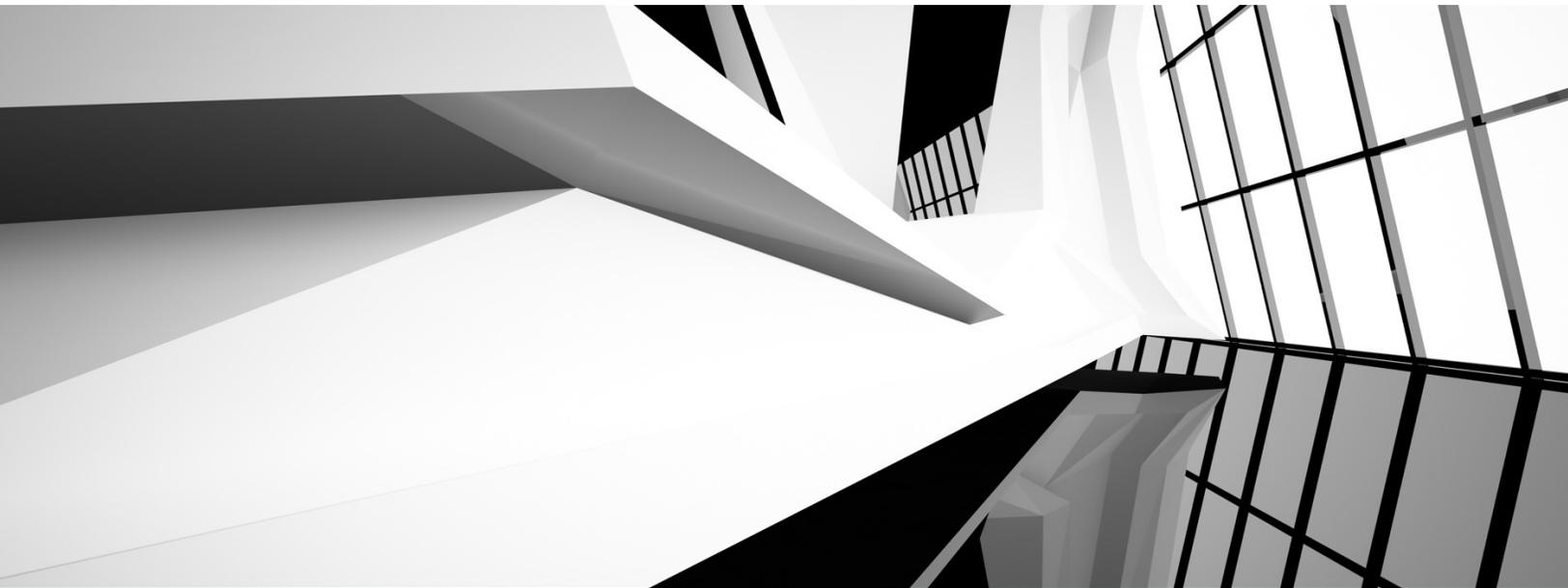


Praxio Legal Alert

November 2019

The European Union adopted a new directive regarding cross-border mergers



Creativity

Efficiency

Sophistication

Knowledge

Following an agreement with the European Parliament earlier this year, the Council of the European Union adopted on the 18 November 2019 the Directive 2018/0114 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (the “**Directive**”).

The Chambre des députés now has 36 months to adopt the necessary measures for the implementation of the Directive into domestic law. This means that the text which will apply in Luxembourg is not yet finalized and may be subject to certain amendment and adaptation by the national legislator.

- **The benefits of the Directive**

According to figures made available by the European Commission¹ there are around 24 million companies in the EU, of which approximately 80% are limited liability companies. Around 98-99% of these limited liability companies are small and medium-sized enterprises. These enterprises will be affected by the upcoming measures.

The aim of the Directive is to remove unjustified barriers to EU companies' freedom of establishment in the EU and to facilitate EU companies' cross-border conversions, mergers and divisions (collectively, “**Cross-Border Operations**”), while at the same time providing adequate protection for stakeholders such as employees, creditors and members.

The Directive introduces comprehensive procedures for cross-border conversions and divisions and provides for additional rules on cross-border mergers of limited liability companies established in EU member States. It also offers further simplifications that will apply to all such operations. These include the possibility of speeding up the procedure by waiving reports for members and employees in the event that shareholders agree, or if the company or any of its subsidiaries do not have any employees.

