

# Corporate Reorganisations

in Luxembourg

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**LEGAL AND REGULATORY FRAMEWORK****Types of transaction**

What types of transactions are classified as 'corporate reorganisations' in your jurisdiction?

In Luxembourg, the term 'corporate reorganisation' can be applied to a wide variety of transactions relating to the reorganisation of the structure of a group (or groups) of companies, and may be driven by several factors such as the integration of acquired assets, streamlining of business operations or optimisation of business activities. Without being exhaustive, the most common transactions that could be classified as corporate reorganisations would be mergers and demergers, share and asset disposals, conversions of the corporate form and company migrations. Most often, a series of these steps will need to be undertaken to achieve the desired objectives of the broader reorganisation.

Further, corporate reorganisations would typically also involve capital and debt restructuring, and the amendment of articles of association and shareholding documentation.

**Rate of reorganisations**

Has the number of corporate reorganisations in your jurisdiction increased or decreased this year compared with previous years? If so, why?

There are a variety of reasons why groups of companies may need to reorganise their activities, but the classic examples would be business integration, improvement of business efficiencies or a change in the capital structure.

Because corporate reorganisation can occur at any stage of an organisation's lifecycle, we usually see a relatively constant demand. We have, however, noticed an increased appetite for reorganisation over recent years in Luxembourg. Such an increase may be linked to the economic recovery in the EU zone, higher liquidity levels, the changing tax environment and increasing private equity activity in Luxembourg.

The local drivers behind the increase of activity are:

- the branding and recognition of Luxembourg as a leading and stable place to headquarter companies in view of future domestic and international expansion;
- multinational groups seeking to restructure their international operations in light of EU and international tax laws, resulting in the increased use of Luxembourg as a general holding and decision-making centre;
- the integration of acquired businesses; and
- to a lesser extent, the anticipation of the potential effect of Brexit, in particular among insurance companies currently operating in the European Union on the basis of regulatory licences granted in the United Kingdom.

**Jurisdiction-specific drivers**

Are there any jurisdiction-specific drivers for undertaking a corporate reorganisation?

Luxembourg offers a supportive investment environment, an extensive network of tax treaties, a wide array of fund structuring options and a flexible corporate toolbox that provides for a favourable legal environment for corporate reorganisations. Further, the relatively recent implementation of partnership structures has helped in the recognition and use of Luxembourg for closed-ended private fund structures, because of their flexibility and similarity to Anglo-Saxon partnership structures.

On 13 July 2016 the Luxembourg Parliament adopted a major reform and modernisation of company law, aimed at revamping the corporate law to adapt it to current business needs and introducing added flexibility in the most-used form of companies. The two underlying principles to this reform were enhancement of contractual freedom and the promotion of a business-friendly environment. The reform adapts the legal framework to economic realities, and improves the consistency of Luxembourg corporate law and the competitiveness of Luxembourg.

## Structure

How are corporate reorganisations typically structured in your jurisdiction?

The structuring will mainly depend on the underlying reasons for the reorganisation, but in all cases it involves at least a planning and preparation phase, followed by implementation. In certain cases, a negotiation phase (eg, with employees or minority shareholders) must also take place.

The impact of any reorganisation should be considered holistically, meaning that the consequences on the commercial, legal, tax, accounting and time aspects should be vetted prior to any implementation.

Several basic principles need to be accounted for, including the fact that transactions between group companies should be conducted at arm's length, and that a mandatory waiting period will apply in the case of mergers and demergers.

In almost all cases, corporate reorganisations involving Luxembourg entities will also have components involving foreign companies, and will thus require close coordination between the various counsel.

## Laws and regulations

What are the key laws and regulations to consider when undertaking a corporate reorganisation?

The primary legislation is the Luxembourg law on commercial companies, which consolidated Luxembourg company law and contains the rules applicable to:

- any capital increase or decrease;
- the making of dividends and other distributions; and
- mergers, demergers and conversion of corporate form.

Luxembourg corporate law is generally more flexible and permissive than that of most other civil law countries, leading to typically lower regulatory hurdles for implementing reorganisations. For instance, notarisation and apostille requirements will generally not apply.

