



Directorships of Luxembourg companies: What every director should know

Talk to the British Chamber of Commerce – Wednesday 20 April 2016

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Introduction

Introduction

Enormous number
of directors on
boards of
Luxembourg
companies

Different
nationalities and
professional
backgrounds

How aware are
they of their duties
and responsibilities
under Luxembourg
law?

Generally
heightened
awareness on the
market

High profile case
law

Recent statistics

	January 2016	February 2016	March 2016
Public limited liability company (<i>Société anonyme</i>)	152	152	137
Private limited liability company (<i>Société à responsabilité limitée</i>)	469	566	598
Total	621	718	735
Number of estimated directors (using average 3 directors per company)	1863	2154	2205

Powers and Duties

Powers

1

Very broad

- Any action necessary to realise corporate object, including power to bind the company towards third parties / sign documents on behalf of the company

2

Except where expressly reserved by law / articles of association to shareholders

3

Powers may also be subject to articles of association, shareholders' agreement (reserved matters), external finance documents, etc.

4

Powers can be delegated, (within certain limits), but in general the board remains responsible

General Duty of Care/Fiduciary Duty

- Duty to manage the company's business in good faith, with reasonable care, in a competent, prudent and active manner

- Duty to act with the standard of care and diligence that a reasonable director would exercise

- Duty to act in the best corporate interest of the company
 - N.b. Security and guarantees granted to secure the obligations of a parent or sister company
 - Belgian case law: (i) corporate object needs to permit; (ii) company needs to derive an arm's length benefit (e.g. more advantageous terms secured by group, with indirect but identifiable benefit to company); and (iii) not disproportionate to the company's means and the benefits to be derived (e.g. limited recourse clause)

Other General Duties

Duty of confidentiality

Duty to comply with the company's articles of association

Duty to stay informed

Duty to comply with the Luxembourg Companies Act


"Conflict of interest"

- Personal, financial, direct or indirect interest that conflicts with that of the company
- Not applicable to decisions relating to daily management
- Directorship of shareholder or another group company does not, *per se*, create a conflict

Additional « Duties »



Regulation



Additional duties if company listed on the Luxembourg Stock Exchange

- Transparency and market abuse laws
- LSE regulations and corporate governance code



Contractual duties (e.g. service contract / shareholders' agreement)



Employment law

Potential Liability

Civil Liability

PRINCIPLE

- Art. 58 Companies Act
- Liability limited to the assets of the company, i.e. no personal liability
- Directors not liable for the obligations of the company

EXCEPTION

- Art. 59 Companies Act and Art. 1382 Civil Code
- Directors responsible for the due performance of their duties and personally liable for mismanagement
- Directors may be liable towards the company and/or towards third parties depending on the type of liability

Misconduct of management

- Art. 59 paragraph 1 of the Companies Act
- What is the expected behaviour of a director?
- Assessment in *abstracto* BUT in the circumstances that are known or should have been known at the time of disputed events/decisions
- Impact of remuneration, sophistication/experience, age, good faith, involvement/implication?
- Who can exercise action?
 - Only the company after decision of general meeting of shareholders
 - Bankruptcy receiver
 - Creditors on the basis of an *action oblique*
- Immunity for directors appointed by majority shareholders? Draft Bill No.5730?

Misconduct of management (cont'd)

- District Court, 25 April 2014, No. 158196, 159713 – Disregarding company's affairs
- District Court, 23 December 2015, No.145724/145725 – Impact of discharge by general meeting of shareholders
- Court of Appeal, 28 January 2015, No. 39446 – Agency principles
- Other examples :
 - Hasty investment decisions without appropriate guarantee
 - Entering into important contracts on terms detrimental to the company
 - Not providing for adequate insurance
 - Not pursuing the payment of debts due to the company
 - Making important payments that are not (yet) due
 - Lack of supervision of the daily managers or accountants
 - Financing entities out of the money
 - Filing for insolvency without authority

