LUXEMBOURG

Law and Practice

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Contents

1. Trends p.4
1.1 M&A Market p.4
1.2 Key Trends p.4
1.3 Key Industries p.5

2. Overview of Regulatory Field p.6
2.1 Acquiring a Company p.6
2.2 Primary Regulators p.8
2.3 Restrictions on Foreign Investments p.8
2.4 Antitrust Regulations p.9
2.5 Labour Law Regulations p.9
2.6 National Security Review p.9

3. Recent Legal Developments p.9
3.1 Significant Court Decisions or Legal Developments p.9
3.2 Significant Changes to Takeover Law p.12

4. Stakebuilding p.12
4.1 Principal Stakebuilding Strategies p.12
4.2 Material Shareholding Disclosure Threshold p.12
4.3 Hurdles to Stakebuilding p.13
4.4 Dealings in Derivatives p.13
4.5 Filing/Reporting Obligations p.13
4.6 Transparency p.13

5. Negotiation Phase p.13
5.1 Requirement to Disclose a Deal p.13
5.2 Market Practice on Timing p.13
5.3 Scope of Due Diligence p.13
5.4 Standstills or Exclusivity p.14
5.5 Definitive Agreements p.14

6. Structuring p.14
6.1 Length of Process for Acquisition/Sale p.14
6.2 Mandatory Offer Threshold p.15
6.3 Consideration p.15
6.4 Common Conditions for a Takeover Offer p.15
6.5 Minimum Acceptance Conditions p.15
6.6 Requirement to Obtain Financing p.15
6.7 Types of Deal Security Measures p.15
6.8 Additional Governance Rights p.16
6.9 Voting by Proxy p.16
6.10 Squeeze-Out Mechanisms p.16
6.11 Irrevocable Commitments p.17

7. Disclosure p.17
7.1 Making a Bid Public p.17
7.2 Type of Disclosure Required p.17
7.3 Producing Financial Statements p.17
7.4 Transaction Documents p.17

8. Duties of Directors p.18
8.1 Principal Directors' Duties p.18
8.2 Special or Ad Hoc Committees p.18
8.3 Business Judgement Rule p.18
8.4 Independent Outside Advice p.18
8.5 Conflicts of Interest p.18

9. Defensive Measures p.19
9.1 Hostile Tender Offers p.19
9.2 Directors' Use of Defensive Measures p.19
9.3 Common Defensive Measures p.19
9.4 Directors' Duties p.19
9.5 Directors' Ability to "Just Say No" p.19

10. Litigation p.19
10.1 Frequency of Litigation p.19
10.2 Stage of Deal p.20
10.3 "Broken-Deal" Disputes p.20

11. Activism p.20
11.1 Shareholder Activism p.20
11.2 Aims of Activists p.21
11.3 Interference With Completion p.21

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1. Trends

1.1 M&A Market

The M&A market in the EU reached one of its highest volumes since the 2008 financial crisis by the end of 2021. However, 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, impacted market sentiment, valuations, and the cost of debt financing deals, leading to an overall decrease in cross-border M&A volumes globally and in the Luxembourg market. This trend continued into 2023, with M&A activity still recovering from these obstacles, compounded by additional macroeconomic and geopolitical tensions.

Following an initial increase in SPAC transactions in Luxembourg during 2021, the use of SPACs as vehicles for mergers or listings significantly declined in late 2022. This trend continued into 2023, reflecting the global slowdown in SPAC activity. On the other hand, it is worth noting that while COVID-19 remains a consideration, with vaccination efforts progressing and assuming no dangerous virus variants emerge, it should not be a major obstacle to M&A activities anymore.

Despite the current economic situation, the Luxembourg market continues to generate further M&A transactions aimed at European-based targets, due to the legal and political stability of its regulatory, financial and legislative framework, and the growing fund industry and financial sector. In contrast to the previous year, the volume of net assets in Luxembourg investment funds increased by 5.10% over the last 12 months, indicating market resilience amid turbulent financial conditions.

Looking ahead to 2024, there is cautious optimism for a rebound in M&A activities, driven by an expected deceleration in inflation and reduced interest rates, coupled with an accumulation of demand for new deals from previous years. Companies are adapting their strategies to the evolving economic landscape, focusing on emerging trends, such as climate/ESG matters and technological disruption (including the rise of AI). At the same time, heightened legislative and regulatory activity is also expected, further influencing M&A activity and strategic decision-making for both companies and investors.

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.

