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**ARTICLE** 

## Luxembourg transposes the EU Mobility Directive

A new framework for Cross–Border Operations within the EEA

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The EU Mobility Directive establishes a new legal framework for cross- border conversions and divisions, harmonising the existing rules for cross-border mergers (the Cross-Border Operations). It aims to enhance company mobility within the internal market while protecting stakeholders.

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mergers (the Cross-Border Operations). It aims to enhance company mobility within the internal market while protecting stakeholders.

The EU Mobility Directive introduces stricter rules for Cross-Border Operations compared to those currently applicable under Luxembourg law. In response, the Luxembourg legislator has limited its scope of application to Cross-Border Operations within the European Economic Area (the EEA), creating two distinct regimes:

- General Regime: Applies to Cross-Border Operations between a Luxembourg company and a non-EEA company (the Non-EEA Cross-Border Operations) and domestic mergers, divisions and conversions, whereby the current rules continue to apply (with minor changes).
- Special Regime: Applies to Cross-Border Operations between a Luxembourg company and an EEA company (the EEA Cross-Border Operations), governed by the stricter provisions of the EU Mobility Directive as transposed by Luxembourg law.

The new regime will apply to EEA Cross-Border Operations with common draft terms (the CDT) published in the Luxembourg *Recueil Electronique des Sociétés et Associations* (the RESA) from the first day of the month following the Law's entry into force.

The law passed on January 23, 2025 (the Law) transposes into Luxembourg law the Directive (EU) 2029/2121 on cross-border conversions, mergers and divisions (the EU Mobility Directive). Effective since January 1, 2020, the EU Mobility Directive had to be transposed by Member States by January 31, 2023. It aims to promote the mobility of companies within the internal market, while strengthening the protection of their stakeholders such as shareholders, creditors and workers.

The EU Mobility Directive introduces a legal framework for cross-border conversions and divisions, operations previously unregulated at the European level. It also adapts the rules applicable to cross-border mergers to harmonise them with the new provisions applicable to cross-border conversions and divisions.

The EU Mobility Directive introduces stricter rules than those currently applicable to Cross-Border Operations under Luxembourg law. In response, the Luxembourg legislator has limited its scope of application to Cross-Border Operations within the EEA, thereby creating two distinct regimes:

- General Regime: Applies to Non-EEA Cross-Border Operations and similar domestic operations, whereby the current rules continue to apply (with minor changes).
- Special Regime: Applies to EEA Cross-Border Operations, governed by the stricter provisions of the EU Mobility Directive as transposed by Luxembourg law.

The new regime will apply to EEA Cross-Border Operations whose CDT are published in the RESA as from the first day of the month following the entry into force of the Law. EEA Cross-Border Operations whose CDT have been published in the RESA before this date but have not yet been completed will remain subject to the current legal regime.

This eAlert presents (i) the new regime applicable to EEA Cross-Border Operations, (ii) the new protection granted to the stakeholders of Luxembourg companies participating in these operations, (iii) the increased legality control of the EEA Cross-Border Operations available to the notaries in Luxembourg, and (iv) the minor modifications to the general regime for domestic and Non-EEA Cross-Border Operations.

## 1. New framework for EEA Cross–Border Operations

#### 1.1. Scope

Applies to Luxembourg SAs, S.à r.l. and SCAs. — Excludes UCITS, companies in liquidation and those under resolution or crisis prevention procedures.

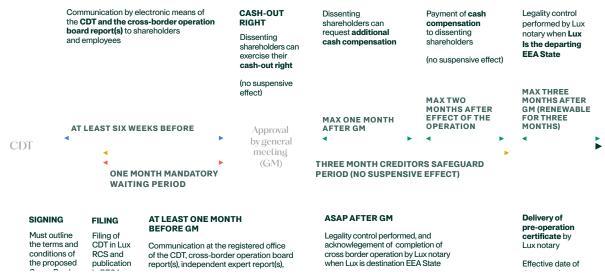
 Cross-border conversions: change of legal form to that of another EEA state<sup>1</sup>(an EEA State) without dissolution or liquidation.

- Cross-border mergers: mergers by absorption, incorporation of a new company and simplified forms like upstream<sup>2</sup> and side-step mergers<sup>3</sup>.
- Cross-border divisions: includes full and partial divisions and divisions by separation.

