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Luxembourg
MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Luxembourg.

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LUXEMBOURG
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1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

The following laws are relevant to M&A in Luxembourg:

- the Act of 10 August 1915 on commercial companies, as amended (the "**Companies Act**");
- the Act of 19 December 2002 on the Trade and Companies Register and the annual accounts of companies (the "**Trade Register Act**");
- the Commercial Code; and
- the Civil Code.

In addition, the following legislation applies to public M&A:

- the Act of 19 May 2006 implementing Directive 2004/25/EU on takeover bids (the "**Takeover Act**");
- the Act of 21 July 2012 on the mandatory squeeze-out and sell-out of securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public (the "**Squeeze-Out Act**");
- the Act of 24 May 2011 on the exercise of certain rights of shareholders at general meetings of listed companies;
- the Act of 16 July 2019 on prospectuses for securities;
- the Act of 11 January 2008 on transparency requirements for issuers (the "**Transparency Act**");
- the Act of 23 December 2016 on market abuse (the "**Market Abuse Act**"); and
- Regulation (EU) 596/2014 on market abuse (the "**Market Abuse Regulation**").

The key regulatory authority is the *Commission de Surveillance du Secteur Financier* ("**CSSF**"), a public institution responsible for supervising financial sector professionals and products in Luxembourg.

Furthermore, all professional economic activities are subject to the prior grant of a business licence (*autorisation d'établissement*) by the General Directorate for Small and Medium-sized Enterprises (*Ministère des Classes Moyennes*).

2. What is the current state of the market?

M&A activity in Luxembourg has resumed since the Covid-19 crisis. 2021 was a very dynamic year; fundraising by private equity funds picked up and used their cash to generate a steady flow of M&A deals. The beginning of 2022 was marked by a deceleration due to the geopolitical and economic environment, including the war in Ukraine and increase of interest rates. Despite a slow start, deal activity remained busy thanks to Luxembourg's favorable regulatory framework and historical stability.

The investment funds and private equity industries both play a central role for M&A transactions in Luxembourg. Assets under management by private equity funds continue to grow and stay above €5,000 billion, despite a slight decrease since February 2022. Luxembourg is considered one of the top jurisdictions worldwide for the private equity fund sector. M&A transactions using Luxembourg-based structures with European targets are still common. Since the emergence of SPACs in 2021, Luxembourg also remains a destination of choice offering popular vehicles.

The outlook for 2023 is uncertain and will bring its own set of challenges. The country will have to display flexibility to navigate successfully through a tense international economic context but will hopefully find its way to return in 2023 with a record number of portfolio companies, fundraising which has continued at pace and a record level of dry power (over USD 3 trillion) to be invested.

3. Which market sectors have been particularly active recently?

Acquisitions are flourishing in the life sciences, new technologies (cloud computing, software and other IT technologies), healthcare (laboratories, hospitals, and medical devices), pharmaceuticals and e-commerce sectors. The real estate and infrastructure sectors are also active.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

- Global digitalization
- The development of special purpose acquisition companies ("SPACs")
- The tax environment, including the implementation of ATAD 3

5. What are the key means of effecting the acquisition of a publicly traded company?

The key means of gaining control over a publicly traded company is to acquire its shares. This can be done through a voluntary or hostile takeover. For a listed company whose registered office is established in Luxembourg, the percentage of voting rights deemed to confer control is 33⅓%.

Control over a listed company may also be acquired through a merger or the subscription of new shares on the occasion of a capital increase.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

The following information relating to a target company is publicly available in accordance with the Companies Act and the Trade Register Act:

- the articles of association and any amendments thereto, the share capital, the names of the directors, the registered office address, the names of the shareholders (for private limited-liability companies only); and
- the financial statements

When a company is listed on a regulated market, certain information must be published in order to ensure transparency with respect to its shareholders and the market as well as to facilitate the participation of shareholders in governance of the company.

Any listed company that has elected Luxembourg as its home country must comply with certain disclosure obligations notably in terms of financial information, proposed amendments to the articles, the acquisition and/or disposal of substantial shareholdings, inside information, and the calling of general meetings of shareholders, as provided for by the Transparency Act. The listing prospectus, offer document and memoranda must also be published in accordance with relevant laws.

