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Corporate M&A 2022

Luxembourg: Law & Practice

Dr Marcus Peter and Sofia Lindqvist
GSK Stockmann SA

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LUXEMBOURG

Law and Practice

Contributed by:
Dr Marcus Peter and Sofia Lindqvist
***GSK Stockmann SA** see p.18*

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1. TRENDS

1.1 M&A Market

During 2021, M&A activity continued to recover from the drop off seen in early 2020. The impact of the COVID-19 pandemic on the M&A market has decreased significantly, especially since the second half of 2021, mostly due to global vaccination campaigns and less severe virus variants.

The recovery of the market throughout 2021 in terms of M&A deal flows can be seen, inter alia, in the significant increase in the volume of net assets under the management of Luxembourg investment funds, especially with regard to private equity funds. The M&A deal volume through Luxembourg vehicles into other markets has increased even more and there has been a noticeable rebound of shareholder activism in the market, which has encouraged deals in various sectors in addition to the fund industry.

In the last 12 months, the volume of net assets rose by 17.81%, which is significant compared to the increase of 5.4% for the year 2020. These funds have been investing into and will generate further M&A transactions aimed mostly at European-based targets.

The recent statistics show that the overall M&A market in the European Union was better at the end of 2021 than in 2007, which is considered to be one of the highest points of the M&A market (ie, directly before the financial crisis). This gives a positive outlook for the year ahead. However, the rising political tensions between Russia, Europe and the USA might contribute to a slow down with a view to M&A activities in and through Luxembourg.

1.2 Key Trends

The deal volume for Luxembourg itself is relatively small and mostly targeted to the financial sector. However, the number of M&A deals steered through Luxembourg vehicles into other markets continues to increase. Due to the legal and political stability of Luxembourg's regulatory, financial and legislative framework, and the growing fund industry and financial sector, the Luxembourg market continues to generate further M&A transactions aimed at European-based targets through Luxembourg-based structures.

There is a mix of private and public M&A transactions in Luxembourg, while the key sectors for M&A activity remain diverse. M&A targets in both the private and public sectors are mostly located in jurisdictions outside of Luxembourg. M&A transactions with European targets initiated from a Luxembourg (investment fund or other) structure remain common due to the attractiveness of the stable and positive legal and business environment in Luxembourg.

The COVID-19 pandemic has influenced the structuring of M&A deals throughout the year. The due diligence process has become even more important since there is a need to look deeper at the financial conditions and the situation of target companies due to the invisible impact of the COVID-19 pandemic. In addition, the sellers have become more prudent with the material adverse change clauses in order to avoid purchasers potentially terminating transactions on the basis of COVID-19 qualifying as a material adverse change. Also, certain business segments (hotel and travel business) were significantly impacted by COVID-19 and investors had to deal with rescue financings or stopped pending deals.

The parties are also paying more attention to diminishing the impact of the COVID-19 pandemic on the purchase prices, whether negotiated pre- or during the pandemic. Tying a portion of the purchase price to the performance of the target company after closing, ie, earn-out provisions, might be a way to give purchasers a degree of security and certainty. Also, an agreement on the allocation of risk on earn-outs could be used as a suitable compromise to diminish the impact of COVID-19 and ensure deal continuity.

See also **3.1 Significant Court Decisions or Legal Developments**.

1.3 Key Industries

Key sectors that have seen significant activity, apart from the fund industry, include cargo transportation and logistics, automotive and engineering, as well as technology, media and telecommunications. The COVID-19 pandemic has driven market activity especially in the technology sector, both nationally and globally.

The investment funds industry continues to play a major role in the Luxembourg financial and legal market. As of 31 December 2021, the total net assets of Luxembourg investment funds, comprising undertakings for collective investments, specialised investment funds and investment companies in risk capital (SICARs), amounted to EUR5,859.485 billion (approximately USD6.5 billion).

Luxembourg has also seen an increase in special purpose acquisition company (SPAC) transactions in 2021, though the listings mostly occurred at non-Luxembourg stock-exchanges. This boom led both ESMA and the Luxembourg Stock Exchange to publish requirements concerning SPACs. However, it remains to be seen if this conduit vehicle is a favourable instrument for investors given the uncertainty of investing into a platform that is not yet fully determined or equipped.

