

ALLEN & OVERY

COVID-19 – Hot topics from a Luxembourg law perspective

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Our thoughts are with our clients at this difficult time. In just a few days, COVID-19 has had a very significant impact on businesses across all sectors and we have received various requests for urgent advice from a Luxembourg perspective. We have decided to share a list of the main topics raised by our clients, so that it might help others to prepare. We will update as the days and weeks go by – this is of course a rapidly evolving situation. As always, we are happy to provide further information on any of these topics – please just reach out to your usual Allen & Overy Luxembourg contact.

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Keeping abreast of the operational impacts of Covid-19 on our clients' businesses is important to us. Please [click here](#) to access our Covid-19 global microsite for more information as well as our insights on the situation as it evolves.

Employment / labour law

- Our employment / labour law team have issued a series of eAlerts and a podcast regarding the impact of COVID-19 on companies that employ people in Luxembourg. Please click the links below to access them:
 - [Covid-19 coronavirus: FAQs for employers in Luxembourg \(eAlert\)](#)
 - [Covid-19 coronavirus outbreak – what are the precautions to take and obligations of the employer in Luxembourg? \(Podcast – in French\)](#)
 - [Business continuity vs. leave for family reasons: closure of nurseries and schools in Luxembourg until month end \(eAlert\)](#)
 - [Covid-19 coronavirus: impact on Luxembourg employers \(eAlert\)](#)

Data, IT security and confidentiality

- When allowing employees to work from home, companies need to ensure that the remote access systems they have in place provide for adequate security of data, and employee accessibility. Employees should be reminded of the conditions that apply to remote working, in particular to ensure that no data is stored on personal devices, no household members gain access to confidential information, etc. For companies that are under the supervision of the CSSF, the CSSF has issued guidance as to how supervised entities should behave in the context of remote working and what IT security measures they should take (see notably the [communiqué](#) and the [FAQ](#) issued by the CSSF in this respect – the latter is regularly updated).
- Information on a person's coronavirus health status qualifies as a special category of personal data which is subject to higher protection under the EU General Data Protection Regulation 2016/679 (GDPR). To this end, the Luxembourg CNPD has published recommendations on the processing of personal data in the context of a health crisis, including a list of compliant and non-compliant processing activities (available [here](#)). The CNPD provides, among others, that employers may, as part of their health and safety obligations, collect and store the data and identity of a person suspected of having been exposed to the virus and communicate the nature of the exposure, to the extent necessary for any health or medical care of the exposed person, to the health authorities at the latter's request. Employers should, however, refrain from collecting information on possible symptoms experienced by an employee/external person and their relatives in a systematic and generalised manner, or through individual enquiries and requests. This includes practices such as requiring employees to provide daily body temperature readings or to fill in medical forms or questionnaires, which have been drawn up in advance. Organisations should also refrain from having visitors or other external persons sign a pre-established statement certifying that they do not have symptoms of coronavirus or that they have not recently travelled to a risk area, etc. Greater flexibility around certain processing activities could come under future EU or Luxembourg law that is enacted specifically to address the virus outbreak. Our data protection team is monitoring developments.

Regulatory

- ESMA and the CSSF have issued recommendations to financial market participants regarding the impact of COVID-19, including on business continuity planning, market disclosure, financial reporting and risk management.

Governance of Luxembourg companies

- Boards need to assess the impact of the crisis on their particular company and underlying assets, and monitor that impact on an ongoing basis. Boards need to consider whether it would be appropriate to meet urgently for an immediate discussion and briefing from relevant advisers, and/or to diarise regular meetings as the situation unfolds. This is particularly important where there are significant risks facing the company, such as contingency planning failure, key contracts potentially at risk of being terminated (see below), cashflow issues, solvency issues, margin calls or key person risk. The board needs to consider whether external advice should be sought in relation to any of these issues, and the board's discussions should be properly recorded. Fiduciary duties of board members may come into sharp focus in the coming weeks, along with the question of to whom (i.e. to which stakeholders) those duties are effectively owed.
- Physical meetings are no longer practically possible. It will be important to check the impact of this on the governance of each company, at both shareholder and board (and indeed noteholder, if relevant) level. Companies' articles should be reviewed to ensure that they contain provisions permitting the use of teleconferencing, and/or the use of circular (written) resolutions or proxies (again, if contemplated by the articles) should be considered. Careful thought will be required as to the exact form and duration of any proxies.
- In the event that a board member becomes incapacitated for an extended period of time, or if a board member lives outside Luxembourg and relied on his or her ability to cross the Luxembourg border to attend meetings in person, it may be necessary to replace that board member. Changes to boards of regulated entities are of course likely to require prior regulatory approval. Alternate (or "temporary") directors – a familiar concept in common law jurisdictions – are not permitted under Luxembourg law. Clients should have in mind minimum quorum and majority requirements as set out in applicable constitutional documents including shareholders' agreements.
- Some articles or related shareholders' agreements may expressly require all meetings to be held on Luxembourg territory. If so, it may be necessary to obtain waivers of any such requirements. The consequences of seemingly technical or immaterial breaches need to be assessed in light of counterparties' possible desire to seek to find ways to terminate or renegotiate contracts.
- Other companies' constitutional documents may not be quite so explicit about the need for physical meetings in Luxembourg, but good governance principles and/or, in particular, applicable tax or regulatory advice may effectively require physical meetings on Luxembourg territory. Regulatory and tax "substance" are dynamic concepts, driven by a number of different factors. One of those factors

may indeed be the location of board and shareholder meetings, but there will typically be others that can be weighed alongside decisions as to whether and, if so, how to hold particular board meetings. Some of our clients have decided to cancel upcoming quarterly board meetings (where they are comfortable that there is no urgent need for an update). Others have decided to proceed but have non-Luxembourg resident managers grant proxies to Luxembourg resident managers to vote as they see fit, or to replace non-resident Luxembourg individuals with Luxembourg resident individuals.