In recent years, there have been developments in the structuring of M&A deals. For instance, the due diligence process has become increasingly crucial due to the need for a deeper examination of the financial conditions and the impact of external factors such as the COVID-19 pandemic, the energy crisis, and recent geopolitical tensions on the target companies' business volumes (including supply chain, imports and exports, currency controls, business continuity, insurance and risks to material contracts). For the same reasons, heightened importance has been given to discussions on material adverse change clauses or political force majeure elements, along with a more thorough evaluation of compliance risks, including AML/KYC and sanctions compliance, as well as counterparty risk and governance risks associated with a potential investment.

On the other hand, certain business segments (such as hotel and travel businesses) have faced acute challenges stemming from the pandemic and the recent geopolitical tensions in Ukraine and the Middle East, leading to rescue financing or stalled deals.

In response, parties are re-evaluating deal structures, with purchasers increasingly opting to mitigate liquidity concerns by reducing the amount of cash considerations. 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 effective tool for purchasers to manage risk and mitigate market volatility.

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. Consistent with recent years, the technology sector has been a significant driver of market activity, both nationally and globally, and is expected to maintain its prominence in 2024 given the ongoing pursuit of digital transformation and the rise of AI.

The investment funds industry continues to play a major role in the Luxembourg financial and legal market. As of 31 December 2023, 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 EUR5,285.010 billion, compared to EUR5,028.456 billion registered as of 31 December 2022. Despite ongoing geopolitical conflicts,

equity markets therefore showed signs of recovery in 2023, driven by optimism surrounding rate cuts and declining inflation.

Some notable transactions took place in 2023. In January 2023, Exceet Group SCA, a Luxembourg-based partnership limited by shares listed on the regulated market of the Frankfurt stock exchange, acquired the APEX group, a Germany-based group specialised in planning and operating hydrogen plants, selling hydrogen, electricity and heat generated in connection with hydrogen plants, as well as developing corresponding software and hydrogen storage systems.

In addition, in July 2023, Luxembourg's majority-state-owned energy company Encevo S.A. acquired the Nexxtmove business, which is a software business line that operates charging stations for electric cars, from bankrupt Belgian energy company Powerdale S.A. Encevo thus takes over the management, operation and exploitation of a platform that manages around 50,000 charging stations daily and a similar number of electric charging cards, as well as electromobility-related applications in Belgium, Luxembourg and the Netherlands.

Furthermore, in August 2023, Deutsche Börse AG, the Germany-based operator of the Frankfurt Stock Exchange offering clearing services and providing related technology and services, agreed to acquire the remaining stake in FundsDLT, the Luxembourg-based blockchain company for alternative investment space. The acquisition was completed in January 2024, following regulatory approval from the Commission de Surveillance du Secteur Financier (CSSF), the Luxembourg financial regulator. It will enrich distribution capabilities, and streamline operations and bring asset managers closer to retail clients through blockchain.

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"). Since undergoing a comprehensive reform in 2016, this legislation has further bolstered Luxembourg's appeal as a destination for M&A and joint ventures by providing an even better corporate vehicle platform. Additionally, the contractual provisions within Luxembourg's Civil Code, governing the relationships between transaction parties, contribute to the country's stable legal framework for the sale and purchase of company vehicles in Luxembourg.

On 27 July 2022, a bill of law No 8053 (the "8053 Bill") was submitted to the Luxembourg parliament. The draft bill revises the sections of the Corporate Law relevant to mergers, divisions and conversion by introducing a general section applicable to national and cross-border restructurings, and implements certain provisions included in Directive (EU) 2019/2121 (the "EU Cross-Border Merger Directive"). Parliamentary discussions regarding the bill are still ongoing and possible changes to the draft may still occur.

Lastly, on 23 August 2023, the Ministry of the Economy introduced before the Luxembourg parliament a draft bill of law No 8296 (the "8296 Bill") regarding a mandatory ex ante notification and screening procedure for mergers concerning certain entities operating in Luxembourg. The 8296 Bill provides that any merger, acquisition or

creation of a joint venture that does not fall under the EU merger control regime set out in Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EU Merger Regulation") shall be notified in advance to the Luxembourg competition authority, if (i) the aggregate turnover realised in Luxembourg by all enterprises involved in the concentration exceeds EUR60 million; and (ii) at least two of the enterprises participating in the concentration generate an individual turnover in Luxembourg of at least EUR15 million. The 8296 Bill is currently in the last stages of its adoption procedure and is expected to be transposed into law in the near future.

Most Common Ways to Acquire a Company

The most common ways to acquire a company in Luxembourg are either by buying shares in the company operating the target business (a share purchase) or by buying the target business itself (an asset purchase). In 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, with all the target company's assets and liabilities being acquired by the buyer. In 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 as a result of 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 or newly incorporated) will assume all the assets, liabilities and obligations of the absorbed companies.

