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Luxembourg: Law & Practice
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LUXEMBOURG

Law and Practice

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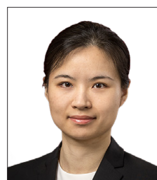

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1. Trends

1.1 M&A Market

If at the end of 2021 the M&A market in the EU reached the one of the highest volumes registered since the 2008 financial crisis, 2022 proved to be a more challenging year for M&A. Macroeconomic factors, such as the war in Ukraine, inflationary pressures and rising interest rates, had an impact on market sentiment, valuations and the cost of debt financing deals, leading to an overall decrease in the cross border M&A deals volume in the global and Luxembourg markets.

As opposed to the positive trends recorded in the past few years, in the last 12 months the volume of net assets in Luxembourg investment funds decreased by 14.18%, which is symptomatic of the current turbulent financial situation.

The number of special purpose acquisition company (SPAC) transactions increased in 2021 until the beginning of 2022. However, later in 2022, such SPAC was only rarely used as a vehicle to convey mergers or listings at stock exchanges; this may also be due to the uncertainties in the debt markets and the macroeconomic factors of recent months. The negative sentiment surrounding SPACs has also led to a decline in the number of “de-SPACs” (that is, mergers between SPACs and target private businesses), which in turn has contributed to the lower number of large mergers in 2022.

Given the political tensions between Russia and Ukraine, high inflation and recession fears, there might be a continuing slowdown of M&A activities both in and through Luxembourg. However, companies are adapting their business strategies to the new environment, and new trends are emerging in the corporate market. Certain factors, such as climate and ESG matters, will drive the market in the coming years, this is also due to an increase in legislative and regulatory activity in the fields.

1.2 Key Trends

The number of M&A deals steered through Luxembourg vehicles into other markets continues to remain high, despite the deal volume for Luxembourg itself being relatively small and mostly targeted at the financial sector. 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 a large number of 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 and the recent Ukrainian crisis have influenced the structuring of M&A deals in recent years. For instance, the due diligence process has become increasingly more important since there is a need to look deeper at the financial conditions and the situation of target companies being affected by the invisible impact of the COVID-19 pandemic and the repercussions of the Ukrainian crisis on the business volumes (on supply chain, imports and exports, currency controls, business continuity, insurance and risks to material contracts). For the same reasons, material adverse change clauses, changes in the law or political force majeure elements have received increasing attention, as well as compliance risks, including AML/KYC and sanctions compliance, counterparty risk and governance risks associated with a potential investment.

Further, certain business segments (hotel and travel businesses) were significantly impacted by COVID-19 and the Ukrainian crisis, and investors had to deal with rescue financing or stopped pending deals.

In addition, parties are also paying more attention to diminishing the impact of the COVID-19 pandemic and/or the economic crisis on the purchase prices, whether negotiated before or during such events. In this regard, earn-out provisions, such as tying a portion of the purchase price to the performance of the target company after closing, have proven to be an appropriate tool to give purchasers a degree of security and certainty for the purpose of risk allocation as well as diminishing the adverse impacts from the market.

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

1.3 Key Industries

Key sectors in the M&A market in Luxembourg, apart from the fund industry, include cargo transportation and logistics, automotive and engineering, as well as technology, media and telecommunications. From late spring 2020 through 2021, the technology sector was a driven market activity, both nationally and globally. The trend partly continued in 2022, where 20% of M&A deals involved the technology sector, although the number of tech M&A went down as did the overall M&A market.

The investment funds industry continues to play a major role in the Luxembourg financial and legal market. However, the social and economic challenges impacted the Luxembourg financial and legal market as well as those in other European jurisdictions. As of 31 December 2022, 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 EUR5,028.456 billion, compared to the all-time high of EUR5,859.485 billion registered in December 2021. The declining number reflects a drop-off in the general level of business confidence, as well as a decrease in the number of mergers involving SPACs.

A notable transaction was in September 2022, when BGL BNP Paribas SA, a Luxembourg based commercial bank and alongside Oraxys Environment 2, acquired a majority stake in Wako Group, a Luxembourg-Belgian manufacturer of premium doors and windows.

In addition, in November 2022, Atlas Investissement, a France-based investment vehicle focusing on the telecoms sector, acquired approximately 2.5% interest in Vodafone Group PLC and approximately 7% interest in Millicom International Cellular SA, the Luxembourg-based provider of mobile and fixed telephony, cable and broadband services.

There was also M&A movement in the financial and insurance sectors between asset management companies. For example, Foyer Group, a Luxembourg-based insurance and asset management company, and Allianz Group, a Germany-based financial services company offering life, health, property and casualty insurance and reinsurance, signed an agreement with a view to Foyer Group acquiring Allianz Group's insurance portfolios that had been managed by Allianz Insurance Luxembourg and Allianz Life Luxembourg. Through the transfer of Allianz's Luxembourg portfolios, Foyer Group is strengthening its position as a leader in the local insurance market. The transaction is subject to approvals from certain authorities including the *Commissariat aux Assurances* (CAA), as the Luxembourg insurance regulator.

