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HOLDING GENERAL MEETINGS REMOTLY DURING COVID-19 CRISIS

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/// During the covid-19 crisis, companies are still obliged to hold general meetings, and at the very least, to hold the annual general meeting to approve annual accounts for the past financial year. While almost all gatherings are subject to constraints, social distancing rules may remain in place even after the state of crisis officially ends. This handbook will provide you with practical tips for organising your general meeting at a time when additional restrictive rules apply, as well as the rules that derogate from the normal regime.



1. Special regime during the state of crisis: scheduling your annual general meeting?

The date of the annual general meeting (the **AGM**) is either stipulated in a company's articles of association, or by law, which under normal circumstances requires a company to hold an AGM within 6 months following the end of its financial year.

During the crisis period, the government and the parliament of the Grand Duchy of Luxembourg adopted temporary measures which allow companies to postpone the date of the AGM as well as the date of filing of annual accounts for 3 months.

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| For the AGMs to be convened | <p>According to the law of 22 May 2020¹ (the Law of 22/5/2020), from 29 May 2020 onwards, any company can hold its AGM within 9 months following the end of its financial year. This applies only to an AGM relating to a financial year ending between 18 August 2019 and 24 June 2020. To be precise, the usual deadline is extended by 3 months.</p> <p>Before the Law of 22/5/2020 was published on 29 May 2020, the Grand-Ducal regulation of 20 March 2020² (the GDR of 20/3/2020) was applicable. It provided that, notwithstanding any provision to the contrary in the articles of association, any company could convene its AGM at the latest of the following dates: (i) a date falling within a period of 6 months after the end of its financial year or (ii) any date before 30 June 2020. However, the Grand-Ducal regulation of 29 May 2020³ (the GDR of 29/5/2020) modifying the GDR of 20/3/2020 repeals the above provisions which are no longer in force as of 29 May 2020.</p> |
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¹ Law 22 May 2020 on extension of the deadlines for filing and publication of the annual accounts, consolidated accounts and related reports during the state of crisis. <http://legilux.public.lu/eli/etat/leg/loi/2020/05/22/a467/jo>

² Grand-Ducal regulation of 20 March 2020 introducing the measures concerning the meetings held in the companies and other legal persons. <http://www.legilux.public.lu/eli/etat/leg/rqd/2020/03/20/a171/jo>

³ <http://legilux.public.lu/eli/etat/leg/rqd/2020/05/29/a468/jo>

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| <p>Filing of the annual accounts</p> | <p>Pursuant to the Law of 22/5/2020, the deadlines for filing annual accounts for a financial year ending between 18 August 2019 and 24 June 2020 with the Luxembourg Trade and Companies' Register (RCS), and publication of them in the <i>Recueil Electronique des Sociétés et Associations</i> (RESA), are also extended by 3 months.</p> <p>In particular, filing and publication must take place within 4 months from the approval of the accounts at the AGM and no later than 10 months after the closing date of the financial year. Therefore, a company that has its annual accounts approved on the last day of the extended legal deadline must then file and publish them within one month, but a company that does not intend to take advantage of the extended legal deadline for the approval of the accounts and approves them within 6 months after the closing date of the financial year can then nevertheless take full advantage of the extended RCS and RESA deadlines and file and publish them within 4 months.</p> |
| <p>Examples of 3-months extension</p> | <p>(a) A company with a financial year ending on 31/12/2019:</p> <ul style="list-style-type: none"> • the deadline to hold the AGM: 30/9/2020 • the deadline to file annual accounts: 31/10/2020 <p>(b) A company with a financial year ending on 31/05/2020:</p> <ul style="list-style-type: none"> • the deadline to hold the AGM: 28/2/2021 • the deadline to file annual accounts: 31/3/2021 <p>(c) A company with a financial year ending on 31/12/2020 (thus outside the scope of the Law of 22/5/2020):</p> <ul style="list-style-type: none"> • the deadline to hold the AGM: 30/6/2021 • the deadline to file annual accounts: 31/7/2021 |

2. Format of the AGMs

During the state of crisis, the GDR of 20/3/2020, as amended by the GDR of 29/5/2020, applied. These Grand-Ducal regulations automatically expired on the last day of the state of crisis, i.e. at midnight on 24 June 2020. As of 25 June 2020, the law of 20 June 2020⁴ (the **Law of 20/6/2020**) came into force, confirming the main principles already present in the Grand-Ducal regulations, while qualifying and further specifying others. That law was itself replaced on 1 October 2020 by the law of 23 September 2020⁵ (the **Law of 23/9/2020**), reproducing the text of the Law of 20/6/2020 fairly faithfully. However, certain provisions on the convening of annual general meetings until 30 September 2020 are obviously no longer included and it should also be noted that this new law is clearer on the extent of its effects, which have been extended until 30 June 2021 by the law of

