The Mergers & Acquisitions Review

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Editor
Mark Zerdin

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For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Mark Zerdin

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Chapter 29

LUXEMBOURG

Philippe Hoss and Thierry Kauffman[1]

I OVERVIEW OF M&A ACTIVITY

M&A activity remained relatively strong in Luxembourg in 2018, with less activity in the first half of 2019 due to a global slowdown caused by the remaining uncertainties resulting from Britain's decision to leave the European Union and ongoing trade wars between the United States and several of its trading partners, including China and the European Union. Some of the reasons for Luxembourg's continuing attractiveness are its regulatory and legislative framework, its legal and political stability and its domestic market, in particular its fund industry and financial sector.

Luxembourg remains the largest investment funds centre in Europe, and the second-largest in the world behind the United States. At the close of April 2019, the net assets under management in Luxembourg amounted to €4.405 billion.[2] Hence, the investment funds industry continues to play a major role in stabilising the Luxembourg market. Luxembourg continues to be ideally placed to implement tax-efficient M&A transactions and hence to be a key platform for M&A and private equity activity. One reason for this is that the relevant legislation continues to be adapted and modernised to be as attractive and flexible as possible: this includes new forms of companies, namely the special limited partnership and the simplified stock company, which offer additional solutions for economic actors, including those of the private equity world. Funding instruments and methods created and used by practitioners over past decades, such as the use of tracking shares or the issuance of hybrid instruments, have been confirmed by the legislator and codified in the law of 10 August 2016 amending the law of 10 August 1915 on commercial companies (1915 Law), hence creating additional legal certainty.

Luxembourg remains one of the leading European hubs for vehicles investing directly or indirectly in European real estate. It is also worth noting that a lot of actions are being undertaken by the government to make Luxembourg a leading hub in the areas of information and communication technology, fintech and space technology.

In general, Asian dealmakers and investors continue to set their sights on European targets in a bid to reduce reliance on their domestic market. North American investors on the other hand may feel more inclined to stay at home, as there may be new opportunities in a less regulated and lower tax US environment as promised by the US President. This tendency might be accentuated by the ongoing trade wars.

1 Philippe Hoss and Thierry Kauffman are partners at Elvinger Hoss Prussen.

2 CSSF press release 19/20 of 3 July 2019.

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With a number of promising drivers and deals in place, we anticipate a relatively active M&A market in the second half of 2019, although not as exceptional as 2018. Low costs of funding, the continued desire to expand geographic reach and innovation capabilities speak in favour of an active year. On the other side, key global elections, heightened regulatory scrutiny, in particular of Chinese investors, and speculations around Brexit may result in a slowdown in M&A activities. Despite the strong concurrent bids from other leading European hubs, investors and companies fleeing Brexit seem to find Luxembourg an adequate alternative, and particularly the insurance and asset management sectors, which noticed the establishment of many newcomers in the Luxembourg market.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Luxembourg Civil Code, notably the provisions governing contracts, and the Luxembourg Commercial Code provide the statutory framework and form the legal basis for the purchase and sale of corporate entities in Luxembourg.

Statutory mergers, including cross-border mergers with EU or non-EU entities, demergers, splits and spin-offs, as well as contributions of branches of activities, or of part or all of the assets and liabilities of Luxembourg undertakings, are mainly governed by the 1915 Law, which implemented the EU Cross-Border Mergers Directive.[3]

In addition, the law of 5 August 2005 on collateral agreements, which provides legal certainty to lenders, is commonly used in M&A transactions irrespective of the location of the target to secure financing. In that context, it should be noted that Luxembourg continues to offer a legal environment more favourable to lenders than any other European jurisdiction.

In the case of an offer for the acquisition of a target whose shares are admitted to trading on a regulated market in one or more Member States, the law of 19 May 2006 transposing the Takeover Law[4] will apply in cases where the target is a Luxembourg company or where its shares are admitted to trading on the regulated market of the Luxembourg Stock Exchange (LSE). If the target is a Luxembourg company and its shares are listed on the regulated market of the LSE, all aspects of the offer will be governed by the Takeover Law (even if the shares are additionally listed on other regulated markets in the EU or the EEA). If the target is a Luxembourg company but its shares are listed only on a regulated market in the EU or the EEA outside of Luxembourg, a split jurisdiction regime will apply, with the law of the listing jurisdiction being applicable for the offer, and Luxembourg law being applicable for corporate law matters, the legality of measures by the target that could defeat the offer as well as information to be provided to employees of the target. With respect to Luxembourg companies, Luxembourg law will also be competent to determine the control threshold, the crossing of which may trigger the obligation to make a mandatory offer, and the exemptions from such obligation. Luxembourg law will also provide for the sell-out and squeeze-out rules following a successful offer.