A notable transaction was in April 2021 when SMS Group, a German plant engineering company for the metals industry, fully acquired the remaining 40.8% shares of Paul Wurth, which were previously held by the Luxembourg state and state-owned banking organisations. Following the takeover, SMS Group became the sole shareholder of Paul Wurth's plant engineering business, strengthening its competence in metallurgy and hydrogen technology.

In addition, in July 2021 Danske Bank entered into an agreement with *Union Bancaire*, UBP on the sale of the business activities of Danske Bank International in Luxembourg, which was expected to result in a one-off gain for Danske Bank of approximately DKK250 million (approximately USD37 million). The sale was completed in January 2022.

There was also M&A movement in the financial sector between asset management companies. For example, TMF Group completed its acquisition of Selectra Management Company. Furthermore, VP Bank acquired certain business portfolios from other players in the market in order to increase its private wealth client business.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

Legal Framework for the Acquisitions of Luxembourg Companies

The key legislation for M&A deals is the Luxembourg Law of 10 August 1915 on commercial companies, as amended (the "Corporate Law"), which implemented the EU Cross-Border Merger Directive into national legislation. Since the reformation of the Corporate Law in 2016, Luxembourg increased its attractiveness for M&A and joint-venture purposes by offering an even better corporate vehicle platform. In addition, the provisions of Luxembourg Civil Code governing contractual relationship between the parties to transactions contribute to the additional stable legal framework for the sale and purchase of company vehicles in Luxembourg.

Most Common Ways of Acquiring a Company

The most common ways of acquiring a company in Luxembourg are either through buying shares in the company operating the target business (a share purchase) or by buying the target business itself (an asset purchase).

On a share purchase, the shares of the company are transferred to the buyer by the shareholders of the target company by means of a share purchase agreement. As such, all the target company's assets and liabilities are acquired by the buyer without specification.

On an asset purchase, the parties (ie, the buyer and the company itself) enter into an asset purchase agreement which specifies the assets, liabilities and obligations to be transferred to the buyer on the acquisition. Since an asset purchase leads to a change of ownership of the assets themselves, more consents and approvals are likely to be required compared to a share purchase.

Another means of acquiring control over a company is by a merger. Under the Companies Law, a merger can be carried out by absorption of one or more companies by another or by incorporation of a new company. In respect of a merger by absorption, one or more companies transfer to another pre-existing absorbing company, following dissolution without liquidation of the absorbed companies. In respect of a merger by incorporation of a new company, several companies transfer to a new company that they form, similarly leading to a dissolution without liquidation of the absorbed companies. The absorbing company (whether pre-existing of newly incorporate) will assume all the assets, liabilities and obligations of the absorbed companies.

Alternative Means of Acquisitions

Growth by way of strategic partnerships/alliances can be considered as alternative means. If a company already has a mature service, it can grow its business by selling a franchise or licence to another company. It is also common in Luxembourg that the parties pool their resources by setting up a joint venture entity. A joint venture entity is a business arrangement of international investors coming together from different regions of the world. By setting up a separate new joint venture entity, the parties may protect their main businesses should the joint venture investment fail. It is also common for a larger, private company to acquire a group of businesses where the shareholders of the group roll over into the new structure, set up by the buyer, and remain in the business as minority shareholders. This way, the old shareholders can obtain, inter alia, financial support and, while managing the business in the new structure, act as co-investors together with the buyer.

2.2 Primary Regulators

For M&A transactions relating to the acquisition of regulated corporate vehicles in Luxembourg, the *Commission de Surveillance du Secteur Financier* (the CSSF), as the regulator for financial services in Luxembourg, must approve changes to companies' shareholding structures. In addition, the CSSF supervises takeover bids where the target company has its registered office in Luxembourg and the company's securities are admitted to trading on a regulated market in Luxembourg.

In addition, the Luxembourg government can interfere with contemplated acquisitions which involve Luxembourg companies doing business in highly sensitive governmental areas.

For antitrust related regulators, see **2.4 Antitrust Regulations**.

