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New Luxembourg law transposing the EU-Mobility Directive dated 17 February 2025 (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. 8053 (the "Bill") was submitted to the Chamber of Deputies on 27 July 2022. The Bill was passed by Parliament on 23 January 2025 and the New Law will enter into force on 2 March 2025. The below overview explores the main aspects of 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.

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 attractivity 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 from 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 if the destination country;

- completion of the relevant publications and formalities with the local trade and companies registers.

Special regime: European cross-border operations

Cross-border operations that fall under the scope of the Mobility Directive will be subject to more complex and time-consuming processes. These added complexities are a small price to pay for a modernized regime that ensures a higher degree of legal certainty and harmonization within the sphere of cross-border operations of companies falling within its scope.

Until now only European cross-border mergers were subject to a harmonized regime. Such legal framework will now be extended to European cross-border conversions and divisions of limited liability companies. The new rules are almost identical for the three types of cross-border operations i.e. for conversions, mergers and divisions. Divisions where the recipient company is an already existing company are specifically excluded from the scope of the special regime.

The below paragraphs give a brief overview of major changes made by the Bill as it currently stands to the existing legal framework for EU cross-border mergers.

- **Common Restructuring Plan** - The draft terms will need to include at least certain listed particulars, including the details of the offer of cash compensation for shareholders exercising their exit right and any safeguards offered to creditors, such as guarantees or pledges.

- **Publication formalities** – The publication of the draft terms (that shall occur at least one month before the shareholders' meeting deliberating upon the merger) shall also be accompanied by a notice informing the shareholders, creditors and employees (or their representatives) that they may submit observations on the draft terms to the company at least five working days before the shareholders meetings.

- **Report of the management body** – Either a joint report (with two distinct sections) or two separate reports shall be drawn up by each company involved to be addressed and made available to their shareholders and employees respectively by electronic means not less than six weeks before the relevant shareholders' meeting (such report(s) shall be made available together with the draft terms of the operation, requiring *de facto* then that such terms shall be finalized and agreed at such time).

  - the report for shareholders shall not be required (i) if all the shareholders have agreed to waive that requirement or (ii) for companies with a single shareholder;

  - the report for employees shall not be required where the merging company and its subsidiaries, if any, have no employees other than those who form part of the administrative or management body

- **Report of the independent expert** – companies that only have one shareholder are automatically exempt from the requirement to obtain a report from an independent expert.

- **Approval by the general meeting** – Meetings of shareholders of each of the merging companies shall be entitled to amend the draft terms and to make the effectiveness of the operation subject to certain particular conditions or time limits.

- **Protection of minority shareholders** – Minority shareholders shall be given two protective rights:
  - **Exit right for shareholders opposed to the operation** - Shareholders of the merging companies may benefit from a right to dispose of all of their shares (except non-voting shares and shares acquired *inter vivos* since the publication of the draft terms) in return for an adequate cash payment in accordance with the relevant legal procedure. Such exit right is however granted only to shareholders who:
    - voted against the approval of the draft terms;
    - would have acquired shares of the company resulting from the operation which would be governed by the law of a Member State other than that of the merging company; and
    - request the notary to record their express opposition to the draft terms and their intention to exercise their exit right.
  - **Right to challenge the exchange ratio for pro-merger shareholders** – Shareholders having approved the merger shall still be entitled to challenge in court the share exchange ratio and claim additional cash compensation (but the company shall be able to pay any other compensation - e.g. shares).
- **Creditor protection** – Unlike the general regime, (i) creditors whose receivables are due on the publication date of the draft terms are excluded from the benefit of this protection, (ii) prior notification to the debtor company is required, and (iii) the time limit to bring legal action is extended to three months from the publication of the draft terms.
- **Double legality control** – The Luxembourg notary shall carry out two legality controls:
  - **First legality control (with anti-abuse control)**: the notary shall first verify the compliance of the operation with all relevant conditions and correct completion of all procedures and formalities provided for under Luxembourg law. Such control shall be carried out by the notary within three months (extendable by three additional months in case of serious suspicion of abuse or fraud) from the date of receipt of the required documents and information and shall result in the notary issuing (or refusing to issue) a pre-merger certificate.
    - The notary shall refuse to issue the pre-merger certificate if not all relevant conditions are fulfilled or if not all procedures and formalities provided for under Luxembourg law are correctly completed. In this case, the notary may grant the company a three-month delay to meet the required conditions or to complete the procedures and formalities.
    - The notary shall refuse the issuance of the pre-merger certificate if the operation is considered as clearly carried out for abusive or fraudulent purposes leading to or aiming at circumventing EU or national law or for criminal purposes.
    - the notary may consult other qualified authorities (e.g. request for certificates as for a Luxembourg one step dissolution) and/or use the services of an independent expert (tax expert, lawyer, professor, accountant, auditor...) at the company's expenses.
    - the pre-merger certificate shall be filed by the notary with the Luxembourg trade and companies register and transmitted by such register to the registers in which the merging companies are registered.
  - **Second legality control**: If the absorbing company is a Luxembourg company, the notary shall also verify and confirm that all applicable conditions (both Luxembourg and foreign) have been fulfilled (and in particular that the draft terms have been approved in the same terms by all merging companies). For this purpose, the notary may rely on the pre-merger certificate(s) issued by the foreign authorities as conclusive evidence of the correct completion of the pre-merger procedures and formalities applicable in the Member State from which the certificate is issued.
- **Effective date of the merger** – the effective date of the merger shall be determined by the law of the absorbing company. Shall the absorbing company be Luxembourgish:
  - The merger shall be effective between the merging companies as from the issuance of the legality certificate by the Luxembourg notary (effectiveness does no longer

depend on the publication of the minutes of the shareholders meeting of the absorbing company).

- The merger shall be enforceable towards third parties as from the publication of the minutes of the shareholders meeting of the absorbing company.

- **Deregistration of the absorbed company** – Where the absorbed company is subject to Luxembourg law, the latter shall be deleted from the Luxembourg trade and companies register upon receipt of the notification of the merger taking effect from the register of the absorbing company (via the EU registers interconnection system).

- **Nullity** – Once the operation has become effective, its validity may no longer be challenged.

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 1 April 2025.

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

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