It is worth mentioning that the above-mentioned 8053 Bill will implement the Luxembourg definition of merger by absorption with two additional categories:

- upstream merger (where a company transfers by way of dissolution without liquidation the entirety of its assets and liabilities to its parent company); and
- side-stream merger (where 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 against the risk of failure of such joint investment.

It is also common for a larger, private company to acquire a group of businesses where the old shareholders of the group roll over into the new structure, set up by the buyer. In this scenario, the old shareholders become minority shareholders in the newly formed entity, retaining a vested interest in the business while benefiting from financial support provided by the buyer. This approach enables old shareholders to maintain involvement in the business while operating as co-investors alongside the buyer.

2.2 Primary Regulators

For M&A transactions relating to the acquisition of regulated corporate vehicles in Luxembourg, the CSSF, must approve changes to companies' shareholding structures. Furthermore, 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 that 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 law of 14 July 2023 establishing a mechanism for the national screening of foreign direct investments (the "FDI Law") was adopted. This law applies to direct investments not completed before 1 September 2023 made by foreign investors (ie, natural persons or legal entities residing outside the European Economic Area) seeking to acquire control over a Luxembourg entity operating in critical sectors within the Grand Duchy of Luxembourg (such as energy, transportation, water, healthcare, communications, data processing and storage, aerospace, defence, finance, and media, as well as the trade of dual-use goods).

Foreign investment potentially falling within the scope of the FDI Law must be notified to the Luxembourg Ministry of the Economy before their completion together with certain information related to the investment (such as product, services, business operations and countries of business activity). A screening ministerial committee will then perform a preliminary analysis of whether a screening process is necessary. The Ministry of the Economy and the Ministry of Finance will then conduct a screening procedure to assess whether the contemplated FDI is likely to affect security or public order, and a decision will be taken to either prohibit or allow the investment.

The scope of the regime is potentially broad, covering every investment made in Luxembourg by a non-European investor taking control of a Luxembourg entity operating in one of the relevant sectors. However, the impact of the new FDI Law can be considered minimal. First, the FDI Law does not add any substantial requirements for financial firms, given that any merger or acquisition contemplated by such entities must be in any case approved in advance by the competent regulatory authority. Moreover, The FDI Law does not apply to "portfolio investments", meaning that UCITS retail fund holdings are exempt from the screening regime. Lastly, although private equity fund investments potentially fall under the FDI Law, it is not common

for private equity funds based outside the EU to acquire targets in Luxembourg.

2.4 Antitrust Regulations

The authority responsible for regulating competition in Luxembourg is the National Competition Authority (formerly known as the Competition Council), an independent public institution with legal personality and financial and administrative autonomy. Established by the Law of 30 November 2022, the National Competition Authority is invested with regulatory, investigatory and sanctioning powers in the field of competition, as the power to apply national and European legislation relating to the prohibition of agreements and abuse of a dominant position.

At the European level, the applicable antitrust regulation is the EU Merger Regulation 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.

For mergers, acquisitions, and joint ventures that fall outside the scope of the EU Merger Regulation, as mentioned in **2.1 Acquiring a Company**, the 8296 Bill aims to establish an ex ante screening and notification procedure by the National Competition Authority. Once the proposed transaction has been notified, the National Competition Authority will assess whether to authorise the transaction or initiate a more detailed examination where there are serious doubts about potential harm to competition. Within 90 days, the National Competition Authority may decide to authorise the transaction, impose conditions, or prohibit it altogether.

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, the 8053 Bill would introduce additional rights for 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 (*Registre de commerce et des sociétés*, or RCS), 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 arrangements. 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) constitutes a violation of the Charter of Fundamental Rights of the EU. Public access to the RBO had therefore been temporarily suspended by the Luxembourg Business Register (LBR), except for a number of professionals having already identified access, as the Luxembourg and UE legislation had to be amended to comply with the said ruling. At first, in December 2022, following circular LBR 22/01, access to the LBR was restored for "professionals" as defined in Article 2 of the AML Law for the purposes of their AML/KYC obligations. Moreover, starting from February 2023, all entities registered with the RCS have been granted access to the LBR by way of a confidential code generated after submitting their RBO declaration. Entities are only able to have access to, and order extracts concerning, their own data.

Environmental, Social and Governance

The recent implementation of Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector (SFDR) and Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (the "Taxonomy Regulation") led to an increasing impact of ESG matters in the M&A market in the Grand Duchy, especially 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 investors aim to ensure that companies comply with ESG standards and disclosure requirements.

