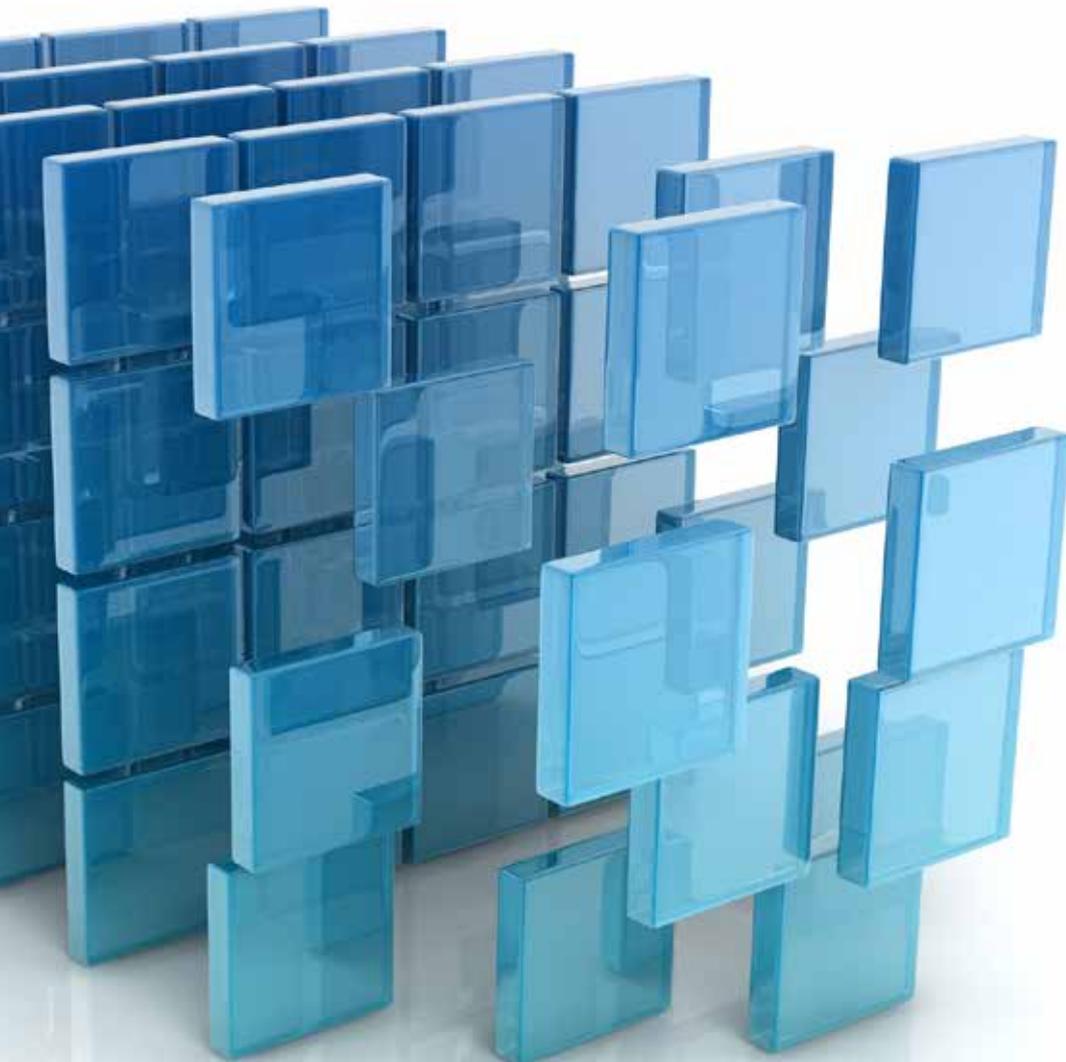


ALLEN & OVERY

Luxembourg Company Law Reform: *The Essential Changes*

August 2016



On 10 August 2016, bill n° 5730 (the **Reform Bill**), which amends and modernises the Luxembourg companies act dated 10 August 1915¹, was signed into law.

The Reform Bill came into effect on the fourth day following its publication in the Luxembourg official gazette, the *Mémorial A* (ie, on 22 August 2016).

