

Luxembourg implementation of the Shareholders' Rights Directive II



The Luxembourg Parliament has adopted a draft law introducing new measures related to shareholders' rights in listed companies. The main objectives are to encourage the long-term engagement of shareholders in listed companies, reinforce shareholders' rights and increase the transparency of institutional investors, asset managers and proxy advisors.

The Luxembourg Parliament has adopted on 10 July 2019 the draft law n° 7402 (the **New Law**) implementing the directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 (the **SRD II**) amending directive 2007/36/EC (the **SRD I**) as regards the encouragement of long-term shareholder engagement.

The New Law introduces SRD II measures in the law of 24 May 2011 on shareholders' rights in listed companies, as amended (which implemented the SRD I, the **Shareholders' Rights Law**). The main objectives are to encourage the long-term engagement of shareholders in listed companies, reinforce shareholders' rights and increase the transparency of institutional investors, asset managers and proxy advisors.

Scope of the New Law

The New Law sets out requirements regarding the exercise of shareholders' rights attached to voting shares, beneficiary shares with voting rights (*parts bénéficiaires avec droit de vote*) and non-voting shares, regarding companies with registered office in Luxembourg whose shares are admitted to trading on an EU regulated market (within the meaning of directive 2014/65/EU of 15 May 2014 (MiFiD II)) or third-country regulated market (in the event of an express opt-in to these rules in the company's articles of association).

As opposed to the Shareholders' Rights Law which only imposed obligations at the level of the issuer and its shareholders, the New Law has largely extended its scope by applying to the following market players in order to ensure greater effectiveness and transparency:

- intermediaries (i.e. investment firms; credit institutions; central securities depositories), insofar as they provide services to shareholders or other intermediaries with respect to shares of companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State (including intermediaries which have neither their registered office nor their central administration in the EU when they provide the above mentioned services);
- institutional investors (i.e. undertakings carrying out life assurance and reinsurance activities; occupational retirement institutions), to the extent that they invest directly or

through an asset manager in shares traded on a regulated market;

- asset managers (i.e. investment firm; AIFM; management company), to the extent that they invest in shares traded on a regulated market on behalf of investors; and
- proxy advisors to the extent that they provide services to shareholders with respect to shares in companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State.

The New Law does not apply to undertakings for collective investments in transferable securities (UCITs) within the meaning of the amended law of 17 December 2010 relating to undertakings for collective investment and to collective investments undertakings (AIFs) within the meaning of the amended law of 12 July 2013 on alternative investment fund managers, except for new transparency obligations detailed below.

Key features of the New Law

I. Right for issuers to identify their shareholders

Shares in listed companies are often held through complex chains of intermediaries making it difficult for companies to identify their shareholders, notably in cross-border situations.

The New Law creates the right for listed companies to identify their shareholders. Indeed, upon the company's request, any intermediary (in the EU or not) must pass on shareholder information to the company, without delay.

Although the New Law does not make use of the SRD II option to set a threshold of a minimum holding of 0.5% of shares or voting rights before a company can request shareholder identification, this threshold can be provided in the articles of association of the company.

II. Obligation for issuers and intermediaries to facilitate the exercise of shareholders' rights

When an issuer does not communicate directly with its shareholders, it must provide intermediaries with information necessary for its shareholders to exercise their rights. Intermediaries must then pass on, without delay, this information down to the shareholders and then back to the company. All such information must be communicated in a standardised form in accordance with the Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018.

Intermediaries must also facilitate the exercise of shareholders' rights, including the right to participate and vote in general meetings, by making the necessary arrangements for the shareholders or their representatives to exercise their rights themselves or through the intermediary. The New Law details specific measures to protect shareholders who vote electronically.

Intermediaries will also have to publicly disclose the pricing of their services regarding their above mentioned obligations.

III. Shareholders "say on pay"

Shareholders must have an effective say on pay in order to align the interests of the company with those of its administrative, management or supervisory bodies . Under the new rules, shareholders will be able to express their views twice.

First, they will vote *ex ante* on a remuneration policy laying down the framework within which remuneration can be awarded to directors. The policy must contribute to the company's business strategy and long-term interests and sustainability and must explain how it does so.

As envisaged by the SRD II, the New Law has opted for an advisory vote, unless the articles of association provide for a binding vote. The remuneration policy must be submitted to the shareholders' vote at each material change and at least every four years.

Shareholders must also vote *ex post* (annually) on the remuneration report, which provides a comprehensive overview of the remuneration awarded to each director during the most recent financial year. The vote is advisory. Small and medium-sized enterprises (SMEs), as defined in the amended law of 19 December 2002 on the register of commerce and companies and the accounting and annual accounts of undertakings, are entitled to replace this vote by a discussion at the general meeting.

Both the remuneration policy and the remuneration report must be publicly disclosed by the company . The remuneration policy (together with the date and results of the shareholders' vote) must remain publicly available on the company's website at least as long as it is applicable. The remuneration report must remain publicly available on the company's website for at least a ten year period.

IV. Transparency for related party transactions

Transactions with related parties (as defined in Regulation (EU) 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards) can adversely affect the company and its shareholders or place its directors in a conflict position.

For this reason, "material transactions" between a listed company and a related party must be publicly announced at the latest at the time of their conclusion and approved by the company's management body. The New Law defines "material transactions" as any transactions entered into by the company and a related party whose publication and disclosure may have a material impact on shareholders' economic decisions and which could create a risk for the company and its non-related party shareholders, including minority shareholders. The nature of the transaction and the position of the related party must be taken into account.

The public announcement regarding material transactions must contain all information necessary to assess whether the transaction is fair and reasonable from the perspective of the company and shareholders who are not related parties, including minority shareholders.

The New Law does not make use of the SRD II's option to draft a report assessing whether the transaction is fair and reasonable for the company and non-related shareholders, as this would lengthen the procedure and increase costs.

The New Law provides from various exemptions from the above regime, including for transactions entered in the ordinary course of business and concluded on normal market terms.

V. Transparency obligations for institutional investors, asset managers and proxy advisors

Institutional investors and asset managers must develop and disclose an engagement policy describing how they integrate shareholders' engagement in their investment strategy. They must also publicly disclose, each year, how their engagement policy has been implemented, including an explanation of the most significant votes at general meetings. This information must be available on the institutional investor's or asset manager's website.

The new rules also require institutional investors to 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.

Furthermore, where an asset manager invests on behalf of an institutional investor, the latter must publicly disclose certain information regarding its arrangement with the asset manager, such as for example, how the arrangement incentivises the asset manager to (i) align its investment strategy and decisions with the profile and duration of the liabilities of the institutional investor, in particular long-term liabilities and (ii) to make investment decisions based on assessments about medium to long-term financial and non-financial performance of the investee company and to engage with investee companies in order to improve their performance in the medium to long-term.

Asset managers must also disclose, on an annual basis, to the institutional investors with which they have entered into such arrangements, how their investment strategy and implementation comply with those arrangements and contribute to the medium and long-term performance of the assets of the institutional investor or of the fund.

Finally, in order to ensure reliable recommendations, proxy advisors must annually disclose certain key information regarding the preparation of their recommendations. Proxy advisors must also publicly disclose their code of conduct and report on the application of the said code.

VI. Sanctions

Directors are personally and jointly liable for any damage resulting from the breach of their obligations under the New Law.

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