If a bidder does not achieve the necessary threshold for a squeeze-out as a result of an offer under the Takeover Law, but reaches that threshold at a later stage, such bidder may be in a position to squeeze-out minority shareholders under the law of 21 July 2012 on the mandatory squeeze-out and sell-out of securities of companies currently admitted or

3 Directive 2005/56/EC.

4 Directive 2004/25/EC.

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previously admitted to dealing on a regulated market in the European Union or having been offered to the public. Conversely, minority shareholders may have the right under that law to cause the majority shareholder to purchase their shares.

Public offerings on the Luxembourg territory and admissions to trading on the Luxembourg regulated market of securities are governed by the EU Prospectus Regulation[5] and by the Luxembourg prospectus law of 16 July 2019 (Prospectus Law), and the Financial Sector Supervisory Commission (CSSF) is the supervisory and regulatory authority competent to oversee these operations.

For companies whose securities are admitted to trading on the regulated market of the LSE, and whose home Member State will be Luxembourg, a certain number of additional Luxembourg laws (mainly deriving from the implementation of relevant European directives) may apply, in particular the Luxembourg law of 11 January 2008, as amended, implementing the Transparency Directive (Transparency Law)[6] and the Luxembourg law of 26 December 2016 on market abuse (Market Abuse Law) implementing the Market Abuse Directive II.[7]

The law of 24 May 2011, as amended, on the exercise of certain rights of shareholders in general meetings of listed companies will also apply to Luxembourg companies whose shares are admitted to trading on a regulated market in the EU (Shareholder Rights Law).

The Takeover Law, the Prospectus Law, the Transparency Law and the Shareholder Rights Law, and those provisions of the Prospectus Law supplementing the Prospectus Regulation, are not applicable to Luxembourg or foreign companies whose shares or other securities are admitted to trading on the Euro multilateral trading facility (MTF) market of the LSE.

The Market Abuse Regulation (MAR),[8] relevant implementing and delegated regulations of the European Commission and the Market Abuse Law will apply with respect to companies whose securities are admitted to trading on the regulated market or the Euro MTF of the LSE.

Moreover, there may be specific legislation to be considered depending on the sector involved in the transaction (e.g., credit institutions, insurance or reinsurance companies, companies operating in the telecommunication business, MiFID firms) and, in particular, prior regulatory approvals or notifications will then be necessary.

Additional regulations will also apply if a purchase, sale or merger of a Luxembourg undertaking involves the transfer of staff.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Modernisation of Luxembourg company law

On 10 August 2016, Parliament adopted bill of law 5730 modernising the 1915 Law and amending, inter alia, relevant articles of the Civil Code. The new law came into force on 23 August 2016 (New Company Law).

Although the New Company Law brings a lot of significant changes, the contractual freedom of shareholders remains the key feature. The New Company Law mainly aims

5 Regulation (EU) No. 2017/1129/
6 Directive 2004/109/EC.
7 Directive 2014/57/EU.
8 Regulation No. 596/2014/EU.

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at integrating some innovations already existing in foreign jurisdictions to offer new legal instruments to investors, to harmonise rules applicable to the different forms of companies and to formally recognise the validity of legal solutions previously developed by Luxembourg practitioners.

The New Company Law contains new opportunities but also certain additional constraints. As a result, the impact of such legislation should be carefully analysed not only for new entities but also for existing structures.

Below is a summary of some of the key changes resulting from the New Company Law. Some of these may require specific actions, including appropriate provisions to be inserted in articles of association or shareholders' agreements:

a Key changes applying to a public company limited by shares (SA), a partnership limited by shares (SCA) and a private limited liability company (Sàrl):
- agreements governing voting rights are now formally recognised (with certain limits);
- the New Company Law now contains a list of cases where a decision of shareholders or bondholders may be declared void;
- a shareholder of an SA, Sàrl or SCA may validly undertake not to exercise all or part of his, her or its voting rights either temporarily or permanently;
- management may, if so authorised by the articles of association, suspend the voting rights of a shareholder that is in default of its obligations under the articles of association or a shareholders' agreement or the relevant shareholder's undertakings;
- the change of nationality of a Luxembourg company will no longer require a unanimous decision by the shareholders (and bondholders); and
- recognition of provisions where current or future shareholders organise the transfer or acquisition of shares.

b Key changes pertaining only to a private limited liability company:
- the majority requirement applicable to the transfer of shares in a Sàrl to a non-shareholder may be reduced from 75 to 50 per cent of the share capital in the articles of association. If the proposed transfer of shares is not approved, the remaining shareholders may propose alternatives within three months of this refusal to the leaving shareholder, allowing it to transfer its shares, and if no solution has been found, the leaving shareholder is authorised to transfer its shares to the third party initially identified;
- the foregoing is without prejudice to the pre-emption and tag-along rights agreed among the parties;
- abolishment of the double majority requirement (majority of shareholders representing 75 per cent of the shares) for extraordinary shareholder decisions. A 75 per cent majority of the shares is now sufficient;
- the possibility for managers to pay an interim dividend;
- the possibility to issue redeemable shares; and
- the possibility to provide for an authorised share capital.