2.3 Restrictions on Foreign Investments

In order to implement Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 (the "FDI Regulation"), a new bill of law (No 7885) was adopted on 15 September 2021 (the "Bill"). In its scope are certain foreign direct investments (FDIs) allowing non-European investors to gain effective control of a Luxembourg-based entity carrying out critical activities in Luxembourg. Such FDIs will have to go through a mandatory notification and pre-approval procedure.

The investors concerned will be required to inform the competent authorities of their intention to make investments in critical infrastructure in certain sectors (eg, energy, health, defence, finance, telecoms, data, media, etc) and provide information prior to the proposed investment. The competent authorities will then perform a preliminary analysis on a case-by-case basis, which may lead to a screening procedure to assess whether the investments are likely to affect security or public order, and a decision will be taken to either prohibit or allow the investment. The Bill provides for specific enforcement measures and sanctions where a prior notification is not made or the screening decision is not respected.

The scope of the Bill is wide, especially with regards to the definition of "critical" activity and extends also to research and production activities directly related to those activities. Simple portfolio investments are nevertheless explicitly excluded from the FDI Regulation and from the Bill.

The Bill is currently going through the ordinary legislative process and its formal adoption is expected in the course of 2022.

2.4 Antitrust Regulations

The applicable regulations are the European Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, which gives the European Commission competence to regulate mergers if certain thresholds are met and certain provisions of the Luxembourg competition law are followed. The authority responsible for regulating competition in Luxembourg is the Competition Council.

In addition, on 20 January 2022, the Luxembourg Ministry of Economy launched a public consultation on the possible implementation of a merger control regime in Luxembourg. The purpose of such a regime would be to give the Competition Council the power and the tools to carry out an ex ante control of certain M&A or other alignments between undertakings which may have a restrictive effect on competition in Luxembourg, and to allow for early detection of such threats to competition, potentially limiting damage to consumers and undertakings alike. The Ministry of Economy has been working in close collaboration with all affected ministerial departments on this subject and is expected to introduce a bill after completion of preparatory works in 2022.

2.5 Labour Law Regulations

According to the Luxembourg Labour Code, in the event of an asset sale the company's employees' representative or the employees must be directly informed about the sale before the assets are transferred to the buyer. There is no need to inform or consult the employees in the case of a share sale as the employees remain employed by the same entity.

In general, the employee participation rights apply to: (i) a Luxembourg public limited liability company that has had at least 1,000 employees for the previous three years; and (ii) any company incorporated in 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.

2.6 National Security Review

See **2.3 Restrictions on Foreign Investments**.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

Know Your Customer/Anti-Money Laundering

With regard to know your customer (KYC) and anti-money laundering (AML) regulatory provisions, the Law dated 13 January 2019 (the "RBO Law") has introduced a register of beneficial owners for legal entities registered in the Luxembourg Trade and Companies Register. Additionally, the Law dated 10 July 2020 (the "RFT Law") has established a register of fiducies and trusts, introducing a series of measures increasing the transparency of the beneficial ownership of trusts, fiducies (ie, fiduciary arrangements) and similar legal arrangements. These laws aim to increase the level of transparency in relation to beneficial ownership. This might have a major impact on M&A transactions where the structures are meant to hide the beneficial owners of the purchasers following the sale whether for tax or for other purposes.

Environmental, Social and Governance

The entry into force of Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector (SFDR) and of Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (the "Taxonomy Regulation"), may have an indirect impact the M&A market due to the importance of the Luxembourg investment fund industry on M&A transactions. The implementation of effective environmental, social and governance (ESG) policies and strategies by target companies is likely to influence their attractiveness, and will in practice enhance due diligence procedures as the investors aim to ensure that the companies comply with ESG standards and disclosure requirements.

Council Directive (EU) 2018/822 (DAC6)

The Law of 25 March 2020 implementing Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6) will continue to have a significant impact on M&A transactions. DAC6 has created a need for revisiting the previous method of cross-border M&A tax structuring as several key elements, such as the share purchase agreement, tax structuring upon acquisition and cash repatriation strategies should be re-considered especially for transparency purposes.

Structuring advice and identifying DAC6 reportable M&A transactions plays a major role in tax due diligence assignments as well as in the decision-making process. Non-compliance with DAC6 reporting obligations may lead to heavy fines and, as such, that risk should be accommodated in the closing deliverables and in the structuring of the purchase price mechanism.

