Public Mergers and Acquisitions in Luxembourg: Overview

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A Q&A guide to public mergers and acquisitions law in Luxembourg.

The country-specific Q&A looks at current market activity; the regulation of recommended and hostile bids; pre-bid formalities, including due diligence, stakebuilding and agreements; procedures for announcing and making an offer (including documentation and mandatory offers); consideration; post-bid considerations (including squeeze-out and de-listing procedures); defending hostile bids; tax issues; other regulatory requirements and restrictions; as well as any proposals for reform.

M&A Activity

1. What is the current status of the M&A market in your jurisdiction?

2020 was a challenging year for the global M&A market, as the COVID-19 health crisis globally slowed down M&A activities, resulting in a decline on both domestic and cross-border deals and a drop in investments. The crisis particularly affected outstanding contracts and transactions, alongside the slowdown due to Brexit, however, there have been signs of a slow recovery since the second half of 2020. The Luxembourg M&A market has shown resilience despite the crisis with transactions being initiated and the economy building strength again. The following sectors have been most active after the pandemic crisis:

- Technology, media and telecommunications.
- Financial.
- Automotive.

2. What have been the largest or most noteworthy sector-specific public M&A transactions in the past 12 months?

Technology, Media and Telecommunications

Dynamica, a Belgian private equity fund founded in 2009, acquired a 70% majority stake in the Luxembourg-based company System Solutions, a support PFS supervised by the *Commission de Surveillance du Secteur Financier* (Financial Sector Supervisory Commission) (CSSF), specialising in cloud and IT services.

Oil, Gas and Chemicals

No key transaction took place in the oil, gas and chemicals sector in the Luxembourg M&A market in the last 12 months.

Financial

In the financial sector:

- Gen II Fund Services completed its acquisition of Quilvest Luxembourg Services S.A., offering private equity and real estate administration services (December 2020).
- TMF Group acquired Selectra Management Company, a regulated management company, from Farad Group, following the approval from the CSSF (February 2021).
- Danske Bank A/S has entered into an agreement with Union Bancaire Privée, UBP SA (UBP) on the sale of the business activities of Danske Bank International S.A. (DBI) in Luxembourg.
- The acquisition of the client business of the Luxembourg-based Private Bank Öhman Bank S.A. by VP Bank (Luxembourg) SA was completed (January 2021).

Mining, Metals and Engineering

SMS Group, a German plant engineering company for the metals industry, fully acquired the remaining 40.8% of Paul Wurth S.A., becoming the sole shareholder of the Luxembourg company's plant engineering business.

Pharmaceuticals, Biotechnology and Healthcare

No key transaction took place in the pharmaceuticals, biotechnology and healthcare sector in the Luxembourg M&A market in the last 12 months.

Other

In the automotive sector, the most significant deal was the acquisition of Autopolis, a Luxembourg-based car dealer, by Van Mossel Automative Group, making it the largest car dealer group in the Benelux.

3. How were the largest or most noteworthy public M&A transactions financed?

Some financial details of the above-mentioned M&A deals (*see Question 2*) were not disclosed. However, the most commonly used financing methods in Luxembourg are a mixture of shareholder financing and third-party debt. Third-party debt mainly depends on the financing needs for the contemplated transaction and is often required at the target's subsidiary level, refinancing existing debt. When using debt financing, lenders could, for example, require specific covenants such as information related to the target company that they assume would be useful in the process of analysing the request for funding.

Any third-party debt financing will be approved and confirmed by the CSSF, as long as the target company is supervised by the CSSF.

Obtaining Control

4. What are the main means of obtaining control of a public company?

Control of a public company is most frequently obtained through the acquisition of the company's shares from its shareholders by means of voluntary or mandatory takeover.

For companies whose registered office is located in Luxembourg, the percentage of voting rights which confers control of a target company is set at 33.33%, regardless whether the bid is voluntary or mandatory (*articles 5(1), 5(2) and 5(3), Takeover Law*).

Another means of acquiring control over a public company is by legal merger, which is regulated by the Companies Law. Under the Companies Law, a merger is 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 company, following dissolution without liquidation, all their assets and liabilities in exchange for the allotment to the shareholders of the company or companies being acquired of shares in the acquiring company (*article 1020-3, Companies Law*). In respect of a merger by incorporation of a new company, several companies transfer to a company which they constitute, following their dissolution without liquidation, all their assets and liabilities in return for the allotment to their shareholders of shares in the new company (*article 1020-4, Companies Law*).

