Luxembourg

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1. Types of companies

In this chapter, only the public limited liability company, or société anonyme ('SA') and the private limited liability company, or *société à responsabilité limitée* ('SARL') will be covered. They are both commercial companies with limited liability pursuant to the Law on Commercial Companies of 10 August 1915, as amended.

Other type of commercial companies will not be covered. The commercial companies with legal personality are the general corporate partnership (*société en nom collectif*), the common limited partnership (*société en commandite simple* or 'SCS'), the simplified public limited liability company (*société par actions simplifiée* or 'SAS'), the corporate partnership limited by shares (*société en commandite par actions* or 'SCA'), the simplified private limited liability company (*société à responsabilité limitée simplifiée*), the cooperative company (*société coopérative*) and the European company (*société européenne*).

There are also other commercial companies that do not have legal personality, namely the temporary commercial company (*société commerciale momentanée*), the commercial company by association (*société commerciale en participation*) and the special limited partnership (*société en commandite spéciale* or 'SCSp').

The SA and the SARL are the most commonly used commercial companies in Luxembourg. The SCA, the SCS and the SCSp are mainly used in the context of alternative investment funds. The SAS is a very well-known vehicle in France and it has been recently introduced by a law dated 10 August 2016, which amends and modernises the Law on Commercial Companies.

Most of the rules of the SA are applicable to the SCA and the SAS as a result of cross-references made in the Law on Commercial Companies to certain articles applicable to the SA that are also applicable to the SCA or the SAS.

Also, we will not cover in this chapter those aspects that relate to listed companies. Therefore, we will not discuss, in particular; the Law of 19 May 2006 implementing Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids; the Law of 11 January 2008 on transparency requirements for issuers; the Law of 24 May 2011 which implements Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders of listed companies; the Law of 21 July 2012 on mandatory squeeze-out and sell-out of securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public; and the Luxembourg Stock Exchange's 10 principles of corporate governance.

1.1 Public limited liability company (SA)

An SA is a limited liability company which has legal personality, whose capital is divided into shares and which is formed by one or more persons who make contributions. Contribution to the share capital can take the form of contribution in cash or contribution in kind.

The share capital must be at least €30,000 and shareholders have liability limited to the amount of their contribution. The capital must be fully subscribed at the moment of incorporation of the SA or of subsequent capital increases, while each share must be paid in as to at least 25% by contribution in cash or in kind.

Shares can be issued with or without nominal value. Where there is no nominal value of shares, shares will bear a fractional value. Shares can also have different nominal values.[1] In this case, each share will benefit from voting rights that are proportionate to the share capital represented by it, with one vote being allocated to the share which represents the lowest proportion, unless otherwise provided in the articles of association.[2]

The shares in the SA are freely transferrable unless otherwise restricted by the articles of association or shareholders agreement, and can be listed on a stock exchange. They can be registered shares, bearer shares and/or dematerialised shares. If shares are not entirely paid in, they remain only registered shares.[3]

The SA can have only one shareholder without causing any automatic dissolution or an increased liability for the sole shareholder. In this case, there is no obligation that the board of directors be composed of at least three directors.

The SA is often used for larger businesses and can ensure the anonymity of shareholders. It is also subject to an important number of rules set out in the Law on Commercial Companies (preferred subscription rights, subscription/purchase of own shares, financial assistance, corporate governance rules, etc).

1.2 Private limited liability company (SARL)

A SARL is a limited liability company which has legal personality and in which one or more shareholders, limited to 100 people, make contributions. Contribution to share capital could take the form of cash or contribution in kind. A sweat equity contribution (*apport en industrie*) is also possible but does not become part of the share capital.[4]

The share capital should be at least €12,000 and the shareholders of a SARL have liability limited to the amount of their contribution. The capital must be entirely subscribed and paid in at the moment of incorporation or of subsequent capital increases. This amount is divided into shares (*parts sociales*), with or without mention of nominal value represented by non-negotiable shares. Shares can also have different nominal values.[5]

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1 Article 37(1) of the Law on Commercial Companies.
2 Article 67(4) of the Law on Commercial Companies.
3 Article 43 of the Law on Commercial Companies.
4 However, sweat equity contributions (contributions of know-how, personal services, etc) entitle contributors to hold shares, which give them the right to participate in profit distribution as well as to share losses of the company. Due to the personal nature that characterises this type of contribution, these shares are not transferable and the articles of association determine the rights attached to such shares (Article 183(3) of the Law on Commercial Companies.).

The shares of a SARL are not freely transferable to non-shareholders and any such transfer is subject to a consent from shareholders representing 75% or more of the share capital.[6] Shares in a SARL are only permitted in registered form, excluding any bearer or dematerialised form.

A SARL can also have only one shareholder without causing any automatic dissolution or an increased liability for the sole shareholder.

The SARL has a more closed character, originally intended for closed small- or medium-sized family business. However, in Luxembourg it has been frequently used in many intra-group or special purpose vehicle structures due to its legal flexibility and tax benefits.

1.3 Becoming a shareholder

In general, there are three ways of becoming a shareholder in an SA or an SARL.[7]

(a) Incorporation

Incorporation of an SA or a SARL is subject to signature of a notarial deed, which includes documents such as the articles of association and results of decisions taken by the shareholders at the moment of the signature of the notarial deed. After that, the notarial deed should be delivered and registered with the Trade and Companies Register and will be published in the *Recueil électronique des sociétés et associations*. An SA or a SARL can be incorporated by one or several shareholders/founders who should deliver to the notary a document proving the existence of share capital.

At incorporation, the company will issue shares subscribed (and fully paid-in for a SARL) by the shareholders who made contributions. SAs and SARLs may not subscribe to their own shares.

Upon the signature of the incorporation notarial deed, the SA or SARL immediately gains legal personality and can enter into agreements or be sued. However, it can only sue someone else once the incorporation deed has been published in the *Recueil électronique des sociétés et associations*.[8]

(b) Capital increase and issue of new shares

As regards the SA, an issue of news shares must be resolved upon by a shareholders' resolution since it involves a capital increase with amendments to the articles of association.[9] Such a resolution must be made in front of a Luxembourg notary.

It is also possible for the incorporation deed or shareholders resolutions, by way of amendments to the articles of association, to authorise the board of directors or the management committee to proceed with capital increases up to a determined maximum share capital amount, with issues of new shares, for a maximum of five years, which may be renewable.[10] This mechanism is called authorised share capital.

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5 Article 182(1) of the Law on Commercial Companies.
6 Article 189 of the Law on Commercial Companies.
7 Transfer of shares by death is not covered by this section.
8 Article 10 of the Law on Commercial Companies.
9 Article 32 of the Law on Commercial Companies.
10 Article 32(2)-(5) of the Law on Commercial Companies.

Shares in an SA to be subscribed for in cash should be offered on a preferential basis to existing shareholders according to the proportion of the share capital represented by their shares (preferential subscription rights). The articles of association may not abolish or limit the preferential subscription right. However, the articles can authorise the board of directors or the management committee to abolish or limit such a right within the framework of the authorised share capital.

As regards the SARL, an issue of new shares must be resolved upon by a shareholders' resolution in front of a Luxembourg notary.[11] An increase by way of authorised share capital is also possible in a SARL,[12] but if new shares are to be issued to non-shareholders, they must be approved pursuant to Article 189 of the Law on Commercial Companies.

(c) Purchase

Transfers of shares (in either an SA or an SARL) can be established by notarial deed or by private deed. In practice, most share purchase agreements are in private deed form. A share transfer is valid between the parties from the date of the transfer agreement, while it is enforceable in respect of the company and third parties once it has been notified to the company or accepted by it in accordance with Article 1690 of the Luxembourg Civil Code.

Shares of an SA are freely transferable, unless they are subject to restrictions in the articles of association or shareholders' agreements.

The recent reform of the Law on Commercial Companies provided rules regarding restrictions on the transferability of shares.[13] Lock-up clauses are valid provided they are limited in time. Approval or pre-emptive clauses are also valid but they may not result in a lock-up situation which exceeds 12 months, and if the clauses provide for a lock-up of over 12 months it will be automatically reduced to 12 months. The articles of association can provide for a method to determine the sale price of shares to allow the shareholder who wants to sell his shares to do so. If nothing is provided in the articles, the president of the District Court sitting in commercial matters can be requested to determine the sale price. Any transfer done in breach of a restriction of transfer provided by the articles of association is null and void.

Besides lock-up clauses, approval clauses or pre-emptive clauses, Luxembourg legal practice uses a large array of clauses used in other jurisdictions.

Shares in an SARL may be freely transferred to an existing shareholder, while they may only be transferred to a third party (non-shareholder) subject to consent from shareholders representing 75% or more of the share capital.[14] The articles of association may also provide for other clauses in relation to the transferability of shares.

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11 Article 199, first paragraph, of the Law on Commercial Companies. which requires the approval of the shareholders representing 75% of the share capital.
12 Article 199, third paragraph, of the Law on Commercial Companies.
13 Article 37 of the Law on Commercial Companies.

2. Classes of shares

In Luxembourg, both SAs and SARLs can have different classes or types of shares.

Ordinary (or common) shares are shares which represent a portion of the share capital of the company and which give their holder political rights (voting rights) and economic rights (rights in a distribution of profits, and in the reserve or proceeds of liquidation). All rights and obligations of such shares are equal in proportion to their nominal value, unless the company has issued shares with different nominal values.