Finally, the changes in the field of Takeover Law and Antitrust Regulations (see **2.4 Antitrust Regulations**) as well the restrictions described in **2.3 Restrictions on Foreign Investments** have an impact on M&A transactions.

3.2 Significant Changes to Takeover Law

See **2.4 Antitrust Regulations** with regard to the public consultation on the possible implementation of a merger control regime in Luxembourg. Outside of this, there have been no notable changes to the Takeover Law.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

The bidder normally does not build a stake in the target or have control over the target company during the process as the bidders prefer to avoid such risk in case the final offer fails or the investment loses its value.

Building a stake in a target company is however possible subject to certain requirements namely that such purchases are not trying to circumvent provisions that require transparency of the process.

4.2 Material Shareholding Disclosure Threshold

The Law of 11 January 2008 on transparency requirements for issuers (the "Transparency Law") provides that securities holders that acquire or sell securities must notify the target company of the percentage of voting rights they reach following a purchase or a sale of securities, whenever the percentage exceeds or falls below any of the following thresholds: 5%, 10%, 15%, 20%, 25%, 33.33%, 50% and 66.66%. The holder of securities must also notify the target company of the percentage of voting rights if it reaches, exceeds or falls below any of the above-mentioned thresholds following a change in the number of voting rights in the company.

The thresholds are calculated based on the aggregate number of outstanding shares with voting rights in the target company, including those whose voting rights are suspended.

4.3 Hurdles to Stakebuilding

In addition to the disclosure requirements mentioned in **4.2 Material Shareholding Disclosure Threshold**, the target company's articles of association may contain additional disclosure requirements. In such case, these notifications must be sent to the target company in compliance with the rules set out in the articles, but do not need to be made public under the Transparency Law.

4.4 Dealings in Derivatives

Dealings in derivatives are allowed in Luxembourg.

4.5 Filing/Reporting Obligations

An announcement is required for a public takeover bid in Luxembourg when a certain threshold of shareholding is reached by the bidder, as described in **4.2 Material Shareholding Disclosure Threshold**. Furthermore, certain rules also require ongoing or even earlier notifications to supervising authorities, as mentioned in **2.2 Primary Regulators**.

4.6 Transparency

In principle, the disclosure requirements depend on the nature of the transaction and the character of the target company. If the shares or other securities of the target company are listed on a regulated market, different disclosing requirements will apply (see **2.2 Primary Regulators**). Also, if targets to be acquired are supervised by the financial supervisory authority, that authority needs to grant approval to the acquisition before it can be implemented.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

Negotiations with a target company can be kept confidential provided that the parties comply with the rules set out in the Regulation (EU) No 596/2014 (the "Market Abuse Regulation"), which consists of insider dealing, unlawful disclosure of inside information and market manipulation.

In any case, the bidder and the target company are required to announce a public bid no later than at the time of reaching (conditional or unconditional) agreement on the bid. Normally this happens when the bidder and the target company sign a document containing the terms and conditions of the bid.

In the case of bid information, which qualifies as insider information within the meaning of the Market Abuse Regulation, the parties may be required to make disclosures earlier in case such bid information is leaked. In general, the target company must also inform the public as soon as possible of inside information that directly concerns that company, whenever such information arises, in a manner which enables fast access and complete, correct and timely assessment of the information by the public.

5.2 Market Practice on Timing

At the moment there is no applicable information in relation to market practice on timing in Luxembourg.

5.3 Scope of Due Diligence

With regard to legal due diligence, normally it is with the buyer's lawyer to send a detailed information request to the seller to request information about the constitution of the target, as well as the relevant information on the target's property and employees, its existing contracts and licences, etc. In practice, the target company creates a virtual data room where the buyer will have access to documents of any kind pertaining to the target company covering all the areas of due diligence, ie, legal, tax, commercial, etc. There are also certain mandatory requirements for the documents to be published under the Takeover Law.

As for the timing to conduct due diligence, there might be differences between public and private deals. In particular, when a significant amount of information has already been made public, listed target companies may expect the bidder to conduct due diligence in a shorter period of time. Conversely, in the case of antitrust hurdles, the bidder may require the conduct of detailed due diligence over several months.

