Right by you in Luxembourg

DRAFT LAW ON COMPANY LAW AMENDMENTS: MERGERS AND DIVISIONS AND NEW REGIME CROSS-BORDER CONVERSIONS

The recently published draft law N° 8053 (the "**Draft Law**") aims to completely overhaul the legal procedures pertaining to mergers and divisions contained in title 10 of the Luxembourg law of 10 August 1915 regarding commercial companies, as amended (the "**Company Law**"), and introduce a new regime regarding cross-border conversions.

The new provisions are to be transposed into Luxembourg law by 31 January 2023.

As regards ongoing restructurings, the new law will only apply to restructurings (used hereinafter to refer to mergers, divisions and cross-border conversions) for which the relevant restructuring plan is published on the first day of the month following the date on which the new law comes into effect. Therefore, where restructuring plans have been published beforehand, the current legal rules will remain applicable to the remaining restructuring steps.

Separate legal regimes will be put in place in each of chapter II of title 10 (dealing with mergers), chapter III (dealing with divisions) and in the new chapter VI (dealing with cross-border conversions) so that on the one hand the Company Law will provide for (i) a **general regime** applying to internal and cross-border restructurings other than restructurings that fall within the scope of the European Union (the "**General Regime**"), and on the other hand (ii) a **special regime** egarding restructurings that fall within the scope of the European Union rules (transposing Directive (EU) 2019/2121 of the European Parliament and the Council of 27 November 2019 on cross-border conversions, mergers and divisions) (the "**Special Regime**").

1. General Regime

For mergers and divisions, the General Regimes reflect the current procedures set out in the Company Law with certain modifications aimed at rendering the legal rules more flexible and clarifying the procedures, in particular the following:

- The General Regimes but not the Special Regimes will now apply to special limited partnerships (*sociétés en commandite spéciale*);
- Simplification of certain provisions regarding the terms of restructuring plans and the publication requirements by deletion of those provisions which apply to cross-border restructurings;
- The general meetings may decide to modify the restructuring plan and make the effectiveness of the restructuring subject to certain conditions or time limits;
- Companies that only have one shareholder are exempted from the requirement to obtain an expert report on the restructuring plan;

- The companies involved in the restructuring shall apply their respective rules governing publications of the implementation of the restructuring, in public registers.

The specificities of the different General Regimes as they apply to a particular restructuring operation are set out below:

a. General Regime regarding Mergers

The definition of mergers by absorption will be extended to also apply to **upstream mergers** (whereby a company transfers by way of dissolution without liquidation the whole of its assets and liabilities to its parent company) and **side-step or side-stream mergers** (whereby a company transfers by way of dissolution without liquidation the whole of its assets and liabilities to an existing company without issue of new shares by such existing company under the condition that one person is the direct or indirect shareholder of all shares in the merging companies or that the shareholders of the merging companies hold their shares in the same proportion in all of the merging companies). The extension of the definition of mergers by absorption to upstream mergers will mean that, in future, it will be more onerous to carry out so-called simplified liquidations where remaining and contingent assets and liabilities are taken over by the parent company. However, upstream and side-stream mergers are subject to a simplified merger procedure.

As per the existing rule, the merger will take **effect between the merging companies** on the date that correlating decisions have been taken by such merging companies.

Mergers other than cross-border mergers will only take **effect against third parties** on publication of the extraordinary general meeting minutes of the absorbing company that approves the merger or, if no such general meeting takes place, of the publication of a certificate by a notary attesting to the satisfaction of all merger requirements.

The date of the effectiveness of a **cross-border** merger will now be determined by reference to the legislation of the country governing the company that results from the merger.

In the case of the absorption of a Luxembourg company by a foreign company, the deletion of the Luxembourg company from the Luxembourg trade and companies register may be carried out on proof of the merger having taken effect (for example by way of an opinion of a foreign notary or lawyer). The notification by a foreign trade register is no longer the only means of proof.

b. General Regime regarding Divisions

As per the existing rule, the division will take **effect between the companies participating in the division** on the date that correlating decisions have been taken by such companies.

It is now expressly foreseen that the division will only take **effect against third parties** on publication of the extraordinary general meeting minutes of the company that is being divided.

The date of the effectiveness of a **cross-border** division will now be determined by reference to the legislation of the country governing the company that is being divided.

c. General Regime regarding Cross-Border Conversions

It is clarified that this new regime shall apply to the transformation of a company or economic interest grouping governed by Luxembourg law into another company or economic interest grouping governed by foreign laws or vice versa if such transformations do not fall within the scope of Regulation (CE) 2157/2001 regulating European Companies or the Special Regime.

If the transformation is into a foreign entity, it may be carried out without dissolution, liquidation or winding up of the Luxembourg entity and, if relevant, without loss of legal personality, subject to this being permissible under the foreign law. The transformation shall be carried out under the rules governing the change of the articles or constitutive documents of the Luxembourg entity.