- Many Luxembourg companies, particularly those with 31 December financial year ends, would ordinarily hold their annual general meetings in the coming weeks and months. As with board meetings, teleconference facilities and/or proxies could be deployed, (assuming the constitutional documents permit them to be used, and subject to additional practical challenges for listed companies), and/or meetings could be adjourned although commercial companies will start to run up against the deadline for approving and filing annual accounts and clients will need to have an action plan for the finalisation of audit processes and subsequent steps. The consequences of qualifications in audit opinions may need to be considered.

Contractual issues

- Counterparties may face commercial pressure to seek to terminate or renegotiate contracts. In recent days a great deal of attention has been focused on certain key clauses in contracts. Examples include covenants in banking and bond issuance documents, material adverse change clauses in sale and purchase and other agreements, pre-closing commitments from sellers to ensure that businesses being sold operate in the usual course, and *force majeure* clauses.
- In addition to the language agreed upon by the parties to a contract, civil law concepts such as *force majeure* may be applicable and may need to be assessed. Careful analysis is required in order to determine whether an event is “irresistible”, “unpredictable” and “exterior”, but if a *force majeure* can be concluded it may allow a party to suspend its contractual obligations.
- There has been an enormous increase in recent years in the number of major business contracts governed by Luxembourg law and Luxembourg courts and/or arbitration. As with other countries, the Luxembourg judiciary system has had to slow down heavily (with mostly only very urgent cases being dealt with currently) and is likely to come under real strain in the coming weeks. Arbitration proceedings may by their nature not be practically possible. Our litigation team is staying close to these developments.

Execution of documents

- It may be impossible to sign and exchange contracts in original form. Various clients have already asked us for advice on how to solve this. The solution often depends on the nature of the document to be signed, and the degree of comfort that the counterparty requires as to the due execution of the document. There is a spectrum of comfort and effectiveness, ranging from the wet ink original

through to e-signatures through to oral or verbal contracts. The use of e-signatures is a major focus currently, and there are important legal and practical points to be considered depending on which e-signature provider or platform is proposed. There are some documents that need to be signed in person or in original form by their nature, and there is often a requirement on deals for a legal opinion as to due execution to be issued. Law firms will need to be forewarned about the proposed method of execution, and additional opinion assumptions or qualifications may need to be negotiated.

- Certain corporate actions and documents require the presence of a notary. We are in constant contact with the notaries with whom we work regularly, and their clerks, to understand their contingency planning over the coming weeks. It will also be important for clients to stay in close contact with other intermediaries on whom they rely to carry on their business in Luxembourg. We have already seen delays in the issuance of blocking certificates by banks, and the activation of bank accounts to enable payments to be made. The timetable for apostilling has been extended. Generally, a greater degree of forward planning and communication will be required on transactions, and we may see a greater use of “contributions in kind”, “capital surplus / Account 115”, “direction letters” or similar techniques, although such techniques always require legal, accounting and tax advice before they are undertaken.

Effect on distributions and contributions

- The accounting position of Luxembourg companies may be negatively impacted and this may make it more difficult to make distributions to shareholders or even payments to creditors. There may be ways in which “cash traps” can be mitigated, but forward planning will be required, particularly on distributions out of equity which require a calculation of sufficient distributable reserves as a matter of law.
- A clear trend in recent days has been the increasing difficulty in valuing assets. This may complicate distributions *in specie* and contributions in kind, and put additional pressure on members of boards who are being asked to sign off on valuations for the purpose of effecting certain corporate actions.

Insolvency / capital calls

- As well as the calculation of distributable reserves on equity distributions, boards will also need to consider the consequences of any voluntary prepayment of debt ahead of maturity. Voluntary prepayments of debt ahead of maturity can be clawed back by the insolvency receiver if there is a subsequent insolvency and the relevant prepayment was made during the so-called “suspect period”.
- Generally, boards will need to be mindful of the need to forecast a company’s cash needs, of its financing covenants and of its covenant testing dates, and of the technical definition of insolvency under Luxembourg law. The insolvency test is a two-pronged test: (i) failing to pay debts as they fall due, and (ii) ceasing to be “creditworthy”, and the application of these concepts to a particular set of facts can be challenging.

- In joint venture and co-investment companies, the enforceability of capital call provisions including emergency funding, and the impact of reserved matters and veto rights, (including in the context of management participation plan vehicles), may need to be assessed.

Enforcement

- Many financings involve Luxembourg borrowers or obligors, with Luxembourg law governed security. Advice on enforcement of security over shares, receivables and accounts is likely to be a hot topic over the coming days.

Tax

- On 17 March 2020, the Luxembourg income tax authorities issued a specific newsletter regarding extraordinary tax measures implemented further to the COVID-19 outbreak. The measures applicable to individuals and companies subject to Luxembourg income taxes (including corporate income tax and municipal business tax) are the following:
 - The deadline for submitting the income tax returns to the tax authorities is postponed to 30 June 2020;
 - In case of liquidity problems, taxpayers realising business profits, agricultural and forestry profits, and/or earnings from self-employment may request:
 - a cancellation of their quarterly income tax advances (as set by the tax authorities) for the first and second quarters of 2020; this measure is limited to income taxes (excluding net wealth tax). To submit such a request, please [click here](#) to access the form.
 - A 4-month extension for the payment of the income taxes and net wealth tax due after 29 February 2020 without late payment penalty. To submit such a request, please [click here](#) to access the form.