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Editor
Mark Zerdin

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Chapter 30

LUXEMBOURG

Philippe Hoss and Thierry Kauffman[1]

I OVERVIEW OF M&A ACTIVITY

M&A activity remained relatively strong in Luxembourg in 2017 and 2018, despite a global slowdown due to the remaining uncertainties resulting from Britain's decision to leave the European Union and key global elections. Some of the reasons for this are Luxembourg's 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 March 2018, the net assets under management in Luxembourg amounted to €4.149 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 in order 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 recently been confirmed by the legislator and codified in the law of 10 August 2016 amending the law of 10 August 1915 on commercial companies (the 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.

Chinese banks continue to establish their European headquarters in Luxembourg. In general, Asian deal-makers 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 new US President.

With a number of promising drivers and deals in place, we anticipate a relatively active M&A market in 2018. Low costs of funding and the continued desire to expand geographic reach and innovation capabilities speak in favour of an active year. On the other

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

2 Financial Sector Supervisory Commission (CSSF) press release 18/16 of 2 May 2018.

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 strong concurrent bids from other leading European hubs, investors and companies fleeing Brexit seem to find Luxembourg an adequate alternative, and particularly the insurance sector, which has seen 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), or both. 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 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 'central threshold' from which a mandatory offer will have to be made and exemptions from these obligations as well as 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 mandatory squeeze-out and sell-out of securities of companies currently admitted or 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.

3 Directive 2005/56/EC.

4 Directive 2004/25/EC.

Public offerings on the Luxembourg territory and admissions to trading on the Luxembourg regulated market of securities are governed by the Luxembourg prospectus law of 10 July 2005, as amended, implementing the Prospectus Directive (Prospectus Law),[5] and the 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, implementing the Market Abuse Directive II.[7]

The law of 24 May 2011 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 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[8] and relevant implementing and delegated regulations of the European Commission 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's 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 (the 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 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.

5 Directive 2003/7/EC.

6 Directive 2004/109/EC.

7 Directive 2014/57/EU.

8 Regulation No. 596/2014/EU.

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.

For any entity incorporated after its entry into force, the New Company Law shall automatically apply in its entirety. For any existing entity, shareholders have 24 months from the entry into force of the New Company Law to adapt the articles of association. During this period (or at least until the articles are amended so as to comply with the New Company Law), the previous legislation remains applicable to all provisions of the articles of association contrary to the New Company Law, while the New Company Law applies to all matters not mentioned in the articles of association.

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 the articles of association or shareholders' agreement:

a Key changes applying to a public company limited by shares, a limited partnership by shares and a private limited liability company are as follows:

- 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, an Sàrl or an 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, 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 an 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 right 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;
- 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 (Mémorial A) and applies from 19 December 2017.

This 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.

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.

Luxembourg will, however, also need to amend its Law of 24 May 2011 on the exercise of certain rights of shareholders (the 2011 Law), which implements the corresponding European Directive,[9] which was amended on 17 May 2017. Luxembourg has until July 2019 to update the 2011 Law, which should reflect changes regarding the identification of shareholders, the increase of the control by the shareholders, as well as the promotion of the exercise of voting rights during shareholders' meetings.

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.

9 Directive 2007/36/EC.

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.

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, during the past few years, 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-Border Mergers Directive in the 1915 Law, it covers not only national mergers and mergers between Luxembourg companies and EU companies of *sociétés anonymes*, 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 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 found in 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 April 2017, Standard Industries completed its acquisition of Braas Monier Building Group SA, a Luxembourg company whose shares were at the time listed on the Frankfurt Stock Exchange. This acquisition allows Standard Industries to combine Braas Monier's operations with its European flat roofing business, Icopal, to form the largest manufacturer

in the European roofing industry. The offer was initially unsolicited, and Braas Monier Building Group SA decided to take defence measures in order to render it significantly more costly for the offeror. After several court actions and discussions between both parties, a business combination agreement was entered into by the parties, following which the board of directors of Braas Monier Building Group SA recommended that its shareholders accept the revised offer, valuing Braas Monier at around US$1.2 billion.

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

a the acquisition via Luxembourg entities of Clarion Events, an event organiser based in London with a portfolio of approximately 150 B2B exhibitions and conferences by Providence Equity Partners for about £210 million;

b the sale of the Helios Group to Kansai Paint by Ring International Holding for €572 million;

c the consortium acquisition of DIF Infrastructure and EDF Invest of Thyssengas for €700 million;

d the acquisition of Athlon Car Lease International by Daimler for €1.1 billion;

e the acquisition of the RFR Holding real estate portfolio by Sigma Prime Selection for €1.5 billion;

f the acquisition of Tumi Holding by Samsonite for US$1.8 billion;

g the acquisition of TNT Express by FedEx for US$4.8 billion;

h the combination of the European wealth management activities of UBS through the cross-border merger of several entities into UBS Europe SE, located in Frankfurt;

i the sale of 58 per cent of the stake of CVC Capital Partners in IDC Salud to Fresenius for €5.75 billion; and

j in February 2018, BGL BNP Paribas and ABN AMRO Bank NV announced an agreement regarding the acquisition by BGL BNP Paribas of all the outstanding shares in ABN AMRO Life SA and ABN AMRO Life SA. This acquisition will strengthen the leading position of the BNP Paribas Group in Luxembourg.

