International
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Legal Guides

Mergers & Acquisitions 2020

A practical cross-border insight into mergers and acquisitions

14th Edition

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The key legislation is the law of 10 August 1915 on commercial companies, as amended (the "**Corporate Law**"). In addition, numerous treaties on the avoidance of double taxation allow Luxembourg to support the worldwide M&A activities of Luxembourg private equity funds and M&A parties.

The law of 19 May 2006 implementing Directive 2004/25/EU on takeover bids, as amended (the "**Takeover Law**"), covers squeeze-out and sell-out rights, which assists the M&A of Luxembourg-based target companies. A natural or legal person acquiring, alone or with persons acting in concert with it, control over a company by holding 33.3% of the voting rights is required to make a mandatory takeover bid to all the shareholders in a Luxembourg company. As far as the competent authority is concerned, the Takeover Law states that if the target company's securities are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the competent authority to supervise the bid shall be the authority of the Member State responsible for the regulated market on which the company's securities are admitted to trading. Matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the bidder's decision to make a bid, the content of the offer documents and the disclosure of the bid, shall be governed by the law of the Member State responsible for the regulated market on which the company's securities are admitted to trading. If a mandatory or voluntary offer is made to all of the holders of securities carrying voting rights in a company, which has listed its securities at a regulated market and if, after such offer, the offeror holds 95% of the securities carrying voting rights of the respective company and 95% of the voting rights, the offeror is entitled to squeeze out the minority shareholders, if any, according to the Takeover Law. Under the Takeover Law, when a mandatory or voluntary offer is made to all of the holders of securities carrying voting rights in a company and if, after such offer, the offeror holds more than 90% of the securities carrying voting rights and more than 90% of the voting rights, the minority shareholders may require the offeror to purchase the remaining securities of the same class.

Finally, the law of 21 July 2012 on 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 "**Luxembourg Squeeze-Out and Sell-Out Law**") applies to the following scenarios: (i) if all or part of a company's securities are currently admitted to trading on a regulated market in one or more EU Member States; (ii) if all or part of a company's securities are no longer traded, but were admitted to trading on a regulated market and the delisting became effective earlier than five years ago; or (iii) if all or part of a company's securities were the subject of a public offer which triggered the obligation to publish a prospectus in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the "**Prospectus Directive**") or, if there is no obligation to publish according to the Prospectus Directive, where the offer started during the previous five years. The Luxembourg Squeeze-Out and Sell-Out Law does not apply during and for a certain grace period after a public takeover, which is or has been carried out pursuant to the Takeover Directive.

1.2 Are there different rules for different types of company?

The Corporate Law provides for all kinds of corporate structures and corporate instruments to create tailor-made corporate structures useable for M&A transactions. The Corporate Law in the past few years introduced new forms of corporate structures which further enhanced corporate structuring via Luxembourg as a platform. The special limited partnership (*société en commandite spéciale*) and also the simplified private limited liability company (*société à responsabilité simplifiée*) are examples in this regard.

The Takeover Law provides for any voluntary bid for the takeover of a Luxembourg company and any mandatory bid.

The Luxembourg Squeeze-Out and Sell-Out Law provides for the squeeze-out and sell-out of minority shareholders of a company that has its registered seat in Luxembourg by a majority shareholder.

1.3 Are there special rules for foreign buyers?

No general rules for specific foreign buyers apply for Luxembourg companies.

1.4 Are there any special sector-related rules?

Some rules for specific companies exist. For example, in case of a target whose registered office is in Luxembourg and securities are admitted to trading on a regulated market in Luxembourg, the offer will be supervised by the *Commission de Surveillance du Secteur Financier* ("**CSSF**"). Furthermore, if a target company carries a licence from the CSSF, the change in shareholding

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must be approved by the CSSF. Finally, it might be possible for the Luxembourg government to intervene in a contemplated acquisition, which aims at certain Luxembourg entities that are doing business in highly sensitive governmental areas.