A transitional period applies for pre-existing companies. They will have a period of 24 months within which to amend their articles² in order to comply, to the extent required, with the new provisions.

The Reform Bill, which is the result of a ten-year legislative process, reinforces the current legal framework and is expected to further increase Luxembourg's attractiveness as a hub for international investments.

On the one hand, it expressly confirms a number of existing practices, thus reinforcing legal certainty. On the other hand, a series of new mechanisms and instruments are introduced to respond to a more complex economic environment and with a view to increasing the flexibility of Luxembourg company law.

The majority of the amendments concern the two most common company types, the public limited liability company (*société anonyme*) (the **SA**)³ and the private limited liability company (*société à responsabilité limitée*) (the **Sàrl**), but the Reform Bill also introduces new general principles and specific measures affecting other company types.

The purpose of this paper is not to present an exhaustive catalogue of all changes, but rather to focus on the most material ones that we believe will have a real impact on our clients' businesses.

01_Any reference in this paper to an article (whether existing, revised or new) is a reference to an article of the law on commercial companies dated 10 August 1915 as resulting from the Reform Bill.

02_Any amendment to the articles of association of a company solely required in view of the renumbering or the repeal of a legal provision pursuant to the Reform Bill, may be implemented by the board of managers/directors without the need for a general shareholders' meeting.

03_In accordance with article 103, the provisions applicable to the SA apply (subject to certain express derogations) to the partnership limited by shares (*société en commandite par actions* – SCA). The most notable change affecting the SCA on a stand-alone basis is the explicit confirmation (revised article 107) that there is no requirement to appoint a physical person as permanent representative of a legal entity acting as manager (*gérant*) of an SCA.

1_Simplified incorporation formalities

While the Reform Bill does not radically change the incorporation procedure (in particular as regards the role of notaries, which remains), there are a series of technical changes that will need to be considered, as follows:

(a) Reduction of the minimum subscribed share capital

The Reform Bill (revised articles 26 and 182) rounds down the minimum required amount of share capital in the SA from EUR30,986.69 to EUR30,000 and in the Sàrl from EUR12,394.68 to EUR12,000.

(b) Maximum number of shareholders raised from 40 to 100 in the Sàrl

While historically the Sàrl was created as a company to promote the development of small and medium-sized industrial or commercial enterprises, it has quickly evolved into one of the most attractive investment vehicles for all sectors, in particular private equity and asset management (especially in relation with U.S. funds in view of the fact that the Sàrl allows to “check the box” from a U.S. tax perspective).

To further increase the flexibility of this vehicle, revised article 181 increases the maximum number of Sàrl shareholders from 40 to 100.

(c) Recognition of “sweat” contributions (*apports en industrie*) in the Sàrl

Revised article 183(3) recognises “sweat” contributions (ie, contributions without a monetary or in kind contribution other than the work or expertise provided by the relevant investors) in the Sàrl provided that the articles of association expressly set out this possibility and lay down the conditions under which shares may be subscribed against “sweat” contributions. Such contributions are not subject to any report by an independent auditor (*réviseur d'entreprises*).

The shares subscribed against “sweat” contributions are not considered as share capital from an accounting perspective and are not transferable. They may benefit from governance and/or economic rights as set out in the articles of association.

2_An expanded range of equity and debt instruments

(a) Recognition of tracking shares

Tracking shares are widely used in Luxembourg companies, in particular in private equity structures or asset management investment platforms with multiple share classes tracking different investments.

Article 1853 of the Civil Code, as it results from the Reform Bill, now expressly confirms this practice for all company types and provides a legal basis reinforcing the mechanism without restricting its flexibility.

(b) A more flexible non-voting share regime

Under the current law, the issuance of non-voting shares in the SA is subject to restrictive conditions. In particular, non-voting shares must not represent more than 50% of the issued share capital and must give a mandatory entitlement to a preferred dividend.

To further broaden structuring options, revised articles 45 and 46 abolish the 50% limitation and allow a free determination of financial rights attached to those shares. As such, the SA now has the option to issue fully fledged non-voting shares without any material limitations.

