Luxembourg: modernisation of company law

On July 13, 2016, the Parliament of Luxembourg passed Bill no. 5730, which provides for a modernization of the Grand Duchy's company law.The amendments bring about three sorts of changes. They (a) give certain market practices a formal legal basis; (b) make certain rules simpler or more flexible; and (c) clarify a number of issues that were previously subject to debate.By modernizing its company law, Luxembourg is likely to enhance its attractiveness for multinationals, private equity firms and investors that wish to structure their investments internationally.Companies have two years from the publication date of the act to bring their articles of association in line with the new provisions.

A formal legal foundation for existing market practices

Under the new regime, all forms of companies are entitled to issue so-called "tracking shares", that is, shares aimed at tracking the performance of a specific underlying asset.Moreover, the amended law recognizes the simplified liquidation procedure, under which a sole shareholder company is dissolved without liquidation, as well as the transfer of all assets and liabilities of the dissolved company to its sole shareholder.With respect to the SA, it also formally acknowledges transfer restrictions (e.g. lock-up periods) and voting undertakings and arrangements, including the conditions for the validity or invalidity thereof. In addition, the amendments furnish a formal legal basis for the appointment of a general manager or CEO (*directeur général*), the establishment of a management committee (*comité de direction*), as well as the creation of other committees.Finally, the law establishes a range of new rules pertaining to the SàRL. These include the possibility to distribute interim dividends, delegate daily management to a board member, third party or employee, have authorized share capital, carry out share redemptions, and issue beneficiary units.

Simpler and more flexible rules

The new law lowers the minimum share capital from EUR 30,986.69 to EUR 30,000 and from EUR 12,394.68 to EUR 12,000 for SAs and SàRLs, respectively. In addition, it no longer requires unanimity to change the nationality of an SA or SàRL but provides for the application of the majority rules to amend the articles of association. What is more, the new law authorizes management to transfer the company's registered office outside the original municipality without shareholder consent as long as it is not transferred abroad.As to the SA, the legislator has abolished the conditions for the issuance of non-voting (preferred) shares. It also has simplified the regime governing non-voting shares, affording the parties more flexibility to regulate financial rights and the number of non-voting shares. What is more, the law now provides for the possibility to grant shares free of charge (or without consideration), which may render easier, for instance, the implementation of management incentive plans. Further, the board of directors can suspend the voting rights of a shareholder that fails to fulfil its obligations, as long as the company's articles of association set out this option. In addition, an SA now has the right to issue shares with unequal par value under certain circumstances, in which case the voting rights are proportional to the percentage of share capital they represent. Finally, an SA can also issue shares below their accounting par value (*pair comptable*) under certain conditions, which may prove useful for listed companies.With respect to the SàRL, an amendment of the articles of association no longer requires a majority of shareholders in numeric terms, but the approval of the shareholders representing 3/4 of the share capital. In a similar vein, the company's articles may lower the majority needed to transfer shares to a third party from 3/4 to 1/2 of the share capital. What is more, the law allows the transfer of shares to third parties even if shareholder consent was not obtained provided that certain conditions are satisfied. It also has raised the maximum number of shareholders of an SàRL from 40 to 100. Finally, SàRL can now issue bonds to the public, including convertible bonds under certain conditions, while the issuance of shares to the public remains prohibited.On the model of the French law, Luxembourg's legislator has introduced a new legal form, namely, the simplified public limited company (*société par actions simplifiée*, SAS), with the objective to give more freedom to shareholders to organize themselves. An SAS allows maximum flexibility in the articles of association, while conferring to the president a major role. While it is not allowed to list its shares, the company can issue bonds to the public. The SAS may be an appropriate alternative to the SA or SàRL for shareholders with special needs in respect of the balance of powers, shareholder relations, and the distribution of profits, as is the case with start-ups or joint ventures.

Clarifications providing more legal security

As regards the SA, the new law clarifies the capital impairment rules (so-called “Article 100” or the “alarm bell procedure”) to apply where a loss results in the value of the company’s net asset value falling below 1/2 or 3/4 of the share capital.The legislator has also adapted the rules on authorized capital to meet market requirements. Notably, it foresees the possibility to use the authorized capital immediately upon the adoption thereof or to issue shares upon the conversion or exercise of instruments even after the authorization period. Under the new regime, the contribution to an SA of a claim against the SA itself is considered as a cash contribution, for which an auditor’s report is no longer required. In relation to convertible bonds, an auditor’s report is only required upon issuance of the convertible bonds if they are not paid up in cash. The rules applicable to the issuance and conversion of convertible bonds have been extended to a number of other instruments that are either convertible into or exercisable as shares (e.g. CPECs and warrants).The law does not extend the financial assistance rules to the SàRL. It clarifies and aligns, for a range of companies, the grounds to invalidate shareholder meetings and the company itself. Furthermore, it introduces specific rules on the conversion of companies from one corporate form to another.