Furthermore, Universal Investment Group, one of Europe's leading fund services platforms and the largest alternative investment fund manager in Luxembourg, completed the acquisition of Luxembourg-based financial services provider European Fund Administration S.A. (EFA) in November 2022, which will strengthen its presence in Europe and the attractiveness of its products, especially for international asset managers who need an efficient platform for their assets. Other major M&A activity includes Caceis, an European leading assets services company, and the Royal Bank of Canada, having signed a memorandum of understanding with a view to Caceis acquiring the European asset servicing activities of RBC Investor Services, which is registered in Luxembourg and manages its operations for both Europe and the Asia-Pacific region. By acquiring RBC Investor Services, Caceis will benefit from an expanded range of services and a wider client base in the European market. The completion of the transaction will be subject to customary closing conditions, including regulatory and antitrust approvals, and is expected to take place by the end of the third quarter of 2023.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Legal Framework for the Acquisition 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 Directive (EU) 2019/2121 (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 the Luxembourg Civil Code governing contractual relationships between the parties to transactions contribute to the additional stable legal framework for the sale and purchase of company vehicles in Luxembourg.

On 27 July 2022, a bill of law (No 8053) was submitted to the Luxembourg parliament. The draft bill revises the sections of the Corporate Law relevant for mergers, divisions and conversion by introducing a general section applicable to national and cross-border restructurings, and implements certain provisions included in the EU Cross-Border Merger Directive. The draft bill is still in parliamentary consultation and precise adoption and publication dates are not yet scheduled.

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.

It is worth mentioning that the above-mentioned bill No 8053 of 27 July 2022 will implement the Luxembourg definition of merger by absorption with two additional categories: (i) upstream merger (by way of which a company transfers by way of dissolution without liquidation the entirety of its assets and liabilities to its parent company), and (ii) side-stream merger (by way of which a company transfers by way of dissolution without liquidation the entirety of its assets and liabilities to an existing company without the issue of new shares by such existing company on the condition that one person is the direct or indirect shareholder of all shares in the merging companies or that the shareholders of the merging companies hold their shares in the same proportion in all of the merging companies).

Alternative Means of Acquisition
Growth by way of strategic partnerships/alliances can be considered as alternative means of acquisition. 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* (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. 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 and media) and provide information prior to the proposed investment. The scope of the bill is wide, especially with regards to the definition of "critical" activity, and also extends 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 but it is not yet clear when it will be adopted by the parliament.

2.4 Antitrust Regulations

The applicable antitrust regulation is 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 National Competition Authority.

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 National Competition Authority 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. On 13 July 2022, the Ministry of Economy published a preparatory report on the introduction of such a regime, which will be similar in terms of rules and

concepts used by the EU Commission and other national competition authorities in the EU. On the basis of the interim report, the Luxembourg government will prepare a bill of law which is expected to be submitted to the parliament in the spring of 2023.

Furthermore, the Law of 30 November 2022 on competition (the "New Competition Law") entered into force on 1 January 2023 for the purpose of amending the Consumption Code and transposing into Luxembourg law Directive (EU) 2019/1. The Directive is aimed, among others, at empowering the competition authorities of EU member states to be more effective enforcers and at ensuring the proper functioning of the internal market.

The New Competition Law granted a new legal status to the Luxembourg administrative competition authority, formerly known as the Competition Council. The National Competition Authority will now operate as an independent public institution with legal personality and financial and administrative autonomy. The National Competition Authority also has regulatory, investigatory and sanctioning powers, as well as the power to apply national and European legislation relating to the prohibition of agreements and abuse of a dominant position.

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.

Moreover, bill No 8053 of 27 July 2022 would introduce additional rights to employees, creditors and shareholders in cross-border conversions, mergers and divisions among the EU, including the right to be informed and consulted and ensuring the participation of their representatives in negotiations and on the board of their company.

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

The two main recent legislative developments in the field of know your customer (KYC) and anti-money laundering (AML) in Luxembourg are the Law of 13 January 2019 (the "RBO Law") introducing a register of beneficial owners ("RBO") for legal entities registered in the Luxembourg Trade and Companies Register, and the Law of 10 July 2020 (the "RFT Law") establishing a register of fiducies and trusts and introducing a series of measures increasing the transparency of the beneficial ownership of trusts, fiducies (ie, fiduciary arrangements) and similar legal arrange-

ments. Such legal framework has a major impact on M&A transactions where the structures are meant to hide the beneficial owners from the purchasers following the sale, whether for tax or for other purposes.

