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Chapter 33

LUXEMBOURG

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I OVERVIEW OF M&A ACTIVITY

M&A activity remained relatively strong in Luxembourg in 2016 and 2017, despite a global slowdown due to the uncertainties resulting from Britain's decision to leave the European Union and key global elections. Some of the reasons therefor 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 2017, the net assets under management in Luxembourg amount to €3.943 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 (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 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 new US President.

With a number of promising drivers and deals in place, we anticipate a relatively active M&A market in 2017. 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

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2 CSSF press release 17/30 of 4 August 2017.

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. Whether investors fleeing Brexit may find Luxembourg an adequate alternative remains also uncertain, especially given the strong concurrent bids from other leading European hubs.

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-Board 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 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 '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.

Public offerings on the Luxembourg territory and admissions to trading on the Luxembourg regulated market of securities are governed by the Luxembourg prospectus law

3 Directive 2005/56/EC.

4 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

of 10 July 2005, as amended, implementing the Prospectus Directive (Prospectus Law),[5] 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, 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 (MAR)[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 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 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, the 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:

- 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 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 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 (but shares thereunder may only be issued to existing shareholders).

c Key changes pertaining only to a public company limited by shares and a limited partnership by shares alone:
- 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).

ii Market abuse law

By a law dated 23 December 2016, the Luxembourg legislator adopted bill of law 7022: (1) implementing the Market Abuse Directive II[9] and the Commission Implementing Directive[10] with regard to reporting to the competent authorities actual or potential infringements in relation to the MAR; (2) supplementing specific provisions of the MAR on administrative measures and sanctions; and (3) amending the Transparency Law (New Market Abuse Law).

When implementing these provisions, the Luxembourg legislator did not go beyond what was required pursuant to the provisions of said directives.

Chapter 2 of the New Market Abuse Law relates to the administrative sanctions and powers conferred on the CSSF in that context. Chapter 3 relates to criminal law sanctions and implements the relevant provisions of the Market Abuse Directive.

To a large extent, Chapter 2 confirms the powers already provided under the law of 9 May 2006 on market abuse (repealed by the New Market Abuse Law) (2006 Market Abuse Law) given to the CSSF as the competent administrative authority, and provides for further precisions in or extensions of the CSSF's investigative powers.

With the implementation of Article 32 of the MAR in the New Market Abuse Law, a specific regime for 'whistleblowers' was enacted. The CSSF is hereby required to put into place procedures that allow the efficient notification to the CSSF of effective or potential violations of the MAR. At the time of writing, the CSSF has not yet adopted any such procedures. Employers who carry out activities that are regulated by financial services regulation are further required to implement appropriate internal procedures that allow their employees to notify any such violations of the MAR.

To avoid any violation of the *ne bis in idem* principle, the New Market Abuse Law maintains the consultation procedure between the CSSF and the State Prosecutor during which these authorities determine whether a suspected infringement of MAR will give rise to an administration or a criminal investigation and sanctions already provided in the now-abrogated 2015 Market Abuse Law.

9 Directive 2014/57/EU.

10 Directive 2015/2392/EU.

iii New capital markets transparency legislation

The Luxembourg law of 10 May 2016 (New Transparency Law), implementing amendments to the Transparency Law for issuers of securities, entered into force on 15 May 2016.

The New Transparency Law implements Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 and Article 1 of Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014, and amends the Transparency Law and (on one point only) the Prospectus Law. The Grand Ducal Regulation dated 11 January 2008 on transparency requirements of issuers of securities (Transparency Regulation) was also amended by a new Grand Ducal Regulation dated 10 May 2016.

It should be noted that by way of Circulars 16/637 and 16/638 issued on 22 June 2016, the CSSF has updated and amended its previous Circulars 08/337 on the entry into force of the Transparency Law and of the Transparency Regulation, and 08/349 relating to details regarding the information to be notified with respect to major holdings in accordance with the Transparency Law. The CSSF has also updated its Q&A on 'The Transparency Law and the Grand-Ducal Regulation' on 27 June 2016. The main changes are, *inter alia*:

a a reduction of the administrative burden of issuers by the removal of certain transparency requirements for issuers whose home Member State is Luxembourg (mainly the abrogation of the need to provide quarterly statements);

b increased notification obligations imposed on investors taking exposure on shares of a listed entity via a much wider range of financial instruments, the definition of which is considerably widened, and the introduction of aggregation rules; and

c significant new injunction and sanction powers of the CSSF.

Changes have also been introduced with respect to the disclosure of the home Member State.

iv Simplified Sàrl

The law of 23 July 2016 creating the simplified Sàrl entered into force on 16 January 2017. This new law creates a new vehicle to encourage 'entrepreneurship by facilitating access to business start-ups', particularly by reducing the setup costs but also by favouring a facilitated incorporation process.

v Trade and Companies Register form

The legal publications regime concerning companies and associations in Luxembourg has been amended by the law of 27 May 2016, published on 30 May 2016.