Besides ordinary shares, SAs and SARLs may issue different classes of shares with different rights often designated by alphabet (Class A, Class B, etc). the rights of the different classes can be determined in the articles of association or in the shareholders' agreement and often relate to political rights (such as the right to recommend certain class of director or manager) and/or economic rights.

Any resolution of the general meeting of shareholders intended to change the rights of any class must fulfil the relevant conditions as to quorum and majority requirements in each class.[15]

The voting rights attached to shares may be subject to voting agreements under the following conditions, those conditions having been introduced by the 2016 amendment to the Law on Commercial Companies:

- the agreement shall not be in violation of the Law on Commercial Companies or contrary to the corporate interest; and
- a shareholder cannot undertake to vote pursuant to directions from, or to approve proposals made by, the company, a subsidiary or any corporate bodies of such entities.[16]

Also, following the implementation of the 2016 amendments, a shareholder may undertake not to exercise its voting rights for a limited period of time or for an indefinite period.[17] Such an undertaking binds the shareholder and will bind the company upon notification to it.

The articles of association may also provide for the suspension by the management of the voting rights of a shareholder who does not comply with its obligations under the articles of association, the deed of subscription or deed of commitment.[18]

2.1 Non-voting shares

In an SA, the issuing of non-voting shares is regulated, and aims at increasing the company's resources without changing its power structure. In exchange for

14 Article 189 of the Law on Commercial Companies.
15 Article 68 of the Law on Commercial Companies for an SA and Article 196*bis* of the Law on Commercial Companies for a SARL.
16 Article 67*bis* of the Law on Commercial Companies for an SA and Article 195*bis* of the Law on Commercial Companies for a SARL.
17 Article 67(8) of the Law on Commercial Companies for an SA and Article 195 of the Law on Commercial Companies for a SARL.
18 Article 67(8) of the Law on Commercial Companies for an SA and Article 195 of the Law on Commercial Companies for a SARL.

abandoning their voting right, holders of such shares receive greater economic rights than ordinary shareholders.

Since the amendment of the Law on Commercial Companies in 2016, the general meeting has the right to fix the maximum amount of non-voting shares without being tied to the previous limit that they could not represent more than 50% of the total share capital. The non-voting shares' economic rights (dividend rights, reimbursement of contributions, and as the case may be, distribution of liquidation surplus) must be set out in the articles of association.[19]

Where any resolution of the general meeting of shareholders proposes to change the rights attached to non-voting shares or to decrease the company's share capital, the non-voting shares regain the right to vote.[20]

Non-voting shareholders have the right to receive notices convening general meetings, and any reports and documents which must be communicated to other shareholders of an SA.[21]

There is no provision regulating the issue of non-voting shares for a SARL and the opinion is rather divided on this issue.[22] However, a SARL can now issue 'founder shares' which can have similar features to non-voting shares.

2.2 Free shares

In an SA only, the articles of association may authorise the board of directors or the management board to issue shares without consideration to certain categories of employees of the company listed in the Law on Commercial Companies.[23] These free shares are the same shares as ordinary shares, with the same rights and obligations, but they can be issued without contribution.

2.3 Bonus shares

In an SA only, the articles of association may allow the general meeting of shareholders to reduce the share capital by reimbursing from distributable profits or reserve the nominal (or accounting) value of shares. The reimbursed shares are cancelled and replaced by bonus shares, which no longer represent part of the share capital, but have the same rights as the shares they replaced except for the right to the reimbursement of contribution.[24]

2.4 Tracking shares

Used already by practitioners and recognised by the 2016 amendment to the Law on Commercial Companies,[25] SAs and SARLs may create 'tracking shares' whose

19 Article 45 LSC of the Law on Commercial Companies.
20 Article 46 LSC of the Law on Commercial Companies.
21 Article 47 LSC of the Law on Commercial Companies.
22 Certain practitioners refer to the traditional legal authors and parliament preparatory work to allege that non-voting shares are prohibited for a SARL, while other practitioners rely on Article 200-1 of the Law on Commercial Companies to defend the position that non-voting shares are possible in a company with one sole shareholder under certain conditions. The recent reform of the Law on Commercial Companies did not clarify this situation and this controversy remains.
23 Article 32-3(5*bis*) of the Law on Commercial Companies.
24 Article 69-1 of the Law on Commercial Companies.
25 Article 1853 of the Luxembourg Civil Code

economic rights are linked to the company's economic performance in a specific sector or asset. Tracking shares are representative of the share capital and benefit from the same rights as those attached to ordinary shares, except with regard to profit and loss participation where the rights and liabilities are limited to the economic performance in the specific sector/asset.

2.5 Founder or profit shares

An SA or an SARL may issue 'founder shares' which do not represent part of the share capital. The Law on Commercial Companies provides that rights attached to founder shares are defined by the articles of association.[26] This makes the founder share a very flexible instrument which can combine economic rights (dividends, liquidation surplus, etc) and political rights (voting rights). Founder or profit shareholders can receive such shares with or without contribution but they are, in principle, not 'shareholders'.

3. The corporate bodies of the company

Corporate bodies are defined in this chapter as corporate supervisory bodies, corporate management bodies and the general meeting.

3.1 General meeting

The general meeting of shareholders is a corporate body which has the widest powers to approve and ratify any action regarding the company.[27] The following types of decision, among others, are reserved to the general meeting of shareholders:

- approval of annual accounts;
- appointment, revocation and discharge of directors/managers (or members of the supervisory committee);
- amendments to the articles of association of the company;
- changes to the nationality of the company;
- increases to the shareholders' commitments;
- mergers, demergers, transfers of assets, branches of activities or all assets, or conversions of legal form.

In practice, the articles of association may also contain a list of matters which require prior consent from a general meeting of shareholders, but which would not normally require consent under the law on Commercial Companies (commonly called 'reserved matters'). In this case, any violation of such a clause could constitute a violation of provisions in the articles of association which could trigger liability on the part of the directors or managers who did not comply with the requirement.

For an SA, an annual general meeting should take place in Luxembourg once a year at a specific date fixed in the articles of association, within six months of the end of financial year.[28]

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26 Article 37(1) of the Law on Commercial Companies for an SA and Article 182(1) of the Law on Commercial Companies for a SARL.
27 Article 67(1) of the Law on Commercial Companies.
28 Article 70(1) of the Law on Commercial Companies.

In order to convene a general meeting, a convening notice including the meeting's agenda must be filed with the Luxembourg Trade and Companies Register for publication in the *Recueil électronique des sociétés et associations* at least 15 days prior to the general meeting.[29] If all the company's shares are in registered form, the convening notice must be sent by letter to shareholders at least eight days prior to the general meeting.[30]

Other extraordinary general meetings are convened and held in order, among other things, to amend articles of association, to change the nationality of the company or to increase the shareholders' commitments. Such a meeting may be convened by the board of directors, the management board, the supervisory board or the supervisory auditors. They must convene such a general meeting when one or several shareholders representing at least 10% of the share capital make a request in writing indicating the agenda, and they must do so within one month of such request.

Each shareholder has a number of votes equal to the shares he holds.[31] Where shares do not have an equal value or where there is no indication of value, each share, unless otherwise provided for in the articles of association, will automatically carry the right to a number of votes proportionate to the part of the share capital represented by it, with one vote being allocated to the share which represents the lowest proportion, while fractions of votes will not be taken into account.[32]

For an SARL, if it has more than 60 shareholders, an annual meeting of shareholders must be held every year at a date fixed by the articles of association. For an SARL with 60 shareholders or under, the shareholders may agree on resolutions in writing.[33]

Other general meetings can be convened by one or several managers. If the manager(s) fail to do so, the supervisory board, if any, or if the latter fails to convene in its turn, one or several shareholders representing more than 50% of the share capital may convene general meetings.[34]

3.2 Corporate management bodies

For an SA, the board of directors is a corporate body which has the power to take any action necessary or useful to achieve the corporate purpose, except for actions which are reserved by law or by the articles to the general meeting of shareholders.[35] The board of directors has management power but also the power to represent the company.[36]

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29 Article 70(7) of the Law on Commercial Companies.
30 Article 70*bis* of the Law on Commercial Companies.
31 Article 67(4) of the Law on Commercial Companies for an SA and Article 195 of the Law on Commercial Companies for a SARL.
32 Article 67(4), second paragraph, of the Law on Commercial Companies.
33 This rule applies to any shareholders' resolutions, except in the event of an amendment to the Articles of association which requires a meeting regardless of the number of shareholders.
34 Article 196(1) of the Law on Commercial Companies.
35 Article 53(1) of the Law on Commercial Companies.
36 An SA which opts for a two-tier structure will have two management bodies, namely the management board and the supervisory board. The management board is under the supervision of the supervisory board and has the power to perform all necessary actions for the achievement of company's corporate purpose without intervening in the scope of actions of the supervisory board and the general meeting. The supervisory board supervises the management of the company without interfering with it. It has the right to inspect any operation concluded by the company, and to review and ask for any information concerning the company.