On 29 July 2022, a law was published with the aim of aligning the Law of 12 November 2004 (the "AML law") with the wording of the Financial Action Task Force (FATF) Recommendations (especially as regards the need to assess potential discrepancies in respect of RBO filings) and increase international co-operation between supervisory authorities for investigations and on-site inspections. The Law of 29 July 2022 also amended the RFT Law, clarifying that the beneficial owner information shall be updated within one month of any change.

Moreover, on 29 November 2022, the Court of Justice of the European Union held that the "public access" feature of the Luxembourg RBO (as required by Article 30 of Directive (EU) 2018/843) is invalid under the Charter of Fundamental Rights of the EU. In this regard, the Luxembourg Business Register (LBR) has suspended public access to the RBO to comply with the said ruling, except for a number of professionals having already identified access. The LBR has further reported that it is currently working to restore the RBO for representative of the press as well as obliged entities under the AML Law.

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.

The Taxonomy Regulation and the SFDR have been subject to substantial changes in the last year. For instance, in July 2022, the European Commission Delegated Regulation (EU) 2022/1288 (RTS SFDR) was published in the Official Journal of the EU and became applicable as of 1 January 2023. The RTS SFDR provides for more detailed disclosure requirements under the SFDR, with prescribed-form reporting templates for Articles 8 and 9 SFDR funds, as well as technical guidance on the obligations under the Taxonomy Regulation and the SFDR. Moreover, starting from 1 January 2023, certain gas and nuclear activities, upon satisfaction of strict requirements, are introduced among the transitional activities contributing to climate change mitigation, therefore being subject to the disclosure provisions under the Taxonomy Regulation and to additional disclosure requirements for companies operating in such sectors.

The ESG-related regulatory landscape in Luxembourg is implemented in detail by the CSSF.

Furthermore, two EU proposals regarding corporate sustainability were also discussed in depth in 2022.

The Corporate Sustainability Reporting Directive (CSRD) was adopted by the Council of the EU on 28 November 2022 and will enter into force starting from the 2024 fiscal year. The CSRD, among

others, will require large companies operating in the UE to disclose information on their ESG performance in their annual financial reports. Non-EU companies with substantial activities in the EU will also be covered.

The Proposal for a Directive on corporate sustainability due diligence will soon be presented to the EU Parliament and the Council of the EU for approval. It aims to force large EU companies and non-EU companies with significant EU activities to disclose the actual and potential human rights and environmental adverse impacts of their own operations and their value chains and of their subsidiaries by introducing a sustainability due diligence duty.

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 play 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.

Moreover, on 13 June 2022, a bill of law (No 8029) was submitted to the Luxembourg parliament to implement the sixth amendment to Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC7). DAC7 contains several sections that complement and extend the existing domestic rules on tax transparency and exchange of information. Once adopted, DAC7 will require digital platform operators to provide the Luxembourg competent authority with information about certain users on their platform, to enable such competent authority to exchange this information with other EU member states.

In addition, further amendments to Directive 2011/16/EU were presented by the EU Commission on 8 December 2022, with the aim of introducing new reporting obligations for service providers or operators involved in providing crypto-asset services to EU resident customers (DAC8). Member states will be required to adopt and publish their laws, regulations and administrative provisions necessary to comply with DAC8 by 31 December 2025 at the latest.

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 does not normally 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 in 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 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 an agreement (conditional or unconditional) 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, it is normally the responsibility of the buyer's lawyer to send a detailed information request to the seller for 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 and commercial. There are also certain mandatory requirements for the documents to be published under the Takeover Law.

In terms of 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- and Ukraine crisis-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 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 if major roadblocks are found. COVID-19 and the recent macroeconomic factors have 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 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 per-

centage) 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, for example, a majority or a supermajority of the 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. Moreover, the judge may adjust the agreed break fees if they are manifestly excessive or derisory.

The negotiation of break fees prior to the transaction has gained greater importance since the spread of the COVID-19 pandemic 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;

- 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 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 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

Shareholder rights and governance in Luxembourg are mainly based on the provisions of the company's articles, the Luxembourg Civil Code, the Corporate Law and, for listed companies, the rules and regulations of the Luxembourg Stock Exchange. Moreover, the Luxembourg Law of 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.

Following the reformation in 2016, the Corporate Law now provides for several rights to minority shareholders, encouraging the management of Luxembourg companies to take greater account of the potential involvement of shareholders, including minority shareholders. Lastly, bill No 8053 related to the EU Cross-Border Merger Directive (see **2.1 Acquiring a Company**) provides that in the case of cross-border conversions, mergers and divisions within the EU, shareholders who vote against the approval of the draft terms have a right to exit and receive cash compensation.

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. 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), as well as 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 increasing integration of non-financial factors, such as ESG and sustainability-related consideration, in investment and governance 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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