Breach of Companies Act or articles of association

1	Art. 59 paragraph 2 of the Companies Act
2	Who can exercise action? – Company – Third parties
3	Court of Appeal, 23 December 2014, No. 39177 and 15 July 2014, No. 38115 – (No) action by individual shareholder?
4	Presumption of joint and several liability
5	How to rebut presumption? – Director should not take part in the breach – Director should report breach to the first general meeting after he/she/it has acquired knowledge thereof
6	Examples derived from case law – Violation of signing authority rules – Violation of conflict of interest rules – Violation of object clause – Failure to submit on a timely basis the annual accounts – Failure to convene a shareholders' meeting if required by law

Liability in tort

Art. 1382 and Art. 1383 of the Civil Code, last recourse remedy?

Fault, any deviation from general standard of good behaviour?
Action and inaction?

Who can exercise action?

Reluctance from Luxembourg courts to hold directors liable towards third parties for misconduct of management

Shadow directors?

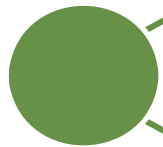
Examples derived from case law

- Manifestly unreasonable continuation of an activity running at a loss
- Exercising competing activities
- Retroactive attribution of remuneration without basis where company is in financial distress

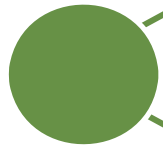
Criminal liability

1	No liability without specific legislation (Art. 163-173bis Companies Act, Criminal Code, other laws)
2	Liability of legal entities if crime or offence committed by one of its legal bodies or by its legal or <i>de facto</i> managers on its behalf and in its interests
3	Specific criminal and civil liabilities in insolvency context <ul style="list-style-type: none">– Criminal bankruptcy– Liability for the company's debts in the event of bankruptcy– Extension of the company's bankruptcy to a manager– Prohibition on practising trade or taking on directorships
4	Recent case law: <ul style="list-style-type: none">– District Court, 23 December 2015, No.145724/145725 – fictive dividends– Supreme Court, 4 July 2013, 39/2013 – bankruptcy filing and accounts publication– Court of Appeal, 29 January 2014, No. 38130 – non payment of taxes and social charges

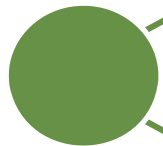
Mitigating Liability



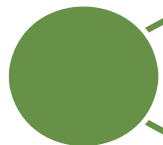
Discharge – Art. 74 Companies Act



Ad hoc approval - Art. 67 Companies Act



Time limitation - Art. 157 Companies Act



Resignation

Practical Tips

Practical Tips

- Be informed
 - Duty to keep up-to-date with the affairs of the company
 - Understand the law, the company's articles of association, plus any shareholders agreement and relevant contracts, e.g. shareholders' agreements, external finance documents
 - No legal limit to the number of directorships that can be taken on, but do you have so many that you cannot comply with your duties ?
- Ensure properly convened board meetings, with sufficient notice to enable a diligent review of documents
- Attend as many meetings as possible (important feature of duty of “diligence”)
- Ensure proper discussion and deliberation, and ensure fulsome minutes (including record of objections)
- All relevant documents, including background reports (e.g. due diligence, valuation and fairness opinions), to be tabled

Practical Tips (cont'd)

- Indemnity?
 - From a solvent entity?
 - Ensure can't be unilaterally amended (e.g. articles of association)

- Insurance
 - Ask for a copy!
 - Check scope
 - Covers the Luxembourg company? «Subsidiary» or «group company» of the insured?
 - Limitations / exclusions in terms of amounts, types of claims, sectors, territories, etc.
 - Disclosure and notification obligations
 - Check impact of change of control and removal or resignation from position

Survey

- Annual survey conducted by A&O
- More than 1 in 5 have experienced a claim or investigation involving a director of their company
- Greatest risks facing directors are considered to be: (1) regulatory and other investigations, (2) anti-corruption legislation, (3) criminal and regulatory fines / penalties, (4) risk of being sued abroad, and (5) sanctions regimes, e.g. Russia and Iran
- Top concerns regarding D&O policies: (1) clear and understandable policy terms, (2) ability to refuse a claim based on non-disclosure, and (3) cover to be available in the early stages of an investigation
- But let's hear the views of the insurance brokers...