The main purpose of the reform is to implement a new central electronic publication platform for companies in Luxembourg by replacing the Mémorial C, Recueil des Sociétés et Associations (the Luxembourg official gazette) with a central electronic platform called Recueil Electronique des Sociétés et Associations.

The new publication regime entered into force on 1 June 2016.

vi Societal impact companies

The law of 12 December 2016 has introduced a legal framework for companies with a social or societal impact objective. The purpose of the legislator was to formally recognise the activities of companies involved in the preservation or development of social or societal issues, such as protecting the environment and supporting people in a precarious situation.

vii The law of 23 July 2016 on disclosure of non-financial and diversity information applicable to some large companies and some groups

The law of 23 July 2016 on disclosure of non-financial and diversity information applicable to some large companies and some groups implementing Directive 2014/95 is effective for financial periods starting on or after 1 January 2017. This law amends certain provisions regarding the accounting and annual accounts of undertakings and the consolidated accounts of certain entities. The main aim of the Directive (and the law) is to increase European companies' transparency and performance in respect of environmental protection and social justice.

viii Parliamentary bills of law not yet adopted

Current ongoing legislative activities relevant to M&A activity are more 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.

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, 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 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 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 the insurance sector, Foyer SA, one of Luxembourg's leading insurance group, acquired International Wealth Insurers SA, owned by Belfius Insurance. This is considered to have been the biggest acquisition in the insurance industry in Luxembourg.

In the banking sector, Julius Bär acquired Commerzbank's Luxembourg private banking business with around €3 billion under management for €68 million. The deal gives Julius Bär around 5 billion Swiss francs in assets under management in Luxembourg.

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.

In February 2017, BDO Luxembourg acquired HRT Group, a firm closely aligned with BDO, with multi-disciplinary services offering that includes auditing, accounting, financial engineering, taxation and human resources.

In terms of mergers, in May 2017 EFG International completed the legal and operational integration of Banca della Svizzera Italiana (BSI) by way of a merger, including the BSI branch in Italy. In addition, Electro Security and Sanichaufer, two local companies offering services in building techniques, merged to create Genista in 2017.

In January 2017, the CERATIZIT Group acquired Becker Diamantwerkzeuge, a German company that produces extremely wear-resistant tools for the automotive, mechanical engineering, medical technology and aerospace industries.

In May 2017, M-PLIFY SA acquired eNoxus Communication bvba and became AlarmTILT Belgium.

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 acquisition by Silverlake Technology Management LLP of CEGID SA, a leading French enterprise management software and cloud services provider;

b the Vertical/Trigen and Osmotica combination, creating a fully integrated specialty pharmaceuticals company;

c the acquisition by Tencent Holdings Limited of a majority stake in Supercell OY from Softbank and other management shareholders;

d the acquisition by Altice of a 70 per cent stake in Cequel Communications Holdings LLC and Suddenlink;

e the sale by PAI partners of airport luggage handler Swissport to HNA Group Co Ltd, the owner of China's fourth-largest airline;

f the US$2.3 billion acquisition by Teva of Representaciones & Investigaciones Médicas;

g the US$2 billion acquisition of a controlling stake in Alvogen by CVC Capital Partners and Vatera Healthcare Partners;

h the €1.3 billion acquisition of the Celsius portfolio, consisting of 10 shopping centres across France and Belgium, by AEW Europe and China Investment Corporation;

i the £1.2 billion sale of British Car Auctions to Haversham Holdings via an accelerated IPO by Clayton Dubilier & Rice; and

j the €5 billion acquisition of RWE Dea from RWE by LetterOne.

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 a 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.

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.

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 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. 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 recently submitted by the government to 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 of 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 October or November 2018. 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 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 tax payers may be subject to corporate income tax (CIT) at a rate of 19 per cent,[11] on which a 7 per cent solidarity surcharge is added, leading to an effective corporate income tax rate of 20.33 per cent, plus municipal business tax (MBT), which varies from one municipality to another.[12]

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.[13] 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 €4.810.

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.[14] Moreover, a full withholding tax exemption may be available under Luxembourg tax law provided certain conditions are met.[15]

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.

iv Recent developments

Transfer pricing

Article 56 of the Luxembourg Income Tax Act (LITA) and Article 56-bis of the LITA (introduced by the law of 23 December 2016) codify the arm's-length principle.

According to Article 56 of the LITA, profits derived by an entity from a transaction with a related entity should be determined on an arm's-length basis. The Luxembourg transfer pricing rules provide that if one or several transactions cannot be observed between

11 The standard corporate income tax rate has been reduced from 21 to 19 per cent in 2017, and will be further reduced to 18 per cent in 2018.