The Taxonomy Regulation and the SFDR have been subject to substantial changes over the past few years. For instance, the European Commission Delegated Regulation (EU) 2022/1288 (RTS SFDR), applicable as of 1 January 2023, 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 satisfac-

tion of strict requirements, are being 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. Further implementation of substantial and technical aspects of these regulations is currently being discussed, demonstrating the EU's active efforts to enhance sustainability standards and practices in the financial sector.

On the same topic, the Corporate Sustainability Reporting Directive (CSRD) entered into force on 5 January 2023. Among other things, the CSRD requires large companies operating in the EU, as well as listed SMEs, to disclose information on the impact of their business on people and the environment and their ESG performance in annual financial reports. The first category of the impacted companies will have to apply the new rules starting from the 2024 financial year, and publish their reports in 2025. Non-EU companies with substantial activities in the EU will also be subject to the CSRD disclosure requirements.

Finally, on 14 December 2023, the EU Parliament and Council reached an agreement on the text of the Corporate Sustainability Due Diligence Directive (CSDDD). The CSDDD aims to introduce a sustainability due diligence requirement for 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. The CSDDD is expected to enter into force following its formal adoption and publication in the EU Official Journal.

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 reconsidered, 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; therefore, this risk should be accommodated in the closing deliverables and in the structuring of the purchase price mechanism.

Moreover, on 3 May 2023, the Luxembourg parliament adopted a law transposing into national legislation the seventh 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. Furthermore, DAC7 requires digital platform operators to provide information about certain users on their platforms to the Luxembourg competent authority, facilitating the exchange of this information with other EU member states.

In addition, in October 2023, the EU Council adopted further amendments to Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8). These amendments

mainly extend the reporting obligations – and the automatic exchange of information between EU tax authorities – to service providers or operators involved in providing crypto-asset services to EU resident customers. Member states will be required to transpose the rules of the new regime into national laws by 31 December 2025 at the latest, to be applicable from 1 January 2026.

New Insolvency Law

The law of 7 August 2023 on business preservation and modernisation of bankruptcy law, which implements Directive 2019/1023/EU, entered into force on 1 November 2023, thus increasing the attractiveness and competitiveness of Luxembourg's restructuring and insolvency framework (the "New Insolvency Law"). The new regime modernises the old insolvency law, introducing new reorganisation procedures, measures for early financial difficulty identification, abolishing certain measures, and reclassifying fraudulent bankruptcy as an offence instead of a crime. The first decision opening a judicial reorganisation proceeding under the new regime was issued by the Luxembourg district court sitting in commercial matters (*tribunal d'arrondissement de Luxembourg, siégeant en matière commerciale*) on 22 November 2023 and further case law developments are expected to explore and clarify the practical implementations of the New Insolvency Law.

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 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 encompasses 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 that 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 law of 19 May 2006 implementing Directive 2004/25/EU on takeover bids, as amended (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.

The due diligence process is influenced by several other factors, including changes in the legislation and market dynamics (eg, ESG impact as described in **3.1 Significant Court Decisions or Legal Developments**). Pandemics, economic conditions and geopolitical tensions further underscore the importance of thorough due diligence, as described in **1.2 Key Trends**.

5.4 Standstills or Exclusivity

If the bidder has obtained insider information that 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 a 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. Pandemics and 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 differ-

ent 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 both parties 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 the 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 percentage) are stipulated in the articles of association of the target company and reserved for shareholders, which triggers the approval from the general meeting of shareholders to be adopted by, 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 par-

ties 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 RCS.

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 advise the board.

The special/ad hoc committees are also used in cases where conflicts of interest 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. Therefore, 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 advisers to advise on the fairness and reasonableness of the transaction price and on the matters relating to conflicts of interest, etc. The involvement of an ESG adviser in the early stage of an M&A transaction has also become increasingly common. In addition to investment advisers and lawyers, management can engage other consultants in relation to 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 advisers.

8.5 Conflicts of Interest

The Company Law requires that a director who has, directly or indirectly, an interest of a patrimonial nature that conflicts with the interest of the company in relation to an operation fall-

ing within the scope of the board of directors' competence should inform the board of this and must not participate in the deliberation of or voting 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 that constitute or may give rise to a conflict of interest and that 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, including the right of approval of important transactions with related parties.

Following the reform in 2016, the Corporate Law now provides for several rights for minority shareholders, encouraging the management of Luxembourg companies to take greater account of the potential involvement of shareholders, including minority shareholders. Lastly, the 8053 Bill (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 both financial and non-financial objectives, which can be linked to either 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.