Panel members



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Directors' & Officers' Insurance / Individual Executive Protection



talisman
Insurance Broking Ltd

Wednesday 20th April 2016

17.30pm - 20.30pm

Allen & Overy 33 avenue J.F Kennedy, Luxembourg





Panel members

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Founding Director

Talisman is a London based independent insurance broker regulated to sell insurance in Europe. Focusing on servicing liability needs in the financial services sector. Providing multi class / multi territory solutions for clients.

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AXIS Capital is a leading global provider of liability insurance and reinsurance. Servicing a wide range of industries and diverse coverage needs through their operating subsidiaries and branch offices in Europe, Bermuda, the United States, Canada, Singapore and Latin America.

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Why do Companies buy Directors' and Officers' Liability?

What is my key goal to purchasing Directors' & Officers' (D&O) Insurance?

- 🌐 **Protect the Balance Sheet**
- 🌐 **Protect the personal assets of individuals**
- 🌐 **Or the main Board**



Corporate risk
Transfer

Personal Asset
Protection

How aligned are the interests of protecting the company with that of the Individual!



Coverage Highlights

There are traditionally **THREE** sections of cover in a **Directors' and Officers' liability** policy:

- 🌐 **Directors' and Officers' liability:** This protects the directors or officers of the company against loss arising from claims made against them, jointly or severally, during the period of insurance because of any wrongful act committed by them in their capacity as director or officer.

This is the “Side A” cover

- 🌐 **Company Reimbursement:** This protects the company where it has indemnified a director or officer as a result of claims made against any director or officer during the period of insurance because of any wrongful act committed by them in their capacity as a director or officer.

This is the “side B” cover

- 🌐 The cover can also be extended to protect the company when it is directly sued in securities claims. This extension is generally provided to the company when it has shares publicly traded.

This is the “Side C” cover



Coverage Highlights

The definition of “ **wrongful act**” is very broad and includes “ any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission, breach of warranty of authority or other acts committed by the directors or officers in their capacity as such”

The policy provides cover for **Defence Costs** as well as for **Damages**. Defence costs are advanced as they are incurred. The policy usually covers the directors and officers of the policyholder and all its subsidiaries worldwide.



company is not
legally permitted
to indemnify its
D&O's

No D&O policy
implemented

PERSONAL
ASSETS OF D&O'S
ARE AT RISK



Risks Faced by Luxembourg Executives

Where does the threat come from?

- 🌐 **Greater disclosure and communication to shareholders / public.**
- 🌐 **Increasing focus on the role of Independent / Non-Executive Directors (NED's).**
- 🌐 **Disclosure of remuneration packages, tax implications, proper authorisation procedures and increased transparency.**
- 🌐 **Expanding the personal liability of directors and officers for mismanagement and non-disclosure.**
- 🌐 **Increase in legislation and regulations in the areas of Corporate Governance.**
- 🌐 **Employment Law, Health & Safety Legislation, Corporate Manslaughter, Senior Managers Regime and developing Class Action etc.**
- 🌐 **Increasing powers of Regulators and cooperation between them i.e. CSSF, DOJ , SFO, FCPA, FCA.**
- 🌐 **Greater willingness of shareholders and other third parties to sue.**
- 🌐 **Poor Financial condition – Bankruptcy related claims.**
- 🌐 **Misuse of confidential or privileged data, especially involving social media sites.**
- 🌐 **Whistle-blower activity.**



Sources of Circumstance / Claim Actions

Where are the liability claims coming from?

