Luxembourg newsflash

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Shareholder rights: new developments

Increased shareholder rights equal additional obligations for asset managers and intermediaries

On 10 July 2019, the Luxembourg parliament adopted the final text of the bill of law (the "**New Law**") implementing into Luxembourg domestic law the provisions of Directive (EU) 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (the "**SRD II**") and amending the Luxembourg law of 24 May 2011 on the exercise of certain rights of shareholders in listed companies (the "**Shareholders Rights Law**").

Whereas the Shareholders Rights Law originally provided for requirements for issuers relating to the exercise by shareholders of their rights in connection with general meetings, the New Law brings a major conceptual change by imposing obligations in particular on asset owners and asset managers with respect to their investments in listed Luxembourg companies. The purpose of these new measures aims at increasing the quality of shareholder engagement and transparency. As a result, the enhancement of shareholders rights goes hand in hand with major regulatory changes for asset owners and asset managers. The New Law further affects intermediaries maintaining securities accounts on behalf of shareholders by involving the financial intermediaries in the transmission of information along the chain, including cross-border information, between the issuer and the shareholder to facilitate the exercise of shareholder rights.

As such, in addition to issuers, the New Law is likely to affect in particular the following professionals:

- asset managers;
- credit institutions;
- investment firms;
- life insurance companies;
- pension funds;
- central securities depositories;
- intermediaries; and
- proxy advisors.

While undertakings for collective investment in transferable securities (UCITS) within the meaning of Article 2(2) of the law of 17 December 2010 on undertakings for collective investment and collective investment undertakings (AIFs) within the meaning of Article 1(39) of the law of 12 July 2013 on alternative investment fund managers are exempted from the application of the New Law, they may nonetheless become subject to the transparency obligations deriving from the New Law.

As far as issuers are concerned, the New Law will mainly concern communication with shareholders and matters of corporate governance such as the remuneration paid to members of the administrative,

management or supervisory bodies of an issuer, including senior executives (the "**Directors**"), and related party transactions.

1. Obligations of issuers

Issuers having their registered office in Luxembourg whose shares, beneficiary units with voting rights attached or non-voting shares, are admitted to trading on a regulated market (within the meaning of Article 4(1) of MiFID II[1]) within the territory of the European Economic Area (the "**Shares**" and the "**Relevant Issuers**"), are henceforth subject in particular to the following obligations:

1.1. Obligations aimed at facilitating interaction between issuers and shareholders

Transmission of information between Relevant Issuers and shareholders

Relevant Issuers are required to provide certain information to their shareholders ahead of each general meeting of shareholders. According to the New Law such information must be provided to intermediaries in a standardised and timely manner in accordance with the provisions of the Commission Implementing Regulation (EU) 2018/1212.

Facilitating the exercise of shareholder rights

Upon request of a shareholder, the Relevant Issuer must confirm that the shareholder's votes have been validly recorded and counted by the Relevant Issuer.

1.2. Obligations in respect of remuneration and related party transactions

Remuneration policy

Issuers shall establish a remuneration policy as regards Directors and shareholders have the right to vote on such remuneration policy at the general meeting. The Luxembourg legislator made use of the option provided for in the SRD II as to the nature of such vote and opted for an advisory vote. The articles of association of the Relevant Issuer may however make this vote binding.

Remuneration report

For each financial year, Relevant Issuers must draw up a remuneration report. The content of such report must provide a comprehensive overview of the remuneration paid to each Director during the most recent financial year including, *inter alia*, the total remuneration split out by component and, to the extent relevant, derogation from the remuneration policy.

The annual general meeting has the right to hold an advisory vote on the remuneration report. Relevant Issuers must explain in the following remuneration report how such vote was taken into account. Special rules are available for small and medium sized companies.

Related party transactions

Important related party transactions, other than transactions concluded on normal market terms or certain specifically defined transactions where appropriate safeguards in relation to the voting process and the protection of third party interests are in place, must be authorised by the Relevant Issuer's competent management body. Relevant Issuers must publicly announce important related party transactions no later than at the time of the conclusion of the transaction.

The Luxembourg legislator did not make use of the option provided for by the SRD II to require that a fairness report accompanies the announcement of important related party transactions.

[1] Directive 2014/65/EU on markets in financial instruments

2. Obligations of asset managers[2]

Provided that they invest in Shares of Relevant Issuers on behalf of their investors the following obligations will apply to asset managers:

Engagement policy

Asset managers must develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy and a report shall be drawn up and published on an annual basis describing the implementation of such engagement policy. Asset managers are not required to comply with the obligations set out in the previous paragraph provided that they publicly disclose a clear and reasoned explanation as to why they have chosen not to comply with one or more of the requirements.

Transparency of asset managers toward institutional investors

Asset managers must disclose, on an annual basis, to the institutional investors[3] with which they have entered into an arrangement how their investment strategy and implementation thereof complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund. The disclosure must include certain mandatory items required by the New Law.