12 In Luxembourg City, the municipal business tax is 6.75 per cent.

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

14 As of June 2017, Luxembourg has signed 81 double tax treaties.

15 Cf Article 147 of the LITA.

independent parties and no commercial rationale for such transactions can be identified, then such (part of) transactions may be disregarded for transfer pricing purposes. Where transactions between a parent company and a subsidiary take place, a non-taxable capital contribution or a non-deductible profit distribution may be assumed if such transactions are not considered to have taken place at arm's length. In principle, such distribution may also be subject to dividend withholding tax unless the participation exemption applies.

Related entities are defined as enterprises that participate directly or indirectly in the management, control or capital of another enterprise, or as enterprises directly or indirectly held, managed or controlled by the same person or entity.

Taxpayers should be able to justify the financial information (including transactions with related entities) that appears in their tax returns and provide the Luxembourg tax authorities with proper transfer pricing documentation sustaining the arm's-length character of their intragroup transactions.

Article 56-bis of the LITA further specifies that the arm's-length pricing of intercompany transactions should be determined by means of a comparability analysis containing the following two main elements:

a the identification of commercial and financial relations between associated enterprises, and a determination of economically material conditions and circumstances in order to delineate the controlled transaction; and

b a comparison of the controlled transaction with comparable transactions between independent enterprises, and a determination of the arm's-length remuneration.

Transfer Pricing Circular LIR No. 56/1–56-bis/1 of 27 December 2016 (Circular)[16] provides further guidance on the tax treatment of intragroup financing activities. The Circular follows key principles of the OECD Transfer Pricing Guidelines, as revised by the 2015 BEPS Report on Actions 8–10 'Aligning Transfer Pricing Outcomes with Value Creation'. The comparability analysis described in detail in the Circular includes a functional analysis, a value chain analysis and a risk analysis.

In addition, a company performing intragroup financing transactions must have the financial capacity to cover any potential risks and the ability to control and manage such risks. In practice, this means that such companies need to have sufficient equity to be able to bear the financial risk linked to the activity performed, and the decision-making capacity to enter into a transaction carrying risks and to monitor such risks. A company performing intragroup financing transactions must therefore have a real presence and substance in Luxembourg.

Automatic exchange of information with respect to advance tax rulings

Following the OECD–BEPS work on the exchange of information on tax rulings, the EU passed Directive 2015/2376 (DAC 3) amending EU Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation, which foresees the mandatory automatic exchange of information on advance cross-border rulings and advance pricing agreements.

16 The Circular replaces Circular Letter LIR No. 164/2 of 28 January 2011.

Luxembourg transposed the DAC 3 provisions into domestic law by the law of 23 July 2016 on the automatic exchange of information on tax rulings and advance pricing agreements. Such law is in line with the DAC 3 provisions.

However, Luxembourg has used the option provided for in DAC 3 to exclude from information exchanges those advance tax rulings and advance pricing agreements that were issued to companies with an annual net turnover of below €40 million at group level, if such advance cross-border rulings and advance pricing agreements were issued, amended or renewed before 1 April 2016. However, this exemption does not apply to companies mainly involved in financial or investment activities.

Country-by-country (CbC) reporting

On 13 December 2016, Luxembourg implemented CbC requirements for Luxembourg entities that are part of a multinational enterprise. The new CbC legislation transposes into Luxembourg law Directive 2016/881 regarding mandatory automatic exchange of information in the field of taxation. Under the CbC law, CbC reports must be submitted by groups with a consolidated group revenue of at least €750 million in the preceding year. The reports contain economic, financial and tax information for financial years starting as of 1 January 2016.

The CbC reports must be submitted by the ultimate parent company[17] within 12 months of the last day of the group's fiscal year at the latest, and will be exchanged within three months (six months in the first year) after receipt with EU Member States and other countries that have signed the OECD Automatic Exchange of Information Agreement (2016).

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 (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

17 Luxembourg tax-resident companies that are not the ultimate parent company may however also fall within the scope of the CbC reporting obligations.

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 European Union and national competition law, and fine-tuning the interplay between private damages actions and public enforcement by the European Commission and national completion authorities.

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 the 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 that the outlook for M&A activities is positive, and that it continues to grow and attract interest from investors both domestic and abroad. This being said, the impact that Brexit, legislation from the new US administration and upcoming elections may have on the global markets and M&A activities in particular remains uncertain and unpredictable. While 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 that industry players and strategic buyers continue to be active in Luxembourg (and in other countries by using structures through Luxembourg), even at a time of Brexit, increasingly expensive financing, fluctuating exchange rates and a legal and regulatory environment that is getting more and more complex.

Appendix 1

ABOUT THE AUTHORS

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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 1 Panthéon-Sorbonne (France) and a postgraduate degree (DEA) in business law from the same university.

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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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