This new regime of non-voting shares is not extended to the Sàrl, but the introduction of founder shares (see section 3 below) in the Sàrl provides for similar structuring options.

(c) Possibility to issue shares with a different nominal value and below par value of existing shares

Pursuant to revised article 37 for the SA and revised article 182 for the Sàrl, the Reform Bill now recognises the possibility to issue shares with different nominal values.

With regard to the SA⁴, new article 67(4) provides that, subject to any contrary provisions in the articles of association, each share will benefit from voting rights that are proportionate to their nominal value (ie, shares with nominal value EUR 1 = 1 vote, shares with nominal value EUR 2 = 2 votes, etc.).

This new feature allows the implementation of a so-called “high tier – low tier” voting structure where all shareholders benefit from the same economic rights, but some (eg, founders, key investors) have a proportionately higher share of the voting rights.

Subject to certain formal requirements, the Reform Bill further validates the issuance of shares without nominal value for a subscription price below their accounting par value. This new structuring option provided for by revised article 26-5 in respect of the SA⁵ will be of particular importance for companies that are suffering losses to allow them to offer discounted subscription prices or those that wish to issue shares without consideration (see sub-section (e) below for details).

04_ With regard to the Sàrl, there is no equivalent provision to new article 67(4). However, it should be considered that pursuant to articles 194 and 199, the proportion held by a shareholder in the share capital of a Sàrl (which is determined based on the nominal value) is considered for the determination of the majority requirements at general shareholders' meetings.

05_ There is no explicit provision in this regard for the Sàrl. Based on generally applicable principles, we believe that the same provisions may be applied *mutatis mutandis* to the Sàrl.

(d) Recognition of subscription rights (*droits de souscription*)

Revised article 32-4 confirms the possibility for the SA to issue detachable subscription rights (*bons de souscription autonomes*). Such subscription rights, also commonly referred to as warrants, were already used by a large majority of Luxembourg companies and the Reform Bill merely provides an explicit legal basis for this practice.

(e) Possibility to issue shares without consideration (*actions gratuites*)

New article 32-3(5bis) introduces the possibility for the SA to issue shares without consideration and provides for an extensive list of possible beneficiaries (including employees and management of the issuing company and affiliated companies).

The issuance of shares without consideration must be provided for in the articles of association of the company and the decision is to be taken by the board of directors or the management board. The ability to issue shares without consideration is expected to be a popular means of implementing employee participation/management incentivisation schemes.

(f) General acceptance of bond issuances

In addition to the extended set of equity instruments, new article 11ter now allows all Luxembourg company types to publicly issue bonds, which so far was expressly prohibited for certain company types (in particular the Sàrl).

The general rules governing bond issuances and bondholder meetings in the SA (revised articles 84 to 94-8) will be applicable to any bonds issued by a Luxembourg company, unless a specific derogation is provided for in the relevant issuance documentation. These provisions may further be voluntarily applied to the issuance of any other debt instruments (such as PECs or CPECs).

(g) Increased attractiveness of convertible debt instruments

Under the current legal framework, the issuance of a convertible debt instrument in an SA was assimilated to a contribution in kind requiring a valuation report by an independent auditor (in principle at the time of such issuance).

Revised article 32-4 now qualifies such a conversion as a contribution in cash by compensation of a receivable held by the holder of the debt instrument against the company. As such, the issuance of convertible debt instruments will no longer require a valuation report by an independent auditor, which is expected to further facilitate the implementation of convertible debt financing in both a transactional and an intra-group context.



3_Modernisation of the Sàrl

The Reform Bill provides for a series of measures to modernise the Sàrl and further increase its attractiveness. The following changes are particularly noteworthy:

- The “authorised share capital” mechanism is expressly recognised for the Sàrl (revised article 199).
- The possibility to issue founder shares (*parts bénéficiaires*) and redeemable shares is extended to the Sàrl (revised article 182).
- The regime regarding the distribution of interim dividends as applicable in the SA is extended to the Sàrl (new article 198bis)⁶.
- Certain corporate governance features of the SA (eg, the possibility to constitute a board of managers and delegate the daily business to a third party) are expressly recognised in the Sàrl (revised articles 191bis(1) and 191bis(4)).
- In the event that a transfer of shares to a non-shareholder has not been approved by the general shareholders’ meeting of the Sàrl in accordance with the mandatory approval clause under revised article 189 (requiring a 75% majority of the share capital), the Reform Bill now provides a framework for an orderly exit (either through a share repurchase or a sale to another shareholder/bona fide third party), which must not take longer than six months.
- The same conflict of interest rules with respect to the board of directors of the SA are applied to the Sàrl (revised article 191bis(6)).
- There are more flexible voting majorities at extraordinary general shareholders’ meetings (which are required for any amendment to the articles of association and any change of nationality, for example) with a default majority of 75% of the share capital and no longer any requirement as regards a majority in number of shareholders (revised article 199).
- Where there is more than one share class and a proposed resolution at a general shareholders’ meeting would change the respective rights of each such share class, the resolution must, in order to be valid, fulfil the statutory conditions as to quorum and majority with respect to each such class (new article 196bis extending article 68 from the SA to the Sàrl).
- Introduction of the option to publicly issue bonds (new article 11ter).

⁶ The requirement for a report by, as the case may be, an internal or independent auditor to confirm the availability of distributable profits based on an interim balance sheet applies however only if such an auditor has indeed been appointed.

4_A more sophisticated and secure framework for shareholder agreements

(a) Structuring of voting rights

The Reform Bill introduces a series of rules relating to the structuring of voting rights that apply both in the SA and the Sàrl:

- **Voting arrangements:** While voting arrangements are very common in practice, Luxembourg law does not currently provide a specific legal framework with regard to their validity.

The Reform Bill introduces a new article 67bis for the SA and a new article 195bis for the Sàrl stating that voting arrangements among shareholders are valid to the extent that they are (i) concluded in the corporate interest of the company and (ii) do not jeopardise the principle of an independent vote (ie, the shareholder may not act upon the instructions of the management of the company or a subsidiary).

While not expressly mentioned by the Reform Bill, it is also generally recognised that voting arrangements must be limited in time with the duration depending on the purpose of the relevant voting arrangement.

- **Suspension/waiver of voting rights:** New article 67(8) for the SA and revised article 195 for the Sàrl recognise the possibility for the board of directors/managers to suspend the voting rights of shareholders in the event of a breach of their obligations under the articles of association. This provides a legal basis for implementing effective default mechanisms in shareholders' agreements and potentially avoiding deadlock scenarios.
- In addition, articles 67(8) and 195 allow shareholders to waive the exercise of their voting rights on a permanent or temporary basis. As indicated in the preparatory works of the Reform Bill and subject to prior confirmation from the relevant regulators, this option could potentially be used to accommodate certain regulatory obligations that an investor may be subject to.
- **Usufruct:** Article 1852bis of the Civil Code as modified by the Reform Bill introduces for all company types the general principle that voting rights may be freely allocated where share ownership is divided between usufruct (*usufruit*) and bare title (*nue-propriété*).

(b) Lock-Up Clauses (*clause d'inaliénabilité*) and Approval Clauses (*clause d'agrément*) in the SA

The legality of restrictions on the transferability of shares, founder shares, subscriptions rights, or any other securities giving access to the company's equity (eg, convertible bonds for instance), has traditionally given cause for debate in the SA in view of the principle of free transferability of shares⁷.

Revised article 37 now provides statutory guidance on the validity of such transfer provisions:

- **Lock-up clauses:** the Reform Bill recognises the validity of lock-up clauses provided that the lock-up restriction is limited in time. This new statutory requirement, which has already been applied in practice, leaves significant room for interpretation and what is a "reasonable" duration will need to be analysed on a case-by-case basis in view of the specific circumstances at hand.
- **Approval clauses:** new article 37(2) recognises the validity of transfer approval clauses and provides that the non-transferability period starting from the date of a transfer approval request or the invitation to exercise pre-emptive rights, respectively, may not exceed 12 months.

Beyond that maximum time period the parties will need to find an arrangement to allow the departing shareholder to leave the company. In this regard, the Reform Bill recognises the competence of the president of the district court sitting in commercial matters (*président du tribunal d'arrondissement siégeant en matière commerciale*) to determine the fair transfer price in the absence of any relevant provisions in the articles of association.