Trends in Deal Structures

In Luxembourg, M&A deals involving public companies are generally structured through a takeover bid. Deal structures involving a scheme of arrangement or a merger by absorption are less common.

Hostile Bids

5. Are hostile bids allowed? If so, are they common?

There are no legal restrictions on hostile bids in Luxembourg. The rules and the process regarding hostile bids are governed by articles 9, 10, and 12 of the Takeover Law which impose restrictions more specifically on the target company. The bidder must announce to the target company its intention to make an offer in the same way as in a friendly bid and inform the CSSF (*second paragraph of article 10(2), Takeover Law*).

Hostile bids are uncommon as they ordinarily receive (during the initial phase of the bid) no support from the board of directors of the target company, which will take defensive measures to frustrate the bid. However, it is not uncommon for hostile bids to become friendly bids.

Regulation and Regulatory Bodies

6. How are public takeovers and mergers regulated, and by whom?

Takeover bids are regulated by the law of 19 May 2006 (as amended from time to time) (Takeover Law), transposing Directive 2004/25/EC on takeover bids (Takeover Directive).

There are also other laws, regulations and circulars that, directly or indirectly, regulate takeover bids, as follows:

- Law of 1 August 2019 (SRD II), implementing Directive (EU) 2017/828 amending Directive 2007/36/EC on the encouragement of long-term shareholder engagement (Amended Shareholders' Rights Directive) and amending the Luxembourg Law of 24 May 2011 on the exercise of certain rights of shareholders in listed companies.
- Regulation (EU) 596/2014 on market abuse (Market Abuse Regulation).
- Law of 30 May 2018 on markets in financial instruments (Market Abuse Law).
- Law of 16 July 2019 on prospectuses for securities (Prospectus Law).
- Law of 11 January 2008 on transparency requirements for issuers (Transparency Law).
- Law of 21 July 2012 on mandatory squeeze-out and sell-out of securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public, and amending the Law of 23 December 1998 establishing a financial sector supervisory commission (Squeeze-out/sell-out Law).

- Law of 23 October 2011 concerning competition (Competition Law).
- Law of 10 August 1915 concerning commercial companies, as amended (Company Law).
- Law of 24 May 2011 on the exercise of certain rights of shareholders in general meeting of the listed companies.
- Law of 5 April 1993 relating to the financial sector, as amended (Law on Financial Sector).
- Law of 23 December 1998 concerning of the creation of the *Commission de Surveillance du Secteur Financier* (Law on CSSF).
- Law of 5 August 2005 on financial collateral agreements, as amended (Law on Collateral).
- The Luxembourg Labour Code.
- The Rules and Regulations of the Luxembourg Stock Exchange (LuxSE).
- Circular CSSF 06/258 regarding the entry into force of the Takeover Law.

In Luxembourg, the Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission) (CSSF) is the competent authority that supervises takeover bids where the target company has its registered office in Luxembourg and that company's securities are admitted to trading on a regulated market in Luxembourg.

The following matters are dealt with in accordance with the rules of the member state of the competent authority in which the target company has its registered office and where that company's securities are admitted to trading on a regulated market (as determined under the Takeover Law):

- The consideration offered in a bid (in particular, the price).
- Matters concerning the offer procedure (in particular, the information on which the bidder bases its decision to make an offer, the contents of the offer document and the disclosure of the offer).

The following matters are governed by the competent authority and applicable rules of the member state in which the target company has its registered office:

- The information to be provided to employees of the target company.
- Matters concerning company law, in particular both the:
  - percentage of voting rights conferring control and any derogation from the obligation to launch a bid; and
  - conditions under which the target company's board of directors can take action to frustrate the bid.

For companies which have their registered office in Luxembourg, the percentage of voting rights conferring control is fixed at 33.33%. All classes of shares in a company, (other than those conferring voting rights only in certain situations), are taken into account when calculating this percentage.

Otherwise, in Luxembourg, the Competition Law contains no specific provisions on mergers. There is no prior merger control regime under Luxembourg law. Nonetheless, mergers and acquisitions and the behavior of parties involved may be subject to an *a posteriori* control by the Luxembourg Competition Council (*Conseil de la Concurrence*) pursuant to article 5 of the Competition Law.