c Key changes pertaining only to a public company limited by shares and a limited partnership by shares:
- the validity of lock up clauses in the articles of association is formally recognised, with the consequence that any transfer made in breach of such clauses is expressly null and void;

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- prior consent clauses and pre-emption clauses relating to shares provided for in the articles of association are formally declared as being valid as long as such clauses do not prevent the leaving shareholder from transferring its shares for more than 12 months;
- the issuance of non-voting shares is no longer limited to 50 per cent of the share capital, and non-voting shares do not necessarily need to receive a preferred dividend; and
- an auditor's in kind report is no longer required for the contribution to a company consisting in a claim against or receivable issued by the same company (under certain conditions).

On 15 December 2017, the Grand-Ducal Regulation (Regulation) coordinating the 1915 Law was published in the Luxembourg official gazette and applies from 19 December 2017.

The Regulation does not further amend the 1915 Law, but it significantly reorganises the numbering of its articles and sections. From 19 December 2017, all references to the 1915 Law shall take into account the new numbering. The constitutional documents of Luxembourg companies in force before 19 December 2017 do not need to be amended, and reference to an old number will automatically be deemed to refer to the corresponding new number of an article or a section.

i Creation of a register of beneficial owners

The 4th EU AML Directive,[9] as amended by the 5th EU AML Directive,[10] requires each Member State of the EU to, inter alia, establish a register of beneficial owners (RBO) in respect of corporate and other legal entities incorporated or formed within its territory.

The Luxembourg Law of 13 January 2019 creating a register of beneficial owners (RBO Law) entered into force on 1 March 2019. Within six months from such date (i.e., before the end of August 2019) all in-scope Luxembourg entities (e.g., commercial companies, special limited partnerships and investment funds, including common funds) will have to comply with the provisions of the RBO Law.

In particular, Luxembourg entities will be required to provide the RBO with relevant information on their ultimate beneficial owners (UBOs) as defined by the AML Law.[11]

All UBOs are concerned, irrespective of whether they are Luxembourg nationals or residents or not. As an exception, companies listed on EU-regulated markets or on regulated markets established in a non-EU jurisdiction that has similar transparency rules shall merely provide the RBO with the name of the relevant regulated market.

ii Amendments to the Shareholder Rights Law

The Shareholder Rights Law will be amended in 2019 pursuant to bill of law 7402.[12]

The Shareholder Rights Law, as it will be amended by bill of law 7402, will require intermediaries (custody banks and other professionals providing securities safe-keeping and

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9 Directive (EU) 2015/849.

10 Directive (EU) 2018/843.

11 Luxembourg Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended.

12 Bill of law 7402 on the exercise of certain rights by shareholders in general meetings of listed companies has, at the time of writing, been voted but not yet published in the Luxembourg legal gazette.

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securities accounts services) to communicate information regarding shareholders' identities on request and without delay to listed issuers so that they may identify their shareholders. These requirements apply to all intermediaries that might be part of a holding chain, including non-EU intermediaries. Intermediaries must also facilitate the exercise of their rights by shareholders, in particular the right to participate and vote at general meetings.

The law will provide for increased transparency on subjects such as the remuneration policy and related party transactions of listed issuers and as regards the shareholder engagement policy of institutional investors and asset managers, the investment strategy of institutional investors and certain information regarding the arrangements with the asset manager appointed by them. Asset managers will need to report to their institutional investor clients how their investment strategy and the implementation thereof complies with their mandate, and on certain other matters. There will also be certain disclosure obligations on proxy advisers with respect to their research, advice and voting recommendations.

iii Parliamentary bills of law not yet adopted

Current ongoing legislative activities relevant to M&A activity are quite limited, with the most important being bill of law 6539 regarding the preservation of enterprises and aiming to modernise the legal framework for insolvency law and assimilated procedures.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Luxembourg is the second-largest investment fund centre in the world after the United States, the premier captive reinsurance market in the European Union and the premier private banking centre in the eurozone. The financial sector is the largest contributor to the Luxembourg economy.

Moreover, Brexit has had a positive impact on the Luxembourg insurance sector with the establishment in Luxembourg of about 10 insurance companies such as AIG, Liberty Mutual, Sompo International and Britannia.

A number of asset management and private equity firms have also pledged to move activities to Luxembourg, including Fidelity, M&G, Standard Life Aberdeen, Columbia Threadneedle, Blackstone, T Rowe Price and Wells Fargo.

Luxembourg's success is founded on its social and political stability, and on a modern, efficient, flexible and business-friendly legal and regulatory framework that is continuously updated. Banks, insurance companies, investment fund promoters and specialist service providers from all over the world have been attracted to Luxembourg. M&A transactions are not subject to any particular restrictions.