Many Luxembourg laws and regulations can have an impact when planning a corporate reorganisation, depending on its nature, the industry sector to which the group belongs and the activities performed by the Luxembourg companies. A classic example would be a Luxembourg entity subject to a regulatory licence (eg, due to loan-origination activities) or a business licence requirement for commercial activities.

Aside from the corporate and regulatory aspects, tax, labour and IP law and data protection regulations will generally be relevant and, therefore, need to be considered prior to effecting the reorganisation.

## National authorities

## What are the key national authorities to be conscious of when undertaking a corporate reorganisation?

A corporate reorganisation does not by itself entail the involvement of national authorities. Their potential involvement will mainly depend on the type of entities, the nature of the corporate reorganisation and the business (or businesses) affected.

For example, corporate reorganisations may be subject to notification or approval from national authorities such as the Luxembourg Commission for the Regulation of the Financial Markets, the Luxembourg Central Bank or ministers for certain sectors (eg, energy or healthcare).

### KEY ISSUES

#### Preparation

## What measures should be taken to best prepare for a corporate reorganisation?

Planning is a key aspect of ensuring an efficient implementation and generally includes:

- commercial and strategic planning;
- setting up communication lines both with advisers and internally, with managers and directors of the companies involved;
- performing due diligence exercises (eg, tax, legal, accounting or financial);
- valuation exercises (eg, transfer pricing analysis);
- identifying any regulatory, commercial or legal issues or barriers (eg, filing with authorities or mandatory terms that may apply to certain corporate actions);
- adjusting a timeline and preparing legal step plans; and
- setting up a virtual data room or communication method to provide access to draft and execution versions of the reorganisation materials.

#### Employment issues

## What are the main issues relating to employees and employment contracts to consider in a corporate reorganisation?

A corporate restructuring does not in itself constitute a ground for dismissal. The transfer of undertakings for the protection of employment (TUPE) regulations require all employees to be transferred to the acquiring entity in case of restructuring. Employers have a limited right to dismiss employees for economic or performance reasons, but the dismissal cannot be a direct consequence of the transfer.

Since 1 January 2007, companies considering job cuts may have to discuss with employee representatives a 'job retention plan', designed to provide for alternative measures to dismissals.

Collective dismissal occurs when a company plans to make at least seven redundancies for economic reasons over a period of 30 days or at least 15 over a period of 90 days. The qualification of collective dismissal entails for the company the obligation to respect, before any notification of the dismissals, a particular procedure consisting in negotiating with employee representatives measures to reduce the number of dismissals or to mitigate the

consequences, with a view to the eventual conclusion of a social plan.

## What are the main issues relating to pensions and other benefits to consider in a corporate reorganisation?

The TUPE regulations require all obligations arising from an employment contract to be transferred to the acquiring entity, including pension rights. Other employee benefits must also be transferred, but can be lightly amended with the consent of the employee if the acquiring entity is unable to provide equivalent benefits.

The concept of 'pre-pension' is also covered by Articles L582-1 and following of the Labour Code. Pre-pensions should not be confused with the early retirement pension. The early retirement pension is covered by social security law, while pre-pension is covered by labour law.

One type of pre-pension is the so-called 'pre-pension adjustment'. It is applicable to 57-year-old private sector employees. An employer may request the admission of its staff to the pre-pension adjustment following the loss of jobs resulting from a corporate reorganisation.

## Financial assistance

### Is financial assistance prohibited or restricted in your jurisdiction?

Under Luxembourg law, financial assistance consists of a company advancing (directly or indirectly) funds, granting loans or providing securities in relation to the acquisition of its shares by a third party.

The Luxembourg law on commercial companies prohibits (subject to the provisions of a limited whitewash procedure) public limited liability companies ( *société anonyme* ), partnerships limited by shares ( *société en commandite par actions* ), simplified joint-stock companies ( *société par actions simplifiées* ) and European companies ( *société européenne* ) from providing financial assistance to a third party for the acquisition of their shares. However, the law (while this topic remains subject to discussions among legal authors) does not extend the prohibition to private limited liability companies ( *société à responsabilité limitée* ), which are the most-used form of companies in Luxembourg.