1.5 What are the principal sources of liability?

The principal basis of liability is mentioned in the Luxembourg Civil Code and the Corporate Law. Depending on the action carried out, the managers or directors of an acting Luxembourg entity can be held liable for management faults or violations of applicable law and provisions of a company's by-laws. Shareholder liability is typically excluded unless a shareholder acts the way that leads a *bona fide* third party to think such shareholder is the manager of the Luxembourg entity in which case manager liability may also be triggered in the hands of such shareholder.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Growth by way of strategic partnerships/alliances is an alternative means. If a company already has a mature service, it can grow its business by selling a franchise or licence to another company. The parties can also pool their resources by setting up a joint venture entity, which often occurs in Luxembourg, being a business arrangement of international investors coming together from different regions in the world. By setting up such separate new joint venture entity, the parties may protect their main businesses in the case of failure of the joint venture investment.

2.2 What advisers do the parties need?

Financial and legal advisors are the most important consultants to an M&A deal.

2.3 How long does it take?

The duration of an M&A transaction can vary tremendously. Provided the M&A transaction volume is small and the target group does not operate internationally, the acquisition may occur in a few weeks provided due diligence of the target group does not reveal major roadblocks. However, if the target group consists of many entities located in different parts of the world, the anti-trust procedure alone could take several months. In addition, the due diligence and negotiation of the share purchase agreement will be much more complex, hence bigger M&A deals might take more than one year.

2.4 What are the main hurdles?

Filing with and notification of merger control/anti-trust authorities, if required, creates the biggest obstacle. Another hurdle can sometimes be found in the due diligence process as it is not always ensured that all necessary documents will be provided swiftly and in a complete manner.

2.5 How much flexibility is there over deal terms and price?

Deal terms and price depend on the due diligence and other factors. Whether flexibility is possible relates to such points but also to the market and target developments during the ongoing M&A transaction. In case of substantial changes, parties show flexibility to adapt as otherwise often the deal will come to a stop. However, once the financial key parameters of the target were identified and assessed, not much flexibility with a view to pricing and terms remains.

2.6 What differences are there between offering cash and other consideration?

The main difference is that a cash payment normally bears no risk of value loss. Instead, a payment in kind (stock/receivables/notes/options/other) might lose value immediately after the M&A deal was closed due to market and other developments. Hence, we predominantly see cash purchase prices to be paid by the purchaser.

2.7 Do the same terms have to be offered to all shareholders?

The Corporate Law also recognises the principle of equal treatment of shareholders. Hence, in a scenario of a merger or acquisition process, all shareholders have to be treated equally unless different treatment has been agreed on in a shareholders' agreement of the target company. This often might be the case especially in private equity-related M&A transactions.

2.8 Are there obligations to purchase other classes of target securities?

In case the purchaser wants to own and fully control the target post-acquisition, it typically will acquire all securities that are necessary to exercise such control. We see often that, e.g., exiting bonds or shareholder loan instruments are also acquired by the purchaser next to the shares in issue.

2.9 Are there any limits on agreeing terms with employees?

The employee participation rights apply to: (i) a Luxembourg public limited liability company which has at least 1,000 employees for the previous three years; and (ii) any company incorporated under the form of a Luxembourg public limited liability company of which the Luxembourg government holds a financial participation of 25% or more or that benefits from a "concession" from the Luxembourg government in relation to the exercise of its activity and is named by Grand-Ducal regulation.

2.10 What role do employees, pension trustees and other stakeholders play?

In the context of the stipulations mentioned in question 2.9 above, it might be necessary to involve employee representatives in an M&A transaction (e.g., by notification, consultation, or otherwise).

2.11 What documentation is needed?

Documentation volume depends on the nature of the acquisition (public or private). Documents can include, *inter alia*,

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announcement documents, offering documents, contractual agreements, due diligence reports, share purchase agreements, tax-related documents, anti-trust filing documents and others.