Furthermore, listed companies must publish inter alia the following information in accordance with the Takeover Act:

- the structure of their share capital, with an indication of the different classes of shares and, for each class of shares, the rights and obligations attached thereto and the percentage of the share capital it represents;
- any restrictions on the transfer of securities;
- significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings)
- the holders of any securities with special control rights and a description of those rights;
- the system of control of any employee share scheme where the control rights are not exercised directly by the employees;
- any restrictions on voting rights
- any agreements between shareholders which are known to the company and may result in restrictions on the transfer of securities or voting rights;
- the rules governing the appointment and replacement of board members and the amendment of the articles of association;
- the powers of board members and in particular the power to issue or buy back shares; and
- any significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company following a takeover bid, and the effects thereof, except where their nature is such that their disclosure would be seriously prejudicial to the company; this exception shall not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements;

The above information must be included in the management report of a listed company established in Luxembourg.

Other than the information generally required to be made public by law, there is no statutory obligation for a target company to disclose diligence-related information to a potential acquirer.

7. To what level of detail is due diligence customarily undertaken?

Private M&A due diligence is generally conducted in a detailed manner and covers business, financial and legal matters. In practice, all relevant information is uploaded to a virtual data room to which the potential acquirer has access.

For public M&A, the Takeover Act does not cover the bidder's due diligence process. For a friendly takeover bid, the issuer will set up a virtual data room including relevant information pertaining to the company which may be consulted by the bidder subject to any non-disclosure agreement.

For a hostile takeover bid, due diligence is carried out by the bidder based on publicly available information.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The key decision-making organ is the board of managers/directors.

Mergers and other reorganizations (as well as certain decisions such as amendments to the articles and changes to the share capital) require shareholder approval.

The general meeting of shareholders is also the competent organ to approve changes relating to the managers/directors as well as the financial statements.

9. What are the duties of the directors and controlling shareholders of a target company?

Generally, managers and directors have the broadest powers to realize the corporate purpose of the company and to represent it to third parties.

They must act in good faith, with diligence and care, for the exclusive benefit of and in the corporate interest of the company. They have a duty of loyalty to the company and must strive to avoid conflicts of interest with the company. If a conflict of interest cannot be avoided, it should be declared and the director concerned may not participate in the deliberations or vote on the matter.

In the context of a takeover bid, the board of the listed target company must act in the interest of the company as a whole and must not deny the holders of securities the opportunity to take a decision based on the merits of the bid. The board of the company shall also issue a recommendation/opinion on the bid and explain the reasons on which its opinion is based including its views on the effects of the bid on all of the company's interests, specifically employment, and the offeror's strategic plans for the company and the likely repercussions for employment and the company's places of business. The board shall always ensure compliance with the Market Abuse Regulation.

Controlling shareholders owe no fiduciary duties to the company but they must not act to the detriment of minority shareholders. Abuse by majority shareholders of their rights can be sanctioned by invalidation of the decision. In the case of a listed company, controlling shareholders are subject to certain obligations under the Transparency Act and the Market Abuse Regulation.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

Employees are represented at board level in public limited-liability companies (*sociétés anonymes*) with at least 1,000 employees or which are more than 25% state owned or have a state concession as their main activity.

In the event of a takeover bid, the boards of directors of the bidder and the target company must inform their respective employee representative bodies (or, in the absence of such bodies, the employees directly).

Certain transactions such as transfer of a branch of activity, a spin off, merger or demerger entail the provision of information to or as the case may be consultation with the employee representatives.

In other situations, the employees have no approval, consultation, information or other rights.

11. To what degree is conditionality an accepted market feature on acquisitions?

Conditions precedent are very common. The most popular conditions precedent are the need to obtain clearance from certain regulatory authorities and the absence of a material adverse change in the financial position.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

In practice, deal exclusivity is secured by way of a letter of intent or exclusivity agreement between the seller and the potential acquirer.

A penalty clause can also be introduced to indemnify the acquirer should the seller breach the confidentiality provisions. The penalty clause must be reasonable and, if it is considered excessive, can be reduced by a Luxembourg court.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Break fees are a tool frequently used by potential acquirers in order to protect against a sudden breakdown in the negotiations.

A break fee agreement, for a bid falling under the scope of the Takeover Act, may be concluded between the bidder and the target company under certain conditions. In the absence of such an agreement, it may be possible to rely on breach of the general provisions of the Takeover Act.

