ALLEN & OVERY

Covid-19 coronavirus – Key considerations from a Luxembourg corporate law perspective

23 March 2020

Covid-19 coronavirus has had a very significant impact on businesses across all sectors and many questions have arisen as regards the application of Luxembourg corporate law in this situation. Our Luxembourg office has set out below the main topics that we have identified at this stage from a corporate law perspective. We will update as the days and weeks go by – this remains 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.

Contents

Governance of Luxembourg companies

At a board level

- Alternatives to physical meetings: physical meetings are no longer practically possible. On 20 March 2020, the Luxembourg government used its emergency powers to issue a new regulation (the **Emergency Regulation**) facilitating the organisation of board meetings. This new regulation allows Luxembourg companies to move to written resolutions or videoconferencing for all board meetings, even where not expressly provided in the articles of association (similar rules apply at the level of shareholder and bondholder meetings as well – see below). We have included below an overview showing the rules that were applicable by default to a S.à r.l. and a S.A. under the Luxembourg law of 10 August 1915 on commercial companies, as amended (the **1915 Law**) and those that are now applicable pursuant to the Emergency Regulation[1] (the Emergency Regulation applies to all types of companies under Luxembourg law):

Board meetings		**Physical meeting**	**Appointment of proxy**	**Circular resolutions**	**Participation by way of video conference**	**Quorum and majority requirements**	**Convening period**
Until 20 March 2020 (only 1915 Law)	**S.à r.l. and S.A.**	Possible	Possible	Possible, but only if provided in artides of association	Possible, unless explicitly prohibited in artides of association	Half of members present and simple majority of votes, unless otherwise provided in artides of association Circular resolutions require unanimous vote	As provided for in the artides of association or, in the absence of such provisions, reasonable convening period
As from 20 March 2020 (1915 Law and Emergency Regulation)	**S.à r.l. and S.A.**	Remains possible, but should be avoided due to state of emergency measures	Unchanged, but note that a meeting needs to consist of more than one person	Possible in all circumstances and irrespective of any provision to the contrary in the artides of association or in the absence of any provisions in the artides	Possible in all circumstances and irrespective of any provision to the contrary in artides of association	Quorum and majority rules are unchanged Unanimity should still be required for circular resolutions[2]	Unchanged

[1] Whilst the Emergency Regulation will remain in force until the earliest of its abolishment or the end of the state of emergency, decisions adopted pursuant to the Emergency Regulation whilst it was in force will remain valid even after that date.

[2] It is unclear whether the Emergency Regulation also allows circular resolutions by the board of managers/directors to be taken without unanimous approval. While it can reasonably be argued that the Emergency Regulation seeks to grant maximum flexibility and that written circular resolutions shall be subject

- Proxies: proxies by one board member to another board member should also be considered. Careful thought will be required as to the exact scope and duration of any proxies.

- Replacing board members: in the event that a board member becomes incapacitated for an extended period of time, it may be necessary to replace that board member. The principles regarding the replacement of board members have not changed. 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.

- Obligation to hold meetings in Luxembourg: some shareholders' agreements may expressly require all board meetings to be held on Luxembourg territory. If so, it will be necessary to consider the impact of the Emergency Regulation on these provisions and whether force majeure provisions may be relied upon. 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.

  In any case, 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.

  Having non-Luxembourg resident board members participating by way of video conference or other means of telecommunications as catered for by the Emergency Regulation may create tax risks (i.e., contribute to the Luxembourg company being potentially considered as a tax resident in the jurisdiction of the non-resident board members). This very much depends on the jurisdictions involved and should be carefully analysed in light of all facts and circumstances.

  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.

- Ongoing monitoring: boards need to assess the impact of the current situation 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, cashflow issues, solvency issues, margin calls or key person risk.

to the same majority rules than a regular physical board meeting, we would recommend that clients proceed with unanimous written circular resolutions or rely on virtual meetings to provide maximum legal certainty.

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.