While the scope of the prohibition of financial assistance in Luxembourg is limited to certain types of companies, financial assistance considerations are still relevant in reorganisations, notably where loans, capital contributions or securities are being granted.

## Common problems

### What are the most commonly overlooked issues or frequently asked questions in a corporate reorganisation?

Due to the international nature of almost all corporate reorganisations in Luxembourg, the most commonly overlooked issues concern compliance with the applicable transfer and assignment provisions, and the post-completion registration and filing approvals. Similarly, the need for valuations and establishment of (interim) accounts and calculation of distributable amounts are often overlooked, and the time required for them is frequently underestimated. These issues could be easily covered in the early stages of the reorganisation by considering the local accounting implications of the contemplated steps. Ideally, these should be confirmed in advance with the accounting team and the tax adviser to ensure the accounting treatment is consistent with the objectives of the reorganisation.

Frequently asked questions typically include those regarding which value to apply, what legal or statutory reserves apply and which type of restructuring method is preferable from a timing perspective.

## ACCOUNTING AND TAX

### Accounting and valuation

How will the corporate reorganisation be treated from an accounting perspective? How are target assets and businesses valued?

From a Luxembourg accounting perspective, corporate reorganisations will, in principle, be considered as a liquidation/disposal of the entire business. Consequently, target assets may be valued at estimated realisation value, defined by Article 27(2) of the Luxembourg income tax law as the price that a party buying this asset would have paid under normal market conditions for this particular asset (ie, the fair market value).

Target businesses may also be valued at operating value, which is defined by Article 27(1) of the Luxembourg income tax law as the price that a party buying the entire business as a going concern would give to a particular asset when allocating the total purchase price to the individual assets composing the business.

Although both concepts are similar, the estimated realisation value and the operating value can, depending on the circumstances, produce different valuation results for particular assets.

Under certain conditions, target assets or businesses may also be valued at book value in domestic reorganisations or in an EU context. Assets and businesses will thus be valued at the same value they were accounted for, in the accounts of the absorbed, transferring or demerged company. This tax-neutral regime is generally available if Luxembourg retains the right to tax the deferred gain.

### Tax issues

What tax issues need to be considered? What are the tax implications of carrying out a corporate reorganisation?

The accounting value for which the corporate reorganisation will be carried out has significant importance, as a corporate reorganisation may be carried out either at book value or fair market value (depending on the eligibility of a reorganisation for a tax-neutral regime).

From a Luxembourg tax perspective, a corporate reorganisation may in general result in a taxable gain corresponding to the difference between the book value of the assets or businesses subject to the reorganisation and their fair market value.

Under EU Directive 2009/133/EC, the corporate reorganisation may be realised at book value and benefit from a tax-neutral regime (thus not resulting in any taxable gain) if the following principal conditions are met:

- Luxembourg must retain the right to tax the deferred gain – this condition is met if the absorbing or beneficiary company, or the entities resulting from the corporate reorganisation, are generally considered as fully taxable companies tax resident in Luxembourg or in an EU country;
- The corporate reorganisation must, in general, be carried out in exchange of the allocation of shares; and
- A cash payment received as a consequence of such corporate reorganisation must not exceed 10% of the nominal value of the shares.

In the event of a merger, if the absorbing company has had a participation of at least 10% in the absorbed company, the gain realised on the cancellation of such shares should, in principle, be tax exempt in accordance with Article 171(3) of the Luxembourg income tax law.

The existence of a significant amount of carried forward losses in the entity which is absorbed, demerged, or transferred should also be considered. Regarding the use of carried forward losses, Article 114(3) of the Luxembourg income tax law provides that losses may be used only by the company which has initially suffered them.

New exit taxation rules, which will come into force on 1 January 2020 in Luxembourg, may also apply in relation to the transfer of assets, a permanent establishment, or the registered office or central administration of a Luxembourg tax-resident company out of Luxembourg. Such transfers will in principle be considered as a disposal at fair market value of the relevant assets and businesses, which may result in a taxable gain upon the transfer.