Such agreements must be analysed on a case-by-case basis according to their terms and the situation of the parties concerned by the takeover bid.

In order for a break fee not to violate the Takeover Act, the parties must pay attention notably to the corporate interest of the public listed company and its shareholders; furthermore, the break fee amount must be reasonable, and the events that trigger payment of the break fee must not affect the independence of shareholders to reject the offer.

14. Which forms of consideration are most commonly used?

The most common forms of consideration are cash and in kind (shares, receivables or other).

Due to the risk of value loss, consideration in kind is mostly used for intragroup acquisitions or acquisitions where the seller agrees to reinvest in the structure.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

In accordance with the Transparency Act, an acquisition or disposal of shares in a public listed company that crosses certain thresholds triggers an obligation for the acquirer or holder to notify the issuer and the CSSF of the acquisition or, as the case may be, the disposal. The company must then proceed to make public the acquisition or disposal of the substantial shareholding through the relevant channels and official platforms.

The relevant thresholds under the Transparency Act are 5%, 10%, 15%, 20%, 25%, 33 1/3%, 50% and 66 2/3%.

16. At what stage of negotiation is public disclosure required or customary?

The parties may keep negotiations confidential as long as they comply with the rules of the Market Abuse Regulation.

In accordance with the Market Abuse Regulation, a public listed company must inform the public as soon as possible of inside information that directly concerns it. Inside information is any precise information that has not been made public relating, directly or indirectly, to an issuer or to one or more financial instruments and if it were made public, would be likely to have a significant effect on the price of the issuer’s securities.

The issuer shall ensure that the inside information is made public in a manner that enables fast access and complete, correct and timely assessment of the information by the public. It is debatable whether a tentative bid for shares of a public listed company should be regarded as inside information and much will depend on the specific circumstances and the stage of negotiations. Under the Market Abuse Regulation, a public listed company may, at its own responsibility, delay disclosure to the public of inside information provided certain conditions are met.

Pursuant to the Takeover Act, the decision to make a bid must be made public as soon as the bidder has taken the decision to proceed with it. The CSSF must be informed of the offer prior to any publication thereof.

Before making public its decision to make a takeover bid, the bidder must ensure that it can provide the full consideration in cash (if consideration is offered), after having taken all reasonable measures to provide any other kind of consideration, as the case may be.

17. Is there any maximum time period for negotiations or due diligence?

There is no maximum time period for negotiations or due diligence.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

The general principle under the Takeover Act is equal treatment of the holders of all securities of the same class of a public listed company.

In the case of a takeover bid made pursuant to the Takeover Act, the price offered to minority shareholders must be a fair/equitable one.

A fair price is the highest price paid for the same shares by the bidder or by person acting in concert with the bidder during a period of 12 months preceding the takeover bid.

19. Is it possible for target companies to provide financial assistance?

Under Luxembourg law, public limited-liability companies (*sociétés anonymes*) and partnerships limited by shares (*sociétés en commandite par actions*) may not directly or indirectly advance funds, lend money or grant security for the acquisition of their own shares by a third party. Private limited-liability companies (*société à responsabilité limitée*) do not fall under this prohibition.

Luxembourg law provides for a whitewash procedure further to which a company's board of directors can convene a shareholders meeting to authorise transactions that would otherwise be contrary to the prohibition and thus void. In this case, the board of directors must draw up a special report for the shareholders, the level of assistance may not exceed the company's distributable reserves and a special procedure must be followed.

20. Which governing law is customarily used on acquisitions?

Most SPAs are governed by English law but the relevant provisions for the transfer and acquisition of shares must be compliant with Luxembourg law.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

The bidder must draw up an offer document that includes all information required for securities holders of the listed company to take an informed decision on the offer. The offer document should include notably the terms of the bid, the identity of the offeror, the securities and relevant class of securities that form the object of the bid, the consideration offered per security, the number of securities to be acquired, the identity of shareholders acting in concert with the bidder, the duration of the acceptance period for the bid and the applicable law.

The law governing the offer document and the competent supervisory authority shall be determined based on, amongst other factors, the primary regulated market where the company is listed (and the time of listing if it is listed on more than one regulated market).