If the transformation is into a Luxembourg entity, it may be carried out under the conditions governing the incorporation of the type of company or entity in Luxembourg.

The laws of the home state shall govern the procedures and formalities that are required to be carried out prior to the transformation in the home state and the laws of the destination govern the procedures and formalities that are required to be carried out following proof that the formalities in the home state have been duly carried out.

2. Special Regime

The procedures regarding mergers, divisions and cross-border conversions within the scope of the Special Regimes are harmonised as much as possible as further set out below:

a. Applicability

Only the Luxembourg companies taking the form of a *société anonyme* (S.A.), a *société à responsabilité limitée* (S.à r.l.) or a *société en commandite par actions* (S.C.A.) can participate in the restructurings covered by the Special Regimes.

Any aspects of the restructuring that are not expressly regulated by the Special Regimes are regulated by the dispositions of the General Regimes.

The Special Regimes do not apply, *inter alia*, to co-operative companies (even if organised as SAs), UCITS, companies in liquidation that have started the distribution of assets, credit institutions, investment firms or European Companies (SE).

b. Restructuring Plan

The companies involved need to agree on a common restructuring plan for the envisaged transaction covering certain points set out in the Company Law.

c. Publication formalities

In addition to the Restructuring Plan, the companies that are required to hold general meetings approving the restructuring also need to publish at least one month before such general meetings a notice addressed to the shareholders, creditors and representatives of employees (or if none, the employees) informing them of their right to provide comments on the Restructuring Plan at least 5 days before the relevant general meeting.

d. Board Report(s)

Either a joint report or two separate reports need to be drafted which are addressed to the shareholders on the one hand and the employees on the other hand containing certain specific information.

The Board Report or Reports are made available in electronic form to the shareholders and representatives of employees (or if none, the employees) at least 6 weeks before the relevant general meeting.

Any comments received from representatives of employees or employees need to be transmitted to shareholders and annexed to the Board Report.

The Board Report or section of the Board Report addressed to shareholders is not obligatory (i) for companies having a sole shareholder or (ii) if all shareholders have waived the requirement.

The Board Report or section of the Board Report addressed to employees is not obligatory if the relevant company or any of its subsidiaries has no workers other than those that belong to its management or supervisory body.

The entire Board Report(s) can be dispensed with if (i) all shareholders have waived the requirement and (ii) the section for employees is not obligatory.

e. Expert Report

The Expert Report needs to be made available to shareholders at least one month before the relevant general meeting.

An Expert Report can be dispensed with either if all shareholders of each company participating in the restructuring have so decided or if a company has a sole shareholder.

f. Making available documents and reports before the general meeting

No notable changes regarding the documents that need to be made available at the registered offices of the restructuring companies or on their websites at least one month before the relevant general meeting. However, please see previous note concerning the need for Board Report or Reports to be made available in electronic form to the shareholders and representatives of employees (or if none, the employees) at least 6 weeks before the relevant general meeting.

g. Approval by General Meetings

The law expressly foresees that the general meetings may either approve, reject or modify (if no incidence for third parties, in particular workers and creditors) the Restructuring Plan.

h. Protection of Shareholders

Shareholders may during the relevant general meeting before a notary vote against the restructuring and declare that they wish to transfer their entire shareholding (or part of shareholding if provided for in the Restructuring Plan) in return for the compensation set out in the Restructuring Plan. Such shareholders will then be entitled to the compensation within 2 months of the restructuring taking effect.

The transferring shareholders may challenge the amount of compensation payable in the courts within one month of the relevant general meeting approving the restructuring.

In respect of mergers and divisions, shareholders that did not exercise the right to transfer their shares can challenge the adequacy of the exchange ratio (number of shares in absorbing respectively new company being obtained in lieu of shares detained in the disappearing company) set out in the Restructuring Plan and apply to the courts for an additional cash payment within one month of the relevant general meeting approving the restructuring.

None of the above legal challenges will suspend the restructuring operations.

i. Protection of Creditors

The right of creditors, whose claims came into existence before publication of the Restructuring Plan, to ask for additional sureties must be exercised within three months of the publication of the Restructuring Plan (rather than within two months of the publication of the effectiveness of the restructuring as foreseen by the present merger and division regimes). Again, such legal challenge does not suspend the restructuring operations.

j. Role of the Luxembourg Notary

The Luxembourg notary needs to, firstly, verify whether all the procedures and formalities required by Luxembourg law for the implementation of the restructuring have been complied with and issue a preliminary certificate. For the purposes of the verification, the notary is furnished with all relevant documents (either online or in person) and is required to carry out the verification within three months of receipt of such documents (which period may be prolonged). He needs to, in particular, verify whether the restructuring is carried out for abusive or fraudulent purposes, in order to remove a company from the application of EU or national laws or to circumvent such laws or for illegal purposes.