A large part of M&A activity in Luxembourg consists of the involvement of Luxembourg vehicles in the acquisition of foreign targets or assets. In particular, the number of Luxembourg holding structures through which real estate is held has continued to increase in past years.

Luxembourg's neighbours, France, Belgium and Germany, are considered to be the main players in the Luxembourg market, and they have a noticeable presence in Luxembourg through their financial institutions. While other European countries have a strong presence, the establishment of some of the main international financial institutions and banks from non-European countries, in particular from China, over the course of the past few years

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is notable. Indeed, several Chinese banks have incorporated their European headquarters in Luxembourg, and Luxembourg has become the leading European jurisdiction for international renminbi business.

Luxembourg is a location that many foreign investors and international groups consider, particularly for the establishment of investment funds or the structuring of cross-border acquisitions and intragroup structuring, mainly due to Luxembourg's stability, its pragmatism and flexibility, and its openness to new businesses.

One of the advantages of Luxembourg's legislation is that when implementing the provisions of the EU Cross-Board Mergers Directive in the 1915 Law, Luxembourg law covers not only national mergers and mergers between Luxembourg companies and EU companies of *sociétés anonyme*s, but also mergers between Luxembourg companies and non-EU companies of any legal form, contrary to the legislation of most other Member States.

It is further possible in Luxembourg to express the share capital of a Luxembourg undertaking in a currency other than the euro or to have the legal documentation directly drawn up in English, with the exception that some documents (i.e., notarial deeds) must be followed by a French or German translation.

As further set forth above, the law of 5 August 2005 on collateral agreements, as amended, is commonly used in M&A transactions involving a Luxembourg entity to secure financing and continues to offer a legal environment more favourable to lenders than other European jurisdictions.

In addition, the migration of companies to Luxembourg with the continuation of their legal personality and without the need for reincorporation has always been recognised and is a common occurrence.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

In November 2018, Luxembourg-based ArcelorMittal completed the acquisition of Italian steel producer Ilva in a deal worth €1.8 billion. The main assets of Ilva notably include its steel plant in Taranto, Italy, which is Europe's largest single-site integrated flat carbon steel plant. Both companies are significant producers in Europe of hot rolled, cold rolled and galvanised flat carbon steel. To obtain the approval of the European Commission for the deal, ArcelorMittal was required to sell a large package of steel plant assets, including integrated steelworks in Romania and the Czech Republic, as well as finishing plants in Italy, Belgium, Luxembourg and North Macedonia, all of which were sold to London industrial and metals company Liberty House.

Luxembourg remains heavily involved in major international deals structured through Luxembourg. Hence, assistance on Luxembourg law aspects was required in, inter alia, the following major deals:

a the investment of Technology Crossover Ventures and CPPIB through a Luxembourg joint venture company in SportRadar AG, which provides sports-related live data and digital content services, for €2.1 billion;

b the acquisition by Foncière des Murs of 14 four and five-star hotels in the UK for £858 million from American investment firm Starwood Capital;

c the acquisition by Silver Lake, the global leader in technology investing, of the property platform ZPG Plc for US$3 billion;

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d the cross-border merger of Nets and Concardis Group to form a leading European payment player, as Nets was a market leader in the Nordic payments industry and Concardis a leading merchant payment service provider in the DACH region;
e the sale by CVC Capital Partners of Belgian food group Continental Foods to Agrolimen;
f the sale of a 40 per cent stake in Belron, a leader in glass repair and replacement, to funds managed by Clayton Dubilier & Rice;
g the acquisition by China Southern Power Grid of a stake in Encevo, a leading utility company in Luxembourg; and
h the sale by residential real estate specialist BGP Investment Sàrl of all its real estate assets (approximately 16,000 residential and commercial units) to certain funds belonging to the ZBI Group.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In addition to financing by cash resources, Luxembourg law and existing practice in Luxembourg provide for a large range of financing possibilities and instruments. It is possible to gain financing, inter alia, through an issue of shares, securities and other financial instruments carrying specific financial or voting rights such as preferred dividend rights, tracking securities, subordinated loans or securities, securities with arrangements ensuring multiple voting rights, convertible instruments, securities or loans with profit-participating elements.

On the equity side, we see contributions to a company's equity account with or without the issue of shares by the company to be financed. In the latter case, the contribution is made to the freely distributable account (account 115) of the company, which is termed a 'contribution to equity capital without issue of shares (capital contribution)' pursuant to the Grand Ducal Decree dated 10 June 2009 on the presentation and content of a standard chart of accounts, this being a sub-account of the share premium account of a company. Alphabet shares, tracking shares and shares with differing par values are also possible, and are now recognised by the New Company Law.

On the debt side, entities are financed through loans that may be interest-bearing, profit-participating, convertible or tracking. However, transfer pricing rules must be complied with, and payments must be at arm's length.