The payment of any Luxembourg tax triggered by the transfer may under certain conditions be paid over a period of five years if the transfer is to an EU member state or a European Economic Area state with which Luxembourg has concluded an agreement on the recovery of taxes.

## CONSENT AND APPROVALS

### External consent and approvals

What external consents and approvals will be required for the corporate reorganisation?

External consents and approvals must be carefully accounted for in corporate reorganisations. It is important to evaluate the impact of the proposed reorganisation on each entity. In particular, it should be considered whether any of the participating entities:

- holds specific permits or other operating licences;
- holds or leases any real estate;
- is party to any IT or IP licences from outside the company group;
- is party to any external financing or debt arrangements, or even internal financing such as a cash pooling;
- is party to third-party contracts that might contain specific change-of-control clauses, negative covenants or securities; or
- has employees.

Particular attention should be paid to regulated entities (eg, entities subject to the supervision of the Luxembourg Commission for the Regulation of the Financial Markets) and entities engaged in regulated markets (eg, energy, telecommunications, healthcare or financial services). In such instances, mandatory consent or notification may be required prior to any implementation.

### Internal consent and approvals

What internal corporate consents and approvals will be required for the corporate reorganisation?

The internal corporate consents and approvals will depend mainly on the nature of the reorganisation and the entities concerned. Moreover, the contractual documentation (eg, shareholders' agreements) may affect the consents and approvals required (eg, when containing specific reserved matters or transfer restriction clauses).

Generally speaking, board consent should be obtained to authorise the corporate reorganisation. For corporate governance purposes, such consent should be approved in advance. For certain actions (eg, share capital increases or decreases, amendments to the articles of association or mergers and demergers), shareholders' approval may also be required. The quorum and voting requirements will, again, depend on the applicable documentation and type of entities.

## ASSETS

### Shared assets

How are shared assets and services used by the target company or business typically treated?

As mentioned, the due diligence exercise is key to any corporate reorganisation. When performing that exercise, attention should be paid to any shared assets and services. When the changes relate only to entities remaining in the group, internal agreements may, in general, be easily prepared to cover any changes affecting the shared assets in a group of companies as well as services.

If, further to the reorganisation, assets or services will continue to be shared with entities that are no longer part of the group, particular attention should be paid to the agreements governing such sharing. In certain restructurings, provisional services arrangements will sometimes be entered into for a limited period of time.

### Transferring assets

Are there any restrictions on transferring assets to related companies?

In principle, there are no restrictions on Luxembourg companies transferring assets to related companies. Any transfer of assets within the group of companies should normally be made in accordance with arm's-length principles and be in the corporate interest of the companies.

Aside from the general principles stated above, attention should be paid to whether those transfers relate to assets that are subject to liens or encumbrances, or may otherwise require third-party consent or be subject to a specific regulatory regime. The tax and accounting aspects should equally be carefully considered, with particular regard to the treatment of gains and availability of distributable amounts.

When the transfer involves distressed companies, attention should be paid to fraudulent conveyances or in case of transfer of data between entities.

Can assets be transferred for less than their market value?

Under Articles 59 and 59 bis of the Luxembourg income tax law, the beneficiary of a transfer may benefit from a tax deferral and apply the same accounting values of the transferred assets as previously used by the transferor provided (among other things) that the transferor and transferee are fully taxable companies resident in Luxembourg or an EU member state.

If the assets are transferred to an EU tax-resident company, the assets must consist of at least an enterprise or a branch of activity. Assets transferred under such regime are deemed to have been acquired by the beneficiary at the date on which they were initially acquired by the transferor.

## FORMALITIES

### Date of reorganisation

Can a corporate reorganisation be backdated or deemed to have already taken place, for example from the start of the financial year?

From a Luxembourg accounting perspective, a corporate reorganisation may have a different effective date than its

actual realisation date; however, this effective date cannot be prior to the opening date of the financial year of the relevant company.

