

ATOZ ALERT

COVID-19: The possibility to hold general meetings and other meetings of corporate bodies of entities remotely extended until 31 December 2020

23 September 2020

On 22 September 2020, the draft law n°7673 providing measures concerning the holding of meetings of companies and other legal entities was voted by the Luxembourg Parliament (the “**Law n°7673**”). Due to the current evolution of the COVID-19 pandemic, this law extends, until year-end, the possibility to hold general meetings and other meetings of corporate bodies remotely. This possibility was originally granted by the Grand-Ducal Regulation of 20 March 2020 and prolonged for a first time by a law dated 20 June 2020.

Corporate rules

As the effect of the law dated 20 June 2020 will end on 30 September 2020, the Law n°7673 allows the general meetings and other meetings of corporate bodies of entities to be held without requiring the physical presence of members until the 31 December 2020, notwithstanding any provision to the contrary in their bylaws.

As a result, companies can, despite any contrary provision in their articles of association, whatever the expected number of participants at the general meeting, hold any general meeting without a physical meeting, and can require their shareholders and other participants to participate in the meeting and to exercise their rights through one or more of the following forms:

- remotely, by a vote in writing or in electronic form, provided that the full text of the resolutions or decisions to be taken has been published or communicated to the participants; or
- by video conference or other means of telecommunication allowing identification of the participants; or
- through a proxy appointed by the company.

Notwithstanding any provision to the contrary in their bylaws, the same rule applies to meetings of management bodies such as boards of directors, boards of managers and supervisory boards. Such meetings may be held, and resolutions may be passed by way of:

- written circular resolutions; or
- video conference or any other means of telecommunications allowing the identification of participants.

This system will thus allow the bodies of any company or legal person to be able to hold their meetings without requiring the physical presence of their members while guaranteeing their effective participation and the exercise of their rights. Participants through such means will be considered present for the purposes of determining the quorum and majorities.

The Law n°7673 will enter into force on 1 October 2020 and will produce its effects up to and including 31 December 2020.

Tax impact

The Law n°7673 does not deal with the fiscal consequence of holding meetings remotely. Unfortunately, this is not a purely Luxembourg-specific question. From a tax point of view, this may indeed shift the place of effective management of a company outside Luxembourg. Thus, a Luxembourg company may become taxable in the jurisdiction in which the place of effective management is located (in accordance with an applicable tax treaty).

On 3 April 2020, the OECD Secretariat released an analysis of potential tax issues linked to telework, individuals that are stranded in a country that is not their country of residence and travel restrictions. The main topics considered in the OECD paper include the potential impact on the tax residency of companies, potential permanent establishment issues and tax issues of cross-border workers. According to the OECD, it is unlikely that the COVID-19 situation will create any changes to an entity's residence status under a tax treaty. A temporary change in location of the chief executive officers and other senior executives is considered as an extraordinary and temporary situation due to the COVID-19 crisis and such change of location should not trigger a change in residence (in particular, when the corporate tie-breaker rule is applied). According to the OECD, all relevant facts and circumstances should be examined to determine the "usual" and "ordinary" place of effective management, and not only those that pertain to an exceptional and temporary period such as the COVID-19 crisis.

However, some countries start to be less tolerant on the scope of the force majeure created by the Covid-19 justifying the remote work (i.e. Belgium). Moreover, considering the political response to the increasing number of positive PCR tests in several jurisdictions (quarantine, lockdown, etc.), it cannot be excluded that the status quo may last longer than initially expected. Therefore, it should be considered to organise board of director meetings in Luxembourg with the physical presence of Luxembourg resident directors on Luxembourg soil (the board of director meeting could be held via conference call or video conference). Non-Luxembourg resident directors may dial-in but should ideally not intervene and instead provide a proxy to the Luxembourg resident directors that can represent the non-resident directors. In some cases, short-term changes in regard to the composition of the board of directors might be considered such as appointing additional Luxembourg directors to a board of directors.

Do you have further questions?



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