In addition to the Luxembourg Competition Council (*Conseil de la Concurrence*), there are other regulatory authorities which have authority depending on the sector involved in the transaction, such as:

- The CSSF which regulates, among others, credit institutions, payment services providers, electronic money institutions, investment firms, specialised professionals of the financial sector and support professionals of the financial sector.
- The Luxembourg Institute of Regulation (*Institut Luxembourgeois de Régulation*) which regulates electronic communications, networks and services, electricity, natural gas, postal services and rail and air transport sectors.
- The *Commissariat aux Assurances* which regulates the insurance sector.

Pre-bid

Due Diligence

7. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended Bid

The Takeover Law does not regulate the conduct of the due diligence process by the bidder. In practice, the target company will create a virtual data room where the bidder will have access to documents of any kind pertaining to the company including, patents, customers, company accounts (including those not yet published), projected statements, development plan, negotiations in progress, and so on. Although virtual data rooms are functioning very well in general, they can have their limits and restrain the circulation of certain key documents.

In accordance with article 11 of the Takeover Law, the target company must publish the following information and documents:

- The structure of its capital.
- Any restrictions on its transfer of securities.
- Significant direct and indirect shareholdings, meaning shareholdings that exceed one of the thresholds of 10%, 20%, 33.33%, 50% and 66.66%.

- The identities of holders of any securities with special control rights and a description of those rights.
- The system of control of any employee share scheme where the control rights are not exercised directly by the employee.
- Any restrictions on voting rights.
- Any agreement between shareholders known to the company which may result in restrictions on the transfer of securities and voting rights.
- The rules governing the appointment and replacement of members of the board of the company and the amendments to the articles of association.
- The powers of board members and in particular the power to issue or buy shares.
- Any significant agreement between the company and its board members or employees providing for compensation if they resign or are made redundant without valid reason, or if their employment ceases due to a takeover bid.

Hostile Bid

Since hostile bids are not supported by the target company's board of directors, the due diligence is carried out only on information available to the public. There are specific obligations that apply to the target company under the Takeover Law (*see* Question 25).

Public Domain

The following information regarding a target company is publicly available:

- Corporate documents (excerpt from the Luxembourg trade and companies register, articles of incorporations, minutes of the general meeting of shareholders, and so on).
- Financial statements.
- Listing prospectus, offer documents and information memoranda.

Secrecy

8. Are there any rules on maintaining secrecy until the bid is made?

Negotiations with a target company can be kept confidential provided the parties comply with the rules set out in the Market Abuse Regulation. These are, among others, that a listed company must publicly disclose any inside information which directly relates to it, as soon as possible. An issuer must inform the public as soon as possible of inside information (that is, price-sensitive information) which directly concerns that issuer, whenever such information arises and in a manner which enables fast access and complete, correct and timely assessment of the information by the public (*article 17, Market Abuse Regulation*). Inside information is precise in nature, has not been made public and relates directly or indirectly to a financial instrument or an issuer. If the information were made public, it would be likely to have a significant effect on the price of the financial instruments or their derivatives.

Agreements with Shareholders

9. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

A written commitment to a share purchase can be reached between key shareholders of the target company and the bidder, provided that this complies with the disclosure requirements of the Market Abuse Law.

However, whether such an agreement is enforceable under Luxembourg law is still unconfirmed.

Stakebuilding

10. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

This matter is regulated by the Transparency Law which 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 holding of financial instruments granting the holder the right, on his or her initiative, to acquire shares in the target company is considered equivalent to the holding of shares.

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

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.

Furthermore, along with these disclosure requirements, the target company's articles of association may also 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.

Voting rights attaching to the shares that exceed the threshold, and have not been notified, are automatically suspended. The suspension is lifted as soon as the required notification is made in compliance with the Transparency Law.

Agreements in Recommended Bids

11.If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

The Takeover Law does not regulate this matter. In practice, after a bid is recommended by the board of directors of the target company, there are no provisions that prohibit a formal agreement between the bidder and the target's board of directors.

