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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 the holders of securities carrying voting rights in a company that 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 more than five years ago; or (iii) if all or part of a company's securities were the subject of a public offer that 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 that is or has been carried out pursuant to the Takeover Law.

1.2 Are there different rules for different types of company?

The Corporate Law sets out the framework governing commercial companies and provides for all types of corporate structures and corporate instruments in order to create tailor-made corporate structures useable for M&A transactions; examples include requirements of corporate governance, as well as substantive and procedural requirements for M&A transactions and other transformative corporate transactions, such as conversions, divisions and liquidation. The Luxembourg Squeeze-Out and Sell-Out Law provides for the squeeze-out and sell-out of minority shareholders by a majority shareholder of a company that has its registered seat in Luxembourg. As for the merger of two investment funds supervised by the *Commission de Surveillance du Secteur Financier* ("**CSSF**"), besides merger-related provisions stipulated in constitutional documentation of the funds, one shall also look into the specific fund product laws concerning the two merging funds as to any requirements, such as procedures for merger, consent requirement, and right of redemption for investors. In addition, merger documentation, such as the merger plan, will have to be submitted to the CSSF for prior approval.

1.3 Are there special rules for foreign buyers?

Until recently, no specific rules for foreign buyers apply for Luxembourg companies. However, in order to implement Regulation 2019/452/EU of the European Parliament and of the Council of 19 March 2019, a new bill of law (no. 7885) was adopted on 15 September 2021, introducing a screening mechanism with a mandatory notification and pre-approval requirement for certain foreign direct investments ("**FDIs**") made by non-European investors in a Luxembourg entity operating in a critical sector in the territory of Luxembourg.

The bill will affect foreign investors that wish to invest in a Luxembourg entity conducting activities in the Luxembourg territory that are regarded as critical in various sectors, e.g. energy, health, defence, finance, telecoms, data, media, etc. Real estate sector is not listed in the new bill of law for the time being as this is normally not relevant for FDIs who instead focus on investment into companies or businesses. The investors concerned will be required to inform the competent authorities of their intention to make investments in critical infrastructure and provide certain 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.

As for the impact of the bill on Luxembourg's investment funds sector – though one might raise the concern that the scope of the bill is large and every investment made in Luxembourg by a non-European investor taking control of a Luxembourg entity might be subject to the screening mechanism – we are of the opinion that the impact can be considered minimal. Financial firms themselves are already subject to regulatory supervisions and any merger or acquisition must be approved in advance by its regulator, which will not be changed by the bill. As for fund investments, the "portfolio investment" clause means the screening mechanism would not apply to UCITS retail fund holdings. Private equity fund investments potentially fall under the bill, whilst private equity funds based outside the EU rarely acquire targets in Luxembourg.

1.4 Are there any special sector-related rules?

There are Luxembourg regulatory authorities that have authorities depending on the sectors and companies involved in the transaction. 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 CSSF. Furthermore, if a target company carries a licence from the CSSF, the change in shareholding must be approved by the CSSF. The CSSF regulates, among others, credit institutions, payment services providers, electronic money institutions, investment firms, specialised professionals of the financial sector and support professionals of the financial sector.

Other regulatory authorities, such as the *Commissariat aux Assurances* ("**CAA**"), regulate the insurance sector. Specific rules, such as rules in relation to qualifying holdings, exist in the banking sectors and insurance sectors. For example, where a person decides to acquire, increase, or dispose of a qualifying holding in a Luxembourg insurance company, resulting in the proportion of the voting rights or of the capital held reaching, exceeding, or falling below, as applicable, 20%, 30% or 50%, a prior notification of the intention in writing to the CAA would be required.

Furthermore, the *Institut Luxembourgeois de Régulation* (the Luxembourg Institute of Regulation) regulates transactions and sectors in relation to electronic communications, networks and services, electricity, natural gas, postal services, and rail and air transport.

