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CONTENTS

Preface	Scott C. Hopkins & Lorenzo Corte, <i>Skadden, Arps, Slate, Meagher & Flom (UK) LLP</i>	
Expert analysis chapters	<i>The SPAC: Entrenched or Endangered?</i> Lorenzo Corte & Marissa Weinrauch, <i>Skadden, Arps, Slate, Meagher & Flom (UK) LLP</i>	1
	<i>Addressing ESG Considerations in the M&A Context</i> Geoffrey P. Burgess, Andrew M. Levine & Patricia Volhard, <i>Debevoise & Plimpton LLP</i>	6
Jurisdiction chapters		
Cyprus	Elias Neocleous & Demetris Roti, <i>Elias Neocleous & Co LLC</i>	26
Germany	Norman Wasse & Lisa Schickling, <i>McDermott Will & Emery Rechtsanwälte Steuerberater LLP</i>	32
India	Puja Sondhi, Aayush Kapoor & Roma A. Das, <i>Shardul Amarchand Mangaldas & Co.</i>	43
Ireland	Alan Fuller & Joseph O'Rourke, <i>McCann FitzGerald LLP</i>	52
Italy	Marco Gubitosi, <i>Legance – Avvocati Associati</i>	61
Japan	Yohsuke Higashi & Ryo Chikasawa, <i>Mori Hamada & Matsumoto</i>	77
Luxembourg	Marcus Peter & Irina Stoliarova, <i>GSK Stockmann</i>	87
Nigeria	Adeniyi Duale, Sodeek Oluwatobi Oyedeji & Tobiloba Awosika, <i>Duale, Ovia & Alex-Adedipe</i>	93
Norway	Ole K. Aabø-Evensen, <i>Aabø-Evensen & Co Advokatfirma</i>	103
Saudi Arabia	Abdulrahman Hammad & Samy Elsheikh, <i>Hammad & Al-Mehdar Law Firm</i>	121
Spain	Ferran Escayola & Andrea Esbrí, <i>J&A Garrigues, S.L.P.</i>	128
Switzerland	Dr. Mariel Hoch & Dr. Christoph Neeracher, <i>Bär & Karrer AG</i>	137
Taiwan	James Huang & Eddie Hsiung, <i>Lee and Li, Attorneys-at-Law</i>	141
United Kingdom	Michal Berkner, Claire Keast-Butler & Russell Anderson, <i>Cooley (UK) LLP</i>	145

Luxembourg

Marcus Peter & Irina Stoliarova
GSK Stockmann

Overview

The chapter provides an overview of the M&A landscape in Luxembourg in 2021.

The years 2020 and 2021 were challenging years for the Luxembourg M&A market, mainly due to the COVID-19 pandemic and the consequent overall restructuring of the business activities. Recovery of the market and stable, continued growth could be observed from July/August 2020 and reached significant levels in the latter half of 2021.

Luxembourg continues to be the largest investment funds hub in Europe and the second largest in the world after the United States. Net assets under management in Luxembourg investment funds reached €5,859.485 billion at the end of December 2021, which shows a continuous and stable growth and development in the market.

Therefore, the investment funds industry continues to play an important role for inbound and outbound M&A transactions in Luxembourg. Investors located in Asia, the United States and Latin America, as well as EU countries, have shown their interest by carrying out M&A transactions using Luxembourg-based structures for acquisitions of targets that are typically based outside Luxembourg.

Luxembourg entities and investment funds continue to serve as a platform for M&A deals involving Luxembourg vehicles in the acquisition of Luxembourg-based and non-Luxembourg targets. In particular, the number of Luxembourg holding structures and/or fund structures through which investments are held has significantly increased in the past few years.

The increasing interest in the M&A industry in Luxembourg is due to its legislative stability and attractive, flexible legal framework that allows the creation of various types of structures for different types of investors and asset classes. The key legislation governing M&A transactions in Luxembourg is the law dated 10 August 1915, as amended (**Corporate Law**), which implemented the EU Cross-Border Mergers Directive into national legislation. The Corporate Law was amended in the recent years to offer an even better corporate vehicle platform for M&A and joint-venture purposes. The provisions of the Luxembourg Civil Code, in particular the provisions governing contractual relationships between parties, provide additional stable legal framework for the sale and acquisition of corporate vehicles in Luxembourg.

Furthermore, the law dated 19 May 2006, as amended (**Takeover Law**), which implemented the EU Directive 2004/25/EC on takeover bids, fully applies to acquisitions where the target company is a Luxembourg registered company, the shares of which are admitted to trading on the regulated market of the Luxembourg Stock Exchange. The Takeover Law introduced and established a legal framework for mandatory squeeze-out and sell-out transactions of certain categories of securities of companies whose registered office is located in Luxembourg. Finally, the Luxembourg law dated 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, applies. The law provides security for minority shareholders that their shares will be acquired by the majority shareholders at a fair price and the CSSF (as defined hereinafter) is the competent authority to ensure that the provisions of the law are applied and duly respected.