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 the 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.

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.

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, 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 incorporations 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.

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 *et seq* 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.

The transferor and the transferee shall be jointly and severally liable in respect of obligations that arose before the date of the 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 undertaking may be foreseen in collective

bargaining agreements, such as the collective bargaining agreements applicable in the banking and insurance sectors. 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. The 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 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.

As regards supplementary pension plans, a bill of law reforming the law of 8 June 1999 on supplementary pension schemes as amended was submitted in March 2017 by the government to the Parliament. This bill of law aims to modify the current rules applicable to supplementary pension schemes that also comprise rules applicable in the case of a transfer of undertaking. It is, however, intended that the option given to a transferee not to maintain a transferor's supplementary pension plan will be maintained.

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 joint works council (where a joint works council exists) 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. This applies in particular in the case of a transfer of undertaking. It should be noted that the law of 23 July 2015 on the reform of the social dialogue provides for the abolition of works councils as of the date of the next social elections, foreseen to take place in February or March 2019. As a counterpart, the rights and obligations of staff delegations will be extended to take over the works councils' current competences if an undertaking employs at least 150 employees over a period of 12 months preceding the first day of the month of the announcement of the elections.

As regards cross-border mergers, the law of 3 June 2016 amending, *inter alia*, Article L426-14 of the Labour Code guarantees to employees that benefited 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 CIT rate of 19.26 per cent, plus municipal business tax (MBT), which varies from one municipality to another.[10]

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.[11] 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.

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 (DTTs).[12] Moreover, a full withholding tax exemption may be available under Luxembourg tax law provided certain conditions are met.[13]

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 the 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.

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

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

12 Luxembourg currently has 81 double tax treaties in force.

13 Cf. Article 147 of the LITA.

iv Recent developments

IP 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 a 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 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 administrative cooperation in the field of taxation and of 25 November 2014 (the 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 had to amend its exchange of information procedure as laid down in the 2014 Law. As a result thereof, Bill No. 7223 amending the 2014 Law was submitted to Parliament in December 2017, and is expected to be adopted in the next few months.

Multilateral Instrument

On 7 June 2017, Luxembourg signed the Multilateral Instrument (MLI) as one of the 68 initial signatories. Luxembourg decided that the MLI will be applicable to its 81 DTTs. The MLI will have a direct impact on 59 of those 81 DTTs because of a reciprocity requirement for its applicability (as of May 2018).

The MLI addresses the DTT changes proposed in the base erosion and profit shifting (BEPS) Action Final Reports and in the 2017 OECD Model Tax Convention.

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.

Most notable choices taken by Luxembourg 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 (commissionnaire 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'.[14]

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.

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.

IX COMPETITION LAW

If there is a local antitrust impact below the EU thresholds, an assessment is undertaken at the level of the European Commission, which may request assistance from the Luxembourg Competition Council when investigating an M&A transaction involving a Luxembourg entity.

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 such M&A transactions do not raise any national antitrust issues.

Where the relevant transaction has an EU dimension, EU antitrust rules will apply, as will the law of 23 October 2011 on competition (the Competition Law), which reflects Articles 101 and 102 of the Treaty on the Functioning of the European Union by prohibiting concerted practices, anticompetitive agreements and abuse of dominant market positions.

No pre-merger filings or prior notification requirements to the Luxembourg Competition Council exist under the Competition Law, which only provides for prohibitions of concerted practices and abuses of a dominant position.

However, the above generally held position significantly changed on 17 June 2016, when the Luxembourg Competition Council asserted its competence to scrutinise and sanction M&A transactions that create or strengthen a dominant position. Through this decision, the Luxembourg Competition Council 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.

On 15 November 2016, Parliament adopted the law on certain governing actions for damages for competition law infringements and amending the amended law of 23 October 2011 on competition (New Competition Law). It implements Directive 2014/104/EU of 26 November 2014 on antitrust damages actions. The New Competition 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 completion authorities.

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

On the one hand, the New Competition 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 New Competition Law refers to the Luxemburgish general procedural law principles that provide for a 10-year limitation period for commercial claims.

On the other hand, the New Competition 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 believe the outlook for M&A activities in Luxembourg is positive, and continues to grow and attract interest from both domestic and foreign investors. The forecast for 2018 regarding domestic M&A is still good, and confirms the global resilience in this field. Moreover, the impact of the legislation of the new US administration is still limited on the global market, and the US market shows a strong performance that will probably have positive consequences on the European and Luxembourg markets. While Brexit has not yet had a negative effect on the Luxembourg M&A market, the terms of the implementation of Brexit remain to be negotiated. It seems clear that some economically significant areas such as merger clearances, cross-board 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 more and more complex.

Appendix 1

ABOUT THE AUTHORS

PHILIPPE HOSS

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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* from the Université Paris I Panthéon-Sorbonne (France) and a postgraduate degree (DEA) in business law from the same university.

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 (Luxembourg 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.

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