More complex and hybrid instruments also exist, such as preferred equity certificates (which can be interest free, tracking, convertible, etc.), notes, and bonds that can be issued by an entity in addition to shares and that are governed mainly by their contractual terms. It remains to be seen to what extent these hybrid instruments will continue to be used under ATAD 2[13] (which is further discussed in Section VIII).

The New Company Law has introduced a great deal of flexibility or has confirmed the flexibility of previously existing techniques: tracking shares are now formally recognised, the public or private issuance of bonds is now possible for all types of entities vested with legal personality, shares of a *société anonyme* can be issued below par value under certain conditions and shares can be issued with different nominal values.

13 Directive (EU) 2017/952 of 29 May 2017.

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Third-party financing usually takes the form of senior or mezzanine loans (whether syndicated or not). That said, alternative lenders are becoming more attractive in the debt financing market given that they often offer more flexibility than traditional bank lenders.

For a number of reasons (including the low minimum share capital, less regulation by the 1915 Law and its closed character), the private limited liability company is the preferred corporate vehicle for Luxembourg-structured acquisitions. For more complex structures, the limited partnership by shares may be interesting in particular for an initiator who wants to retain total control of its management. Some additional company types have become available over the past few years such as the special limited partnership, the simplified private limited liability company and the simplified stock company. The special limited partnership regime is inspired by the UK and US common law concept of a limited partnership. It provides considerable flexibility and offers additional onshore structuring solutions. Investors have demonstrated significant interest in these partnerships, as evidenced by the high number of incorporation of this company form over the past few years. The simplified stock company available in Luxembourg since the New Company Law is a company inspired by French law that has seen great success in France, and has begun to be used in Luxembourg as an alternative to the private limited liability company.

VII EMPLOYMENT LAW

Where a merger or an acquisition results in a transfer of an undertaking based on the territory of the Grand-Duchy of Luxembourg defined as a 'transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary', Articles L127-1 and following of the Luxembourg Labour Code apply.

As a consequence, the rights and obligations of the transferor arising from employment contracts or existing employment relationships on the date of the transfer shall, by virtue of the law, be transferred to the transferee. The transferee is obliged to maintain all the essential elements of the employment contracts of the transferred employees.

Transferors and transferees shall be jointly and severally liable in respect of obligations that arose before the date of a transfer from an employment contract or an employment relationship existing on the date of the transfer.

The transfer of an undertaking shall not in itself constitute a valid ground for dismissal for the transferor or the transferee. Dismissals on the basis of real and serious grounds linked to an employee's behaviour or on the basis of economic reasons not linked to the transfer remain possible. However, additional restrictions with respect to the termination of employment contracts following a transfer of an undertaking may be foreseen in collective bargaining agreements, such as the collective bargaining agreements applicable in the banking and insurance sector. The collective bargaining agreement of the banking sector prohibits terminations based on economic reasons for a period of two years following a transfer unless expressly agreed on by staff representatives. The collective bargaining agreement for the insurance sector does not provide for such exception.

Following a transfer, the transferee is furthermore obliged to maintain the provisions of a collective bargaining agreement that had been applicable to the transferor. Transferred employees will continue to benefit from the provisions of the collective bargaining agreement until its termination or expiry, or until the effective date of its replacement. However, pursuant to recent Luxembourg case law, in cases where a clause of a transferred employment contract

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refers to the application of a collective bargaining agreement, the provisions of such collective bargaining agreement shall continue to apply to the transferee even after the termination or expiry of the collective bargaining agreement in force the day of the transfer or the entry into force of its replacement. If so, the application of the collective bargaining agreement can be ended either by mutual consent or by a unilateral decision of the employer, provided a specific procedure is followed.

In the context of the transfer of an undertaking, the transferor must inform the transferee in due time about all rights and obligations transferred to the extent that these rights and obligations are known by the transferor at the time of the transfer. The transferor and the transferee shall furthermore inform in due time prior to the effective date of the transfer staff representatives or, in the absence of staff representatives, the employees concerned in the transfer regarding the date and the reasons of the transfer, as well as the legal, economic and social implications for the employees and any measures envisaged towards the employees. Finally, should the transferor or the transferee envisage taking measures involving the employees due to the transfer, their respective staff delegations must be consulted on those measures in due time with a view to reaching an agreement. The respective staff delegates of the transferor and the transferee shall also be informed and consulted in advance about all decisions that are likely to entail important modifications in the work organisation or in employment contracts, and the respective staff delegates shall be informed about and consulted on any economic or financial decision that may have a substantial impact on the structure of the undertaking or on the level of employment in undertakings counting at least 150 employees. This applies in particular in the case of a transfer of undertaking. As regards cross-border mergers, the law of 3 June 2016 amending, inter alia, Article L.426-14 of the Labour Code guarantees to employees that benefitted before the merger from a more favourable employee participation system than the one foreseen in Luxembourg the maintenance of their participation in such system.