25 November 2020 as amended by the law of 19 December 2020⁶ (the **Law of 25/11/2020**).

For all companies, the Law of 23/9/2020 prolonged by the Law of 25/11/2020 therefore extends the authorisation to use a format of AGM respecting social distancing until 30 June 2021 and expands the scope of its application to non-profit associations and foundations, agricultural associations, commonhold associations, EIGs and EEIGs, the Order of Architects and Consulting Engineers (OAI), the Law Society, the Board of Notaries, the Chamber of the judicial officers, the Order of Chartered Accountants, the Luxembourg Institute of Registered Auditors, mutual insurance associations, and the Housing Fund.

Therefore, a company can currently choose between the two special formats of general meetings (including the AGM) set out under A. and B. below,

⁴ Law of 20 June 2020 extending measures concerning the holding of meetings in companies and in other legal entities <http://www.legilux.public.lu/eli/etat/leg/loi/2020/06/20/a541/jo>

⁵ Law of 23 September regarding the holding of meetings in companies and other legal entities <http://legilux.public.lu/eli/etat/leg/loi/2020/09/23/a785/jo>

⁶ Law of 25 November regarding the holding of meetings in companies and other legal entities <http://legilux.public.lu/eli/etat/leg/loi/2020/11/25/a932/jo>

which can be imposed on shareholders who must then adhere to them exclusively in order to exercise their rights. Nevertheless, shareholders always have a third option, being to vote via a proxy, which is discussed under C. below. The aim of the scheme is to overcome the absence in the company's articles of association of the possibility to resort to the different ways of organising a general meeting, but contrary to what was still possible under the GDR of 20/3/2020 it is no longer permitted to contravene an express prohibition in the articles of association of one of these formats of meeting. The other formats provided for by law or the articles of association will also remain possible.

A. Remote voting in written or electronic form

- A company may require its shareholders to exercise their rights exclusively by remote voting either in written or electronic form, provided that the full text of the resolutions or decisions to be taken has been published or communicated to them in advance.
- It is necessary to send shareholders an explanatory note on the format of decision-making (which must indicate a postal and an email address of a member of the board of directors / managers), the full text of the resolutions (with boxes to vote in favour, against or abstention), as well as any documents necessary for shareholders to take their decision in full awareness (hence, for the AGM it is necessary to attach a copy of the annual accounts and reports, if any).
- It is also recommended that the company conveys the deadline by when shareholders must return signed written resolutions by mail or email, in order to allow them to address any potential questions on one or several management operations to the management body before having to decide on the discharge to be given to the members of the management body. This deadline must be included in the explanatory note.
- The Law of 23/9/2020 and the Law of 25/11/2020 are silent on the presentation and signature of the minutes of general meetings without a physical meeting, so that it is necessary to keep the common rules, which are however likewise not explicit on the case where all votes are exclusively cast remotely in writing or in

electronic form, without even the presence of a signing proxy. Subject to complying with the recommendations on social distancing, a board of the meeting (bureau) may even for private limited liability companies (sociétés à responsabilité limitée) appear to be a very practical type of organisation for the counting of the votes received and the signing of the minutes.

- However, certain companies with shareholders resident in the same foreign country may need to maintain their presence (i.e. substance) in the Grand Duchy of Luxembourg. If that is the case, one of the following two ways of voting can be considered.

B. Videoconference or other means of telecommunication

- Under normal circumstances, videoconferences, conference calls or other means of telecommunications allowing identification of participants are permitted only if the articles of association expressly allow them. For private limited liability companies, they must additionally ensure that at least one shareholder or its representative is physically present at the company's registered office.
- In this time of crisis, management can require that the general meeting is held by any of these means of telecommunication, even if the articles of association are silent.
- Following a general meeting held by a form of telecommunication, ordinary minutes must still be drawn up. Where the signatures of all shareholders are required, each participant may instruct a member of the board of the meeting (bureau) to sign the minutes on his/her behalf, with the mention "as instructed by videoconference / telephone". The same can be applied to signing an attendance list.
- Under the Law of 23/9/2020, the company has the choice to impose one or more of the formats of participation described here under A. and B., and if it has imposed only one of these two formats, then that format excludes participation by the other format. Thus, if the directors impose a remote vote in writing or in electronic form, a shareholder is not permitted to request a video conference for himself alone.