The Reform Bill further provides that any transfer performed in violation of a transfer restriction included in the articles of association shall be null and void.

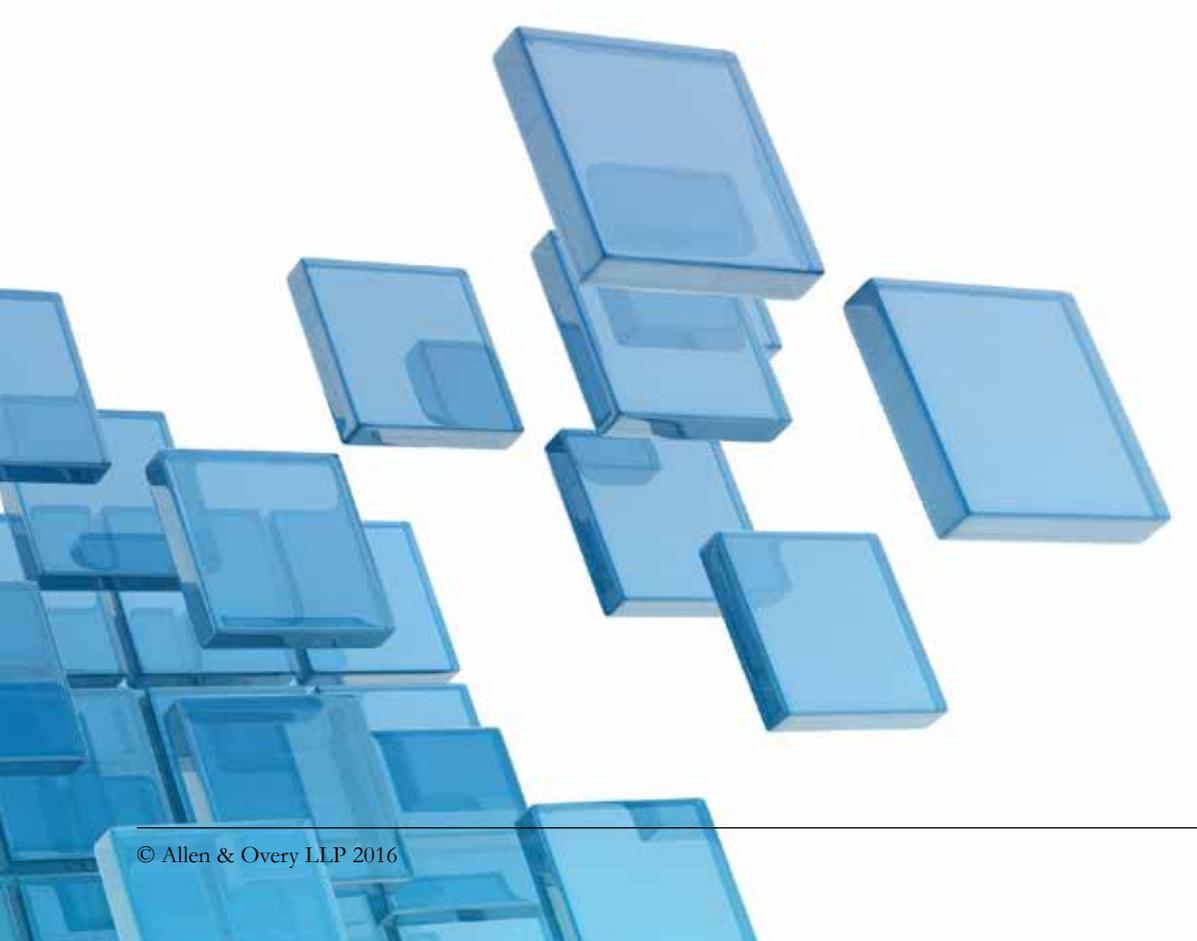
⁰⁷ In the Sàrl, the approval clause is automatically provided for by law and mandatorily applies to any transfer of shares. See section 3 above.