The law dated 24 May 2011 on the exercise of certain rights of shareholders in general meetings of listed companies (as defined hereinafter), for the purposes of compliance with the EU Directive 2017/828 of 17 May 2017, amending the EU Directive 2007/36/EC, is applicable to companies registered in Luxembourg and whose shares are admitted to trading on a regulated market in the EU.

For M&A transactions relating to the acquisition of regulated vehicles in Luxembourg, the *Commission de Surveillance du Secteur Financier (CSSF)*, responsible for financial regulation in Luxembourg, must ensure that the provisions of respective product laws are respected and, additionally, must approve changes to companies' shareholding structure. There may also be specific legislation to be considered in M&A deals depending on the sector or area of the transaction.

We also note that since the United Kingdom's decision to leave the EU, many insurance companies and asset managers acquired and/or increased their participations in different regulated vehicles and structures in Luxembourg. Other market players increased their presence and substance on the market in order to be able to serve different types of clients from the Luxembourg hub.

Significant deals and highlights

Luxembourg remains involved in different M&A transactions involving counterparties from around the globe.

Following the decrease of deals in 2020, 2021 showed a more positive outlook with view to M&A deals.

The following major deals have been concluded recently:

- In April 2021, a German plant engineering company, SMS Group, completed its acquisition process and is now the sole shareholder of the Luxembourgish steel company, Paul Wurth, by acquiring the remaining shares (40.8%) previously held by the Luxembourg state and other institutions.
- 31 December 2021 saw the closing of the acquisition of pasta manufacturer Panzani for an amount of €550 million, previously held by Ebro Food by a Luxembourg-based investment fund, CVC Capital Partners.
- January 2022 saw the completion of the acquisition of Danske Bank' subsidiary, Danske Bank International (**DBI**), specialising in asset management, by a major Swiss bank Union Bancaire Privée (**UBP**) for approximately \$37 million.

Key developments

As stated above, the Corporate Law was amended to a certain extent a few years ago by creating additional legal security with regard to the structuring of M&A transactions. Now there is more flexibility with regard to the structuring of share classes and their characteristics; the rules applicable to different forms of companies have been also harmonised. Moreover, new corporate forms were created, such as, for example, the unregulated reserved alternative investment fund (**RAIF**), as well as more flexible provisions pertaining to the issuance of bonds and the holding of shareholder meetings.

The other major legal changes concern the KYC and AML regulatory provisions, in particular: (i) the establishment of the register of beneficial owners by the law dated 13 January 2019, as amended (**RBO Law**) in respect of corporate and other legal entities incorporated within the territory of Luxembourg; and (ii) the law dated 10 July 2020, which established a register of *fiducies* (fiduciary agreements) and trusts (**RTF Law**). The RTF Law integrated the regime set out by the RBO Law enhancing the level of transparency in relation to the beneficial ownership of fiduciary arrangements and trust-related devices.

We believe these new developments did not significantly impact the volume of M&A deals over the last years and they will not be an obstacle to the progress of M&A transactions in Luxembourg going forward, as they are part of the EU AML and KYC innovations that were established also in the other EU Member States.

The law dated 24 May 2011 on the exercise of certain rights of shareholders in general meetings of listed companies (**Shareholder Rights Law**) was amended by the law dated 1 August 2019 in order to be compliant with the EU Directive 2017/828 of 17 May 2017, amending Directive 2007/36/EC. The Shareholder Rights Law establishes specific requirements to encourage shareholder engagement, especially in the long-term perspective. These specific requirements apply to the identification of shareholders, transmission of information, facilitation of exercise of shareholders' rights, transparency of institutional investors, asset managers and proxy advisors, remuneration of directors and related party transactions. The new legal regime of shareholders rights in listed companies was completed by the EU Commission Implementing Regulation 2018/1212, applied as of 3 September 2020, which improved the communication between the issuer and its shareholders and introduced standardised formats for data transmissions.

The law of 25 March 2020, as amended, implemented the EU Directive 2018/822 on the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (**DAC 6**), and was applied as from 1 July 2020. The first reportable transactions were, however, those transactions whose first implementation step occurred between 25 June 2018 and 30 June 2020. The relevant information needed to be reported to the Luxembourg authorities by 31 August 2020 at the latest. However, due to COVID-19, an extension deadline to DAC 6 reporting deadlines has been granted, meaning that for reportable cross-border arrangements where the first step was implemented between 25 June 2018 and 30 June 2020, the deadline for reporting was postponed to 28 February 2021 instead of 31 August 2020. DAC 6 had and will continue to have a major impact on M&A deals and specifically on the structuring of those deals. The owners, initiators and their legal advisers will have to be more careful and diligent in order to avoid any material adverse consequences related to that.

