

Amendments of the law of 1915 on commercial companies further to the law of 10 June 2009 (the “Law”)

The Law aims at implementing a series of European legal instruments in national law¹.

The changes brought by the Law consist in the reworking of different areas of the revised law dated 1915 on commercial companies (the “Law of 1915”).

In particular, the Law offers (i) new prospects such as partial divisions and (ii) more flexibility as regards already existing provisions of the Law.

Please find below a brief overview on these changes.

I. Consecration of partial demergers (“*Scission partielle*”) under Luxembourg law

Article 287 of the Law as modified by the provisions of the Law intends to allow partial demergers contrary to what was possible until then.

A partial demerger will notably imply that the demerged company, instead of disappearing further to its dissolution without liquidation such as it is the case under current provisions of the Law, continues to exist. The company being demerged reduces its share capital up to the value of the contribution made to one or the other pre-existing company or the company to be incorporated.

The receiving companies will therefore (i) issue shares in the same proportion than the contribution amount and (ii) distribute them directly to the shareholders of the company being demerged.

This operation will be regarded as neutral from a tax perspective.

II. Financial assistance: from the banning to the permission under control

New article 49-6 of the Law intends to permit a company to, either directly or indirectly, advance funds or make loans or provide security, with a view to the acquisition of its shares by a third party.

These transactions take place under the responsibility of the administrative or management body and at fair market conditions.

In addition, a special report has to be issued and submitted to the general meeting for prior approval at a quorum and a majority rules required to modify the articles of association of the company.

Furthermore, the report has to be published in the Luxembourg official gazette.

¹ Directive 2005/56/CE on cross-border mergers, Directive 2006/68/CE amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital; and Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies.

III. Enlarged possibilities to acquire its own shares for “*sociétés anonymes*”

The authorization to acquire its own shares given by the general meeting in accordance with provisions of article 49-2 of the Law which was initially given for maximum eighteen-month duration will become five-year duration.

In addition, the acquisition by a company of its own shares will not be limited anymore to a maximum of 10% of the subscribed capital.

IV. Requirements of independent expert’s reports withdrawn in case of contribution other than in cash

In case of contribution to a “*Société Anonyme*” other than in cash, the requirement for these reports can be withdrawn:

- where transferable securities or money-markets are contributed as contribution other than in cash, and that those securities or money-market instruments are valued at the weighted average price at which they have been traded on one or more regulated market(s) during a six-month period, preceding the effective date of the contribution of the respective consideration;
- where assets, other than the transferable securities and money-market instruments referred to in paragraph hereof, are contributed as contribution other than in cash and which have already been subject to a fair value opinion by a recognized independent under certain conditions in terms of (i) date of the valuation and (ii) valuation methodology;
- where assets, other than the transferable securities and money-market instruments referred to in paragraph hereof, are contributed as contribution other than in cash and whose fair value is derived by individual asset from the statutory accounts of the previous financial year.

In such specific cases and within one month after the effective date of the asset contribution, a declaration notably containing information regarding the description of the relevant consideration, its value, the source the valuation, etc, has to be published.

V. Finalization of the implementation of the European cross-border mergers regulation

The Law completes the two laws regarding mergers that were enacted on 23 March 2007 to facilitate cross-border mergers involving Luxembourg companies with European or non European companies.

The Law aims to finalize the standardization of the conditions applicable to national and cross-border mergers. Therefore all mergers (national or cross-border) are submitted to the same rules and conditions, apart from certain elements which are specifically linked to the cross-border aspect.

Therefore, the Law has the virtue of finalizing notably the implementation of Directive 2005/56/CE on cross-border mergers² and Directive 2007/63/EC as regards the

² Being noted that the laws of 23 March 2007 had already partly implemented Directive 2005/56/CE on cross-border mergers.

requirement of an independent expert's report on the occasion of merger or division of public limited liability companies.

This permits in particular to have a cohesive set of rules as regards cross-border mergers between European companies, by taking notably into consideration in the provisions of the Law of 1915:

- the involvement of employees;
- the fact that the draft term and conditions of the merger shall be a common one and shall include new information in addition to the ones already required by the Law (e.g. description of the possible effects of the mergers on employees as the case may be, information on the procedures whereby the modalities relating to the implication of the employees are fixed, information regarding the valuation of the assets and liabilities of the absorbing company);
- additional precisions regarding publications and notification by the Trade and Companies Register in relation to the merger; and
- the possibility to waive the requirement of the independent expert's report by the unanimity of the shareholders of the companies concerned by the merger.

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A special thanks to Sylvie Fernandes Forster and Marc Albasser for their collaboration.

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