

New Luxembourg law transposing the EU-Mobility Directive (the “New Law”)

The Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (the “Mobility Directive”) was published in the Official Journal of the European Union on 12 December 2019. In order to implement the Mobility Directive into Luxembourg national law, Bill of Law No. 8053¹ (the “Bill”) was submitted to the Chamber of Deputies on 27 July 2022. The Bill was passed by Parliament on 23 January 2025. The overview below explores the main aspects of the general regime as amended by the New Law.



A position consistent with the freedom of establishment as interpreted by the European Court of Justice

The legislative position adopted by the New Law is considered to be in line with the freedom of establishment as interpreted by the Court of Justice of the European Union, and is based on two pillars:

- the **first pillar** is based on the principle “the whole directive, nothing but the directive” to restrict the scope of application of the new regimes resulting from the Mobility Directive to what is strictly necessary. Thus, the scope will not extend to

other cross-border operations such as cross-border conversions involving non-EEA member states or cross-border divisions by absorption.

- the **second pillar** consists of using the latitude given to member states by the Mobility Directive to put in place a regime that is as favourable as possible to cross-border mobility, in order to ensure that Luxembourg company law remains attractive and competitive.

¹ Bill of Law No. 8053 amending (1) the law of 10 August 1915 on Commercial Companies, as amended, (2) the law of 19 December 2002 on the register of commerce and companies and the accounting and annual accounts of undertakings, as amended, for the purpose of transposing the Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

The introduction of two distinct legal regimes

Under the terms of the New Law, each of the conversion, merger and division operations (the “**operations**”) are to be restructured and organized under two distinct legal regimes to be introduced in the Law of 10 August 1915 on Commercial Companies, as amended (the “Companies Law”):

- a **general regime** applicable to domestic operations (i.e., operations involving only one or more Luxembourg companies) and cross-border operations that do not fall under the scope of the special regime (including cross-border operations with non-EU companies); and
- a **special regime** applicable to cross-border operations falling under the scope of the Mobility Directive (the “**EU cross-border operations**”), meaning operations involving a Luxembourg limited liability company (i.e. a public limited liability company (*société anonyme* - SA), a private limited liability company (*société à responsabilité limitée* - SARL) and a partnership limited by shares (*société en commandite par actions* - SCA) and at least one EU limited liability company (as foreseen by the relevant annexes in the Mobility Directive)

By way of a general rule, the New Law provides that any aspects of an operation covered by the special regime that are not explicitly regulated by the special regime shall be subject to the provisions of the general regime.

General regime: domestic and cross-border operations

Mergers and divisions – The general regime applicable to mergers and divisions will closely replicate the current procedures provided for in the Companies Law. However, in order to maintain a greater degree of flexibility and attractiveness of the Company Law, in line with the Mobility Directive, the following amendments to the current regime are noteworthy:

- the general meeting of shareholders is entitled to modify the draft terms of the operation and make the effectiveness of the operation subject to certain particular conditions or time limits;
- companies that only have one shareholder are automatically exempted from the requirement to obtain a report from an independent expert on the draft terms of the operation

(whereas under the current regime a formal waiver is needed, except in case of a simplified merger and divisions with newly incorporated companies);

- with respect to mergers: extension of the simplified merger procedure to sidestream mergers (i.e. operation by which one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company without the issue of any new shares by such existing company, provided that one person holds directly or indirectly all the shares in the merging companies or the shareholders of the merging companies hold their shares in the same proportion in all merging companies) and the requirement to hold a shareholders’ meeting of the absorbed company is, in this case, abolished;
- effectiveness of the operation towards third parties as from the publication of the minutes of the shareholders meeting of the absorbing/divided company approving the operation (and no more as from the publication of the minutes of the shareholders meeting of each of the companies involved);
- effectiveness of a cross-border merger or division will now be determined by reference to the law of the country governing the absorbing/divided company;
- in case of a merger by absorption of a Luxembourg company by a foreign company, the deletion of the Luxembourg company from the Luxembourg trade and companies register may be made on the basis of any conclusive evidence that the merger has taken effect (that evidence will therefore not need to be only by way of a notification received from a foreign register but may be by way, for example, of a legal opinion from a local counsel - such as a notary or a law firm).

Conversions – Although the migration of a company from or to Luxembourg without loss of legal personality is recognized in practice, Luxembourg law does not currently provide for any provisions setting out the specific process for such operation. The new general regime applicable to such operation provided for by the New Law now expressly provides that a company governed by Luxembourg law may be converted into another company governed by foreign laws, under the condition that the destination country also recognizes such possibility. The conversion shall only be carried out through the applicable conditions stipulated in the New Law such as, an amendment of the articles of association of the concerned company.

While not expressly addressed, inbound conversions shall also be possible under the conditions governing the incorporation of such company in Luxembourg.

Operations that do not fall under the scope of the special regime will remain subject to the current Luxembourg more simple procedure which derives from a well-established legal and notarial practice. From a Luxembourg law perspective, without this list being exhaustive, the operation is usually and mainly implemented as follows:

- confirmation from an authority in the departure country that the transfer of registered seat to the destination country will not lead to loss or interruption of legal personality, which will continue to exist under the laws of the destination country;
- adoption of a shareholder resolution (which, in Luxembourg, must be under the form of a notarial deed) approving the migration and conversion of the company into a legal form compliant with the laws of the destination country;
- completion of the relevant publications and formalities with the local trade and companies registers.

A forthcoming newsflash will follow soon exploring the main aspects of the special regime introduced by the New Law.

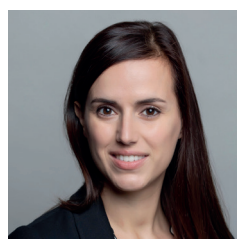
Pursuant to a transitional provision in the Bill, the new rules shall apply to those operations for which the draft terms are published on or after the first day of the month following the entry into force of the New Law.

For more information and to stay up to date on this topic, please feel free to reach out to the contacts listed in this article or your usual Luther S.A. contact.

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