VIII TAX LAW

i Statutory framework

In general, Luxembourg corporate taxpayers may be subject to corporate income tax (CIT) at a rate of 18 per cent, on which a 7 per cent solidarity surcharge is added, leading to an effective corporate income tax rate of 19.26 per cent, plus municipal business tax (MBT), which varies from one municipality to another.[14]

Moreover, corporations are generally subject to an annual net worth tax (NWT), levied at a rate of 0.5 per cent on their unitary value (i.e., taxable assets minus liabilities financing such taxable assets) as at 1 January of each year.[15] A reduced tax rate of 0.05 per cent applies to the portion of net wealth exceeding €500 million. Corporations having their registered office or their central administration in Luxembourg for which the sum of financial assets, transferable securities and bank deposits, receivables held against related parties or shares or units in tax-transparent entities exceed 90 per cent of their total balance sheet and €350,000 are subject to a minimum NWT of €4,815.

14 In Luxembourg City, the municipal business tax is 6.75 per cent and the overall combined rate of corporation taxes in Luxembourg City is of 26.01 per cent.

15 For corporations having a financial year corresponding to the calendar year.

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ii Participation exemption on dividends, liquidation proceeds and capital gains

Under the Luxembourg participation exemption, dividends, liquidation proceeds and capital gains realised by a fully taxable Luxembourg-resident company from shareholdings in resident or non-resident corporations may be exempt from CIT, MBT and NWT, provided certain minimum holding conditions are met.

iii Withholding taxes

The standard withholding tax rate stands at 15 per cent for dividend payments to both resident and non-resident shareholders. Reduced rates or withholding tax exemptions may be available under applicable double tax treaties.[16] Moreover, a full withholding tax exemption may be available under Luxembourg tax law provided certain conditions are met.[17]

No withholding tax is due in Luxembourg on a full or partial liquidation of a fully taxable company, regardless of the tax residence or tax status of a shareholder.

In addition, there is no withholding tax on royalty payments and fixed or floating rate interest payments made to corporate lenders or to non-residents generally.

iv Recent developments

Intellectual property tax regime

On 17 April 2018, a new intellectual property (IP) tax regime was enacted, which is applicable as from fiscal year 2018.

An 80 per cent tax exemption on eligible net income for qualifying IP rights is available under the new regime. This new IP tax regime is based on the modified nexus approach developed by the OECD in the final BEPS report on Action 5.

Ruling of the Luxembourg Administrative Court No. 39193C of 23 November 2017

The Luxembourg Administrative Court issued an interesting ruling in November 2017 on the tax treatment of share redemptions by a company.

The Court held that the price paid to a shareholder upon the redemption by the company of all or part of his or her shares should qualify as a sale of the shares (rather than a dividend distribution) regardless of whether the shares are cancelled thereafter or not, provided however that the sale price corresponds to the net asset value of these shares. As a consequence thereof, no withholding tax should apply on such redemption. If the shares are redeemed at a price exceeding the net asset value, the excessive portion of the price may be considered as a hidden dividend distribution (which may be subject to a 15 per cent withholding tax) unless there are exceptional economic reasons justifying a redemption above net asset value.

Exchange of information

On 16 May 2017, the Court of Justice of the European Union (ECJ) delivered its long-awaited judgment in the *Berlioz* case regarding the compliance of the Luxembourg laws of 29 March 2013 implementing Council Directive 2011/16/EU of 15 February 2011 on

16 Luxembourg has currently 81 double tax treaties in force.

17 Cf Article 147 of the law on income tax.

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administrative cooperation in the field of taxation and of 25 November 2014 (2014 Law) on the procedure applicable to the exchange of information in tax matters, with respect to the Charter of Fundamental Rights of the European Union.

The ECJ ruled in substance that a party has the right to appeal against a request for information, which the aforementioned laws had denied. As a consequence thereof, Luxembourg restored the information holder's right of a judicial review of the legality of the request by the law of 1 March 2019 amending the exchange of information procedure as laid down in the 2014 Law (Amending Law). In particular, the Amending Law obliges the Luxembourg tax authorities to make a high-level review of the foreseeable relevance of an incoming request for information before sending an order to the information holder. The information holder will be entitled to seek the annulment of the Luxembourg tax authorities' order by the Luxembourg Administrative Courts. The claim (which has a suspensive effect) must be filed with the Administrative Tribunal within one month of the notification of the information order.

Multilateral Instrument

On 7 June 2017, Luxembourg signed the Multilateral Instrument (MLI) as one of 68 initial signatories.

The MLI addresses the double tax treaty (DTT) changes proposed in the base erosion and profit shifting (BEPS) action final reports and in the 2017 OECD Model Tax Convention.