Once the target company's board of directors has issued its reasoned opinion recommending the bid, the parties can enter into a non-binding letter of intent or a memorandum of understanding recording their intent to carry out the proposed transaction and in particular the ability of the bidder to finance the acquisition. The parties will ordinarily also enter into a non-disclosure agreement since the bidder will usually have access to the target company's data room. By entering into an agreement with the bidder, the board of directors of the target company must protect the interests of the company, which includes the interests of its shareholders.

With regard to other offers, the Takeover Law does not regulate the ability of the board of directors of the target company to solicit or to recommend other offers when already dealing with a recommended bid.

Break Fees

12. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

According to general legal principles, the abrupt breakdown of negotiations may result in the payment of damages by the responsible party. Break fees are not regulated and not illegal per se. Break fees are contractual fees, meaning that they are negotiated by the parties. Given the impact of the COVID-19 health crisis, negotiating such break fees prior to a transaction can be important for the parties to seek contractual protection. A break fee may be paid to the bidder by the target company (or its controlling shareholders) but the latter must prove that the payment of such a fee is in the interest of the target company. The parties are free to determine the amount of break fees which will be based on the existence and the amount of the damage relating to the non-performance of the obligation. However, the judge may moderate or increase the agreed break fees if they are manifestly excessive or derisory.

In principle, break fees are paid to the party who is a victim of the non-performance of a contractual provision. Break fees will be paid to the target company if both:

- The target company is a party to the agreement.
- It has suffered a damage separate from damage suffered by its shareholders.

The Luxembourg Civil Code does not prohibit parties from providing that break fees will be paid by the party responsible for the non-performance of the contract to a party other than the victim. However, the party responsible may not pay for both the victim and another other party. Therefore, in that case, break fees could be paid by the bidder either to the shareholders or to the target company.

Committed Funding

13. Is committed funding required before announcing an offer?

Committed funding is required prior to announcing an offer. In accordance with the Takeover Law, a bidder must only make a bid after having ensured that it can supply the full cash consideration and after having taken all reasonable steps to ensure the availability of any other type of consideration.

The bidder must include in its offer document information concerning the financing of the bid (*article 6(3)(l), Takeover Law*).

Announcing and Making the Offer

Making the Bid Public

14.How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

Requirement to Make an Announcement

In accordance with the Takeover Law, a decision to make a bid must be:

- Notified to the CSSF.
- Made public by the bidder.

Offer Timetable

As soon as the bid is made public, the board of directors of both, the bidder and the target company, have to inform the representative of their respective employees (or, in the absence of such representatives, the employees themselves).

The bidder must draw up and make public an offer document containing the information necessary to enable the holders of the target company's securities to reach a proper and duly informed decision on the bid. Before the offer document is made public, the bidder must submit a draft to the CSSF for approval, within ten working days from the day the bid was made public.

The CSSF will notify the bidder of its decision regarding the adequacy of the bid within 30 working days following the presentation of the draft offer document. If the CSSF considers that the offer document is incomplete or that further information is necessary, it will notify the bidder within ten working days following the filing of the offer document, requesting additional information. In such case, the deadline of 30 working days (*see above*) will run from the date the requested information is given by the bidder.

When the offer document is made public, the boards of directors of both the bidder and target companies, must communicate such document to the representatives of their respective employees or, where there are no such representatives, to the employees themselves. The board of directors of the target company must draw up and make public a document setting out its opinion on the bid, and the arguments on which that opinion is based. This includes:

- Its 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.
- Their likely repercussions on employment and the location(s) of the company's place(s) of business as set out in the offer document.

Before drawing up its opinion, the target company's board of directors must consult with the company's employee representatives. The consultation of the representatives of the target company and the drawing up of an opinion by the board of directors of the target company must be carried out within the acceptance period.

The time period allowed for the acceptance of the bid cannot be less than two weeks or more than ten weeks from the date of publication of the offer document.

One of the main principles contained in the Takeover Law is that the target company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities. The time period from the date the decision to make the bid was made public to the end of the offer acceptance period cannot exceed six months.

The CSSF can grant derogations from the six-month period above in order to allow the target company to call a general meeting of shareholders to consider the bid.

Where the bidder acquires control of the target company, the shareholders of the target company which had not accepted the bid before the end of the time period can accept the bid during a supplementary fifteen-day period (except in case of a mandatory offer), which runs from the last day of the acceptance period.

Where a competing bid is made, the acceptance period of the initial bid will be automatically extended and expire at the same time as the acceptance period of the competing bid (*article 13, Takeover Law*). The shareholders of the target company who have accepted an offer are automatically released from their acceptance in case of a competing offer.