- 🌐 **Shareholders / Partners / Investors / Creditors / Securities & Bond Holders.**
- 🌐 **Government enforcement and Regulatory Agencies i.e. CSSF Declaration of Honours.**
- 🌐 **Other enforcements regulations i.e. Environmental / Health & Safety etc.**
- 🌐 **Company / Entity itself.**
- 🌐 **Fellow directors (new management against previous management).**
- 🌐 **Employees / Unions.**
- 🌐 **Customers / consumer groups.**
- 🌐 **Business partners – vendors, suppliers etc.**
- 🌐 **Competitors.**
- 🌐 **Trustees.**

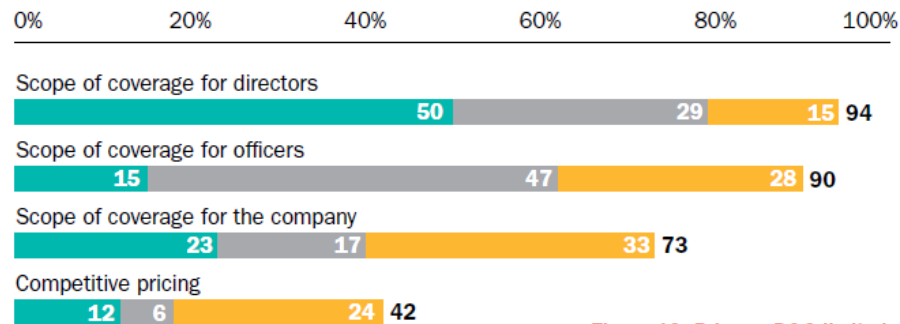
What do clients focus on when “purchasing” Directors’ & Officers’ Liability Insurance?

Towers Watson Latest Directors’ and Officers’ Liability Survey

Figure 21. Most important aspects of D&O insurance coverage

Ranking for aspects of D&O insurance coverage on a scale of 1 to 4, where 1 is most important and 4 is least important (top three rankings)

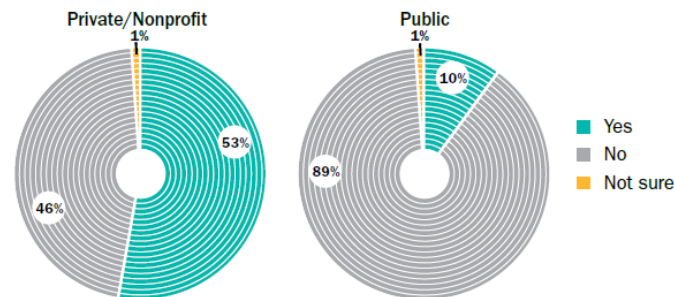
Private/Nonprofit



“Directors and officers feel the need for additional assurances beyond corporate indemnification. In fact, 43% of respondents indicated the need for added protection in the event their company becomes bankrupt and/or insolvent, 28% in 2010.”

Figure 19. Primary D&O limit shared or blended with other coverages

Is your *primary* D&O limit shared or blended with other coverages (e.g., EPL, fiduciary)?





What is important to Individual Executives?

Why do Companies buy D&O?

- 🌐 **Protect the Balance Sheet.**
- 🌐 **Protect the personal assets of individuals.**
- 🌐 **Or the Main Board!**

Why would Individuals want D&O?

- 🌐 **Legal Defence Costs & Support;**
 - Freezing Order / Extradition Proceedings.
 - Luxembourg home Counsel interpretation.
 - Spouse, estate, heirs.
- 🌐 **Defence of Reputation;**
 - Pre any formal actions.
- 🌐 **Regulatory crisis intervention.**
- 🌐 **Protection of Personal Wealth / Assets.**

Increasingly D&O feel the need for additional assurance beyond the potential of corporate indemnification.

CSSF DECLARATION OF HONOUR – FOR NATURAL PERSONS

*j) Being covered by an insurance policy covering all risks arising from my activity
(only applicable if the undersigned acts as a natural person)*

*By signing this declaration of honour, the undersigned commits to inform the CSSF without delay
in case one of the elements covered by this declaration was to change in the future*



What Should Individual Executives be asking?