There are also several factors to be considered during the due diligence process which are also impacted by changes in the legislation and market, political and societal developments (eg, ESG impact as described in **3.1 Significant Court Decisions or Legal Developments**). For COVID-19-related impacts on due diligence, see **1.2 Key Trends**.

5.4 Standstills or Exclusivity

If the bidder has obtained insider information which has not yet been made public by the target company, the relevant provisions of the Market Abuse Regulation become applicable and prohibit the bidder from trading in the target company's securities.

The target company may also wish use contractual restrictions on the bidder by demanding the inclusion of a standstill commitment in the definitive agreements. This would prevent the bidder from trading on the target company's securities and acquiring a controlling interest in the target.

Exclusivity provisions can also be included for example in the letter of intent agreed between the parties.

5.5 Definitive Agreements

Following the issuing of a reasoned opinion recommending the bid by the target company's board of directors, the parties can enter into a non-binding letter of intent or a memorandum of understanding where the intention of the parties to carry out the proposed transaction will be recorded. In addition, the parties normally enter into a non-disclosure agreement especially with regards to virtual data rooms.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

The length of an M&A transaction varies according to the transaction volume and the target company. The acquisition process may be completed in few weeks when the transaction volume is small and the target company does not operate internationally. In all cases, the findings of the due diligence have an impact on the length of the process especially in case major roadblocks are found. COVID-19 has also increased the severity of the due diligence process, which now requires more focus on the financial situation of the target company. In addition, if the target company/group operates internationally, the due diligence and negotiation of the share purchase agreement could take more than a year to complete due to the complexity of the transaction. In addition, the antitrust procedure alone can take several months and delays are possible due to the different pace of approvals by authorities in different jurisdictions.

6.2 Mandatory Offer Threshold

The Takeover Law covers squeeze-out and sell-out rights for the M&A of Luxembourg-based target companies. In accordance with its provisions, 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.

6.3 Consideration

The consideration for all the shares in the target company is more often in cash but all or part of the consideration can also be in securities. The main difference relates to a risk of value loss, which does not normally exist in relation to cash considerations. For example, a payment in kind, whether in the form of stocks, receivables or options, etc, might lose value immediately after the closing of the M&A deal due to market developments.

Cash payment as consideration is more practical in terms of post-closing purchase price adjustments. A portion of the purchase price can also be tied to the performance of the target company after closing by way of earn-out provisions, which may give purchasers more security and certainty.

6.4 Common Conditions for a Takeover Offer

In addition to the conditions required by the applicable laws, such as consent from merger control authorities or the Ministry of Economy in Luxembourg (as described in **2.3 Restrictions on Foreign Investments**), offers are mostly done subject to extensive contractual conditions. These include pre-offer conditions such as providing certainty for the funding, antitrust approvals and non-occurrence of material adverse change.

6.5 Minimum Acceptance Conditions

The management body of the target company initially approves the transaction. Subject to the articles of association of the target company, there might subsequently be a shareholder vote if certain matters (eg, if the transfer of the shares in the target company is more than a certain percentage) are stipulated in the articles of association of the target company and reserved for shareholders, which triggers the approval from the general meeting of shareholders to be adopted by, eg, a majority or a supermajority of votes cast.

6.6 Requirement to Obtain Financing

In accordance with the Takeover Law, committed funding is required prior to announcing an offer. The bidder can only make a bid once it has ensured it has the capacity to supply the full cash consideration. The bidder must also take all reasonable steps to make sure that there is availability for any other type of consideration. The description of the financing of the bid must be included in the offer documentation.

6.7 Types of Deal Security Measures

Break fees are not prohibited in Luxembourg under the applicable laws. Break fees are regularly negotiated between the parties at the beginning of the transaction as commonly the breakdown of negotiations results in payment of damages by the responsible party. The negotiation of break fees prior to the transaction has gained greater importance due to the impact of COVID-19 as the parties seek enhanced contractual protection, in particular in private M&A deals. In tender offers, the break fee can be agreed to be paid either to the shareholders of the target company or to the target company itself.

Non-solicitation provisions are also quite commonly seen in practice.