2.12 Are there any special disclosure requirements?

Disclosure requirements also depend on the nature of the transaction and in particular the character of the target company/target group. If the shares or other securities of the target company are listed on a regulated market, different disclosing requirements will apply. Also, if the target company in Luxembourg holds a licence from the CSSF, such authority needs to be informed. Hence, each transaction bears its own disclosing requirements, which should be duly assessed with advisors to the purchase in advance of starting the M&A transaction.

2.13 What are the key costs?

Fees for advisors and incurred in relation to merger control/anti-trust authorities, etc., are the key costs incurred in a transaction. Commercial terms decide which party bears such costs.

2.14 What consents are needed?

Consent from merger control authorities, if required, as well as consent from the management body of the target company, if it is a Luxembourg company, are needed.

2.15 What levels of approval or acceptance are needed?

The management body of the target company (initially) approves the transaction, and subject to the by-laws of the target company, it sometimes subsequently goes to a shareholder vote if certain matters (such as if the transfer of the shares in the target company is more than a certain percentage) are stipulated in the by-laws of the target company and reserved for shareholders, which will then trigger approval from the general meeting of shareholders to be adopted by, e.g., a majority or a supermajority of votes cast.

2.16 When does cash consideration need to be committed and available?

Typically, the cash consideration is put into escrow shortly before the closing date. Once, on the closing date, the fulfilment of all conditions precedent under the share purchase agreement are confirmed by both parties, the cash consideration is released from the escrow account to the selling shareholder(s). The purchase price can be subject to adjustments after closing of a transaction.

3 Friendly or Hostile

3.1 Is there a choice?

The Corporate Law provides that transfer of corporate shares or units shall not be valid *vis-à-vis* the target company or third parties until they have been notified of the management of the target company or accepted by it in accordance with the provisions of article 1690 of the Luxembourg Civil Code. In a hostile takeover, the management of the target company rejects the takeover which, in principle, prevents the merger. However, the acquirer company can employ strategies, such as persuading shareholders of the target company to vote out certain managers or directors, who are against the takeover, at the general meeting of shareholders and reinstall a new board which is more receptive to a takeover by the acquiring company.

3.2 Are there rules about an approach to the target?

To our knowledge, there are none.

3.3 How relevant is the target board?

See the answer to question 3.1.

3.4 Does the choice affect process?

Certain choices should be taken before starting the M&A transaction. Initially, it should be considered whether to fully or partly acquire the target. Furthermore, it should be verified whether to approach a certain shareholder or all shareholders of the target company or rather the board of directors of such target company. If it is a public takeover, normally the purchaser, first contacts the board of directors of the public target company before making its offer to assess whether or not a friendly takeover is possible.

4 Information

4.1 What information is available to a buyer?

Certain information, such as the corporate name, registered office, incorporation or formation date and board of managers, is available, as the case may be, on the website of the Luxembourg Trade and Companies Register (*Recueil Electronique des Sociétés et Associations*). Furthermore, the buyer can gather information about the target company by carrying out due diligence. As for the legal due diligence, normally the buyer's lawyer sends a detailed information request to the seller to request the constitution of the target as well as the information on its property and employees, its existing contracts and licences, etc.

4.2 Is negotiation confidential and is access restricted?

Typically, yes.

4.3 When is an announcement required and what will become public?

An announcement is required for a public takeover bid in Luxembourg, as described above, when a certain threshold of shareholding is achieved by the purchaser. Furthermore, certain rules also require ongoing or even earlier notifications to supervising authorities.

4.4 What if the information is wrong or changes?

The seller is normally required to give a list of warranties, which are assurances about the target company covering all aspects of

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its information. If the information the seller gives to the buyer as a warranty is wrong or changes, the seller may be liable to pay damages to the buyer under a claim of a breach of warranty.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Yes, subject to certain requirements that such purchases are not trying to circumvent provisions that require transparency of the process.

5.2 Can derivatives be bought outside the offer process?

See the answer to question 5.1.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

See the answer to question 5.1.