Members of the board of directors are liable to the company for the execution of their mandate and for any misconduct in the management of the company's affairs.[37] They are jointly and severally liable to the company or to third parties for damages resulting from any violation of the Law on Commercial Companies or the articles of association.[38] In particular, the directors have a duty of confidentiality in respect of any information which they have regarding the company and whose disclosure could be detrimental to the company's interest as further mentioned below.[39]

A conflict of interest emerges in situations where the board of directors is supposed to deliberate about a matter and one of its members has a direct or indirect financial interest that conflicts with the company's interest. In such a case, the conflicted director is required to notify the conflict to the board of directors, mention it during its meeting and refrain from deliberating and voting on this particular matter. If the quorum requirement is not met as a result of a conflict of interests, the board of directors can decide, unless prohibited by the articles of association, to refer the question to the general meeting of shareholders. A special report must be presented on the conflict at the next following general meeting of shareholders.[40]

Further to the 2016 amendments to the Law on Commercial Companies, the board of director can delegate some of its management powers to other corporate bodies, namely the management committee or the managing officer, if authorised to do so by the articles of association.[41] The board of directors supervises both bodies, and has the right to restrict the management powers delegated to them and to define the conditions under which the management committee and the managing officer carry out their duties. The management committee can be composed of directors or not. There is no specific legal requirement regarding the conditions of appointment, removal, remuneration, the term of office or rules of operation of management. All these conditions should be set up by articles of association or the board of directors.

In addition, the board of directors may decide, by means of incorporating a statutory provision in the articles of association, to grant the members of the management committee and the managing officer the right to represent the company in dealings with third parties. Consequently, the company will be bound by acts and decisions undertaken by them,[42] whether or not these acts and decisions exceed the corporate objects of the company, unless the company proves that the third party was aware of that fact irrespective of the mere publication of the articles of association.

The conflict of interest regime applicable to the management committee[43] and the managing officer[44] is similar to that applicable to the board of directors.

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37 Article 59, first paragraph, of the Law on Commercial Companies.
38 Article 59, second paragraph, of the Law on Commercial Companies.
39 Article 66 of the Law on Commercial Companies; this obligation applies to the management committee, managing officer, management board and supervisory board, and to any person who attended the meeting of the relevant corporate body.
40 Article 57 of the Law on Commercial Companies.
41 Article 60-1 of the Law on Commercial Companies.
42 Article 60*bis* of the Law on Commercial Companies.
43 Article 60-2 of the Law on Commercial Companies; if the required quorum is not met due to a conflicted management committee member, the management committee may refer the decision at issue to the board of directors.
44 Article 60-2(5) of the Law on Commercial Companies; if the managing officer has a conflict, he or she must refer the decision at issue to the board of directors.

Finally, both the members of the committee and the managing officer are liable to the company for mistakes committed during the execution of the mandate given to them. They are jointly and severally liable for damages resulting from any infringement of the provisions of the Law on Commercial Companies or the articles of association of the company.[45]

For an SARL, one or more managers[46] or a board of managers, if provided for by the articles of association,[47] manage and represent the company, and have the power to take any action necessary or useful to achieve the corporate purpose, except for actions which are reserved by law or by the articles to the general meeting of shareholders.

Managers are liable based on the same liability rules as directors of an SA.[48]

Rules on conflicts of interest and the duty of confidentiality applicable to an SA also apply to an SARL.[49]

3.3 Corporate supervisory bodies

In an SA, one or several supervisory auditors are appointed by the general meeting of shareholders and are in charge of the supervision and control of all transactions conducted by the company. They can have access to and review books, accounts, correspondence, minutes of meetings and all records of the company.[50]

A SARL is required to appoint a supervisory auditor(s) only if the company has more than 60 shareholders.[51]

4. Shareholders' rights to information

Information on, and documents of, a company that a shareholder has may have a significant importance for it, in particular in the context of, for example, a contemplated sale of its shares to a third party or the assessment of potential litigation against the company.

The shareholders' rights to obtain information and documents from the company can primarily be exercised in connection with the shareholders' meeting. In a pre-litigation or a litigation context, a shareholder has additional rights to obtain information and documents from the company as further set out in under heading 5 below.

4.1 Shareholders' rights of information in a non-litigation context

A shareholder has virtually no individual right to obtain information and documents from the company, unless it has entered into an agreement with the company for that purpose, save for the right of shareholders representing at least 10% of the share

45 Article 59 of the Law on Commercial Companies.
46 Article 191 of the Law on Commercial Companies.
47 Article 191*bis* of the Law on Commercial Companies.
48 Article 192 of the Law on Commercial Companies, which refers to Article 59 of the Law on Commercial Companies applicable to an SA.
49 Article 191*bis*(6) of the Law on Commercial Companies which refers to Articles 57 and 66 of the of the Law on Commercial Companies.
50 Article 62 of the Law on Commercial Companies.
51 Article 200 of the Law on Commercial Companies.

capital to obtain responses from the management in respect of questions asked in relation to a management transaction as set out in Article 154 of the Law on Commercial Companies (see 4.1(a) below).

In the context of a shareholders' meeting, a shareholder has the right to obtain information and documents in relation to the agenda of the meeting that are necessary for it to vote in an informed manner (see 4.1(b) below).

(a) Right of information outside the shareholders' meeting

The Law on Commercial Companies provides for very few rights of information for shareholders.

Information on shareholdings: In an SA, information on the shareholdings is not public information available at the Trade and Companies Register or published in the *Recueil électronique des sociétés et associations*. However, partial information can be obtained through the *Recueil* in this respect:

- the incorporation deed must include the identity of the subscribers, and that deed is published in the *Recueil*;
- the minutes of a shareholders' meeting recording a capital increase must include the identity of the subscribers, and such minutes are also published in the *Recueil*.[52]

Therefore, based on public information, a shareholder should not be in a position to know who the other shareholders in the company are.

A shareholder may obtain information on the identity of the other shareholders and the number of their shares if the shares of the company are in registered form.[53] In such a case, a shareholder has the right to consult the share register at the company's registered office.[54] It is commonly held that the shareholder has the right to consult the entire share register and not only the entries regarding its own shareholding.

If the company's shares are in bearer form, a shareholder does not have any right to obtain information on the other shareholders of the company. It may only request a certificate from the depositary recording the entries in respect of its shares.[55]

It may be important for a shareholder in an SA to know the identity and percentage ownership of the other shareholders of the company. Indeed, a certain number of shareholders' rights may be exercised only if a single shareholder or shareholders acting jointly hold at least 10% of the shares in the SA, as further set out below.

Therefore, a minority shareholder who hold less than 10% of the share capital and who has no information on the other shareholdings of the company, in order to

52 Acknowledgment deeds recording share capital increases decided by the management under the authorised capital procedure should arguably also include the identity of the subscribers, and be published in the *Recueil*. However, there is no consistent practice in this regard.

53 It is extremely common that the shares of an SA be in registered form. As mentioned, shares may alternatively be in bearer form or in dematerialised form.

54 Article 39 of the Law on Commercial Companies.

55 Article 42 of the Law on Commercial Companies.

be able to exercise any such rights, may ask to consult the share register at the registered office (assuming that the shares are in registered form) as a preliminary step to trying to obtain the necessary number of shares, on a joint basis.

In an SARL, information on the shareholdings is public information available at the Trade and Companies Register and published in the *Recueil électronique des sociétés et associations*. In addition, a shareholder has the right to consult the entire share register.[56]

Accounting documentation: In respect of an SARL, the Law on Commercial Companies provides that a shareholder may consult the inventory, the balance sheet and the report of the statutory auditors on the annual accounts (if any), at the registered office.[57] This right is limited to a period of 15 days before the annual general meeting if the SARL has more than 60 shareholders.

That statutory right may be viewed as somewhat useless given that the annual accounts, composed of the balance sheet, the profit and loss account and the notes, as well as the management report and the report of the statutory auditors or the independent auditor, if any, should be, in principle, approved or acknowledged at the annual general meeting within six months from the end of the financial year and thereupon lodged with the Trade and Companies Register within one month from such approval.

In an SA, no such general right is provided for by law. The annual accounts, management reports and report of the statutory auditor or independent auditor must be available to the shareholders at the registered office at least eight days before the annual general meeting, and shareholders also have the right to obtain such documents, as further set out below.

On a related point, there are no legal provisions entitling shareholders in an SA or an SARL to obtain the general ledger or the daily ledger and their supporting accounting documentation (such as invoices, bank statements etc). Those documents are, in principle, never presented to the shareholders at the annual general meeting.

No general right to information: There are no express legal provisions in the Law on Commercial Companies under which a shareholder in an SA or an SARL may obtain generally information or documents from the company.

Therefore, it is usually accepted that a shareholder has no individual right to obtain, for example, information on an ongoing transaction carried out by the company or companies of the group, agreements entered into by the company or by companies of the group, or minutes of board meetings (and supporting documentation provided to board members).

As an aside, under Luxembourg law the shareholders of an SA or an SARL have in principle no authority to decide on management matters, their powers being restricted to those set out by law or in the articles of association. These powers

56 Article 185 of the Law on Commercial Companies.
57 Article 198 of the Law on Commercial Companies.

include, for example, approval of the annual accounts, amendments to the articles of association, and the appointment or removal of the directors and auditors. As a result, shareholders – in particular minority shareholders – are not in a position to be informed of management matters on an ongoing basis.

The Law on Commercial Companies expressly provides that, in respect of an SA or an SARL, directors have a duty of confidentiality in respect of information relating to the company, if the disclosure of any such information could be detrimental to the company, unless disclosure is allowed or required by law or the public interest.[58] That duty of confidentiality remains effective after the director ceases to hold office.

Contractual right to information: It is commonly accepted that a company can enter into an agreement with one or more shareholders whereby the company will provide information or documents to those shareholders. This type of provision is generally included in a shareholders' agreement. The company has to be a party to the shareholders' agreement in order to be bound by such a provision.