6.8 Additional Governance Rights

Bidders have a formal obligation, when filing a tender offer, to apply for 100% of the share capital, apart from specific simplified offers where they can seek only 10% of the capital. As long as a bidder does not cross the 33.3% mandatory offer threshold, it can choose to enter into different agreements to obtain additional governance rights. The most common agreement for this purpose is a shareholders' agreement, which may cover a variety of subjects eg, providing a bidder with specific rights with regards to the management of the target company. For example, a holding of 10% allows shareholders to request the convening of general meetings of shareholders or to add points to the agenda of such general meetings.

6.9 Voting by Proxy

Shareholders are allowed to vote by proxy in Luxembourg.

6.10 Squeeze-Out Mechanisms

The governing law in Luxembourg for the mandatory squeeze-out and sell-out of securities of companies admitted or previously admitted to trading on a regulated market or having been offered to the public is the Law of 21 July 2012 (the "Luxembourg Squeeze-Out and Sell-Out Law").

The Luxembourg Squeeze-Out and Sell-Out Law applies:

- if all or part of a company's securities are admitted to trading on a regulated market in one or more EU member states;
- 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 less than five years ago; or
- 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 November 4 2003 on the prospectus to

be published when securities are offered to the public or admitted to trading ("Prospectus Directive") or, if there is no obligation to publish according to the Prospectus Directive, where the offer started in the previous five years.

In accordance with the Takeover Law, when an offer is made to all the holders of securities carrying voting rights in a company that has listed its securities at a regulated market and if, following such offer, the bidder becomes a majority shareholder by holding securities representing 95% or more of the share capital and 95% or more of the voting rights, the offeror is entitled to squeeze out the minority shareholders, if any.

Once the majority shareholder decides to exercise its squeeze-out right, it must in the first instance inform the CSSF before exercising such right while committing to bring the squeeze-out to completion. After informing the CSSF, the majority shareholder must inform the target company concerned and make the decision public without delay. The information must be made accessible quickly and on a non-discriminatory basis.

Within one month of the notification of the exercise of the right of the mandatory squeeze-out to the CSSF and the target company, the majority shareholder must communicate the proposed price and a valuation report of the securities, followed by providing the information without delay to the company concerned and making it public. The minority shareholder may oppose the proposed price of the squeeze-out, in which case the CSSF must decide on the price to be paid by the majority shareholder within three months from the expiry of the opposition deadline.

6.11 Irrevocable Commitments

Although allowed, irrevocable commitments are not commonly implemented. Prospective bidders tend to prefer obtaining the control of a block of shares bought from a core/majority shareholder. Parties mainly negotiate for irrevocable commitments to tender the shares to acquire a key shareholding before filing the tender offer.

7. DISCLOSURE

7.1 Making a Bid Public

In accordance with the Takeover Law, a decision to make a bid must be notified to the CSSF and made public by the bidder. In addition, the board of directors of the target company and the bidder must inform the employee representatives as soon as the bid has been made public.

After announcing its decision to make a bid, the bidder must draw up an offer document containing the necessary information for the shareholders of the target company to reach a proper and duly informed decision on the bid. Before publishing the offer document, a draft of it must be submitted to the CSSF for approval within ten business days from the day the bid was made public.

7.2 Type of Disclosure Required

Under the Takeover Law, the offer document must contain the terms of the bid, the identity and other details of the bidder, the securities for which the bid is made, and all the conditions to which the bid is subject, etc. The mandatory information to be included in the offer document is set out in Article 6(3) of the Takeover Law.

In addition, the board of directors of the target company must communicate its opinion on the bid by drawing up and making public a document setting out its opinion and the arguments on which it is based. The document shall include the board's view on the effects of implementing the bid on all the company's interests, and more specifically on employment, and the bidder's strategic plans for the target company and their likely repercussions on employment and the location(s) of the company's place(s) of business as set out in the offer document.

7.3 Producing Financial Statements

The offer document usually includes information regarding the target company's financial status. Financial statements are made public annually in the Luxembourg Trade and Companies Register.