In light of the COVID-19 pandemic, the Luxembourg government introduced in 2020 a package of measures aimed at facilitating holding of board and shareholders meetings in companies by allowing the remote attendance without any physical presence, despite any contrary provision in the company's articles of association. Shareholders were entitled to exercise their voting rights (i) in writing or electronic form allowing their identification and provided that the full text of the resolutions or decisions to be taken had been published or sent to their attention in advance, or (ii) via videoconference or other means of telecommunication allowing the identification of shareholders. As regards board of directors or managers, including any supervisory board and management board, the members were allowed to (i) adopt resolutions by way of circular resolutions, or (ii) attend a meeting held by video conference or other telecommunication means allowing the

identification of the participants. Such measures were firstly introduced by the Grand-ducal Regulation of 20 March 2020 and were further extended by various laws until 31 December 2022. Given the whole uncertainty created by the COVID-19 pandemic, those measures significantly simplified and smoothed the management of companies during pandemic.

Regardless of the latest developments in the regulatory framework, the COVID-19 pandemic also impacted the praxis of deal-making in the M&A sector, e.g. due diligence procedures became more onerous, had to include a deeper assessment of the financial conditions and situation of target companies and, hence, took more time as usual. The drafting of standard contact clauses, such as representation and warranties, indemnity clauses and specific provisions relating to material adverse change, termination clauses, or price adjustment had to be drafted more diligently considering the current economic environment due to COVID-19 and the impact that it has on business development and evaluation. Both buyers and sellers demanded the inclusion of specific COVID-19 provisions in the agreements.

Finally, given the central role played by the Luxembourg investment funds industry on M&A transactions, the latest regulatory developments impacting investment funds relating to environmental, social and governance (ESG) matters on the European level seem to also impact considerably the M&A deals. This is particularly the case regarding the EU Sustainable Finance Disclosure Regulation, 2019/2088 (SFDR) applicable as of 10 March 2021 and the EU Taxonomy Regulation, 2020/852 (**Taxonomy Regulation**) that applies progressively as of 1 January 2022.

Such regulatory developments indirectly impact the M&A market since the attractiveness of investee companies will depend more and more on the implementation of reliable and effective ESG policies and strategies by those target companies. In practice, this leads to enhanced due diligence procedures by investors aiming at verifying the compliance of the investee company with ESG standards and disclosure requirements.

We observe a huge change in trend with view to ESG matters, from a “nice to have” to a business imperative that potentially can affect long-term success and value creation of companies. Companies become more accountable to shareholders and customers and shareholders are paying more and more attention on how their money is invested and whether their investment has any positive or negative impact on environment. Potentially, investee companies may be prevented from bank financing in case they are not ESG-compliant.

On 15 September 2021, following the implementation of the EU Regulation 2019/452 of the European Parliament and Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the EU Union, the Bill of Law no.7885 was submitted to the Luxembourg legislator. The Bill consists in the implementation of a screening mechanism *ex ante*: following a mandatory notification for any foreign investors (i.e. non-European investors) investing in a Luxembourgish entity carrying out critical activities (energy, transport, etc.) to the Ministry of Economy. The Minister shall determine thanks to a pre-screening stage, the likelihood of such investment to affect security and public order or essential national or European interests and, thus, decide whether or not to authorise the foreign investment. The impact of this will most likely result in an enhanced analyse of the target’s activities for potential foreign investors.

A merger control regime is being discussed to be implemented in Luxembourg in the years to come. On 20 January 2022, the Ministry of Economy launched a public consultation on that matter. This would aim at establishing an *ex ante* control over certain mergers and acquisitions transactions that could be considered as threats to normal competition such as through the abuse of a dominant position. The deadline for this public consultation is 31 March 2022 and the Ministry of Economy plans to start preparatory works for the bill later in 2022.

Industry sector focus

In Luxembourg, there is no particular dominant sector for M&A transactions. Some sectors are more popular than others and this depends on investors' appetite for risk; some investors would rather focus on high-yield areas, promising areas that may bring them the highest return despite the risk being quite high. Judging by the current economic, political and market conditions, investors are looking for alternatives and seek to diversify their risks.

For transactions involving real estate, assets are mainly located in the other jurisdictions where Luxembourg is used for holding structuring purposes due to its business-friendly and positive legal environment.

With the COVID-19 pandemic, we have seen significant digital transformation. That tendency showed that more and more companies invested in innovation and technology and that trend will only become stronger in the years to come.

The year ahead

Global M&A deals slumped by around 35% in February 2022 due to current political tensions between Russia, the EU and the United States. This situation might slow down or put on hold some M&A deals.

However, globally we expect the overall M&A market to stay stable in Luxembourg and potentially grow, given the increasing access to finance by private investors.

The Luxembourg government is also undertaking many different measures to make Luxembourg a leading centre in the areas of fintech, space technology, information and communication technology, which all reflect in a positive way on Luxembourg's business industry, attracting new investors and companies to the market and allowing large diversification of the economy.

A new focus of the Luxembourg industry is indisputably sustainable finance, which is largely promoted by various industry players and government and digital finance.

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