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 in a 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. A joint venture entity is a business arrangement of international investors coming together from different regions of 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. It is also common for a larger private equity company to acquire a group of businesses where the shareholders of the group roll over into the new structure, set up by the acquiring private equity company, and remain in the business as the minority shareholders. By doing this, the selling shareholders obtain, among others, financial support from the acquiring private equity company for their old business and can still manage, to a certain extent, the business in the new structure as co-investors together with the private equity company. Finally, under the Corporate Law it is also possible that a merger be carried out by absorption of one or more companies by another company or by incorporation of a new company. In respect of a merger by absorption, one or more companies transfer to another pre-existing company, following dissolution without liquidation, all of their assets and liabilities in exchange for the allotment to the shareholders of the acquired company or companies of shares in the acquiring company. In respect of a merger by incorporation of a new company, several companies transfer to a new company that they constitute, following their dissolution without liquidation, all their assets and liabilities in exchange for the allotment to their shareholders of shares in the new company.

2.2 What advisers do the parties need?

Financial and legal advisors are the most important consultants to an M&A deal. Other advisors, such as commercial advisors, tax advisors and, more recently, ESG advisors, due to the hot ESG topic, are also crucial to an M&A deal.

2.3 How long does it take?

The duration of an M&A transaction can vary tremendously. Due diligence, the negotiation of acquisition terms, and the preparation of completion of an acquisition will take most of the time during a transaction. Provided the M&A transaction volume is small, due diligence of the target group does not reveal major roadblocks, and the target group does not operate internationally, the completion of the acquisition may occur in a few weeks. If the target group consists of many entities located in different parts of the world, the anti-trust procedure alone could take several months before completion. In addition, the negotiation of shareholders' and/or co-investors' rights and obligations over the target company after completion is also

an important part for a transaction. If the transaction involves prior approval from the CSSF, as mentioned in question 1.4, additional time will need to be considered.

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. Moreover, due to the COVID-19 pandemic, the due diligence procedure has become more severe and onerous due to the need for deeper assessment of the financial conditions and the situation of target companies.

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. Once the financial key parameters of the target have been identified and assessed, not much flexibility with a view to pricing and terms remains. However, the COVID-19 pandemic might provide slightly more flexibility for parties to renegotiate the purchase price of the target, which had been agreed during the pre-COVID-19 period, to ensure that it is still considered fair for the value exchanged; otherwise, either party or both parties may attempt to terminate the deal.

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 with variable value, such as issuing stocks or offering options to sellers, might lose value immediately after the M&A deal was closed due to market and other developments. A payment in kind with fixed value, such as issuing loan notes to sellers, might be less risky to the extent purchasers have good credibility and reputation on the market. It is commonly brought up when sellers have the intention to finance the deals. Nevertheless, we see cash payment for a main portion in combination with kind payment for a small portion predominantly requested and agreed by parties. Tying a portion of purchase price to the performance of the target company after completion, i.e. earn-out provisions, is also a way to structure purchase price. An agreement on the allocation of risk on earn-outs may have been a suitable compromise in order to save certain deals and also diminish the impact of COVID-19.

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 might often 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 alongside the shares in issue. We have also seen cases where the shares in issue and other securities of the target company are stapled, in which case purchasers will have to acquire all other target securities if they purchase the shares in issue. In addition, purchasing all other classes of target securities might be required by the seller as a condition to sell shares in the target company.

2.9 Are there any limits on agreeing terms with employees?

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 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?

Employee representatives might be involved in an M&A transaction for consultation purposes in the context of the stipulations mentioned in question 2.9.

2.11 What documentation is needed?

Documentation volume depends on the nature of the acquisition (public or private). Documents can include, *inter alia*, announcement documents, offering documents, due diligence reports, share purchase agreements, the shareholders' agreement, co-investment agreements, tax-related documents, anti-trust filing documents and others.

2.12 Are there any special disclosure requirements?

Disclosure requirements 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. In addition, if the target company carries out critical activities, a prior notification process and screening procedure with the competent authorities will need to be respected. Disclosing requirements 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 parties bear such costs.