5.4 What are the limitations and consequences?

See the answer to question 5.1.

6 Deal Protection

6.1 Are break fees available?

Current market practice sees break fees regularly negotiated at the beginning of a transaction. Luxembourg service providers regularly accept that a breakup fee can include a certain discount given the economic downside of an unsuccessful bid.

6.2 Can the target agree not to shop the company or its assets?

Yes, the target can agree not to seek alternative offer proposals in competition with a proposal recommended by the bidder; however, this is seen more where the parties have entered into exclusive negotiations.

6.3 Can the target agree to issue shares or sell assets?

Generally speaking, the board of managers of the target company shall act neutrally and in the best corporate interest of the target company. However, it is possible for the target to take steps by issuing share, disposing of the target firm's most prized and valuable assets to make it less desirable to the acquirer company.

6.4 What commitments are available to tie up a deal?

The board of managers or directors of the target company is the management body who is familiar with the business of the target company. It can advise shareholders to vote in favour of a preferred bidder; however, advice should be prudently identified to ensure that the deal will not create unexpected disadvantages for the target company.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Deal conditions are subject to the specific transaction at stake. All conditions, however, have to comply with applicable law, which should be identified duly in advance of starting the deal.

7.2 What control does the bidder have over the target during the process?

The bidder normally does not have control over the target company during the process, unless a certain level of shareholding is reached.

7.3 When does control pass to the bidder?

When ownership of the target being acquired is transferred to the bidder, the bidder has all/certain control of the target depending on the agreed terms and level of shareholding achieved.

7.4 How can the bidder get 100% control?

In case not all the shareholders of the target company are willing to sell for the offered price, the bidder must try to achieve the threshold of 95% to start a squeeze-out process. This, however, is only possible in public companies. No squeeze-out process exists in Luxembourg for private companies.

8 Target Defences

8.1 What can the target do to resist change of control?

As mentioned before, Luxembourg laws provide that the transfer of shares in the target company needs to either be notified to the management of the target company or be accepted by it. In case the board of the target company does not deem the offer to be in the best interest of the Luxembourg target company, it may resist such offer. However, the bidder may still make its offer public, which then becomes a hostile takeover. In such case, not many elements for resistance exist apart from finding another interested party that wants to acquire the target company. Other resistance might be created by the board of the target in taking a stance against the offer due to respective economic or other arguments. And, of course, the shareholders of the target company may resist in not rendering their shares for sale to the bidder, given different reasons.

8.2 Is it a fair fight?

Fairness is certainly desired; however, sometimes market players might have a different negotiating power, which, however, does not necessarily lead to unfairness.

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9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Major influences are a well-experienced and prepared advisory team, a prudent and thorough management team at the acquisition party as well as financial resources to hang on to the acquisition process even if it takes longer than expected.

9.2 What happens if it fails?

The failure of an acquisition seems to have mostly negative consequences. The reputation of the purchaser, the target company and/or seller(s) might take a hit in the market. Furthermore, certain business strategies depending on the successful acquisition may have to be abandoned. This can create severe turbulence for the purchaser who failed to acquire. Finally, costs incurred, depending on the stage of the deal, might be substantial. These have to be borne by the respective parties despite the broken deal (taking into consideration any discount granted by an acting advisor).

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

The Corporate Law was recently amended in 2016 to enhance corporate structuring. It now provides for better structuring of share classes and characteristics (voting or non-voting shares/shortening of the period for exercising preferential subscription). New corporate forms were also created as well as more flexible provisions pertaining to the issue of bonds and the holding of general meetings of shareholders. In addition, investment fund forms were created (e.g. the unregulated reserved alternative investment fund or RAIF in 2016), which allows the swift set-up of private equity regimes and other alternative funds to allow time for market investment activity. Specialised investment funds (“**SIFs**”) have also grown in number recently because the approval process for a SIF by the Luxembourg financial supervisory authority CSSF was accelerated.

Moreover, the Luxembourg government has always been open-minded toward international business activities and international investors.

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