The validity and the enforceability of such an agreement is subject to various factors, and therefore should be drafted to take into account such factors:

- Any such agreement should comply with the principle of equality among shareholders. It does not proceed from that principle that all the shareholders must be treated equally by the company in terms of the provision of information. Indeed, that principle only requires that shareholders who are in the same position should be treated equally. Therefore, information being provided to the majority shareholder alone under any such agreement does not, in itself, conflict with that principle. It may prove extremely difficult (if not impossible) for a minority shareholder to argue that information passed to the majority shareholder must also be passed to it under the principle of equal treatment;
- The agreement should comply with the corporate interest of the company. Issues may arise to the extent that information to be passed shareholder(s) would be detrimental to the company's interest; and
- The agreement should respect the company's confidentiality obligations and any information subject to client-attorney privilege.

On a related point, it is common practice that a director nominated by a given shareholder passes to him information acquired in that capacity. Certain legal scholars take the view that this is justified by an implied consent granted by the board of directors under which a director is authorised to pass information to the shareholder who nominated him. However, that implied consent should be subject to the following conditions:

- information cannot be passed if this would conflict with a public policy provision;
- information cannot be passed if it is particularly sensitive; and

58 Article 66 of the Law on Commercial Companies for the SA and Article 191*bis*(6) of the Law on Commercial Companies for the SARL.

- information can be passed only if the shareholder uses that information to supervise the execution by its nominee of the director's duties, and not where the shareholder uses it for personal purposes or further passes it to a third party.

Right to obtain answers in respect of management transactions: One or more shareholders in a commercial company, including an SA or an SARL, who together own at least 10% of the share capital or 10% of the voting rights, have the right to ask questions to the management in respect of management decisions.[59]

This procedure derives from the 2016 amendments to the Law on Commercial Companies. It is similar to a procedure applicable under French law and hence French law should be relevant in order to interpret the legal provisions regarding that new procedure.

Any questions must be made in writing by the shareholders and be addressed to the management of the company.

They must relate to one or more management transaction. Therefore, they should not relate to:

- general questions on the company's management;
- the regularity of the annual accounts; or
- decisions that are within the scope of authority of the shareholders' meeting.

The right to ask questions should not involve the right to obtain documents from the company. The management should only have to provide answers to the questions raised but, in our view, it should not have any obligation to provide any supporting documentation in relation to those answers. Therefore, a minority shareholder should assess carefully, from the outset, if the procedure would be appropriate in order to obtain the relevant information.

The questions to be asked may relate to:

- a management transaction of the company; or
- a management transaction of a company controlled by the company, provided that the questions are assessed in light of the interest of the group of companies. Therefore, the management could potentially object that it is not in the interest of the group to provide answers.

The management has one month to respond to the questions asked by the minority shareholder(s).

Article 154 of the Law on Commercial Companies provides that, if no response is given, the shareholders may request to the president of the District Court, sitting in commercial matters and under the procedure of interlocutory proceedings, to appoint one or more experts in order to prepare a report on the management transactions that are the subject matter of the questions.

If an answer is provided by the management, but that answer is not deemed satisfactory by the minority shareholders, the question arises whether this would amount to a failure by the management to respond. The equivalent French legal

59 Article 154 of the Law on Commercial Companies.

provision provides that a response that is not satisfactory amounts to a failure to respond. However, that requirement was expressly set aside in the course of the parliamentary work on the 2016 amendments to the Law on Commercial Companies. According to the parliamentary work, a response that is too short may amount to a failure to respond but other criteria according to which the response could be held to be unsatisfactory were too subjective and hence were not included in the 2016 amendments.

In our view, even if an answer is detailed, if the minority shareholders have sufficient elements to establish that the answer is objectively flawed, this should amount to a failure to answer on the part of the management.

In light of French case law, the president of the District Court will appoint an expert only if the minority shareholders can establish that the request is sufficiently serious. Under that requirement, the majority shareholder must establish that there is a likelihood that the management transaction is unlawful or contrary to the corporate interests of the company or the companies of the group.

Against that background, if a minority shareholder intends to initiate such a procedure, it should take the following into account:

- that it can only obtain a response from the management and not documents;
- that it should already have sufficient evidence or factual information that establish a likelihood that the management transaction could be unlawful or against the company's interest or the interest of the group; and
- that no expert can be appointed if the management provides an answer to the questions, it being understood that it could be difficult to establish that an unsatisfactory answer amounts to a failure to answer.

The president of the District Court shall determine the scope of the mission and powers of the expert. The expert would usually be granted access to the corporate and accounting records of the relevant company in order to carry out its duties.

In our view, based on French case law, a shareholder could additionally ask, in respect of the same management transaction, for the appointment of an expert under the procedure providing for investigative measures 'in futurum', as further set out below.

(b) Right of information at a shareholders' meeting

Documents to be provided before, or at, the shareholders' meeting: In an SA, in relation to the approval of the annual accounts at the annual general meeting, the Law on Commercial Companies provides that eight days before the general meeting:

- A shareholder may consult at the registered office, in particular, the annual accounts, the management report and the report of the statutory auditor or the independent auditor, if applicable, and the comments from the supervisory board, if applicable;[60] and
- A shareholder may obtain from the company such documents upon request.

60 Article 73 of the Law on Commercial Companies.

In an SARL, as mentioned, the Law on Commercial Companies provides that a shareholder may consult the inventory, the balance sheet and the report of the statutory auditors on the annual accounts (if any), at the registered office.[61] This right is limited to a period of 15 days before the annual general meeting if the SARL has more than 60 shareholders.

The Law on Commercial Companies provides for some other reports or documents to be issued in connection with a shareholders' meeting, which include, without this list being exhaustive:

- a report from the independent auditor in respect of either a contribution in kind in consideration for the issue of shares,[62] or a sale from a shareholder to the company made within two years from the incorporation of the company;[63]
- a management report and a report from an independent auditor in respect of the issue of shares below the par value of existing shares;[64]
- a management report in respect of the cancellation of the pre-emptive rights of shareholders or the authorisation to the management to effect such a cancellation;[65]
- a management report under the 'whitewash' procedure regarding the waiver of the prohibition of financial assistance;[66]
- a communication from the management on a transaction involving a conflict of interest on the part of a director;[67]
- a management report if the net asset value becomes lower than one-half or three-quarters of the share capital;[68]
- a management report and a report from independent experts in connection with a merger or a demerger;
- a simplified balance sheet in the case of a transformation of the company, and a related report from an independent auditor together with a management report;[69]
- a balance sheet and related report from the independent auditor or statutory auditor in the case of an interim dividend distribution;[70] and
- a draft of proposed amendments to the articles of association and coordinated consolidated version of the articles of association.[71]

Right to ask questions: Under Luxembourg law, a shareholder must be in a position

61 Article 198 of the Law on Commercial Companies.
62 Article 26-1 of the Law on Commercial Companies, applicable to an SA.
63 Article 26-2 of the Law on Commercial Companies, applicable to an SA.
64 Article 32-6 of the Law on Commercial Companies, applicable to an SA.
65 Article 32-3(5) of the Law on Commercial Companies, applicable to an SA.
66 Article 49-6 of the Law on Commercial Companies, applicable to an SA.
67 Article 57 of the Law on Commercial Companies, applicable to an SA and Article 191*bis*(6) of the Law on Commercial Companies, applicable to a SARL.
68 Article 100 of the Law on Commercial Companies, applicable to an SA.
69 Articles 308*bis*-16, 308*bis*-17 and 308*bis*-18 of the Law on Commercial Companies, applicable to an SA and a SARL.
70 Article 72-2 of the Law on Commercial Companies, applicable to an SA and Article 198*bis* of the Law on Commercial Companies, applicable to a SARL
71 Article 73 of the Law on Commercial Companies, applicable to an SA.

to deliberate and vote in an informed manner at a shareholders' meeting in respect of the resolutions relating to the agenda of the meeting.

This entails a shareholder having the right to ask questions to the management at a shareholders' meeting.

The management must, at the shareholders' meeting, provide answers to any such questions under the following conditions:

- The question must relate to an item of the agenda;
- The management may not answer if the response involves revealing information that would be detrimental to the company's interest or would be in breach of a confidentiality obligation; and
- The right to ask questions cannot be exercised abusively by the shareholder (for example, where the answer to the question would create an unnecessary administrative burden in light of the limited benefit of the information obtained).

It is not settled whether a shareholder has a right to be provided with documents – and not just information relayed verbally – in relation to an item of the agenda (for example, a request being made to obtain supporting accounting documentation in respect of an item of the balance sheet, or the documents supporting the valuation of a participation held by the company). In our view, in principle, a shareholder should have the right to obtain such documents, subject to the conditions set out above, in order to be able to vote in an informed manner.

From a practical perspective, a shareholder should consider asking its questions in advance of a shareholders' meeting so that the management cannot object, at the meeting, that it does not have the information at hand or that it is not able to provide the requested document. Also, given that the directors have no obligation to attend shareholders' meetings, directors could then be warned in advance that they should be ready to attend the meeting.

As mentioned, the right to ask questions relates to the items of the agenda of the meeting. For example, in respect of the approval of the annual accounts, questions could be asked in respect of each item of the balance sheet or the profit and loss accounts or in respect of the notes. General questions on the management and the general policies of the company could also be asked in relation to the agenda item regarding the acknowledgment of the management report and also the agenda item covering the discharge of the directors.

Finally, a shareholder also, at a shareholders' meeting, has the right to make statements in relation to the agenda of the meeting, and those statements shall be included in the minutes or annexed thereto (subject to any statements that can be viewed as abusive and hence that could be rejected for that reason).