In addition, breakage fees are also commonly seen. Such fees are incurred when a deal that has reached an advanced stage falls through and are usually composed of a deposit requested by the seller based on the total selling price.

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. In addition, as mentioned in question 1.3, an approval from related competent authorities, mainly the Ministry of Economy of Luxembourg, is a prerequisite for making investments that are likely to affect national security or public order or for purchasing target companies that carry out critical activities.

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 seller. The purchase price can be subject to adjustments post-closing.

3 Friendly or Hostile

3.1 Is there a choice?

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 they have 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. In a hostile takeover, the management of the target company rejects the takeover, which, in principle, prevents the merger. However, the buyer 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 that 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 made before starting the M&A transaction. Initially, it should be considered whether to fully or partly acquire the target. Furthermore, it should be decided 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 *Recueil Electronique des Sociétés et Associations* (Luxembourg Trade and Companies Register). 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 representations and warranties, which are assurances about the target company covering all aspects of its information. If the information the seller gives to the buyer as a representation and/or warranty is wrong or changes, the seller may be liable to pay damages to the buyer under a claim of a breach of representation and/or 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, which is determined by the parties based on the existence and the amount of the damage relating to the non-performance of the obligation in accordance with the Luxembourg Civil Code. Nevertheless, the judge may adjust the agreed break fees if they are manifestly excessive or derisory.

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 management body 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 shares, 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 management body of the target company, who is familiar with the company's business, 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.

7.3 When does control pass to the bidder?

When ownership of the target being acquired is transferred to the bidder at completion, the bidder has all/certain control of the target by way of changing the composition of the management, 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, giving different reasons.

8.2 Is it a fair fight?

Fairness is certainly desired. Sometimes market players might have a different negotiating power, although this does not necessarily lead to unfairness.

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 be able to follow through 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.

With regard to tax planning, on 21 March 2020, the Luxembourg parliament passed a law implementing Council Directive 2018/822/EU of 25 May 2018, amending Directive 2011/16/EU, regarding the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("**DAC6**"), which is applied as of 1 July 2020. DAC6 tightens the reigns on M&A deals across the globe, as the previous method of cross-border M&A tax structuring in terms of the review of the share purchase agreement, tax structuring upon acquisition, cash repatriation strategies upon sale, etc., needs to be re-considered for various purposes and with particular transparency.

Given the importance of the investment fund industry in M&A transactions, the entry into force of Regulation 2019/2088/EU of 27 November 2019 on sustainability-related disclosure in the financial services sector and of Regulation 2020/852 of June 2020 on the establishment of a framework to facilitate sustainable investment, may indirectly impact the M&A market. The implementation of effective environmental, social and governance ("**ESG**") policies and strategies by target companies may influence the attractiveness of investee companies, and will enhance due diligence procedures to ensure that the companies comply with ESG standards and disclosure requirements.

Furthermore, an FDI screening mechanism introduced by bill no. 7885, which was adopted on 15 September 2021 (as mentioned in question 1.3), will also have an impact on M&A transactions by influencing foreign investors in the sectors on which their investments focus.

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 that 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. On 13 July 2022, the Ministry of Economy published an interim report on the preparatory work on the introduction of such a regime to which economic players and public authorities have participated. On the basis of the interim report, the Luxembourg government will prepare a bill of law which is expected to be filed with Parliament in the Spring of 2023.

As for practices, mergers using a special purpose acquisition company ("**SPAC**") were prevalent at the beginning of 2022. However, later on this year, such SPACs were only rarely used as a vehicle to convey mergers or listings at stock exchanges. They provide private companies with a unique way to access the public markets, while offering investors a way to co-invest side by side with best-in-class sponsors. As SPACs do not impose any restrictions on the investor's profile, which is unlike a traditional investment fund, and are a faster way for a target company to enter the public market, this alternative (to the traditional M&A) has been a popular option for some time in Luxembourg. At present, this tool is only rarely used, which might also be due to the economic crises of the recent months.

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