

LUXEMBOURG TRANSPoses THE MOBILITY DIRECTIVE

On 23 January 2025, the Parliament passed the law (the "Law") transposing the Directive (EU) 2019/2121 (the "Mobility Directive"), amending Directive (EU) 2017/1132 regarding cross-border conversions, mergers, and divisions. This Law introduces significant changes to cross-border mergers and establishes a legal framework for cross-border conversions and divisions within the EU.

BACKGROUND

The primary objective of the Mobility Directive is to facilitate the mobility of companies within the EU by harmonising Member States' legislation on cross-border operations. It also aims to enhance the protection and rights of stakeholders impacted by these operations, including employees, creditors, and minority shareholders.

Previously, cross-border merger was the only operation with a harmonised legal framework within the EU. Although cross-border conversions and divisions were possible under the case law of the Court of Justice of the European Union, the absence of a unified legal framework created significant barriers. This lack of legislation resulted in legal fragmentation and uncertainty, impeding the exercise of freedom of establishment within the EU. The Mobility Directive addresses this by introducing a harmonised legal regime for cross-border conversions and divisions, while also clarifying the existing rules on cross-border mergers.

SCOPE

The Law introduces specific regimes for cross-border mergers, divisions¹, and conversions² within the European Union, now incorporated into dedicated sections of the amended law of 10 August 1915 on commercial companies. This new framework derogates from the general regimes of cross-border operations and applies to companies with legal forms listed in Annex II of Directive (EU) 2017/1132. In Luxembourg, these forms include SA, SARL, and SCA. Unlike other Member States such as Belgium and Germany, Luxembourg has opted not to extend the European regime to other legal forms.

For cross-border operations involving jurisdictions outside the European Union or legal forms not referred to above, the general regimes continue to apply, unless the

Key issues

- Harmonisation of cross-border mergers, divisions, and conversions within the EU
- Introduction of specific regimes for cross-border mergers, divisions, and conversions within the European Union
- Introduction of a double control of legality to be performed by the notary in Luxembourg
- Strengthening the protection of minority shareholders, creditors, and employees
- Applies to cross-border operations within the EU having their draft terms published after the first day of the month following the date of entry into force of the Law

¹ Only divisions with incorporation of companies are in the scope of the Mobility Directive – divisions by absorption remain governed by the general regime.

² Also referred to as "migration".

companies involved are subject to another special regime, such as, for example, for *Société Européenne* (SE) or UCITS. Certain companies are excluded from the scope of the European regime for cross-border operations, including companies in liquidation that have begun distributing assets to shareholders, and companies subject to insolvency proceedings or preventive restructuring measures, as defined by national law.

HARMONISED PROCESS

The process of cross-border operations (i.e. mergers, divisions, and conversions) introduced by the Mobility Directive is divided into three phases: (i) the preliminary phase; (ii) the approval phase; and (iii) the implementation phase; including a waiting period between the first and second phases and double control of legality between the second and third phases.

In the preliminary phase, the companies' management body draws up the terms of the operation, arranges for its publication on public records and notifies the stakeholders, including employees, shareholders, and creditors. Detailed reports are prepared for shareholders and employees, explaining the legal and economic aspects and their implications. Compliance with employee rights is mandatory, and an independent expert reviews the draft terms unless waived by shareholders.

The approval phase starts at the earliest one month after the publication of the draft terms of the operation and consists in the general meeting of the shareholders voting on the operation in the departure country. Following the approval of the operation, a control of legality is performed both in the country of departure and in the country of destination.

If the operation passes the double control of legality, the implementation phase begins. Among other things, the deed is executed in the country of destination and is registered with the competent local registers (in Luxembourg the Luxembourg Trade and companies register "**RCS**"). The effective date of the operation is determined by the destination country's law.

DOUBLE CONTROL OF LEGALITY

The Mobility Directive introduces a double control of legality mechanism consisting of a preliminary control in the departure country and a final control in the country of destination to be performed by the competent local authorities. In Luxembourg, the Law designates the notary as the competent authority in charge of performing this control of legality, either for the preliminary control, if Luxembourg is the departure country, or the final control if it is the country of destination.

The purpose of the preliminary control is to verify the legality of the proposed operation, ensuring compliance with the Law and the absence of fraud and abuse. This control is to be performed within three months as from the receipt by the competent authorities of the departure country of the relevant documents and information concerning the general meeting approving the operation. An additional three-month period may be used if deemed necessary by the competent authorities. If the operation passes this control, the company will issue a pre-operation certificate to be registered with the competent register of the departure country (in Luxembourg the RCS). This certificate is transmitted digitally by the competent register of the departure country to the competent register of the destination country.

Following this, the final control is conducted by the competent authorities of the country of destination and consist in verifying that all legal conditions have been met and that the operation complies with the destination country's local requirements.

PROTECTION OF STAKEHOLDERS

In line with the Mobility Directive, the Law places a strong emphasis on safeguarding the interests of employees, creditors, and shareholders who are vulnerable to potential fraud or abuse during cross-border operations. Companies must prepare a comprehensive report for shareholders and employees, outlining the legal and economic rationale behind the proposed operation. The report should also detail the impact on employment, including any significant changes to legal employment conditions. The report is to be split into two parts or two separate documents, one intended for the shareholders and the other for the employees.

Minority shareholders who oppose the operation are entitled to exit the company in exchange for adequate cash payment. For mergers and divisions, shareholders who do not exercise their right to exit have the right to dispute the share exchange ratio set out in the draft terms and request additional cash payment within one month following the general meeting. Creditors with claims preceding the date of publication of the draft terms are protected through various measures, including the right to request safeguards from relevant authorities within three months from the publication of the draft terms. Furthermore, shareholders, creditors, and employees (or their representatives) are granted the opportunity to voice their concerns before the general meeting that will decide on the operation.

ENTRY INTO FORCE & CHALLENGES

The transposition of the Mobility Directive was highly anticipated as the deadline for its implementation by Member States was set for 31 January 2023. Luxembourg, however, did not meet this deadline and is the last country to transpose the Mobility Directive. The date of entry into force of the Law is currently still unknown as the waiver of the second constitutional vote from the Council of State (*Conseil d'Etat*) is still outstanding. It will enter into force on the fourth day following its publication in the *Mémorial A*. The European regime will apply to cross-border operations within the EU having their draft terms published after the first day of the month following the date of entry into force of the Law ; operations with draft terms published before this date will remain subject to the general regime.

The Mobility Directive establishes a harmonised legal framework for cross-border operations, providing more legal certainty for companies' mobility within the EU and higher protection of stakeholders. However, the new regulatory framework introduces longer delays and additional administrative burden for intra-European operations compared to cross-border transactions involving non-EU countries.

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