Even if the company or client you have a relationship with has traditional D&O Liability Insurance in place, these are some of the questions you should be considering:

Access to Policy / Insurance Details

- 🌐 Have you seen evidence of cover being in force?
- 🌐 Is this available following each annual renewal?
- 🌐 Have Premium Payment Warranty been met?
- 🌐 What Self Insured Retention applies to Corporate?

Coverage / Aggregation Exposures

- 🌐 Cover cancellation / Insurer Insolvency?
- 🌐 Sharing of Aggregate Limits?
- 🌐 Priority of Insured Persons?
- 🌐 Regulatory Investigation cover provided?
- 🌐 What Run Off cover exists?

Notification / Control / Duty of Disclosure

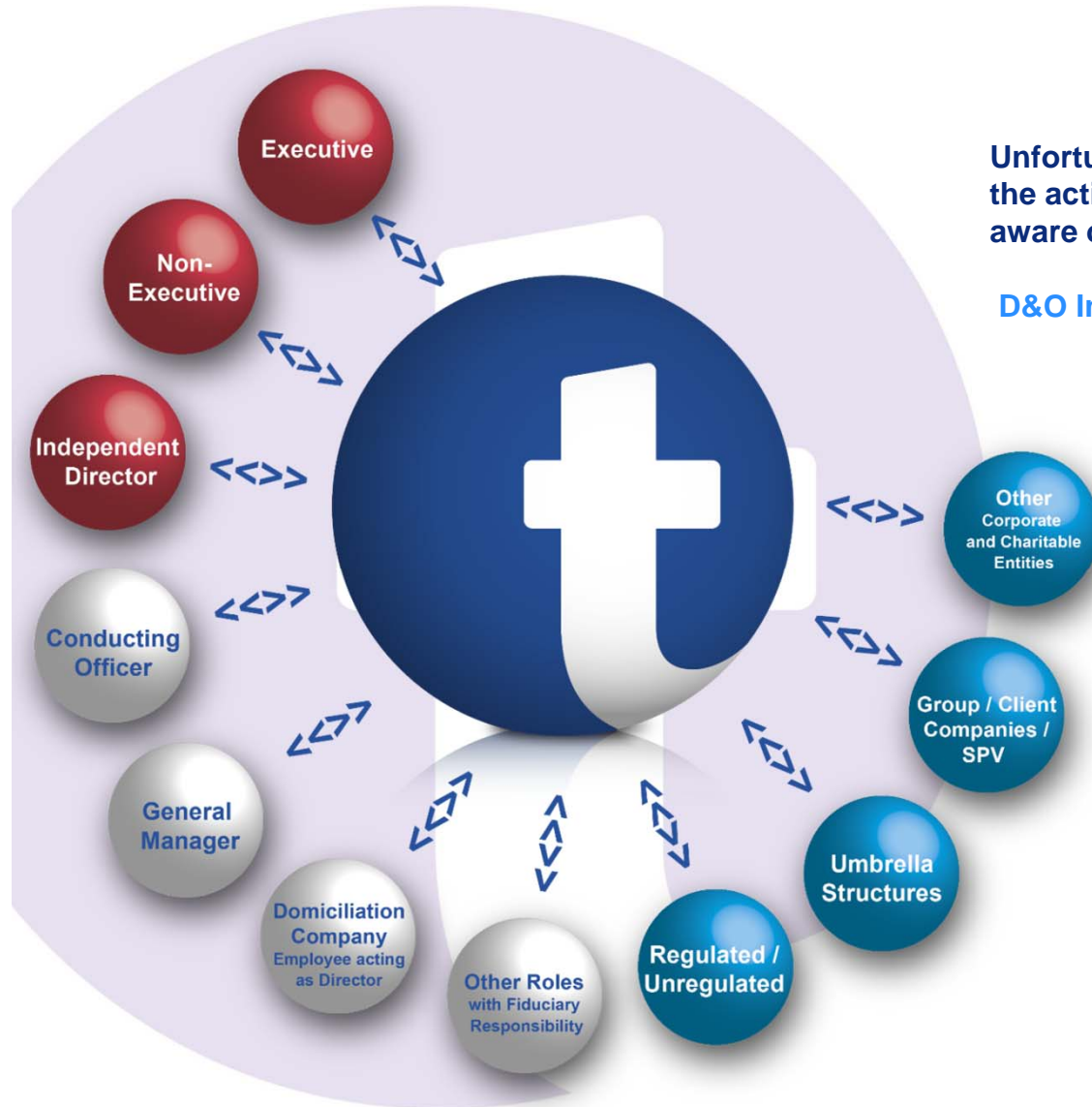
- 🌐 What constitutes a claim / triggers the policy?
- 🌐 Who and how do you notify a circumstance?
- 🌐 Can you elect your own legal council?
- 🌐 Challenge of how much risk information is required by the Insurers in understanding the risk. Has information relevant to your risks been adequately disclosed?