A shareholder also has the right to obtain a copy of the minutes of the shareholders' meeting. In respect of an SA, it also has the right to ask to sign the minutes.[72]

72 Article 67 of the Law on Commercial Companies.

Other rights in relation to shareholders' meetings: A shareholder does not have an individual right to convene a shareholders' meeting or to include items on the agenda of an already scheduled meeting.

However, in either an SA or an SARL, shareholders representing a certain percentage of the share capital can have such rights under certain conditions. Minority shareholders may consider convening a shareholders' meeting or adding agenda items to an already scheduled meeting in order to try to obtain information and documents from the management.

In an SA, shareholders representing at least 10% of the share capital may request in writing to the board of directors that it convene a shareholders' meeting, with such a request including the agenda.[73] The board of directors must then convene, within one month, a shareholders' meeting with that agenda.

Also, in an SA, shareholders representing at least 10% of the share capital may request the management to add items to the agenda of an already scheduled meeting.[74] That request must be made at least five days before the meeting, by a registered letter sent to the registered office of the company.

In an SA, shareholders representing at least 10% of the share capital may also request, at the start of a shareholders' meeting, that the board of directors postpone the meeting for four weeks. It is not required that this request include any reasons justifying it. In such a case, the meeting must be reconvened by the board of directors, with the same agenda, four weeks later.[75] No meeting can be held in the meantime with the same agenda. The board of directors also has the right to postpone the shareholders' meeting, which is to be exercised at the start of the meeting.

In an SARL, shareholders representing more than half of the share capital are entitled to convene a shareholders' meeting under strict conditions. They can convene a meeting only in the case of a failure by the management and the supervisory board of auditors (if any) to do so.[76] From a practical standpoint, the exercise of this right involves, as a preliminary step, that the shareholders request the management (and if applicable the supervisory board of auditors) to convene a shareholders' meeting with a given agenda.

On a separate point, the management of a company could convene, on a voluntary basis, a shareholders' meeting to provide to the shareholders information regarding a specific transaction or other particular developments relating to the company.

This would usually be done with a view to asking for the consent of the shareholders' meeting to proceed with a particular transaction. That consent should effectively amount to a waiver of liability for the directors in respect of that transaction, provided that shareholders vote in an informed manner.

In the same vein, if the company is in a distressed situation, the management could consider convening a shareholders' meeting to propose restructuring options,

73 Article 70 of the Law on Commercial Companies.
74 Article 70 of the Law on Commercial Companies.
75 Article 67 of the Law on Commercial Companies.
76 Article 196 of the Law on Commercial Companies.

including a solvent liquidation, it being understood that, in such a context, the management has the obligation not to pass confidential information to all the shareholders if this could be detrimental to the company's interest.

5. Judicial procedures

A shareholder has additional rights to obtain information and documents from the company in the context of litigation, including in a pre-litigation phase.

5.1 Investigative measures 'in futurum'

Before initiating legal proceedings, a shareholder may request the court to order the company to provide documents and/or it may obtain other measures, such as the appointment of an expert.

Article 350 of Luxembourg's New Code of Civil Procedure states that:

The judge may order any legally admissible investigation measure if a party has a legitimate interest in the establishment or the conservation, before any trial, of the proof of the facts on which may depend the issue of such trial.

The use of this procedure, under which investigative measures may be obtained, is quite common in Luxembourg.

Under that procedure, the shareholder has to make an application against the company to the president of the District Court, under the procedure applicable to interlocutory proceedings. This is an oral procedure in front of a single judge.

These measures are granted where the following conditions are met:

- There must be a potential dispute, and the object and the ground of the potential dispute must be sufficiently established by the claimant (even if not with the precision of full proof);
- The claimant must have a legitimate interest in the establishment or conservation of the evidence sought;
- The requested investigative measure must be legally admissible;
- The measure to be obtained is likely to have an influence on the outcome of the potential litigation;
- In respect of a request for documents, it is likely that any such document exists and is likely to be held by the company, and the document must be specifically identified by the claimant; and
- No proceedings on the merits have been initiated.

Therefore, if a shareholder intends to initiate such proceedings, it should assess in particular the following:

- whether it has sufficient evidence or factual information that will allow him to establish that there is a potential dispute between it and the company that is credible;
- whether the measures requested could have an influence on the outcome of that litigation;
- whether the document requested is subject to statutory or contractual confidentiality obligations, although based on Luxembourg case law, the company could be ordered to disclose it if the claimant can establish that, in

balancing its interests with the interest in protecting confidentiality, its interests are the more important;

- the timing as to the initiation of the proceedings on the merits, taking into account, in particular, the limitation period of six months in which a claim to void a shareholders' resolution must be made (see 6.3 below).

The above requirements do not include a need for urgency.

This procedure cannot be used in order to carry out a fishing expedition given that, as mentioned, the claimant must establish that it is likely that a given document exists and is held by the company and any such document must be specifically identified by the claimant.

The investigative measures that can be obtained include an order to be provided with documents held by the company.

It also appears that the president of the District Court could appoint an expert with a specific task to be carried out. In such a case, the shareholder will have to establish the likely grounds of his future action on the merits, and will also have to demonstrate that the expert's findings are likely to have an influence on the outcome of such an action.

5.2 Appointment of a provisional manager or an *ad hoc* agent

Any shareholder may request the appointment of a provisional manager by the president of the District Court by bringing interlocutory proceedings under the Luxembourg New Code of Civil Procedure.

The appointment of a provisional manager is made according to the statutory requirements applicable to measures ordered by the court during interlocutory proceedings.

There are two alternative legal grounds under which a provisional manager can be appointed. In both cases, the claimant must establish the existence of urgency justifying the appointment of a provisional manager. The question of urgency must be assessed with regards to the overall situation of the company and not with regards to the situation of a particular shareholder.

The claimant has to establish, in addition, that:

- such an appointment is justified because the need for such measure cannot be seriously challenged, or that it is justified by the existence of a dispute;[77] or
- such an appointment is justified to prevent imminent harm or to end a manifestly unlawful activity.[78]

In determining whether to appoint a provisional manager, the court will have to consider the general approach adopted by Luxembourg case law according to which the courts do not, in principle, interfere in the management of a company.

Against that background, it has been held in particular by the courts that a provisional manager can be appointed in the case of a general deadlock in the

77 Article 932 of the New Code of Civil Procedure.
78 Article 933 of the New Code of Civil Procedure.

management, which would entail a severe threat for the future of the company. The courts could also consider, for example, whether there have been any suspicious acts on the part of the management, including management decisions made against the interests of the company and abuses of a majority shareholding, in determining whether a provisional manager must be appointed.

The appointment of a provisional manager is made on the following terms by the court:

- The mission granted by the court has a conservatory nature, because the court, acting in interlocutory proceedings, cannot make decisions that would have definite consequences for the company;
- The scope of its powers should not exceed the daily management of the company and should not include the authority to dispose of the company's assets;
- The appointment shall be made for a limited period of time; and
- The usual management no longer has any powers within the company until the end of the mission of the provisional manager.

On a related point, a shareholder could also request the president of the District Court to appoint an *ad hoc* agent on the basis of the legal provisions referred to above in respect of interlocutory proceedings; it being understood that the courts may, in principle, not interfere in the management of a company. An *ad hoc* agent could be appointed, for example, to convene a general meeting of shareholders. In such case, the normal management would keep the power to manage the company.

5.3 Request for documents during proceedings on the merits

During proceedings on the merits in an action between a minority shareholder and the company, for example, for an alleged abuse of majority, a shareholder may request the court to order the delivery of documents from the company.

The shareholder must establish that it is likely that a given document exists and is held by the company, and any such document must be specifically identified by the claimant.[79]

6. Particular shareholders' rights

6.1 Annulment of shareholder decisions

Any shareholder shall have legal standing to challenge the validity of a shareholder resolution, unless the shareholder voted in favour of that resolution or otherwise consented to its passing.

The law on Commercial Companies provides that a shareholder resolution may be voided on the following grounds:[80]

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79 Article 288 of the New Code of Civil Procedure, which cross-refers to Articles 284 and 285 of the code.

80 Article 12*septies* of the Law on Commercial Companies. The provisions of Article 12*septies* of the law on Commercial Companies were introduced by the 2016 amendments and are based on corresponding provisions of Belgian law. The opinions of Belgian scholars and Belgian case law may therefore be relevant in interpreting those provisions.

- the resolution is flawed as a result of a formal irregularity, provided the claimant proves that the irregularity may have influenced the resolution;
- the resolution was made in breach of the rules regarding the proceedings of the meeting or as a result of deliberations that were not on the agenda of the meeting, if there was fraudulent intent;
- an abuse or a misuse of powers;
- in the case of the exercise of voting rights which are suspended; and
- any other reason set out in the Law on Commercial Companies.

These grounds are exhaustive.

Any shareholder can request the Luxembourg courts to declare a shareholder resolution void.

(a) Formal irregularity

The concept of 'formal irregularity' encompasses breaches of the rules regarding the convening of the shareholders' meeting, the organisation of the meeting (for example, the setting-up of the bureau, which is generally composed of a chairman, a secretary and one or two scrutineers, and ensures the practical functioning of the meeting) and the rules regarding the deliberations.

