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Draft law 8053 transposing the mobility directive

On 10 May 2023, the Luxembourg Bar Association (*Ordre des Avocats du Barreau de Luxembourg*) issued its opinion on the draft law No. 8053 (the "**Draft Law**"), which aims to transpose 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**").

The Mobility Directive aims to rectify certain existing imperfections in cross-border mergers, but also to adopt harmonized rules on cross-border conversions and divisions, both modelled on cross-border mergers.
To this end, the Draft Law establishes separate but harmonized legal rules for mergers, divisions and cross-border conversions, with on the one hand, a common regime applicable to internal mergers and divisions, as well as cross-border mergers, divisions and transformations other than operations falling within the scope of the rules of the European Union (the "**Common Regime**"), and on the other hand, a special and derogatory regime to ordinary laws which fall within the scope application of the rules of the European Union by creating the concepts of European cross-border merger, European cross-border division and European cross-border transformation (the "**Special Regime**"), the purpose being to harmonize between them, as far as possible, the procedures for cross-border mergers, cross-border divisions and cross-border conversions and to limit the more restrictive rules resulting from the Mobility Directive to cross-border operations falling within its scope. It should be noted that the existing procedure for an internal transformation, which does not involve moving the registered office across borders, is not amended by the Draft Law.

COMMON REGIME

The Common Regime takes on the existing rules on mergers and divisions in the law of 10 August 1915 on commercial companies, as amended with certain amendments aimed at making them more flexible, and introduces rules for non-European cross-border conversions modelled on the procedures of mergers and divisions. Among other things, the Draft Law:

> opens up the possibility of carrying out a merger or a division for special limited partnerships, whereas they have no legal personality;
> clarifies that the general meeting has the power to amend the common project of merger, division, or transformation and that it may also make the completion of the operation subject to certain conditions or terms;
> eliminates the need for an independent expert for single member companies.

Mergers

With regard to the Common Regime of mergers, the Draft Law specifies that:

> the concept of merger by absorption also includes two simplified forms of merger that are characterized by the absence of an exchange of shares: the upstream merger (carried out by the company that holds all the shares and other securities conferring voting rights of the absorbed company) and the side-stream merger (carried out by a person who directly or indirectly holds all the shares of the merging companies or where the shareholders of the merging companies hold their shares in the same proportion in all the merging companies), thus introducing the possibility of carrying out simplified mergers between sister companies;
> mergers other than cross-border will henceforth be enforceable against third parties upon the publication of the minutes of the general meeting of the acquiring company that approves the merger or, in the absence of such a meeting, upon the publication of a certificate from a notary established at the request of the company concerned stating that the conditions of the merger have been fulfilled;
> the effective date of a cross-border merger is now determined by reference to the legislation of the State to which the company resulting from the cross-border merger is subject;
> in the event of the absorption of a company governed by Luxembourg law by a company governed by a foreign law, the striking-off of the absorbed company from the Luxembourg Trade and Companies Register ("**RCS**") may be carried out on the

basis of conclusive evidence of the entry into effect of the merger and no longer, only on the basis of the notification from the register to which the absorbing company belongs.

Divisions

The Draft Law now provides that under the Common Regime of divisions that:

> the effective date of a cross-border division is determined by the law of the State of the company being demerged;

> the division will only be enforceable against third parties as of the publication of the minutes of the extraordinary general meeting of the demerged company;

> the effective date of a cross-border division will henceforth be determined by reference to the law of the State governing the company being demerged.

Cross-border conversions

With regard to cross-border conversions under the Common Regime, the Draft Law specifies that:

> this new regime will apply to the conversion of a company or an economic interest grouping ("**EIG**") established under Luxembourg law into a company or an EIG established under foreign law or *vice versa* (unless the transformation falls within the scope of the application of Regulation (EC) 2157/2001 relating to the statute for a European company);

> the conversion of a Luxembourg company into a foreign entity, is carried out without dissolution or liquidation of the Luxembourg entity and, where applicable, without loss of legal personality, provided that the law of the State of destination does not object to it;

> the conversion is carried out according to the rules governing the amendment of the articles of association of the Luxembourg company;

> the conversion of a foreign company or EIG into an entity governed by Luxembourg law can only be carried out under the conditions applicable to the incorporation of a company or a EIG.

