of a company, those Directors represent the State/public legal entity that caused their appointment, and they execute their instructions. To that end, they must transmit all necessary information which they acquire to the State/public legal entity.

The State/public legal entity of which the Director is a representative assumes the responsibilities of the persons appointed at its request (but may itself take recourse against such individuals in case of serious personal misconduct).

Any directorship fees due to such Directors are paid to the State/legal public entity. In turn, it is the government which determines any fees payable to these Directors for the fulfillment of their Director duties.

Under the terms of Article 91 (3) of CRD IV, Directors representing a Member State of the European Union on the Board of a significant credit institution are exempt from the requirement to limit the number of directorships they hold.

5.2. Staff representatives as Board members

Employee representatives within Boards of Directors are broadly subject to the same rules and regulations as other Directors.

In addition, the employee representation is specifically regulated by article L.426-2 and following of the Labour Code and subject to certain specific rules, especially in terms of employment protection and time off from other duties in order to attend to Director duties. According to Articles L.426-1 and L.426-3 of the Labour Code, *"a "Société Anonyme" (SA) counting at least 1000 employees and being established in Luxembourg for 3 years, is obliged to have staff representatives among the Board members, representing 1/3 of all the members"*. Importantly, the liability of staff representatives is subject to the same regime as that applicable to other Directors (as provided by the laws (including Company Law) governing the liability of the Directors), with article L.426-8 (2) of the Labour Code, stating that staff representatives are jointly liable with the other Board members.

It is not uncommon, however, for employee representatives to benefit from indemnities from the union recommending their appointment. Such indemnities are of course limited by the usual common law limits – for example they cannot cover fraud, gross negligence and other serious misconduct.

In the context of entities regulated by the CSSF, CSSF circular 12/552 excludes staff representatives of relevant credit institutions and investment firms from the CSSF's control of their time commitment. Nonetheless ILA recommends that all Directors – regardless of the origins of their appointment – take into consideration best practice as regards committing sufficient time and energy to the role.

5.3. Audit committees

The existence of an audit committee is mandatory in some companies, and merely optional in all other entities. An audit committee must be established in all entities that qualify as PIEs under the applicable legislation, i.e. notably all listed entities, credit institutions, insurance and reinsurance undertakings. All other companies should consider whether the establishment of an audit committee is useful in light of the overall functioning of the Board as well as the latter's oversight duties.

According to the Audit Law, the audit committee's key roles are the following:

- Monitoring the statutory audit of the financial statements and informing the Board of the results of such audit
- Monitoring the process for financial reporting
- Overseeing the work of the external auditor, including the provision of non-audit services, the selection process and independence of the external auditor
- Overseeing the internal control and risk management systems

The audit committee is either an independent committee, or a sub-committee of the Board. In most entities, the audit committee acts as a sub-committee of the Board.

The members of the audit committee are appointed by the Board of Directors (Article 441-6 of the Company Law) and/or by the General Meeting (Article 52(1) of the Audit Law). The audit committee shall comprise at least one member competent in accounting and/or auditing. Overall, the members of the audit committee must be knowledgeable in the field of activity of the company. As a general rule, the majority of the members of the audit committee should be independent from the audited entity.

The Audit Law lists the tasks that the audit committee must fulfill (Article 52(6)). Before accepting an appointment to an audit committee, the potential member should familiarize himself/herself with those tasks and ensure that he/she will have the skills required to perform the duties of an audit committee member.

The voice of corporate governance in Luxembourg

ILA MISSION STATEMENT

The mission of ILA is to promote the profession of Directors by developing its members into highly qualified, effective and respected Directors.

In parallel, it will promote best practices in Luxembourg in the field of Corporate Governance of companies and institutions by actively engaging with those institutions charged with the introduction, application and oversight of those Corporate Governance rules and practices. It will achieve this through high quality training, forum discussions, research, publications and conferences.

ILA aims to be the premier interlocutor in Luxembourg on issues affecting Directors.

www.ila.lu