This concept of formal irregularity is usually held under Belgian law to be generic and therefore as including the concept of breach of the rules regarding the proceedings of the meeting or those regarding the agenda of the meeting. As a result, it is held that the grounds referred to under the first two bullet points above can be merged. In our view, the same should prevail under Luxembourg law. There is, to our knowledge, no Luxembourg court precedent in respect of this matter.

Against that background, a shareholder can therefore void a resolution on the grounds of a formal irregularity, which should encompass the rules regarding the proceedings of the meeting and the agenda, if he establishes:

- the breach of a mandatory provision of the law or of the articles of association setting out that formality; and
- that that irregularity may have influenced the outcome of the resolution; or
- that it was made with fraudulent intent.

It could prove difficult for a shareholder to establish that a formal irregularity has influenced the outcome of a resolution. For example, if the company fails to notify a shareholder of a shareholders' meeting, it will have to be established that, if he had been present at the meeting, his presence could have had an impact at the meeting that was likely to influence the outcome of the deliberations. In the same way, if the breach relates to the non-response by the management to a question asked at the meeting by a shareholder, the shareholder would have to establish that an accurate response would, as a likely result, have changed the outcome of the meeting.

It could also prove difficult for a shareholder to establish that a formal irregularity was made with fraudulent intent, as this requires that the shareholder bring positive evidence to that effect.

(b) Abuse or misuse of powers

The concepts of 'abuse of powers' or 'misuse of powers' are different.

An abuse of powers relates primarily to the scenario in which a decision is passed by the shareholders' meeting when it should have been passed by another corporate body, such as the board of directors, according to the law or the articles of association.

A misuse of powers relates to the well-known concept of abuse of majority rights. It is held under Luxembourg case law that an abuse of majority rights is established if:

- the decision involves an intentional breach of equality between the shareholders to the benefit of the majority shareholder; and
- the decision is contrary to the company's corporate interest.[81]

A minority shareholder may face difficulties in establishing that a decision is contrary to the company's corporate interest. Indeed, a breach of equality between the majority shareholder and the minority shareholder does not necessarily imply that the decision is contrary to the company's interest. For example, if a capital increase is carried out by the company for the sole purpose of diluting the minority shareholding, the capital increase could, arguably, be viewed as not being contrary to the company's interest to the extent that the proceeds of the capital increase would, for example, allow the company to make further investments.

It can usually be expected that the legal dispute in respect of an abuse of majority rights in front of a court would focus on:

- the concept of corporate interest; and
- the rationale behind the decision, in respect of which evidence may be brought before the courts by the parties to the proceedings.

In respect of the concept of 'the corporate interest', this concept is, under Luxembourg law, a fluctuating and case-law-defined concept. It fluctuates because the Luxembourg courts may consider, in a given case, that the concept relates to the interests of the shareholders, while, in some other cases, they would take into account the interests of other stakeholders, the corporate interest being then considered to be the interest of the corporate entity, a body distinct from the individual shareholders.

If it is held that the corporate interest correlates with the interests of the shareholders, then, as a result, a court would be more likely to consider that a breach of the principle of equality between the shareholders results in the corresponding decision being contrary to the interests of the company.[82]

Against that background, it should be viewed as being of the utmost importance

81 See, for example, Tribunal d'Arrondissement de Luxembourg, 26 February 2015, 142277.

82 In a similar vein, it has been recently held by the French Supreme Court (the position of which can be of a persuasive nature for the Luxembourg courts), that a decision to increase the share capital constituted an abuse of majority rights because the decision had no legitimate reason and its sole purpose was to dilute the minority shareholder (Cour de Cassation, 3rd Civil Chamber, 8 July 2015, 13-14348).

to establish all the factual circumstances regarding a decision challenged on the basis of an abuse of majority rights.

In relation to the determination of whether a decision is contrary to the corporate interest, the Luxembourg courts consider that a certain degree of discretion shall be left to the directors in making their decisions. The judge shall not substitute his judgment for that of the directors as he is not a court of appeal against the decisions made by the management of the company.

6.2 Annulment of management decisions

The Law on Commercial Companies does not provide for an express legal regime in relation to having management decisions declared void. Luxembourg case law considers that a management decision can be annulled for an irregularity of form or for a breach of the substance of a legal provision or the articles of association.

The management decision could be declared void only if it can be established that the breach may have had an influence on the outcome of the decision, unless the breach relates to substantial formalities or imperative rules. In the latter case, in our view, this should include, for example, a failure to give notice of a board meeting to a director, or an abuse of majority rights.

Any shareholder should have legal standing to challenge the validity of a management decision.

6.3 Limitation period for annulling shareholder and management decisions

The Law on Commercial Companies provides that corporate decisions, namely decisions of the shareholders and decisions of the management, can only be challenged for a period of six months as from the date that the decision is effective towards the claimant, or from the date that the claimant knew, or should have known in light of the circumstances, of the decision.

That limitation period is extremely restrictive. A minority shareholder has to factor in that limitation period in determining whether it would be appropriate first to initiate the pre-trial procedure set out under Article 350 of the new Code of Civil Procedure in order to obtain documents or any other investigative measure. As mentioned above, that procedure is available only before an action on the merits is initiated.

6.4 Suspension of a corporate decision

Prior to challenging a decision on the merits, a shareholder could also request, in interlocutory proceedings, that the president of the District Court order the company to refrain from deliberating on and passing resolutions at a shareholders' meeting or at a board meeting or, if such a decision has been passed and but not yet implemented, that the president suspend the effects of the decision. The company will have to be a party to that proceeding.

Such a request is made on the basis of the general provisions regarding interlocutory proceedings. Therefore, there are two alternative legal grounds under which a decision can be prevented from being passed or be suspended. In either case, the claimant must establish the existence of urgency justifying the measure.

The claimant has to demonstrate in addition that:

- the measure is justified because the need for it cannot be seriously challenged, or it is justified by the existence of a dispute;[83] or
- the such measure is justified to prevent imminent harm or to end a manifestly unlawful activity.[84]

From a practical perspective, the following should be noted:

- The shareholder will usually have to prove an obvious breach of the Law on Commercial companies or the articles of association, which will be harmful to it. For example, a legal debate regarding an abuse of majority rights that does not include any such obvious breach, will be unlikely to ground a favourable decision for a minority shareholder in interlocutory proceedings. This is because a judge in interlocutory proceedings cannot make any determination in respect of a fact that is not obvious and that can therefore be challenged;
- The order to be rendered is of a provisional nature, and therefore the shareholder would usually still have to start an action on the merits of the case if he is successful;
- Given that the company will be warned of such legal action, and possibly take the necessary steps to pass and implement the decisions at stake before the court hearing, the option of interlocutory proceedings may not be appropriate in all circumstances.

Under Luxembourg law, a person could also have the right to request the president of the District Court to give an order in an *ex parte* procedure, that is to say, one to which the company is not a party.[85] Under that procedure, the claimant must establish:

- the urgency of the measure requested;
- that the measure requested is necessary; and
- that the measure requested could not be efficiently obtained under interlocutory proceedings (because, for example, the decision is to be passed imminently before a hearing could even take place), it being understood that such order will be granted for a limited period of time only (usually a deadline will have be set to initiate proceedings on the merits).

Also, under that procedure, the court could order a prohibition on holding a meeting or deliberating on certain items of the agenda, or it could suspend the effects of a decision that has not yet been implemented.

Once rendered, the order of the president of the District Court could then be challenged by the company in interlocutory proceedings.

83 Article 932 of the New Code of Civil Procedure.
84 Article 933 of the New Code of Civil Procedure.
85 Article 66 of the New Code of Civil Procedure.

6.5 Directors' liability and company's liability to shareholder

A shareholder shall have the individual right to claim damages from the company or its directors in limited circumstances.

(a) Shareholder's right to claim damages on behalf of the company

The liability of the directors of a public limited liability company to the company they manage is regulated under Article 59 of the Law on Commercial Companies. This article is also applicable to the managers of an SCA and the managers of an SARL thanks to the cross-reference made in Article 192 of the law.

Article 59 provides that:

Directors are liable towards the company according to the general principles governing the execution of the mandate given to them and for any misconduct in the management of the company.

They are jointly and severally liable either to the company or to third parties for any damage resulting from infringements of this law or of the articles of association of the company. They shall be discharged from this responsibility if no fault is attributable to them personally and if they reveal this infringement to the next general meeting of shareholders.

In accordance with the first paragraph of Article 59, the liability of directors towards the company is basically governed by the rules concerning the exercise of a mandate as provided for by Articles 1991 onwards of the Luxembourg Civil Code. This means that the terms of the first paragraph of Article 59 of the Law on Commercial Companies shall be complemented as necessary by the applicable provisions of the Luxembourg Civil Code governing liability for breach of contract and the terms of the mandate, including in respect of the causal link between any breach of contract and the harm for which a remedy is sought.

Under the first paragraph of Article 59, each director may be held individually liable for the faulty execution of his mandate. The directors must at all times act in the best interest of the company. They have the obligation to execute their mandate with due care. Luxembourg courts will always assess any misconduct on the part of a director by comparison with a normally diligent and careful director placed in the same circumstances.

A claim for damages for mismanagement can only be initiated by the company following a shareholder resolution passed by a simple majority. Therefore, a minority shareholder does not have such a right. In our view, there are, however, arguments to the effect that a minority shareholder could request, in interlocutory proceedings, the appointment of an agent who will initiate a claim for damages on behalf of the company, in accordance with the conditions applying to obtaining measures in interlocutory proceedings.