At a shareholders' meeting level

- Alternatives to physical meetings: as physical meetings are no longer practically possible, the Emergency Regulation allows the board of all Luxembourg companies to elect to move to a vote in writing or in electronic format, through a special proxy chosen by the company, or by video conference (or any other means of telecommunication allowing the identification of participants) for all shareholder (and bondholder) meetings. These new rules apply regardless of any provisions to the contrary in the articles of association of the relevant company and regardless of the number of participants. We have included below an overview showing the rules that were applicable by default under the 1915 Law and those that are now applicable pursuant to the Emergency Regulation:

Shareholder Meetings		**Physical meeting**	**Written resolutions/voting in writing or in electronic format[3]**	**Participation by way of video conference**	**Appointment of proxy**	**Quorum/ Majority**	**Convening period**
Until 20 March 2020 (only 1915 Law)	**S.à r.l.**	Possible	Written resolutions possible for companies having less than 60 shareholders, except to amend articles of association	Possible, but only if provided for in the articles of association and at least one shareholder (or proxyholder) is present at the registered office	Possible	Quorum and majority provided in the 1915 Law and articles of association	As provided in the 1915 Law and articles of association
	S.A.		Not possible	Possible, but only if provided for in the articles of association			
As from 20 March 2020 (1915 Law and Emergency Regulation)	**S.à r.l. and S.A.**	Remains possible, but should be avoided due to state of emergency measures	Possible[4]	Possible in any event	Remains possible (including for notarial deeds)[5]	Quorum and majority rules are unchanged	Convening formalities are unchanged[6]

[3] Whilst voting in electronic format can grant more flexibility, its implementation may give rise to practical challenges (eg, in terms of correctly identifying the participants or avoiding fraud), especially for listed companies or companies with a complex shareholder base.

[4] Voting in writing or in electronic format (eg, through an e-mail) can only take place if the full text of the resolutions have been published or otherwise provided to the participants in advance. As this process is organised by the management of the company, the proposals will have to be communicated to all shareholders and other relevant participants known to the company. Parties should discuss with the notary how the vote in writing or in electronic format will be recognised to amend the company's articles of association before a notary. The possibility to appoint a proxy to execute a notarial deed remains unaffected.

[5] Pursuant to the Emergency Regulation, the company can in addition elect to move to a vote through a special proxy chosen by it.

[6] In the absence of provisions in the articles of the company dealing with voting in writing or in electronic format, convening terms applicable to physical shareholders' meetings should apply *mutatis mutandis*. Quorum and majority requirements under the company's articles of association remain unaffected, as the Emergency Regulation only impacts the way votes are expressed at a shareholder level.

With regard to shareholder meetings of listed companies, it should be considered that whilst a fully virtual meeting can now legally be held, there may be additional practical obstacles such as for example organising a virtual Q&A session and electronic vote counting and certification. This should be carefully considered with the relevant advisers.

- Timing of annual general shareholder meetings (**AGM**): 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. In addition, the AGM could also be held by using one of the alternative means made available under the Emergency Regulation (subject to additional practical challenges for listed companies) and/or meetings could be adjourned. Against this background, the Emergency Regulation allows companies, irrespective of any contrary provisions in their articles of association, to convene their annual general meeting at the later of the following two dates:

  1. the date falling six months after the end of its financial year; and
  2. a date within a period ending 30 June 2020.

  The above provisions apply to any meeting convened on or prior to 30 June 2020. Even if a company has already convened its general meeting before the adoption of the Emergency Regulation, it may opt for any of the above measures by publishing it and notifying its shareholders at the latest on the date falling three business days before the convened AGM.

  It should further be noted that in an S.A., the board of directors or the management board, as applicable, has the right to adjourn the AGM and organise a new AGM (with the same agenda) within four weeks pursuant to the 1915 Law (regardless of the current state of emergency situation). It must do so at the request of one or more shareholders representing at least one-tenth (10%) of the share capital. There is no need to motivate the decision to adjourn the AGM and, only one such adjournment is possible. This is particularly relevant for listed companies which have already dispatched convening notices and would like to ensure that shareholders may attend in a physical meeting (although it cannot be excluded that the overall situation will not have improved at the date of the second AGM).