In Luxembourg, the ratification process has been achieved through the law of 7 March 2019 and the deposit of the ratification instrument with the OECD on 9 April 2019. As a consequence, the MLI entered into force on 1 August 2019, but only if the contracting state of a covered tax agreement (CTA) has also ratified the MLI. CTAs cover the DTTs that have been designated by Luxembourg as being subject to amendments by the MLI. In this respect, Luxembourg has listed 81 DTTs as CTAs.

MLI provisions can be classified into three categories: minimum standards that cannot be opted out of; provisions that apply unless one or both contracting jurisdictions make a full or partial reservation against them; and provisions that have to be expressly opted into by the signing jurisdictions to be applicable.

Luxembourg's notable choices can be summarised as follows: Luxembourg opted for full reservations with respect to Article 4 (dual resident entities), Article 8 (dividend transfer transactions), Article 9 (capital gains from the alienation of real estate-rich companies), Article 10 (permanent establishment triangular cases), Article 11 (savings clause), Article 12 (commissionaire arrangements) and Article 14 (splitting-up of contracts).

With respect to Article 3 (transparent entities), Luxembourg has made a partial reservation, deciding not to apply Article 3(2), Article 3(1) addressing treaty benefits to be granted to income 'derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State'.[18]

With respect to Article 5 (method for the elimination of double taxation), Luxembourg has chosen option A, providing for a switch-over clause under which the residence state must grant a credit, rather than an exemption, for the taxes levied in the other contracting jurisdiction.

18 Article 1(2) of the 2017 OECD Model Tax Convention.

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With respect to Article 7 (prevention of treaty abuse), Luxembourg chose to apply the principle purpose test (PPT) in contrast to the application of a simplified limitation on benefits (LOB) alongside a PPT, or the fully fledged LOB.

Once entered into force, the MLI will be applicable for a specific CTA with regard to the matching provisions only (which include, in any case, the minimum standards).

Anti-Tax Avoidance Directive[19]

The Anti-Tax Avoidance Directive (ATAD) lays down rules against tax-avoidance practices that directly affect the functioning of the internal market, ATAD is the European response to the OECD and G20 BEPS action plan set out in 2013 to address tax avoidance, ensuring that multinational companies pay their fair share of taxes where economic activities generating profits are performed and where value is created.

In Luxembourg, ATAD has been implemented by the law of 21 December 2018. It introduced five legally binding measures to clamp down on aggressive tax planning, namely the controlled foreign companies rules, the interest deduction limitation rule, the anti-hybrid rules, exit taxation and the general anti-abuse rule. These rules are applicable from 1 January 2019 except for the exit tax provisions, which will be applicable as from 1 January 2020. While most of them should have no major impact on Luxembourg, the interest deduction limitation rule (IDLR) raises more concerns.

The IDLR limits the ability of taxpayers to deduct excess borrowing costs to the highest of 30 per cent of its EBITDA (taxable earnings before interest, tax, depreciation and amortisation) or €3 million. Borrowing costs are in excess when they exceed the 'taxable interest revenues and other economically equivalent taxable revenues that the taxpayer receives'. Practical issues for the application of the IDLR result from a lack of details regarding the concepts used in the IDLR (i.e., borrowing costs and interest revenues) leaving room for interpretation. In this context, the IDLR may have negative tax consequences, especially for securitisation companies investing into distressed debt, Additional clarifications through one or several administrative circulars have been announced by the Ministry of Finance but are currently still pending.

ATAD has in the meantime been amended by ATAD 2, which extends the scope of the EU hybrid mismatch rules to a wider variety of mismatches and to third countries. ATAD 2 has not been implemented yet into Luxembourg law, but its implementation deadline is 31 December 2019.

IX COMPETITION LAW

The amended law of 23 October 2011 on competition (Competition Law), which reflects Articles 101 and 102 of the Treaty on the Functioning of the European Union, prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices having as their object or effect the prevention, restriction or distortion of competition as well as the abuse of dominant market positions. Such law does not provide for an approval mechanism for mergers by the Luxembourg Competition Council (Competition Council).

19 Directive (EU) 2016/1164.

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Where a transaction has an EU dimension within the meaning of EU competition law, EU merger control rules will apply exclusively and the European Commission will be solely competent to review the transaction.

Where a transaction is below the EU merger notification thresholds, no pre-merger filings or prior notification requirements exist in Luxembourg law, but the referral mechanism in EU merger control law may allow the European Commission to review transactions below the EU merger notification thresholds under certain conditions. In any event, the cooperation mechanism in EU merger control law allows the European Commission to exchange information with the Competition Council when investigating an M&A transaction involving a Luxembourg entity or affecting the Luxembourg market, or both.