7.4 Transaction Documents

In principle, the approved offer document must be disclosed in full. The target company and the bidder may refrain from disclosing sensitive information (eg, information containing business secrets) where the disclosure would be detrimental to the important interests of the target company or of the bidder.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

According to Luxembourg law, the management body of the target company shall act neutrally and in the best corporate interest of the target company. It is also obliged to comply with the provisions of the Corporate Law and the articles of association of the target company. This includes the obligation to manage the company's business in good faith with prudent care and to refrain from acting against the company's corporate object. The Corporate Law also imposes certain general duties on directors and managers, such as the general management of the company, representation of the company towards third parties and upholding their duty to avoid any conflict of interests.

The duty of the management is to act in the best interest of the company, not its shareholders. The corporate interest of the company is most commonly aligned with the interest of the shareholders but it can also include the interest of the company as a whole, including that of the shareholders, employees and creditors.

8.2 Special or Ad Hoc Committees

The principles set out by the Luxembourg Stock Exchange require the board of directors of listed companies to establish special or ad hoc committees where necessary for the proper performance of the company's tasks or to examine specific topics and to advise the board.

The special/ad hoc committees are also used in cases where conflicts of interests arise because of proposed business combinations. The company's board is obliged to act in the best interest of the company, meaning that a conflict of interest may create the need to establish an independent committee to investigate a particular matter.

Regardless of the establishment of a separate committee, the liabilities and powers remain with the company's board.

8.3 Business Judgement Rule

As described in **8.1 Principal Directors' Duties**, the board of directors (and individual directors) must act prudently and in the best interest of the company. As such, the board of directors must continue to act in accordance with the interest of the company in the context of a takeover (also in adopting defence measures). Where there is a breach of this fiduciary duty causing direct damage to the shareholders or to a third party in the context of a takeover, the members of the board of directors may be held liable jointly or severally in accordance with the Corporate Law.

8.4 Independent Outside Advice

Most commonly, each party to an M&A deal appoints its own financial and legal advisors to advise on the fairness and reasonableness of the transaction price and on the matters relating to conflicts of interest, etc. In addition to investment advisors and lawyers, the management can engage other consultants for the specific questions arising in the course of a transaction. However, the board of directors/management of the company remains responsible for its decisions even when following the advice of external advisors.

8.5 Conflicts of Interest

The Company Law requires that a director who has, directly or indirectly, an interest of a patrimonial nature which conflicts with the interest of the company in relation to an operation falling within the scope of the board of directors' competence should inform the board of this and must not participate in the deliberation or the vote on the matter. Any conflict of interest must be recorded in the minutes of the board meeting and a report in this respect will need to be made to the shareholders of the company at the next general meeting of shareholders. The company auditor also needs to be informed.

It is recommended that the board of managers/directors of Luxembourg companies identify the circumstances which constitute or may give rise to a conflict of interest and which may entail a material risk of damage to the interests of investors. For this purpose, the boards establish, implement and maintain an effective conflict of interest policy in order to, inter alia, identify such conflicts of interest and to provide for procedures to be followed and measures to be adopted in order to prevent them where possible and to manage such conflicts in an independent manner. The boards are also required to make all reasonable efforts to resolve conflicts of interest or, in cases where a conflict of interest is unavoidable, to seek to address it on an arm's length basis and to disclose it adequately to interested parties.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

The Takeover Law does not restrict hostile bids in Luxembourg; the rules and the process are governed by the provisions of the Takeover Law, which imposes restrictions mostly on the target company. However, hostile takeovers are not common in Luxembourg, as they are not supported by the management of the target company, which will take defensive measures to stop the bid.

9.2 Directors' Use of Defensive Measures

The Corporate Law provides that the transfer of corporate shares or units shall not be valid vis-à-vis the target company or third parties until the transfer has been notified to the management of the target company or accepted by it in accordance with the provisions of Article 1690 of the Luxembourg Civil Code.

If the management of the target company does not deem the offer to be in the best interests of the company, it may resist such offer by employing defensive measures. However, the bidder may still make its offer public, which then becomes a hostile takeover. In this case, the board of directors of the target company may seek another interested party that wants to acquire the target company. The management of the target company may also object to the offer by pleading respective economic or other arguments.

9.3 Common Defensive Measures

See **9.2 Directors' Use of Defensive Measures**.

9.4 Directors' Duties

See **8.1 Principal Directors' Duties** and **8.3 Business Judgement Rule**.