(c) Validity of Put Options

According to the historic principle prohibiting “leonine clauses” (*clauses léonines*) under article 1855 of the Luxembourg Civil Code, a clause granting a “lion’s share” to one or several shareholders or, conversely, protecting a shareholder from any participation in the losses of the Company would be considered to be void.

A literal interpretation of this principle could lead to a possible challenge of the validity of certain financial arrangements among shareholders, including in particular

put options guaranteeing a loss-free exit. The Reform Bill, through amending article 1855 of the Civil Code, eliminates this legal uncertainty by expressly recognising for all company types the validity of arrangements that do not have as their sole purpose the control of participations in profits and losses, but are part of a broader arrangement among the relevant shareholders as regards share transfers.



5_Modernisation of the corporate governance rules

(a) Recognition of general directors (*directeurs généraux*) and management committees (*comités de direction*)

New article 60-1 recognises the possibility for the board of directors of the SA to delegate management powers to a general director (*directeur général*) or to a management committee (*comité de direction*).

Such delegations are already common, but in the absence of a clear legal framework, the applicable rules remain uncertain.

The Reform Bill now provides for a flexible set of rules that will allow most existing arrangements to be maintained. The new rules confirm in particular that the board of directors must always retain ultimate control over the Company's management and that the individuals benefiting from a delegation are subject to the same liability risk as directors.

(b) Explicit recognition of circular resolutions

Subject to the recognition of such procedure in the relevant company's articles of association, the board of directors in the SA (based on revised article 64(1)) and the board of managers in the Sàrl (based on new article 191bis(2)), respectively, may take decisions by circular resolutions without a physical meeting.

The Reform Bill requires a unanimous written consent of all board members on the final text of the proposed resolutions and an abstention by any board member is to be considered as a negative vote blocking the passing of such circular resolutions.

The circular resolutions procedure is already widely used in practice and will now be expressly confirmed. Despite this legal recognition, the potentially adverse impact of circular resolutions on the corporate governance and tax substance of a Luxembourg company needs to be considered from time to time in light of the applicable circumstances.

(c) New conflict of interest provisions in the SA

The Reform Bill introduces several amendments to article 57 (which is now also applicable to the Sàrl, see section 3 above):

- The key change is the extension of the conflict of interest regime beyond the members of the board of managers, the board of directors and the supervisory board to persons in charge of the day-to-day management, general directors and members of management committees as well as liquidators.
- The nature of the conflicting interest has been clarified. First, only a “patrimonial” interest (ie, linked to a monetary or other financial interest) is covered, which makes it possible to exclude purely “moral” interests from the scope of the regime. Second, both direct and indirect interests are captured.
- In order to avoid paralysis of the board of directors in a situation where it is impossible to obtain a sufficient quorum in view of conflict of interest rules, the Reform Bill now allows the board of directors to refer the relevant decision to the general shareholders' meeting.

6_Minority shareholder rights

(a) New minority shareholder action

Under current Luxembourg law, the approval of a simple majority of shareholders is required in order to commence proceedings against negligent directors on behalf of the company for any harm caused to the company as a result of mismanagement.

Alternatively, individual shareholders may introduce proceedings on their own behalf if they provide evidence of personal damage. Luxembourg case law has historically applied the personal damage requirement in a restrictive way and, as such, minority shareholders have not had an effective means to introduce liability proceedings on their own.

New article 63bis introduces for the SA the *action ut singuli*, with the possibility for individual shareholders to bring a claim against negligent directors on behalf of the company.

The *action ut singuli* may be launched by shareholders and/or holders of beneficiary shares representing at least 10% of all the votes entitled to be expressed at the annual general shareholders' meeting. It can be directed against members of the board of directors in one-tier structures or members of the management board and the supervisory board in two-tier structures.

The recognition of this new minority shareholder claim is an additional factor to be considered by the board of directors and other management members when evaluating their liability risk. It should be noted that this claim is only available for shareholders in the SA or SCA, but not in other company types.

(b) Adjournment (*prorogation*) of general shareholders' meetings in the SA

Revised article 67(5) decreases the threshold to request the adjournment of a general shareholders' meeting in the SA from a share capital participation of 20% to 10%.