Luxembourg Compliant?

Indemnification Agreements

- 🌐 Specific to Luxembourg?

Who are these Individual Executives?



Unfortunately an Executive is potentially liable for the actions of others even though they may not be aware of or be able to control such actions.

D&O Insurance can provide cover for this situation.

Wrongful Act(s) means:

- (i) any actual or alleged or proposed error, misstatement, misleading statement, act, omission, neglect, or breach of duty by any Insured Individual in their capacity as such; or
- (ii) any matter claimed against any Insured Individual solely by reason of their serving in such capacity; or
- (iii) a Wrongful Employment Act.

Talisman Individual Executive Protection Policy



Principal Features & Benefits

- 🌐 This policy is intended to protect you personally.
- 🌐 This policy responds first (Affirmative language).
- 🌐 You do not need to ask permission from anyone to access the policy.
- 🌐 The policy covers you for multiple roles.
- 🌐 New positions you accept during the policy period are automatically included (CSSF Declaration of Honour For Natural Persons).
- 🌐 Continuous protection.
- 🌐 A free Three Year Extended Reporting Period.
- 🌐 You choose the lawyer or PR agent.
- 🌐 Complimentary to Entity D&O.

Luxembourg Law / Compliant

Talisman Individual Executive Protection Policy

Principle Extensions Built in

- 🌐 Reputation Expenses.
- 🌐 Regulatory Crisis Response.
- 🌐 Extradition Proceedings.
- 🌐 Spouse (or Civil Partner) & Estate, Heirs, legal representative or assignees.
- 🌐 Defence costs from Freezing Order.
- 🌐 Luxembourg jurisdiction Counsel interpretation.
- 🌐 Extradition or Asset & Liability Proceedings.
- 🌐 Light touch Insured Administration.

Luxembourg Law / Compliant



How should such policies interact?

- 🌐 Access and consideration of the cover afforded by Entity Policy is recommended.
- 🌐 Individual Policy is designed to be complimentary to Entity D&O, not as a replacement, whilst delivering greater certainty and control to the individual .
- 🌐 Notification of any circumstance should be concurrent.
- 🌐 Intention may be similar but they will operate distinct from each other.
- 🌐 Target of achieving consistent legal opinion.



Example of Risk Scenarios

Private Equity / Real Estate

- ⌘ UK based PE firm. Portfolio company in Italy. Portfolio company goes into administration. Directors not able to access local D&O policy. PE parent won't indemnify. Directors needed to defend themselves
- ⌘ Real estate investment. Guernsey Fund leveraged to acquire property in Spain, unable to sell asset due to pollution. Claim brought by PE Mgmt against Fund Directors for mismanagement

Regulatory

- ⌘ Corporate veil being pierced. Individuals now accountable (HSBC)
- ⌘ AIFMD – AIFM Board vs Fund Board

Extradition

- ⌘ NatWest. David Bermingham had no knowledge of the terms and conditions of NatWest D&O's policy and was given no access to it
- ⌘ BA, FIFA

Client Conflicts

- ⌘ An individual's ability to access D&O Policy (via Broker & Insurers) is compromised when no longer a director of the company

BCC Evening Business Forum with A&O Risks for Directors of Luxembourg Companies



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Questions for the Panel

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