Such preliminary certificate is filed with the Luxembourg trade register and transmitted by the register to the register(s) of the companies that participate in the restructuring operations.

If the company that results from the restructuring is subject to Luxembourg law, the notary is additionally charged with verifying and confirming that all steps (Luxembourg and foreign) relating to the restructuring have been carried out in accordance with all legal requirements. For these purposes the notary can rely on preliminary certificates concluding that all required procedures and formalities have been carried out in the other member states of the EU to which one or more of the restructuring companies are subject.

k. Communications between different Trade Registers

The restructuring companies will separately apply their respective laws with regard to the modalities of the publication of the accomplishment of the restructuring in their respective trade registers.

If the company that results from the restructuring is subject to Luxembourg law, the administrator of the Luxembourg trade register will promptly inform the trade register of each of the restructuring companies that the restructuring has taken effect.

If a Luxembourg company is being dissolved without liquidation following the effectiveness of the restructuring, its deletion from the Luxembourg trade register will take place as soon as the Luxembourg trade register receives notification of the effectiveness of the restructuring from the trade register of the company that results from the restructuring.

l. Nullity

Once the restructuring has become effective, its validity may no longer be challenged.

The specificities of the different Special Regimes as they apply to a particular restructuring operation are set out below:

a. Special Regime regarding Mergers

The Special Regime applies to the same type of mergers including upstream and side-stream mergers as the General Regime. However, it will apply even if the cash compensation exceeds 10% of the nominal or par value of the company that results from the merger.

The laws of the country to which the company that results from the merger is subject determine the date of effectiveness of the merger.

Between the merging companies, the merger is effective on confirmation by the notary, as indicated above, that all legal requirements have been fulfilled.

Against third parties, the merger is effective from the date of publication of the minutes of the general meeting of the company that results from the merger.

b. Special Regime regarding Divisions

The Special Regime applies to the following forms of divisions:

- Complete Divisions: transfer by a company at the time of its dissolution without liquidation of the entirety of its patrimony to two or more newly constituted companies with the shareholders of the company being divided receiving shares in the recipient company or companies and possibly a cash payment
- Partial Divisions: transfer by a company of part of its patrimony to one or more newly constituted companies with the shareholders of the company being divided receiving shares in the recipient company or companies, the company being divided or at the same time in the recipient company or companies and the company being divided and possibly a cash payment
- Division by Separation: transfer by a company of part of its patrimony to one or more recipient companies with the company being divided receiving the shares in the recipient companies

Unlike the General Regime the Special Regime does not apply to (i) total or partial divisions to one or more pre-existing companies or (ii) mixed divisions where the patrimony of the company being divided is distributed to one or more pre-existing companies and one or more newly constituted companies.

However, it will apply even if the cash compensation exceeds 10% of the nominal or par value of the company that comes into being by reason of the division.

The date of effectiveness of the division is determined by the laws of the country to which the company being divided is subject.

It is now expressly foreseen that the division will only take effect in Luxembourg on the date of publication of accomplishment of the division in the Luxembourg trade register.

c. Special Regime regarding European Cross-Border Conversions

The special regime for European cross-border conversions applies to cross-border conversions meeting all the following conditions:

- the conversion of a company established in the form of S.A., S.à r.l. or S.C.A. under Luxembourg law into a company of another EU Member State having one of the forms listed in Annex II of Directive (EU) 2017/1132, or the conversion of a company established in another EU Member State in one of the forms listed in Annex II of Directive (EU) 2017/1132 into a company established in the form of an S.A., S.à r.l. or S.C.A. under Luxembourg law;
- the conversion does not cause the dissolution, liquidation or winding up of the company;
- the conversion involves at least the transfer of the company's registered office to the EU Member State of destination; and

- the company retains its legal personality.

The laws of the country of destination of the conversion determine the date of effectiveness of the European cross-border conversion.

For the companies involved in the cross-border conversion, the conversion is effective upon confirmation by the notary that all legal requirements have been fulfilled, as further indicated above.

The conversion takes effect against third parties from the date of the publication of the confirmation attesting to the completion of the European cross-border transformation.

3. Transfer of Assets, Branch of Activity Transfers and All Assets and Liabilities Transfers

The Draft Law provides that Chapter IV of the Company Law now also applies to special limited partnerships (*sociétés en commandite spéciale*).

In case any one of the operations in this chapter may be qualified as a Division by Separation under the Special Regime applicable to divisions, the Special Regime relating to divisions will be applicable rather than the dispositions of Chapter IV.

4. Transfer of Professional Assets

The Draft Law provides that Chapter V of the Company Law now also applies to special limited partnerships (*sociétés en commandite spéciale*).

In case the operation may be qualified as a division under the Special Regime, the Special Regime relating to divisions will be applicable rather than the dispositions of Chapter V.