The 2016 amendments to the Law on Commercial Companies introduced a right of minority action in respect of an SA (and an SCA or an SAS).[86] Under that minority action right, shareholders or holders of beneficiary shares that held at least 10% of the voting rights at the latest shareholders' meeting that voted on the discharge of

86 Article 63*bis* of the Law on Commercial Companies.

liability of the members of the management can initiate a claim for damages for mismanagement on behalf of the company.

That minority action cannot be initiated by shareholders that voted in favour of the discharge. In order to be in a position to prove that a minority shareholder has not approved the discharge, he should expressly request that the fact that he voted against the discharge be included in the minutes of the meeting.

In terms of timing, it is not settled whether the minority shareholders have to wait until the annual general meeting approving the annual accounts of a given financial year must be held so that they can be in a position to start a minority action in respect of mismanagement that took place during that year. This matter is unsettled, but, arguably, based on a literal interpretation of the law, shareholders will indeed have to wait for the holding of the annual general meeting.

The claim for damages is made on behalf of the company. If the claim is successful, then the damages must be paid by the director(s) to the company and hence, they are not paid to the minority shareholders that initiated the claim.

The Law on Commercial Companies is silent in respect of the party that shall bear the costs of the proceeding. Therefore, the general rule in the New Code of Civil Procedure regarding such matters shall be applicable.[87] This provides that, in principle, the costs, not including lawyers' fees, are borne by the losing party.

During the course of the parliamentary work on the 2016 amendments to the Law on Commercial Companies, a draft legal provision whereby in the event that the minority action is successful, any reasonable costs borne by the minority shareholders that are not included in the costs borne by the losing party must be reimbursed by the company to the minority shareholders, was expressly set aside. This draft provisions covered, among other things, lawyers' fees.

(b) Individual shareholder's claim for damages

Under Luxembourg law, there is a general principle whereby the actions of directors in the exercise of their mandate shall be considered as being the actions of the company they manage and, as a result, directors cannot be held individually liable to third parties for actions undertaken by them in the exercise of their mandates. This principle is referred to as the 'théorie de l'organe'. This principle is generally applicable to companies having legal personality, including SAs, SCAs and SARLs.

Based on this principle and subject to the exceptions described below, a third party can only make a claim against the company itself. That claim may be:

- a contractual claim, if the subject matter of the claim is a breach of an agreement between the company, purportedly committed by the company acting through its directors, and the third party; or
- a claim in tort if the alleged action of the company, made through its directors, is not a breach of contract by the company in respect of an agreement entered into with that third party.

There are, however, two exceptions under which a third party can make a claim

87 Article 238 of the New Code of Civil Procedure.

directly against the directors of a company in respect of actions made in the exercise of their mandates. In this context, a third party is usually defined as any person other than the company itself. In this case, the claim has the nature of a claim in tort as opposed to a contractual claim. This claim is generally governed by the rules set out in Articles 1382 and 1383 of the Luxembourg Civil Code.

The two exceptions under which a third party can make a claim directly against the directors of a company in respect of actions made in the exercise of their mandates derive from:

- the express terms of the second paragraph of Article 59 of the Law on Commercial Companies; and
- Articles 1382 and 1383 of the Luxembourg Civil Code, as applied by the Luxembourg courts in respect of claims for damages made by third parties against directors for actions committed in the exercise of their mandates that amount to misconduct that is severable from their functions as directors.

Under the second paragraph of Article 59 of the Law on Commercial Companies, directors of a company are directly liable to third parties (or to the company) for any breach of that law or of the articles of association of the company. As mentioned above, this Article is applicable to an SA, an SCA or an SARL.

As stated above, this form of claim is an exception to the principle whereby only the company can be liable to third parties for actions made by directors in the exercise of their mandates. Legal authors explain that exception by stating that the conduct of directors consisting of committing a breach of the Law on Commercial Companies or the articles of association must be considered as a fault that is so severe that it must in itself trigger liability on the part of the directors to third parties (assuming that the requirements regarding the causal link between the fault and the harm alleged, and the existence of harm that can be repaired under Articles 1382 and 1383 of the Luxembourg Civil Code are met).

If a breach of the articles of association or the Law on Commercial Companies is committed by the directors, the Luxembourg courts will have no discretion in assessing the existence of fault on the part of the directors. Any breach of the articles of association or the Law on Commercial Companies constitutes a fault triggering their liability. In this case, in accordance with the terms of the second paragraph of Article 59, all the directors must be held jointly liable.

The second exception to the principle whereby only the company can be liable to third parties for actions taken by directors in the exercise of their mandates involves misconduct by directors that "can be separated from the functions of the directors".

The Luxembourg courts have adopted the following definition of misconduct severable from the functions of a director, by replicating the definition adopted in a decision of the French supreme court: "intentional fault that is particularly severe, which is not compatible with the normal exercise of management functions".

It is, however, not settled whether a shareholder should be considered as a third party or not. If a shareholder is considered as a third party, a director will be liable towards him if he establishes misconduct that can be separated from the functions

of the directors. If a shareholder is not considered as a third party, and hence assimilated to the company, a shareholder would have to establish mere misconduct on the part of the directors. In light of French case law, arguably, directors could be liable to a shareholder as a result of their mere misconduct (as opposed to misconduct that can be separated from the functions of the director) though, to our knowledge, there is no Luxembourg case law in respect of this matter.

Against that background, any shareholder can make a direct claim against the directors under tort law, on the basis of the second paragraph of Article 59 of the Law on Commercial Companies or Articles 1382 and 1383 of the Civil Code.

To substantiate such a claim, another condition must be met. The shareholder must have suffered individual harm, which must be different from the harm caused to the company. Therefore, a decrease in the net asset value of the company is not considered as harm suffered by a shareholder individually.

Based on French case law, the concept of individual harm should include the scenario of loss being suffered by a shareholder investing in or retaining his shares as a result of inaccurate financial information provided by the company. That loss should not correspond to the overall loss resulting from the decrease in the value of the company, but only to the loss of the chance for the shareholder to have made a better investment decision. It could also, for example, include the scenario under which a minority shareholding is diluted because of an over-valuation of assets paid against the issue of new shares by a majority shareholder.

In respect of the same facts, according to Luxembourg case law, any shareholder could also make a direct claim for damages against the company on the basis of Articles 1382 and 1383 of the Luxembourg Civil Code. In such a case, the shareholder must also establish individual harm which is different from the harm suffered by the company.

The Law on Commercial Companies provides that the limitation period for actions against the managers, directors, members of the management board, members of the management committees, managing executive officers, members of the supervisory board, statutory auditors or liquidators, in respect of acts undertaken by them in that capacity, is five years as from the time of those acts, or if they were fraudulently concealed, from the discovery thereof.[88]

6.6 Mandatory share redemptions

The Law on Commercial Companies does not provide for any mechanism under which a shareholder can request the redemption of its shares by the company or the company can exclude a shareholder by redeeming its shares.[89]

The articles of association can provide for such rights under certain conditions.

In respect of share redemptions to be requested by a shareholder:

- The company must have sufficient distributable reserves and profits, as

88 Article 157 on the Law on Commercial Companies.

89 Squeeze-out rights and sell-out rights are provided for in the Law of 19 May 2006 implementing Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids and the Law of 21 July 2012 on mandatory squeeze-out and sell-out of securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public.

determined from an accounting standpoint on a stand-alone basis, to carry out the redemption;
- The trigger event of the redemption rights and the method of determining the redemption price must be set in the articles of association;
- The principle of equal treatment of shareholders will have to be complied with; this requires in particular that a specific class of shares including the redemption terms must be created if the redemption right is to benefit to a particular shareholder;
- Issues regarding the timing for the payment of the redemption price and the steps that may have to be taken by the company in connection therewith will have to be addressed in the articles of association (for example, any requirement to dispose of certain company assets or to carry out a restructuring in order to pay the redemption price).

In respect of share redemptions to be requested by the company:
- The company must have sufficient distributable reserves and profits, as determined from an accounting standpoint on a stand-alone basis, to carry out the redemption;
- The trigger event of the redemption rights and the method of determining the redemption price must be set in the articles of association;
- The principle of equal treatment of shareholders will have to be complied with; this requires in particular that a specific class of shares including the redemption terms must be created if the company is to have the right to redeem the shares of a particular shareholder; and
- To the extent that the redemption event leads to the exclusion of the shareholder and that the redemption price is lower than the value of the shares, it cannot be ruled out that a minority shareholder could argue that such redemption amounts to a penalty clause, which would allow the court to increase the amount of the redemption price (if that assessment is held as correct by the court). In addition, in that scenario, it would be cautious to provide for a detailed procedure leading to the total share redemption, including in particular the right for the shareholder to put forward to the management his arguments in respect of the underlying facts triggering the redemption rights.

6.7 Dissolution of a company for just cause

The Law on Commercial Companies provides for the dissolution of an SA or an SARL for just cause.[90] Any shareholder can ask for the dissolution of the company for just cause.

The courts will usually order the dissolution of the company for just cause only if they determine that the normal running of the company is definitively paralysed because of a deadlock situation at the level of the shareholders and the management, so that the future of the company is at stake.

90 Article 99 of the Law on Commercial Companies for an SA and Article 180-1 for a SARL.

That type of situation can arise in various scenarios ranging from a serious dispute between shareholders to a shareholder having disappeared (and therefore blocking the decision-making process). In this context, an abuse of majority rights committed by the majority shareholder would not be sufficient in itself to constitute a just cause for dissolution.