There is no strict 'put up or shut up' rule before the offer document has been published. In accordance with article 13(e) of the Takeover Law, from the date of publication of the offer document, the bid is irrevocable unless it meets one of the following conditions:

- There is a competing bid.
- The administrative authorisation required for the acquisition of the securities which are the subject matter of the bid is missing and in particular assuming the transaction could not take place following a decision by the authorities responsible for ensuring free competition.
- Independently of the bidder's intention, one of the terms of the bid is not fulfilled.
- Subject to the duly motivated authorisation by the CSSF, in case of exceptional circumstances which do not allow the bid to be completed independently of the bidder's intention.

The shareholders of the target company who have accepted the offer can validly withdraw it if one of the provisions of this law has not been complied with by the bidder or a person acting in concert with the latter.

The withdrawal of the bid must be notified to the CSSF. The CSSF must publish this withdrawal at the latest on the day after receipt of such notification, at the cost of the bidder and in accordance with the procedures it will determine.

The above-mentioned procedure will slightly differ in a hostile bid. In fact, the general meeting of shareholders of the target company must grant authorisation to the board of the target company not to apply the restrictions rules and the breakthrough rules (*see Question 25*) no earlier than eighteen months before the bid was made public, when the bidder does not apply such rules (*article 9(5), Takeover Law*).

Moreover, when applying the restriction rules, the board of the target company must call a general meeting of shareholders to approve or confirm any decisions taken before the acceptance period which does not form part of the normal course of the company's business and the implementation of which may result in the frustration of the bid or for prior consent of the decisions taken during the acceptance period which may result in the frustration of the bid. The general meeting of the shareholders may be called by single notice published in the in the Mémorial and a Luxembourg newspaper at least two weeks prior to the meeting.

The Takeover Law does not provide provisions for the publication of documents defending against the bid. However, the target company must draw up and issue a public document setting out its opinion on the bid and the reasons on which it is based.

In cases where the CSSF is not the competent authority for regulating the bid, the offer document will be recognised in Luxembourg on the condition that it has been approved by a competent authority and translated into one of the recognised languages in Luxembourg (that is, Luxembourgish, German, French or English).

When the target company has its registered office in Luxembourg, the CSSF is not the competent authority that supervises takeover bids if the securities of that target company are not admitted to trading on a regulated market in Luxembourg (*article 4(2)(a), Takeover Law*).

Offer Conditions

15.What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

The Takeover Law does not regulate conditions in a takeover offer, except for mandatory offers.

A bid is mandatory when a natural or legal person, as a result of his or her own acquisition or the acquisition by persons acting in concert with him or her, obtains securities in a company, which, added to any existing holdings of those securities of his or hers and the holdings of those securities of persons acting in concert with him or her, directly or indirectly give him or her a specified percentage of voting rights in that company, giving him or her control of that company (*see Question 4*) (*article 5(1), Takeover Law*). Such a person is required to make a bid as a means of protecting the minority shareholders of that company.

For voluntary offers, a successful bid may be made conditional on reaching a specified minimum percentage of share capital or voting rights to be acquired.

There is no requirement that a certain percentage of the target's shares must be bid. The bidder must include in his or her offer document the maximum and the minimum percentages or quantities of securities which he or she undertakes to acquire (*article 6(3)(f), Takeover Law*).

Bid Documents

16. What documents do the target's shareholders receive on a recommended and hostile bid?

Typically, in case of a recommended or hostile bid, the target company's shareholders must receive the announcement to the market issued by the bidder indicating the main purpose of the bid, the offer document, the acceptance form prepared by the bidder and the target company's notice relating to the valuation of the bid approved by the target company's board of directors and containing all information necessary to assess the bid together with the opinion of the board of directors.