The Reform Bill does not amend the procedural framework according to which the relevant minority shareholder(s) must address the adjournment request to the board of directors during the relevant general shareholders' meeting. Such an adjournment may only be requested once with regard to the same meeting and for a maximum period of four weeks.

It should be noted that no similar right exists for minority shareholders in the Sàrl.

(c) Right to request an independent investigation

Revised article 154 recognises the right for one or more shareholders representing at least 10% of the share capital or holding at least 10% of the voting rights attached to all instruments issued by the relevant company, to address written questions to the management body with respect to the company's operations.

In the absence of a response by the management body within one month, the relevant shareholders may request the president of the district court sitting in commercial matters and in the form of summary proceedings (*président du tribunal d'arrondissement siégeant en matière commerciale et comme en matière de référé*) to appoint one or several independent experts to establish a report on the operations that were the subject of the written questions.

Under the current legal framework, the request for an independent investigation needs to be introduced by shareholders representing at least 20% of the share capital and is conditioned by the existence of "exceptional circumstances". The new rules will facilitate access to an independent investigation and, going forward, this minority shareholder action is expected to be used more broadly than in the past.

7_Flexibility and legal certainty regarding general shareholders' meetings

(a) Simplified formalities for shareholders' meetings in the SA

– **Date of the AGM:** The Reform Bill abolishes the requirement that annual general shareholders' meetings in the SA be held at a time and at a venue specified in the articles of association. Revised article 70 now only requires that these meetings be held in Luxembourg.

– **Convening notices:** Pursuant to the new revised article 70, convening notices must be published only once at least fifteen days before a general shareholders' meeting takes place whereas under current applicable rules, two publications are required.

Moreover, where all the shares are in registered form, registered shareholders may be convened by any means of communication, such as express mail or email, and not only by registered mail as is currently the case. In this situation, the minimum convening notice period is reduced from fifteen to eight days.

– **Change of nationality:** Pursuant to revised article 67-1(1), a unanimous vote is no longer required for changing the nationality of the company. This decision can now be taken by a majority of 66.7% in the SA⁸.

– **No bondholder consent:** Revised article 67-1 abolishes the current default requirement for bondholder consent in the event of a change of nationality, an increase of shareholder commitments or an amendment to the corporate object clause or the form of the company. It should however be noted that such bondholder consents may be required pursuant to the relevant bond issuance documentation.

(b) New regime regarding the criteria for the annulment of general shareholders' meetings

New article 12septies introduces a set of rules which sets out the criteria for the annulment of general meetings and the procedure to be followed in order to claim the annulment of a general shareholders' meeting (a **Meeting**).

The new rules apply to all types of companies and cover five alternative criteria:

- Formal irregularities that have influenced the outcome of a Meeting (eg, a majority of shareholders were not properly convened).
- Flawed proceedings during the Meeting (eg, deliberation on an item that was not included on the agenda) if there is a fraudulent intention.
- A resolution passed during the Meeting is the result of an excess or misuse of power (*excès ou abus de pouvoir*).
- Suspended voting rights have been exercised at a Meeting and had a decisive impact on the outcome.
- Any other cause expressly provided for in the companies law as amended pursuant to the Reform Bill.

Any action for the annulment of a Meeting must be introduced within six months of the Meeting (revised article 157)

08_ Similarly, in the Sàrl, the change of nationality can now be approved by a majority of 75% (revised article 199, see section 3 above).

8_Introduction of a new regime for company conversions

Under the current legal framework, there is no comprehensive overall regime for conversions. The Reform Bill introduces a new section XVquater to cover all aspects of conversions and provide a more robust framework.

The rules vary depending on the company types involved in the conversion process. The most noteworthy provisions concern the conversion of the Sàrl into the SA.