Consequently, losses realised by the absorbed or demerged company since the opening of the financial year may be considered as realised by the absorbing or beneficiary company.

## Documentation

### What documentation is required in a corporate reorganisation?

The documentation required for a corporate reorganisation depends mostly on the type of reorganisation, but can be categorised as follows:

- structuring and planning documentation, such as the structuring memo, tax analysis and legal step plan;
- substantive documentation, including the general corporate approvals (board and, if applicable, shareholders' approvals), notarial deed to effect changes to the articles of association, share purchase agreements, contribution agreements, subscription agreements and common draft terms of merger or demerger; and
- filing and post-completion actions and documentation, such as registration in the shares register, filing with the Luxembourg business register and filing with the Luxembourg register of beneficial owners.

## Representations, warranties and indemnities

### Should representations, warranties or indemnities be given by the parties in a corporate reorganisation?

It is relatively uncommon to provide for extensive representations and warranties in reorganisation documentation. While the parties remain free to determine the exact scope of representations, warranties, covenants or indemnities, intragroup documentation is generally focused on standard representations and warranties such as title to shares and assets, corporate approvals, valid licences, filings and registrations, and the arm's-length nature of the transactions.

## Assets versus going concern

### Does it make any difference whether assets or a business as a going concern are transferred?

From a corporate perspective, when transferring a business as a going concern it is important to determine whether any restrictions such as change-of-control provisions or third-party notices or consents may apply. It is equally important to verify whether transfer restrictions or liens may impede the transfer of those assets.

In relation to employees' rights, it does not make a difference. The transfer of undertakings for the protection of employment (TUPE) regulations apply to the transfer of a business or part of a business. Luxembourg courts apply the TUPE regulations in case of transfer of a business as well as in case of a transfer of assets, provided that there is a sufficiently strong link.

From a Luxembourg tax perspective, a transfer of assets or business as a going concern is in principle a taxable event. The taxable gain will correspond to the difference between the book value of the assets or businesses transferred and their estimated realisation value.

Regarding demergers, a tax-neutral regime is available under Articles 59(3) and (3a) and 59 bis of the Luxembourg income tax law for domestic reorganisations or taking place in an EU context, under the condition that the partners or

shareholders of the demerged company receive shares in the beneficiary companies on a basis proportional to their participation in the demerged company and a potential cash payment which may not exceed 10% of the nominal value of the shares allocated to the shareholders of the demerged company. This tax-neutral regime is also subject to the condition that the assets transferred must consist of at least an enterprise or a branch of activity which can operate independently.

### Types of entity

Explain any differences between public, private, government or non-profit entities to consider when undertaking a corporate reorganisation.

When dealing with publicly held companies, it is important to ensure that investor notifications and applicable stock exchange requirements are duly assessed and met, because such entities are subject to ongoing disclosure obligations and market abuse rules. The timeline for the reorganisation will generally be affected, as the notification and publication requirements take much longer than for private entities.

Government entities and non-profit entities are rarely seen in cross-border reorganisations. Most government entities are subject to specific regulations that would require specific assessment and government approval.

### Post-reorganisation steps

Do any filings or other post-reorganisation steps need to be taken after the corporate reorganisation takes place?

Corporate reorganisations will almost always require post-completion steps, but their nature depends on the type of transaction. In Luxembourg, the most common post-completion actions include:

- registration of share transfers and, where applicable, pledges in share registers;
- filings and registrations of applicable information with the Luxembourg business register;
- filing of notarial deeds the Luxembourg business register; and
- bookkeeping entries.

Further potential post-completion actions include:

- filings with the land register or other public registers (eg, when transferring immovable properties);
- notification requirements for specific regulated businesses (the most common being companies active in the financial services industry in Luxembourg); or
- filing with the competent patent or trademark office.

## UPDATE AND TRENDS

### Recent developments

Are there any emerging trends or hot topics regarding corporate reorganisations in your jurisdiction?

We expect steady activity in the coming years for corporate reorganisation, driven mainly by continued M&A activity but

also the changing tax environment.

## UNPROCESSED QUESTIONS

### All questions

Updates and trends