The relevant competent authority must first approve the offer document in accordance with applicable law.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

Transfers of shares of private limited-liability companies (*sociétés à responsabilité*) must be recorded in a notarial or private document. They are not binding against the company and third parties until they have been notified to the company or accepted by it and must be filed with the Luxembourg Trade and Companies Register.

Transfers of shares of public limited-liability companies (*sociétés anonymes*) are carried out by way of recordation in the register. The company or depositary, as the case may be, may accept and enter in the register a transfer evidenced by correspondence or other documents recording the agreement between the transferor and the transferee.

There are no transfer taxes or duties in Luxembourg.

23. Are hostile acquisitions a common feature?

It is possible for a bidder to plan the hostile acquisition of a Luxembourg public company. There are no statutory restrictions to doing so in Luxembourg. The Takeover Act sets out the various options available to a public listed company to mount a defense and corporate governance in terms of decisions on defensive measures.

As a hostile takeover bid is not supported by the board, which must act in the interest of the company, the board may decide to take any actions to frustrate the bid that could be successful. Another possibility is for the board to enter into negotiation with the bidder so that the bid becomes attractive to the company and turns into a friendly one.

24. What protections do directors of a target company have against a hostile approach?

Under the Takeover Act, a company may opt to include the "board passivity rule" in its articles of association meaning, subject to the prior approval of the general meeting, the board of directors may not take any measures that would result in frustration of a takeover bid, except for searching for a better offer (such as a white knight). This option is reversible.

In the absence of such provisions, the board of directors may generally take actions that could result in frustration of a takeover bid, provided it always acts in the interest of the company as a whole and does not deny shareholders the opportunity to decide on the merits of the bid. The board of directors may implement defensive measures, including a so-called "poison pill" (such as a recapitalization, share buyback, issuance of shares to a "friendly" investor and sale of core assets, distribution of dividends).

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Any person who, acting alone or in concert with another or others, acquires a percentage of shares which, when added to any shares held prior to the acquisition, confers control over the company must launch a takeover bid in order to protect the company's minority shareholders. For a listed company with its registered office in Luxembourg, the percentage of voting rights deemed to confer control is 33⅓%.

Persons are deemed to act in concert if they cooperate on the basis of an agreement, verbal or written, express or implied, aimed at acquiring control of a target company or at frustrating the successful outcome of a takeover bid.

There is no obligation to launch a mandatory offer following the acquisition of control of a company as the result of a voluntary bid under the Takeover Act.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

In public limited-liability companies (*sociétés anonymes*), the key minority shareholder rights are:

- shareholders holding 5% or more of the company's share capital have the right to request the adjournment of a general meeting of shareholders;
- shareholders holding 5% or more of the company's share capital have the right to request the convening of a general meeting;
- shareholders holding 10% or more of the voting rights have the right to initiate an individual action for liability against directors, members of the management board or members of the supervisory board; and
- shareholders holding 10% or more of the voting rights or share capital have the right to submit questions to the directors regarding the management and operations of the company or an affiliate.

In private limited-liability companies (*sociétés à responsabilité*), the rights of minority shareholders are limited. The transfer of shares to a non-shareholder requires the approval of shareholders holding at least ¾ of the company's share capital (or ½ of the company's share capital if provided for in the articles of association). In the event of refusal of the transfer, the shareholders can transfer their shares either through a share repurchase or sale to another shareholder or a third party, which must not take longer than six months. Minority shareholders will therefore not be locked up if there is no specific transfer provisions in the articles or a separate shareholders' agreement.

27. Is a mechanism available to compulsorily acquire minority stakes?

If a natural or legal person holds at least 95% of a listed company's share capital and voting rights as the result of a bid to acquire the company's shares, it may acquire at a fair price the remaining shares by way of a squeeze out. This right must be exercised within three months.

The squeeze-out price offered by the bidder must be fair. It must take the same form as the consideration offered in the bid or be in cash. Cash must be offered at least as an alternative.

In the case of a voluntary bid, the consideration offered shall be presumed fair where, through acceptance of the bid, the bidder acquires securities representing at least 90% of the capital carrying voting rights comprised in the bid.

In the case of a hostile bid, the consideration offered is presumed fair.

A squeeze-out is also possible under Luxembourg law in other circumstances including six months after a takeover bid and subject to certain conditions in accordance with the Squeeze-out Act.

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