Where the information that is required to be disclosed according to the previous paragraph is already publicly available, it is not necessary to provide it to the institutional investor directly.

3. Obligations of institutional investors

Provided that they invest directly or through an asset manager in Shares of a Relevant Issuer the following obligations will apply to institutional investors:

Engagement policy

Institutional investors are subject to transparency obligations with respect to their engagement policy similar to those applicable to asset managers as outlined in section 2. *Obligations of asset managers – Engagement policy* above.

Disclosure requirements for institutional investors

Institutional investors must publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets.

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[2] '**asset manager**' means an investment firm as defined in point 16 of Article 1 of the law of 30 May 2018 on markets in financial instruments that provides portfolio management services to investors, an AIFM (alternative investment fund manager) as defined in point 46 of Article 1 of the law of 12 July 2013 on alternative investment fund managers that does not fulfil the conditions for an exemption in accordance with Article 3 of that law or a management company as defined in point 31 of paragraph 1 of Article 1 of the law of 5 April 1993 on the financial sector, as amended, or an investment company that is authorised in accordance with the law of 17 December 2010 relating to undertakings for collective investment, as amended, provided that it has not designated a management company authorised under that law for its management;

[3] '**institutional investor**' means:
(i) an undertaking carrying out activities of life assurance within the meaning of Article 35 of the law of 7 December 2015 on the insurance sector (the "Insurance Sector Law") and of reinsurance as defined in point 28 letters a) and b) of Article 43 of Insurance provided that those activities cover life-insurance obligations, and which is not excluded pursuant to Directive 2009/138/EC;
(ii) an institution for occupational retirement provision falling within the scope of Directive (EU) 2016/2341 in accordance with Article 2 thereof, unless a Member State has chosen not to apply that Directive in whole or in parts to that institution in accordance with Article 5 of that Directive;

Arrangements between asset managers and institutional investors

Where an asset manager invests on behalf of an institutional investor, whether on a discretionary client-by-client basis or through a collective investment undertaking, the institutional investor must publicly disclose certain information regarding its arrangement with the relevant asset manager.

Where the arrangement does not contain one or more of the compulsory information items required by the New Law, the relevant institutional investor must give a clear and reasoned explanation as to why it deviates from the statutory requirements.

4. Obligations of Intermediaries[4]

Intermediaries providing services with respect to Shares of Relevant Issuers, including third-country intermediaries, will be subject to the following obligations:

Identification of shareholders

Relevant Issuers henceforth have the right to identify their shareholders. Accordingly, upon request received from a Relevant Issuer, intermediaries must provide such issuer, without delay, with the information regarding shareholder's identity or where there are several intermediaries in the chain, it must ensure that the request is transmitted between intermediaries without delay.

Transmission of information

Intermediaries are required to transmit, without delay, information that Relevant Issuers are required to provide to the shareholders, to enable the shareholder to exercise rights deriving from its Shares.

Facilitation of the exercise of shareholder rights

Intermediaries must facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings, which must comprise at least one of the following:

a. the intermediary makes the necessary arrangements for the shareholder or a third party nominated by the shareholder to be able to exercise themselves the rights;
b. the intermediary exercises the rights flowing from the shares upon the explicit authorisation and instruction of the shareholder and for the shareholder's benefit.

Non-discrimination, proportionality and transparency of costs

Intermediaries must disclose publicly any applicable charges for the services provided in connection with the transmission of information and facilitation of the exercise of shareholder rights.

Any charges levied on shareholders, companies and other intermediaries must be non-discriminatory and proportionate in relation to the actual costs incurred for delivering the services. Any differences between the charges levied between domestic and cross-border exercise of rights is only permitted if it is duly justified and if they reflect the variation in actual costs incurred for delivering the services.

[4] '**intermediary**' means (i) a person, such as an investment firm as defined in point 16 of Article 1 of the law of 30 May 2018 on markets in financial instruments, or (ii) a credit institution as defined in point 12 of Article 1 of the law of 5 April 1993 on the financial sector, as amended, in so far that either (i) or (ii) provide services to shareholders or other intermediaries with respect to Shares of a Relevant Issuer, and a central securities depository as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council, which provides services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons

5. Obligations of proxy advisors[5]

Proxy advisors must publicly disclose the code of conduct that they apply and report on the application of such code of conduct.

They are also required to publicly disclose, on an annual basis, key information about their activities.

6. Entry into force

The regime set out by the New Law will be complemented and refined by the provisions of Commission Implementing Regulation (EU) 2018/1212 which will become applicable as from 3 September 2020. The purpose of this regulation is in particular to improve the communication by listed companies to their shareholders. In this respect, it will set standards for the use of common formats of data and message structures in transmissions.

[5] '**proxy advisor**' means a legal person that analyses, on a professional and commercial basis, the corporate disclosure and, where relevant, other information of listed companies with a view to informing investors' voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights.

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