The Directive sets out procedures to check the legality of Cross-Border Operations against the relevant national legislation and introduces a mandatory anti-abuse control procedure. The procedure will allow competent authorities, such as the Luxembourg notary, to block a cross-border operation when it is carried out for abusive or fraudulent purposes, i.e. when it is designed to evade or circumvent national or EU law or is intended for criminal purposes.²

The Directive provides for similar rules for Cross-Border Operations on employee participation rights. It also ensures that employees will be adequately informed and consulted about the expected impact of the operation.³

¹ Council of the European Union (18 November 2019), press release, visited on: <https://www.consilium.europa.eu/en/press/press-releases/2019/11/18/eu-makes-it-easier-for-companies-to-restructure-within-the-single-market/>

² Article 86m, 127 and 160m of the Directive.

Article 127-9 of the Directive : “Where the competent authority [...] has serious doubts indicating that the cross-border merger is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes [...] The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis, through a procedure governed by national law.”

³ Article 86e, 124 and 160e of the Directive.

Article 124 of the Directive : “The administrative or management body of each of the merging companies shall draw up a report for members and employees explaining and justifying the legal and economic aspects of the cross-border merger, as well as explaining the implications of the cross-border merger for employees.”

The protection of the right of minority and non-voting shareholders' rights would be enhanced. Indeed, members of a company who vote against the approval of the draft terms of the cross-border operation will have the right to dispose of their shares for adequate cash compensation⁴ (the “**Withdrawal Right**”).

Finally, the Directive encourages the use of digital tools throughout the cross-border operation. It will be possible to complete formalities, such as the issuance of the pre-operation certificate, online. All relevant information are planned to be exchanged through existing digitally interconnected business registers.

- **The drawbacks of the Directive**

In addition to the above described benefits, the Directive might have a negative impact on Cross-Border Operations. Indeed the increased protection given to certain stakeholders would result in introduction of more formalities.

With the new rules one can foresee that the European policy makers are trying to thwart the prevailing liberalism in cross-border operations and are suspicious regarding these operations within the EU. The EU therefore wants to add procedural requirements to de facto counter such liberalism.

Under the Directive, the regime for divisions is aligned with the mergers regime, which is the heaviest of the three existing ones (requirement of a draft terms of the cross-border division,⁵ notary certificate, expert report) and will therefore be subject to more detailed and complicated requirements than before. The common draft terms of the cross-border merger is still a mandatory requirement and need to be prepared and remain similar to the current one. In addition to the this common draft terms, the Directive also requires the drafting of a report regarding the employees of the companies.

Moreover, the new Withdrawal Right might be a barrier to a merger because of this compensation has to be paid by the company, which implies additional costs for the operation. The Withdrawal Right raises other issues. The Withdrawal Right would also constitute a blocker of a Cross-Border Operation if a shareholder exercises its withdrawal right but the relevant company does not have sufficient funds to pay the compensation.

As mentioned above, the Directive sets out procedures to check the legality of Cross-Border Operations. In Luxembourg, this check will be made by the notary. In practice, how will the notary do this and with which means? The new checks will hence add a new step to the Cross-Border Operations and render them more complex.

⁴ Article 86i, 126a and 160i of the Directive.

Article 126a of the Directive: “[...] the members of the merging companies who voted against the approval of the common draft-terms of the cross-border merger have the right to dispose of their shares for adequate cash compensation, [...] as a result of the merger they would acquire shares in the company resulting from the merger which would be governed by the law of a Member State other than the Member State of their respective merging company.”

⁵ Article 160f of the Directive: “Member States shall ensure that an independent expert examines the draft terms of the cross-border division and draws up a report for members.”

For more information, please do not hesitate to contact:



Faruk Durusu
Avocat à la Cour
Partner

T: +352 27 779 705
M: +352 691 778 378
E: faruk.durusu@praxiolegal.com



Mikail Ceylan
Junior Associate

T: +352 27 779 708
E: mikail.ceylan@praxiolegal.com

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LUXEMBOURG

Praxio S.C.S

Law Firm (Société d'Avocats)
Registered with the Luxembourg Bar
RCS Luxembourg B223247
www.praxiolegal.com

PRAXIO LAW & TAX

Law Firm Luxembourg
4a, rue Henri Schnadt
L-2530 Luxembourg
T: +352 27 779 700
info@praxiolegal.com