It is usually held that the shareholder who is the cause of the dispute between shareholders cannot request the dissolution of the company for just cause in front of the courts.

7. Alternative dispute resolution

There are two types of alternative dispute resolution that can be used under Luxembourg law, namely arbitration and mediation.

7.1 Arbitration

Arbitration is usually used in Luxembourg to settle contract and commercial disputes.

The rules governing arbitration proceedings are mainly provided for by the New Code of Civil Procedure. Luxembourg has also ratified international agreements regarding arbitration (including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958). In addition, the Luxembourg Chamber of Commerce has its own arbitration centre, created in 1987, and has put its secretariat at the service of parties interested in using arbitration to settle their dispute.

Arbitration can only take place if both parties have agreed. The agreement to arbitrate is made through an arbitration clause included in the contract or, after the performance of the contract, through the conclusion of a written agreement to arbitrate.

In practice, it is not unusual that an arbitration clause be included in a shareholders' agreement relating to a Luxembourg company. In this context, a shareholders' agreement will sometimes be governed by Luxembourg law, but it is quite common for a shareholders' agreement to be governed by a foreign law that is familiar to foreign investors.

If it is chosen to include an arbitration clause in a shareholders' agreement, it would usually be viewed as important that all the shareholders and the Luxembourg company consider including an appropriate arbitration clause in all other agreements relating to their investment in the Luxembourg company, such as subscription agreements and loan agreements. This is to ensure that the arbitration clauses in the different agreements are compatible.

In this context, an arbitration clause will have to comply with Luxembourg law to the extent that the shareholders' agreement is itself governed by Luxembourg law. The matters usually addressed in a shareholders' agreement are considered as arbitrable under Luxembourg law. Indeed, under Luxembourg law, anyone can compromise on rights that may be freely disposed of,[91] except for certain matters

91 Article 1224 of the New Code of Civil Procedure.

expressly set out in the New Code of Civil Procedure (for example, the status and legal capacity of natural persons) or disputes that are subject to mandatory attribution of jurisdiction (for example, matters regarding the contractual relationship between an employer and an employee).

In respect of the arbitration procedure, a default procedure is provided for by the New Code of Civil Procedure. However, given in particular that the rules set out in the code are not very detailed, the parties will usually include specific procedural rules, usually by relying on a model arbitration clause made available by an international arbitration organisation (International Chamber of Commerce, London Court of International Arbitration, World Intellectual Property Organisation, the Arbitration Centre of the Chamber of Commerce of Luxembourg, etc). If the parties do not provide any details in respect of the procedure, the parties and the arbitrators must use the time limits and forms required before the local courts.[92]

In respect of challenges to and enforcement of the arbitration award, a difference shall be observed between awards issued in Luxembourg and awards issued outside Luxembourg.

As far as arbitration awards issued in Luxembourg are concerned, the award can only be declared void by the District Court on the basis of limited grounds set out in the New Code of Civil Procedure.[93] No appeal on the merits is allowed. Those grounds include, for example, the award amounting to a breach of public policy, breach of the rights of the defence or the arbitration award having been obtained by fraud. In addition, as a requirement to request the annulment of an arbitration award, that award must have been first declared enforceable by an order issued by the president of the District Court,[94] and this requirement is usually viewed as an unnecessary burden.

In respect of arbitration awards issued outside Luxembourg, awards are declared enforceable by the president of the District Court.[95] Subject to the provisions of international conventions, a judge may refuse to declare an award enforceable if:

- The award can still be challenged before the arbitrators and the arbitrators did not order its provisional enforcement notwithstanding an appeal;
- The award or its enforcement is contrary to public policy or the dispute was not arbitrable; or
- It is established that there are certain grounds for annulment referred to in Article 1244 of the new Code of Civil Procedure.[96]

As mentioned, those requirements are subject to the provisions of relevant international conventions. As mentioned, Luxembourg is, in particular, party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958. That convention was approved by a law of 20 May 1983. The law specifies that this convention applies on the basis of reciprocity for the

92 Article 1230 of the New Code of Civil Procedure.
93 Article 1244 of the New Code of Civil Procedure.
94 Article 1246 of the New Code of Civil Procedure.
95 Article 1250 of the New Code of Civil Procedure.
96 Article 1251 of the New Code of Civil Procedure.

recognition and enforcement of arbitration awards made in the territory of another contracting state.

7.2 Mediation

Mediation is regulated by a law dated 24 February 2012. This law has introduced mediation in both civil and commercial matters into Luxembourg law. The law implements Directive 2008/52/CE on mediation in civil and commercial matters (with regard to certain aspects).

In the context of civil and commercial matters, any dispute, with the exception of inalienable rights and liabilities, public policy provisions and acts and omissions for which the state is liable in the course of the exercise of public authority, can be subject to a conventional mediation or a judicial mediation.

In respect of corporate law matters, mediation is usually used to settle disputes in the context of family-owned businesses.

Under a conventional mediation, each party can propose to the other parties, independently of a judicial or arbitral proceeding, a mediation process. The parties then appoint a mediator by common consent or appoint a third party that is responsible for appointing a mediator.

Under a judicial mediation, a judge already presiding over a dispute can, at any time during the proceedings and when the parties agree or on his own initiative but with the consent of the parties, request the parties to undertake mediation. The parties appoint a licensed mediator by common consent. A licensed mediator is one who has been granted a specific authorisation by the Ministry of Justice.

A full or partial agreement reached between the parties during a mediation process has to be approved by the president of the District Court in order to bind the parties and be enforceable as such. The judge can refuse to approve the mediation agreement only on very restrictive grounds, namely, if the agreement conflicts with public policy, it is contrary to the interest of children (in family law matters), if it cannot be enforced because of provisions deriving from a specific statute, or because the subject matter of the dispute cannot be settled by mediation.[97]

Any agreement may include a mediation provision, pursuant to which the parties must use mediation in order to settle potential disputes in relation to the validity, the interpretation, the performance or the termination of the agreement.[98] If an agreement includes such a provision, the judge or the arbiter must suspend the proceedings at the request of any party, and they can be resumed only once the parties or any of them have notified the court and the other parties that the mediation has ended.[99] However, any party can obtain interim measures and conservatory measures under interlocutory proceedings in respect of disputes that are covered by a mediation provision.[100]

97 Article 1251-22 of the New Code of Civil Procedure.
98 Article 1251-5(1) of the New Code of Civil Procedure.
99 Article 1251-5(2) of the New Code of Civil Procedure.
100 Article 1251-5(3) of the New Code of Civil Procedure.

8. Insolvency

Under Luxembourg law, three pre-insolvency proceedings are available for commercial companies in a distressed situation, namely:

- compositions with creditors;
- controlled management proceedings; and
- stays of payments.

These proceedings are rarely used in practice.

Usually, Luxembourg commercial companies in a distressed situation end up being subject to bankruptcy proceedings. Bankruptcy proceedings are opened by the District Court sitting in commercial matters, at the request of the company or a creditor, or by the District Court on its own initiative.[101]

Bankruptcy proceedings can only be opened if the District Court determines that the company is unable to repay its debts as they fall due and has lost its financial creditworthiness, in the sense that it cannot obtain sufficient financing to meet its payment obligations.[102] Those requirements are usually considered as a cash flow test.

The company must file for bankruptcy within one month as from the time the requirements for the bankruptcy are met.[103] The decision to file for bankruptcy must be made by the management of the company. The shareholders have no right to file for bankruptcy, unless they are also creditors of the company, in which case they can file for bankruptcy in their capacity as creditors (and not as shareholders).

If the management fails to file for bankruptcy within the one-month period, the managers may be subject to criminal liability under the criminal offence of bankruptcy.[104] If a manager were to be held as having committed such a criminal offence, they can be prohibited from carrying out commercial activities or management and audit activities by decision of the District Court.[105]

As from the opening of the bankruptcy, the existing management is no longer responsible for managing the company. The bankruptcy trustee appointed by the District Court must carry out the liquidation of the company, and it acts in its dual capacity as representative of the company and as representative of the creditors as a whole. The bankruptcy trustee acts under the supervision of a supervising judge.

In respect of insolvency proceedings, the individual rights of a shareholder are (almost) non-existent:

- In practice, although this is rare, a shareholders' agreement or the articles of association may grant a veto right to a shareholder or the general meeting of shareholders in respect of the management decision to file for bankruptcy once the bankruptcy conditions are met. In our view, given that a late filing for bankruptcy is subject to criminal liability, those provisions should not be enforceable as they would conflict with public policy rules.
- In bankruptcy proceedings, the bankruptcy trustee is the sole person entitled

101 Article 442 of the Commercial Code
102 Article 437 of the Commercial Code
103 Article 440 of the Commercial Code
104 Article 574(4) of the Commercial Code
105 Article 441 of the Commercial Code

to claim damages against the management in an action to remedy a deficiency in the company's assets[106] or to claim for damages for mismanagement.[107] The general meeting of shareholders has no authority to initiate any such claim.

- In our view, a shareholder should still be able to claim damages as compensation for an individual loss on the basis of the second paragraph of Article 59 of the Law on Commercial Companies or Articles 1382 and 1383 of the Civil Code.
- In the opinion of certain Belgian scholars, arguably, shareholders and holders of beneficiary shares that hold at least 10% of the voting rights of the company could still initiate a minority action[108] on behalf of the company after the opening of bankruptcy proceedings. However, there is no Luxembourg case law addressing this matter.

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106 Article 495-1 of the Commercial Code
107 Article 59 LSC
108 Article 63*bis* LSC