Under the current legal framework, such a conversion requires the establishment of a valuation report by an independent auditor. This requirement is now replaced with a new set of rules, as follows:

- Prior to the contemplated conversion and to the extent the last financial year has been closed for more than six months, the management of the Sàrl needs to prepare an accounting statement summarising all assets and liabilities of the company. This requirement may be waived by a unanimous shareholder vote, provided however that if (i) a contribution in kind was made to the Sàrl in the two years preceding the contemplated conversion and (ii) such contribution in kind was not appraised by an independent auditor, this waiver is not available and the preparation of an accounting statement is mandatory (new article 308bis-16).
- An independent auditor needs to prepare a report in relation to such accounting statement (to the extent its requirement has not been waived as set out above). The independent auditor shall in particular indicate whether there has been an excessive valuation of the Sàrl's assets and note the difference (if any) between the net assets and the Sàrl's equity (new article 308bis-17).
- A management report justifying the conversion needs to be prepared by the Sàrl's management. In all situations, this requirement may be waived by a unanimous vote of the shareholders of the company to be converted (new article 308bis-18).

9 Acknowledgment of the validity of a “simplified liquidation” procedure

The Reform Bill clarifies the situation of companies with a single member.

The Reform Bill first confirms with regard to the SA, the Sàrl and the SAS that they may operate as single-member companies (*sociétés unipersonnelles*). The Reform Bill (through amending article 1865bis of the Civil Code) further recognises for all company types the option for the single member to decide by a sole shareholder resolution⁹ the dissolution without liquidation of the single-member company.

In the event of such a dissolution, all assets and liabilities of the company will be transferred by effect of law (*effet universel de transmission du patrimoine*) to the single member provided that creditors of the relevant company may within thirty days of the publication of the dissolution resolution request the president of the district court to obtain additional security from the sole member. This provision thus validates the commonly accepted notarial practice of “simplified liquidations” and is expected to further facilitate corporate restructurings under Luxembourg law¹⁰.

With regard to all other company types, the Reform Bill recognises the right of any interested party to request the dissolution of the company where the “single member” situation is not regularised within a period of one year. The single member of the company is also entitled to dissolve the company at any time in accordance with the same procedure as that applicable to the SA, the Sàrl and the SAS.

09_ This decision shall be documented in the form of a notarial deed if such a notarial deed is required for the incorporation of the relevant company type.

10_ In the event the sole member of the dissolved company is a foreign entity, the validity and the recognition of this procedure in the relevant foreign jurisdiction must be confirmed on a case-by-case basis. It should further be considered that revised article 141(2) requires the production of a certificate by the social security, the direct tax and the indirect tax administrations confirming compliance with all payment obligations prior to the dissolution decision.

10_Introduction of the SAS (*société par actions simplifiée*)

The Reform Bill introduces a new company, the simplified public company (*société par actions simplifiée*) (**SAS**) based on the French model.

The SAS may be formed by one or more shareholders, who are only liable up to the amount of their respective contribution. The minimum share capital of the SAS is set at EUR30,000 (or its equivalent in another currency). It is not allowed to proceed with an initial public offering and have its equity listed on a stock exchange.

The shareholders are free to determine the organisational rules of the SAS in its articles of association. Their only obligation is to name a president (either a natural person or an entity) to represent the SAS vis-à-vis third parties and in legal proceedings, either as plaintiff or defendant. The president has the widest powers to act, in any circumstances, in the name of the SAS and within the limits laid down by its corporate object.

Certain decisions must be collectively taken by the partners (eg, decisions relating to the share capital of the SAS, mergers, divisions or dissolution, the conversion of the SAS into a company having another legal form, the approval of annual accounts and the distribution of profits), but the quorum and majority for such decisions may be freely determined in the articles of association of the SAS.

The main advantages of the SAS are:

- i. the freedom to organise the internal organisation either by replicating the system of one of the existing company types or by creating ad hoc corporate governance; and
- ii. the freedom to determine the rights and obligations attaching to shares, including in particular the following:
 - different economic rights between the shareholders;
 - the non-transferability of the shares (in accordance with the same principles than for the SA);
 - a prior approval to be given by the shareholders for the transfer of shares; and
 - a pre-emption right granted to the shareholders in case of a transfer of shares.

In view of its features and in particular its flexible corporate governance regime, the SAS could be especially useful in the context of joint venture companies and in situations where a foreign company redomiciles to Luxembourg so as to allow such company to carry on with those of its foreign features, which under normal circumstances would not apply to Luxembourg companies other than an SAS.

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