  As with board meetings, shareholders' agreements and similar arrangements need to be checked for any provisions which expressly regulate shareholder meetings.

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.

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.

- In this FAQ we set out some of the key considerations to be borne in mind: https://bit.ly/2WEBERd

- 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 (in particular corporate services providers, independent experts, accountants and banks). 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 official timetable for apostilling has been extended to 5 business days and certain other logistical burdens may extend such timing. 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.

Impact on M&A transactions

- Pre-Signing Stage: parties need to take into account Luxembourg law rules on the termination of pre-contractual negotiations. Despite the current situation, the general principle of good faith in negotiations continues to apply and any termination of pre-contractual negotiations needs to be made in appropriate format and in line with any process letters or equivalent to avoid any claims for damages by the counterparty.
- Between Signing and Closing Stage: a number of issues may arise in relation to transactions between signing and closing:

- In the presence of a "material adverse effect clause" or equivalent condition precedent, a party may argue that the conditions for completion are not fulfilled. The validity of such a claim must be analysed on a case-by-case basis.
- In addition to any specific contractual clauses, general 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", and to what extent such event renders a contractual performance impossible or merely justifies a delay in such performance. This would need to be analysed on a case-by-case basis.
- Pre-closing covenants may require the seller to ensure that the activities of the target are carried on in the ordinary course of business, and specific events may require the consent of the purchaser. It may be that urgent action needs to be taken by the target and that this action (e.g. seeking additional financing, or claiming under or renegotiating material contracts) requires consent from the purchaser (in addition to reserved matters under any shareholders' agreement or external financing documents).
- Contractual provisions may require a physical completion meeting and/or the delivery of certain originals as closing deliverables. We take the view that in the vast majority of cases, it should be possible to accommodate any contractual obligations without the need for a physical closing meeting that would otherwise be in breach of the currently applicable "state of emergency" framework. For example, parties can agree to replace physical meetings with virtual meetings (including if needed with videoconference) and originals can be directly dispatched to relevant parties via courier services (including if needed with prior verifications of scans of the originals between legal advisers). Parties need to keep in mind that under Luxembourg law they are bound by a general good faith principle and attempts to delay or avoid closing of executed transactions on this basis could give rise to damage claims and/or specific performance. This would need to be analysed on a case-by-case basis.

- Post Closing Stage: post-completion covenants in share purchase agreements/asset transfer agreements as well as any undertakings in transitional services agreements will as a matter of principle continue to remain in full effect. However, the same *force majeure* and specific contractual clause considerations as set out above apply and parties may seek to obtain the suspension/cancellation of certain obligations that can no longer be materially fulfilled.

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. As noted above, it may be necessary for joint venture companies or their subsidiaries to take urgent action which require approval under the reserved matters.

Luxembourg trade and companies register and Luxembourg register of beneficial owners

On 18 March 2020, the Luxembourg Business Registers published a statement on their website to inform the public that:

- the desks of the Luxembourg trade and companies register (**RCS**) and the Luxembourg register of beneficial owners (**RBE**) are closed to the public until 31 March 2020 but the online services (electronic filing, extracts, declaration to the RBE, etc.) will remain available;

- the RCS and RBE telephone helpdesk will no longer be available although contact can still be made by email at helpdesk@lbr.lu; and

- entities registered with the RCS will have an additional administrative period of 4 months in which to file their annual accounts (and other financial data filings, as applicable) at the standard rate of €19 excluding VAT and other taxes. Thus, for a financial year ending, for example, on 31 December 2019, the filing of annual accounts will be subject, until 30 November 2020, to the standard administrative costs of €19 excluding VAT and other taxes. However, this administrative grace period does not change the fact that the late annual account filing is a technical breach of Luxembourg law (it being understood that in view of the current circumstances, the actual sanction risk is in our view rather academic).

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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.