#### 1.2. Key steps/timeline

The following steps are the key to completing an EEA Cross-Border Operation under the new regime.

#### Main legal steps for EEA Cross-Border Operations



Cross-Border In RESA operation

AA for the last three financial years and related management reports, interim accounts (as applicable) to shareholders

Effective date of the operation between parties\* (\*only for merger's and conversions - the division takes effect as of Lux RESA's publication of its completion - subject to receipt of a pre-operation certificate from other EEA authority)

the operation determined by destination EEA State

Once effective, the operation can no longer be annulled

#### 1.3. Areas of focus

#### Two-level legality control

The Law introduces a two-level legality control for EEA Cross-Border Operations. This mechanism aims to enhance the legal security of EEA Cross-Border Operations.

When Luxembourg is the departing EEA State, the first level of legality control concerns compliance of the EEA Cross-Border Operation with the procedures and formalities provided by Luxembourg law. The Luxembourg notary has a period of three months from the receipt of the necessary information (CDT, reports, etc.) to carry out this control. If all conditions are met, the notary issues a pre-operation certificate. In case of non-compliance, abuse, fraud or criminality, the notary will refuse to issue the certificate. If the notary suspects that the operation has been carried out for abusive or fraudulent purposes or for criminal purposes, they may benefit from an additional three-month period

to conduct thorough investigations and consult other relevant authorities and independent experts at the expense of the companies. This period can be extended in case of particular complexity of the operation. At the end of the control, the notary can grant or refuse the certificate.

Once the certificate is issued, it is transmitted to the competent authority of the destination EEA State through the BRIS (Business Registers Interconnection System), which will carry out the second-level legality control.

When Luxembourg is the destination EEA State, the company resulting from the operation is governed by Luxembourg law, such that the Luxembourg notary is competent to carry out the second-level legality control, during which the notary scrutinises the legality of the EEA Cross-Border Operation as regards that part of the procedure which is governed by Luxembourg law and verifies that the company resulting from the operation complies with Luxembourg law requirements regarding incorporation and registration as well as the modalities related to worker participation, if applicable. The preoperation certificate issued by the competent authority of the departing EEA State shall be accepted by the Luxembourg notary (unless there is a manifest error in it) as conclusively attesting to the first-level legality control in the departing EEA State, without which the completion of the EEA Cross-Border Operation cannot be confirmed by the Luxembourg notary.

#### Enhanced protection for key stakeholders

The desired enhanced protection for key stakeholders put forward by the EU Mobility Directive, as transposed into Luxembourg law by the Law does not have a suspensive effect on the implementation and the effectiveness of the EEA Cross-Border Operation, but it will considerably extend the timing on the implementation of such transactions.

Shareholder protection: right of withdrawal and right to challenge the share exchange ratio

The Law strengthens the rights of shareholders by establishing a right of withdrawal with fair compensation for those who oppose the EEA Cross-Border Operation by allowing them to transfer their shares to the participating

companies, the other shareholders or agreed third parties in consideration for cash compensation (soulte), shares or other agreed compensation offered by the company resulting from the EEA Cross-Border Operation.

This right is granted only to shareholders holding voting shares and must be exercised on all the shares held by the dissenting shareholders as at the date of publication of the CDT in the RESA. To exercise this right, the dissenting shareholder must express their opposition and intention to leave the company at the general meeting deciding on the EEA Cross-Border Operation. Within two months following the effective date of the operation, the dissenting shareholder will receive cash compensation, the amount and terms of which have been defined in advance in the CDT.

If the dissenting shareholder considers the compensation insufficient, they can appeal for additional compensation before the judge presiding over the chamber of the District Court (*Tribunal d'Arrondissement*) dealing with commercial matters and sitting in summary proceedings (the District Court) within a month of the general meeting. This appeal has no suspensive effect on the implementation of the Cross-Border Operation and its effectiveness.

In the event of a merger or division, shareholders who do not oppose the EEA Cross-Border Operation but consider its conditions unfair can also challenge the exchange ratio before the District Court and make a claim for additional compensation within a month of the general meeting. This opposition has no suspensive effect on the implementation of the Cross-Border Operation and its effectiveness.

#### Creditor protection: transparency and effective remedies

The Law strengthens creditor protection by introducing transparency measures and effective remedies.