SPECIAL REGIME

The Special Regime will only be applicable to public limited liability companies (*sociétés anonymes)*, partnerships limited by shares (*sociétés en commandite par actions*) and private limited liability companies (*sociétés à responsabilité limitée)* (for intra-European mobility operations, as explained above). The Special Regime will also not be applicable to cooperative companies (even organized as public limited companies – *sociétés anonymes*), UCITS, companies in liquidation that have begun the distribution of assets, credit institutions, investment companies or European Companies (SE).

As part of the Special Regime, the Draft Law provides that:

> similarly to the Common Regime, the companies involved must agree on written draft terms (*i.e.*, either draft terms of cross-border merger, or draft terms of cross-border division, or draft terms of cross-border conversion, as the case may be) covering certain points set out in the Draft Law, which must be published in the Electronic Official Gazette (*Recueil Electronique des Sociétés et Associations)* at least one month before the date of the general meetings which must approve the operation;

> in addition to the draft terms, the companies (insofar as the operation must be approved by the general meetings) must also publish at least one month before these meetings a notice addressed to the shareholders, creditors, and employees' representatives (or failing that, the employees themselves) informing them of their right to submit comments on the draft terms at least five days before the concerned general meeting;

> the competent administrative or management bodies must draw up a report intended for their shareholders and their employees, explaining and justifying the legal and economic aspects of the operation, as well as the implications for the employees. This report can be drawn up either in the form of a joint report (that is to say addressed to both the shareholders and the employees, but in two separate parts), or in two separate reports. These reports are made available to the employees or their representatives six weeks before the meeting called to decide on the operation. Any opinion on this report received from the employees or their representatives must be transmitted to the shareholders of the company concerned and annexed to the report of the administrative body. The report or part of the report of the administrative body that is addressed to the shareholders is not mandatory for single-member companies or if all the shareholders have waived this requirement; likewise, the report or part of the report of the administrative body that is addressed to the employees or their representatives is not mandatory if the company has no employees other than those who form part of the administrative or management body;

> a report drawn up by an independent expert must be made available to the shareholders at least one month before the general meeting called to decide on the operation, unless all the shareholders of the companies concerned have waived it, or in the event of single-member companies.

In addition, the Draft Law also provides for a right of exit for the shareholders who voted against the approval of the draft terms in exchange for adequate cash compensation, which must be paid within two months after the operation takes effect. The cash compensation may be paid and the acquisition carried out either by the companies concerned by the operation, by the remaining shareholders, or by third parties in agreement with the companies concerned by the operation. The independent expert must, in his report, opine on the adequacy of the cash payment.
Under the Special Regime, the Luxembourg notary will have to verify whether the relevant conditions and the procedures and formalities required by law for the implementation of the operation have been complied with, and he will have to issue a certificate prior to the operation. In particular, the notary will have to check whether the operation was put in place for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes. In this context, the notary may consult other relevant authorities who are qualified in the various fields concerned by the operation, including, where applicable, the authorities of the Member State of the foreign company party to the operation, and obtain from these authorities and from the companies involved in the operation the information and documents necessary to check the legality of the operation. The certificate is filed with the RCS and sent by the RCS manager to the register where the companies participating in the operation are registered.
Once the operation has become effective, it may not be declared null and void.
Finally, it should be noted that the provisions of the Mobility Directive relating to cross-border divisions, partial or complete, are limited to divisions involving a pre-existing company.

Transposition – Entry into force

Once adopted, the new law will apply to the operations for which the written draft terms of the proposed operation are published as of the first day of the month following the date of entry into force of the new law. Consequently, for projects published before this date, the restructuring rules in force will remain applicable.
In its opinion, the Luxembourg Bar Association approved the approach of the authors of the Draft Law aimed at transposing the Mobility Directive according to the Luxembourg principle and legal tradition of "the whole directive, nothing but the directive", thus making it possible to restrict the binding scope of the new regimes of the Mobility Directive to what is strictly necessary, but rightly questions the impact of the transposition of the Mobility Directive on the attractiveness and competitiveness of Luxembourg company law.
The transposition of the Mobility Directive was due to take place by 31 January 2023 at the latest. The opinion of the State Council (*Conseil d'Etat)* on the Draft Law is nevertheless still awaited.

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