- If the directors impose a vote by one or more of the formats of participation described here under A. and B., it should however be possible for shareholders to give a proxy to a proxy holder of their choice who would then vote remotely in their place or participate in the videoconference in their place (depending on what is imposed by the company), by attaching to the remote vote the signed proxy and a copy of his/her identity card or by showing in the webcam the signed proxy and his/her identity card or better still by sending a copy to the management body before the date of the videoconference. Indeed, the right to give a proxy is a general right of the shareholders and the Law of 23/9/2020 even expressly provides for it for listed companies. However, the use of a third party proxy may be difficult if the meeting is organised by means of a conference call, as it will be difficult to identify the proxy, unless the principal has taken the necessary steps in advance to make the identification of such a proxy possible by the company. On the other hand, if the company has designated a sole representative, then the shareholders always have the right to give a proxy to that person, as described below under C.

C. Practical aspects of holding an AGM by videoconference

- Under normal circumstances, voting by proxy is possible even if this option is not expressly mentioned in the articles of association. What changes in this period of crisis is that the company may require shareholders to give their proxy to one unique representative designated

by the company. If the articles of association intend to limit the number of proxies to one per representative, this clause will necessarily be without effect.

- The representative appointed by the company will then collect all the proxies in his sole hand and hold a meeting where only he will be physically present. Theoretically, he could also himself cast the votes of the proxies remotely and/or connect to the videoconference from his home, but it makes much more sense for him to go to the registered office or any other place of the meeting in the Grand Duchy to scrutinise the votes received and/or initiate a videoconference, and finally sign the minutes and the attendance list.
- If a shareholder appoints as his/her proxy a representative other than the one imposed by the company, his/her third party representative will not be able to attend the meeting but will at most be able to give sub-proxy to the representative appointed by the company (provided that the initial proxy allows for a sub-proxy). Or, as stated above under B., with the practical limitations mentioned above, the third party representative may attend the meeting in the format(s) imposed by the company - which will moreover be the only way to proceed by representative if the company has failed to appoint a sole representative.
- In practice, it is recommended that the directors/managers of a company attach a proxy form to the convening notice, including an agenda as detailed as possible. For each item on the agenda, there should be three boxes for a vote in favour, against, and abstention.

3. Practical aspects of holding an AGM by videoconference

From the beginning of the crisis, certain platforms (Zoom, Microsoft Teams, etc.) have been widely used to organise business meetings. By way of illustration, certain practical aspects are discussed in this section in relation to the organisation of an AGM or any other ordinary general meeting.

- **Choice of format of the meeting: webinar or videoconference.** Webinars allow a limited number of speakers in audio / video mode. Others can participate without audio / video and

their feedback will only be visible in a chat or a poll made by a moderator. This format could be suitable for an AGM with a large number of shareholders. Videoconferencing allows for freer exchange, where each shareholder can have a say, which is well suited to an AGM with a small number of shareholders.

- **Presentation:** If a meeting is organised by videoconference, it would be practical to prepare a presentation with the agenda and supporting

information to ensure smooth running of the meeting.

- **Identification and verification of shareholders:** Identification of shareholders requires specific organisation. In a webinar, only speakers are visible and the moderator must ensure that the names of the participants appear when they connect to the platform and verify the identity of each participant via chat. In a videoconference, visualisation of participants' faces is possible and facilitates identification. If a shareholder is represented by a proxy, a signed copy of the proxy and identity document must be received by the company before the AGM.
- **"Board" of the meeting (*bureau*):** It is common to appoint several members of the *bureau* to ensure discussions and votes are organised. For an AGM held by videoconference via a platform, it may be useful to designate such a *bureau*, whose members can help the chairman identify the participants, draw up an attendance list and take minutes of the AGM.



- **Attendance list:** Identification of shareholders at the beginning of a videoconference allows the *bureau* to establish the attendance list. The secretary of the *bureau* may ask each participant for verbal authorisation to sign the attendance list in their name, with the mention "as instructed by videoconference / telephone".
- **Questions from shareholders:** Videoconference meetings allow questions and answers, either verbally or via chat.
- **Voting:** It is possible to vote verbally, using the "poll" function offered by some platforms, or via chat. Polls have the advantage of showing the percentage of votes only to the moderator, which ensures voter anonymity.
- **Plan B:** Platforms can often have unexpected technical problems which disrupt a general meeting (slow internet connection, no sound for some participants, etc.). It is always a good idea to have a classic dial-in in place so that meetings can proceed in the event of such a disruption.

MOLITOR Avocats à la Cour is at your disposal to respond to your questions and to assist you with any difficulties you may face when organising your company's general meetings.

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