#### **Information and transparency**

The debtor company must inform its creditors of the guarantees proposed in the CDT. Creditors also have the right to present their observations on the CDT at least five business days before the general meeting, but these observations have no binding or suspensive effect on the implementation of the EEA Cross-Border Operation and its effectiveness.

#### Creditors' remedies

Creditors whose claims predate the publication of the CDT in the RESA and are not yet due can challenge the protection offered. To do so, they must demonstrate that the EEA Cross-Border Operation compromises the recovery of their claim and that the guarantees provided in the CDT are insufficient. This remedy must be exercised within three months following the publication of the CDT in the RESA, without suspensive effect.

It is crucial to note that this protection regime applies only to creditors whose claims are not due at the time of publication. This marks a significant change from the previous regime, which will now apply solely to domestic and Non-EEA Cross-Border Operations. In these regimes, all claims prior to publication are and will still be covered. In contrast, for EEA Cross- Border Operations, only claims that are not yet due will be targeted. This change reflects the Luxembourg legislator's intention to transpose "the entire directive, nothing but the directive," without extending the protection mechanism as broadly as domestic and Non-EEA Cross-Border Operations.

### Worker protection: information, consultation and participation

The Law strengthens the rights of workers by guaranteeing them the right to be informed and consulted before the completion of the EEA Cross- Border Operation and to participate in the management bodies of the new entity.

#### Information

The company's management body must draft a report detailing the legal and economic aspects of the EEA Cross-Border Operation. This report must include a specific section for workers explaining the consequences on employment relationships, employment retention measures and significant changes in employment conditions or locations. This report cannot be waived

by the shareholders, but it is not required if the company has no employees other than those of the management body.

#### Consultation

Workers or their representatives must be able to express their views on the CDT at least five business days before the general meeting that will approve it, but these observations have no binding or suspensive effect on the implementation of the EEA Cross-Border Operation and its effectiveness.

#### Participation in management bodies

The rules for workers' participation in management bodies are harmonised with those of cross-border mergers. The company must follow the participation rules of the EEA State where its registered office is located after the operation, unless the legislation of that EEA State does not guarantee an equivalent level of participation.

# 2. Modifications to the regime for domestic operations and introduction of a framework for Non-EEA Cross-Border Operations

The Law introduces several adjustments to the general regime for mergers and divisions aimed at making the legal framework more attractive and functional for companies operating in Luxembourg and beyond the borders of the EEA.

#### Main changes:

1. Unification of rules for domestic and Non-EEA Cross-Border Operations: The rules applicable to mergers, whether domestic or cross-border outside the EEA, are unified. The same rules apply to domestic and cross-border divisions outside the EEA.

- 2. Introduction of the side-step or side-stream merger: This is a simplified form of merger by absorption, characterised by the absence of share exchange. In this type of merger, the absorption is carried out by an entity that either directly or indirectly owns all shares of the merging companies. Alternatively, it can occur when the shareholders of the merging companies hold their securities and shares in the same proportion in all the merging companies.
- 3. Flexibility regarding CDT: The Law allows the shareholders of the companies participating in a domestic or Non-EEA Cross-Border Operation to modify the CDT and to condition the approval of the operation on a suspensive condition or a term.
- 4. Easing obligations for single-member companies: Single-member companies will be exempt from the requirement to draw up an independent expert report.
- 5. Clarifications regarding universal transfer of assets (TUP): The Law clarifies that the TUP includes all contracts, credit, rights and obligations of the absorbed or divided company, including intuitu personae contracts and criminal and administrative sanctions.

#### 3. Entry into force

The Law will come into force on the fourth day following its publication in the Luxembourg Official Journal, the date of which is still unknown as it awaits the Council of State's exemption for a second vote.

The new provisions will apply to EEA Cross-Border Operations for which the CDT will be published from the first day of the month following the Law's entry into force. Operations whose CDT have been published before that date but have not been completed will remain subject to the current rules.

#### Footnotes

1. A company must at least transfer its registered office (siège statutaire) to the destination EEA State.

- 2. A cross-border merger by absorption carried out by a company that holds all the shares and other securities conferring voting rights at the general meetings of the absorbed company or companies.
- 3. A cross-border merger by absorption 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 securities and shares in the same proportion in all the merging companies.

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