Given that the Luxembourg national market is small, and that most M&A transactions with a Luxembourg connection deploy their competitive effect on a global or EU scale, or mainly in other jurisdictions, most of such M&A transactions do not raise any antitrust issues in Luxembourg. Even though the Competition Law does not provide for pre-merger fillings with or prior notification requirements to the Luxembourg Competition Council, on 17 June 2016, the Council asserted its competence to scrutinise and sanction M&A transactions that create or strengthen a dominant position in Luxembourg in its *Utopia* decision.[20] Through this decision, it affirmed its authority to exercise *ex post* control of mergers by using, in the absence of a specific merger control regime at the national level, the provisions prohibiting the abuse of a dominant position. In its recent *Féderation des Artisans* decision,[21] the Competition Council confirmed its case law in this respect and carried out *ex post* control of that transaction.[22]

Finally, the law of 15 November 2016 on certain rules governing actions for damages for competition law infringements and amending the amended law of 23 October 2011 on competition (Private Damages Law) implements Directive 2014/104/EU of 26 November 2014 on antitrust damages actions. The Private Damages Law reflects the objectives of the Directive, improving the effectiveness of private enforcement as to infringements of EU and national competition law, and fine tuning the interplay between private damages actions and public enforcement by the European Commission and national competition authorities.

On the one hand, the Private Damages Law facilitates actions for damages through the introduction of certain specific procedural rules:

a their exercise is simplified by a set of irrebuttable and rebuttable presumptions with respect to the existence of an infringement of competition law and its effects;

b access to evidence, essential for competition law-based claims, is facilitated through certain disclosure rules;

c the joint and several liability of undertakings that have infringed competition law through joint behaviours allows an injured party to require full compensation from any of them until it has been fully compensated; and

d the Private Damages Law refers to the Luxemburgish general procedural law principles that provide for a 10-year limitation period for commercial claims.

20 Decision 2016-FO-04.

21 Decision 2019-R-01.

22 In that matter, the complaint, which qualified as an acquisition of shares as an abuse of a dominant position, was dismissed.

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On the other hand, the Private Damages Law encourages consensual dispute resolution. In accordance with the Directive, it provides for the suspension of the limitation period to bring an action for damages for the duration of the consensual dispute resolution process and the suspension of the proceedings relating to the action for damages during a maximum period of two years.

X OUTLOOK

We remain cautiously optimistic that the outlook for M&A activities is positive, and that the market will continue to grow and attract interest from investors both domestic and abroad. The forecast for 2019 regarding domestic M&A in Luxembourg is still relatively good, although less so than one year ago, and confirms the global resilience in this field. Moreover, the impact of legislation from the new US administration is still limited on the global market, and the US market shows a good performance that will probably have positive consequences on the European and Luxembourg markets. This positive effect might, however, be cancelled out, or even outweighed, by the effect of the tensions surrounding the potential escalation of trade wars on the global markets. While Brexit has not yet had a negative impact on the Luxembourg M&A market, there is uncertainty as to whether there will be hard or an orderly Brexit. In addition, the terms of the relationship between the EU and the UK post-Brexit remain to be negotiated. It seems clear that some economically significant areas such as merger clearances, cross-border taxation and transfers of employees will be affected. We see industry players and strategic buyers continuing to be active in Luxembourg (and in other countries by using structures through Luxembourg), increasingly expensive financing, fluctuating exchange rates and a legal and regulatory environment that is getting ever-more complex.

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Appendix 1

ABOUT THE AUTHORS

PHILIPPE HOSS

Elvinger Hoss Prussen

Philippe Hoss became a member of the Luxembourg Bar in 1987 and joined Elvinger Hoss Prussen in 1988, where he has been a partner since 1990.

Philippe holds a *maîtrise en droit* and a postgraduate degree (DEA) in business law from the Université Paris 1 Panthéon-Sorbonne (France).

He lectures on various business and financial matters at the University of Luxembourg, and on company law as part of the course for admission to the Luxembourg Bar.

He has been a member of the board of directors of the ILA (Luxemburg Institute of Directors) since 2010 and a member of the Capital Market Committee set up by the CSSF (Financial Sector Supervisory Commission).

Philippe's principal fields of activity are M&A, capital markets, banking and finance, and securitisations.

Philippe authored the first published English translation of the law of 10 August 1915 on commercial companies and of all subsequent updates thereof.

THIERRY KAUFFMAN

Elvinger Hoss Prussen

Thierry Kauffman became a member of the Luxembourg Bar in 2009 and joined Elvinger Hoss Prussen the same year; he became a partner in 2018.

Thierry holds a *maîtrise en droit* from the Université Paris 1 Panthéon-Sorbonne (France) and a master's degree in international private and business law from the Université Paris II Panthéon-Assas (France).

He was the president of the Luxembourg young bar association in 2018 and 2019.

Thierry's principal fields of activity are M&A, capital markets, corporate and finance.

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ELVINGER HOSS PRUSSEN

2 Place Winston Churchill
1340 Luxembourg
Tel: +352 44 66 44 0
Fax: +352 44 22 55
philippehoss@elvingerhoss.lu
thierrykauffman@elvingerhoss.lu
www.elvingerhoss.lu

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