9.5 Directors' Ability to "Just Say No"

See **9.2 Directors' Use of Defensive Measures**.

10. LITIGATION

10.1 Frequency of Litigation

Litigation in relation to M&A deals is uncommon in Luxembourg, except in hostile public offers, where litigation is a substantive part of the process. Most frequently, M&A litigation comes into question in relation to private M&A transactions.

10.2 Stage of Deal

In principle, litigation happens after a private M&A deal has been completed, and usually concerns either earn-out provisions or warranty claims. In public M&A, litigation is rare, except in hostile takeovers.

10.3 "Broken-Deal" Disputes

There is no applicable information in this jurisdiction.

11. ACTIVISM

11.1 Shareholder Activism

Following the development of EU law over the past year, shareholders' rights have gradually increased in Luxembourg. The Luxembourg Law dated 24 May 2011 on the exercise of certain rights of shareholders in general meetings of listed companies and as amended by the Law of 1 August 2019 (the "Shareholder Rights Law") established specific requirements to encourage shareholder engagement. The Shareholder Rights Law offers a comprehensive framework for more transparency, accountability and increased shareholder rights, in particular with regard to the need to approve important transactions with related parties to a shareholders' vote.

In addition, the Corporate Law now transfers additional rights to minority shareholders. The management of Luxembourg companies is taking greater account of the potential involvement and action from shareholders, including minority shareholders.

In general, activist shareholders can be motivated by different objectives, both financial and non-financial. Usually these objectives are linked to the short-term or long-term vision of their investment.

Shareholder activism carried out for financial objectives is more commonly linked to the short-term vision of investors. In some cases, this short-term vision can be prioritised at the expense of long-term value creation. Such shareholder activism is generally applied by activist shareholders using aggressive methods that are aimed at challenging the economic performance of the company, such as cost-cutting and capital allocations (in the form of share redemptions or the payment of dividends).

Shareholders themselves can also conduct shareholder activism for financial reasons using speculative methods (such as short-selling and lending shares) to put pressure on the share market price. The purpose of these transactions is to generate significant volatility that paralyses capital transactions.

Shareholder activism carried out for non-financial reasons is normally linked to the long-term vision of investors. This is a relatively recent trend and is in line with the latest legislative developments on the encouragement of long-term shareholder engagement as incorporated into the Shareholder Rights Law. As a result, there has been a change in investment considerations over the last few years. Shareholders have evolved from having only a short-term view of investment governed by financial considerations to having a long-term view of investment governed more by non-financial considerations involving all stakeholders. This development can be seen in the integration of non-financial factors, eg, ESG has become a major driving factor in investment policies.

11.2 Aims of Activists

See **11.1 Shareholder Activism**.

11.3 Interference with Completion

Activists have been seen to attend general meetings of shareholders and ask questions about transactions. However, this is common practice and companies deal with these questions in a professional manner.

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AUTHORS

Dr Marcus Peter heads the investment funds and private equity practice of GSK Stockmann in Luxembourg. Prior to joining GSK Stockmann, Marcus Peter worked for a Luxembourg law firm from 2004–16 (the latter four years as partner). He has been a partner at GSK Stockmann in Luxembourg since 2016. Marcus Peter is an expert in Luxembourg investment funds and private equity law, M&A and corporate law. He speaks German, English, French and Russian. Marcus Peter is a member of the Luxembourg Private Equity Association (LPEA), Chinese-Luxembourgish Chamber of Commerce (CHINALUX), the German Bar Association (DAV) and Cross Border Business Lawyers (CBBL).

Sofia Lindqvist has been an associate at GSK Stockmann in Luxembourg since 2019. She studied at the University of Turku (Finland) and the University of Fribourg (Switzerland). Sofia holds a Master's degree from the Universiy of Turku and is admitted to the Bar in Luxembourg (2021). Sofia's practice areas include investment funds, private equity and M&A transactions, and corporate law. She speaks English, French, Finnish and Swedish.

GSK Stockmann SA

44, Avenue John F. Kennedy
L-1855 Luxembourg

Tel: +352 271802 00
Fax: +352 271802 11
Email: luxembourg@gsk-lux.com
Web: www.gsk-lux.com

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