Under the Takeover Law, the offer document must contain at least the following mandatory information:

- The terms of the bid.
- The identity of the bidder, the type of company, the name and registered office of that company.
- The securities or, where appropriate, the class or classes of securities for which the bid is made.
- The consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid.
- The compensation offered for the rights which might be removed as a result of the breakthrough rule.
- The maximum and minimum percentages or quantities of securities which the bidder undertakes to acquire.
- Details of any existing holdings of the bidder, and of persons acting in concert with him or her, in the target company.
- All the conditions to which the bid is subject.
- The bidder's intentions with regard to the future business of the target company and, in so far as it is affected by the bid, the bidder company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment. In particular, it must also include the bidder's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business.
- The time allowed for acceptance of the bid.
- Where the consideration offered by the bidder includes securities of any kind, information concerning those securities.
- Information concerning the financing for the bid.
- The identity of persons acting in concert with the bidder or with the target company and, in the case of companies, their types, names, registered offices and relationships with the bidder and, where possible, with the target company.
- The national law which will govern contracts concluded between the bidder and the holders of the target company's securities as a result of the bid and the competent courts.

(*Article 6(3), Takeover Law*).

Employee Consultation

17. Are there any requirements for a target's board to inform or consult its employees about the offer?

Regardless a mandatory bid or a hostile bid, when the offer document is made public, the boards of directors of both the bidder and the target company, must communicate such offer document to the representatives of their respective employees or, where there are no such representatives, to the employees themselves (*articles 6(2) and 10(5), Takeover Law*).

The board of directors of the target company must draw up and make public a document setting out its opinion on the bid, and the arguments on which that opinion is based. This includes its 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, as well as their likely repercussions on employment and the location(s) of the company's place(s) of business as set out in the offer document.

Before drawing up its opinion, the target company's board of directors must consult with the company's employee representatives.

Mandatory Offers

18. Is there a requirement to make a mandatory offer?

The Takeover Law provides a mandatory offer threshold for target companies that have their registered office in Luxembourg. In accordance with the Takeover Law, when a natural or legal person, either acting alone or in concert with others, acquires securities in the target company that, added to any existing holdings of those securities, give him or her control of the target company, (that is, meaning 33.33% of the voting rights of the company), that person must make a mandatory offer in order to protect the minority shareholders of the company (*see Question 15*).

This requirement cannot be waived.

Consideration

19. What form of consideration is commonly offered on a public takeover?

The bidder can offer securities, cash or a combination of both as consideration. However, the bidder must offer cash consideration as an alternative in two situations:

- When the consideration offered does not consist of liquid securities admitted to trading on a regulated market.
- When the bidder or persons acting in concert with the bidder have acquired, during the 12 months preceding the mandatory offer, cash securities carrying 5% or more of the voting rights in the target company.

20. Are there any regulations that provide for a minimum level of consideration?

In accordance with the Takeover Law, all holders of securities of the same class of the target company must be treated equally during a bid. Furthermore, if a person acquires control of the target company, the other holders of securities must be protected.

In addition, a bidder which has acquired, directly or indirectly, by itself or acting in concert with others, control of the target company must make a mandatory offer to all holders of the target company. The acquisition of the same class of securities must be made at an equitable price.

The equitable price is the highest price paid for the same securities by the bidder, or by persons acting in concert with him or her, over a period of 12 months prior to the mandatory bid (*article 5(4), Takeover Law*). If, after the bid has been made public and before the offer closes for acceptance, the bidder or any person acting in concert with him or her purchases securities at a price higher than the offer price, the bidder must increase his or her offer so that it is not less than the highest price paid for the securities so acquired.

The offer document needs to contain information in respect of the consideration, including:

- The consideration offered for each security (or class of securities).
- In the case of a mandatory offer, the measures employed in determining it, with particulars determining precisely how that consideration is to be paid.
- Where the consideration offered by the bidder includes securities of any kind, information concerning those securities.

21. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

Foreign bidders are subject to the same rules as national bidders.

Post-bid

Compulsory Purchase of Minority Shareholdings

22. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

When following a bid a holder of the target's securities becomes a majority holder (that is, holding securities representing 95% or more of the share capital and 95% or more of the voting rights), it can force the remaining securities holders to sell the remaining securities to him or her at a fair price, when the bidder holds (squeeze-out).

As soon as a majority shareholder decides to exercise his or her right of mandatory squeeze-out, she or he must inform the CSSF in the first instance beforehand and commit to bringing this mandatory squeeze-out to completion.

The majority shareholder must then inform the company concerned thereof and make his or her decision public without delay in a manner ensuring fast access to this decision and on a non-discriminatory basis. The company concerned must ensure that the information is also communicated or sent to the holders of transferable securities covered by the mandatory squeeze-out and that are not admitted to trading on a regulated market in one or several EU member states through the usual channels of communication or by dispatch to these shareholders.

Within the month following the notification of the exercise of the right of mandatory squeeze-out to the CSSF and the company concerned thereof, the majority shareholder must communicate to the CSSF the proposed price and a valuation report of the securities and, where applicable, of the other transferable securities covered by the mandatory squeeze-out. The majority shareholder must then provide the company concerned with and make public without delay the proposed price with the valuation report in a manner ensuring fast access to this information and on a non-discriminatory basis.

This valuation report, the costs of which will be borne by the majority shareholder, must be drawn up by an expert of his or her choice, independent from any party concerned, and who does not have any conflict of interest.

Every remaining holder of securities or of other transferable securities concerned by the mandatory squeeze-out may oppose this mandatory squeeze-out project. In the absence of any opposition, the CSSF will accept the proposed price as fair price and inform the majority shareholder and the company concerned thereof. The price accepted by the CSSF as fair price must be published on its website.

In the event of opposition, the CSSF must decide on the price to be paid by the majority shareholder within three months from the expiry of the opposition deadline or, if the CSSF requires a second valuation report, within three months following receipt of this second report. The CSSF must notify its decision to the majority shareholder and to the company concerned. Following the CSSF's decision, the majority shareholder must, as soon as possible and in a manner ensuring fast access to such information and on a non-discriminatory basis, make public the information on the final date and payment conditions. The CSSF's decision must be published on its website.

Where the mandatory squeeze-out is under way, no sell-out procedure may be made before the squeeze-out procedure has been finalised.

The minority holders of the target company securities can demand that the bidder buys their remaining securities at a fair price, if, following a bid, the bidder acquires more than 90% of the securities of the target company (sell-out).

A holder of securities that decides to exercise his or her right of mandatory sell-out must inform the majority shareholder via registered letter. A copy of the letter must be sent to the CSSF and to the company concerned.

Within the month following the notification of the exercise of the right of mandatory sell-out to the CSSF and the company concerned, the majority shareholder must communicate to the CSSF the proposed price and a valuation report on the securities covered by the mandatory sell-out. The majority shareholder must then provide the company concerned with and make public without delay the fact that she or he received information relating to the mandatory sell-out and the proposed price with the valuation report in a manner ensuring fast access to this information and on a non-discriminatory basis.

The holder(s) of the remaining securities that exercised the right of mandatory sell-out, as well as any other holder of remaining securities that wishes to present his or her securities to the mandatory sell-out, may oppose the proposed price for the mandatory sell-out.

In the absence of any opposition, the CSSF will accept the proposed price as fair price and inform the majority shareholder and the company concerned thereof. The price accepted by the CSSF as fair price must be published on its website.

In the event of opposition, the CSSF must decide on the price to be paid by the majority shareholder within three months from the expiry of the opposition deadline or, if the CSSF requires a second valuation report, within three months following receipt of this second report. The CSSF will notify its decision to the majority shareholder and to the company concerned. Following the CSSF's decision, the majority shareholder must, as soon as possible and in a manner ensuring fast access to such information and on a non-discriminatory basis, make public the information on the final date and payment conditions.

Restrictions on New Offers

23. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

No provision in the Takeover Law prevents the bidder from launching a new offer if the bid is not successful.

De-listing

24. What action is required to de-list a company?

In accordance with the Rules and Regulations of the LuxSE, the issuer of securities must send a justified request to the LuxSE in order to de-list the company. When reviewing the request, the LuxSE takes into account the interests of the stock market, the investors and the issuer.

The LuxSE will set a date on which the suspension or withdrawal of securities will take effect. It may request the issuer to publish a press release to this effect and demand that the announcement be made sufficiently early so that a reasonable timeframe can be allowed for between the announcement and the date on which the suspension or withdrawal will take effect.

The Rules and Regulations of the LuxSE do not set out any additional procedure for carrying out a delisting.

Target's Response

25.What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Luxembourg has decided to implement the "*opt in*" system, meaning that companies which have their registered office in Luxembourg have the option, which is reversible, of submitting to the provisions of articles 10(2), 10(3) (board passivity rule) and article 12 (breakthrough rule) of the Takeover Law.

Such a decision may be taken by a general meeting of shareholders (with a two-third majority vote of those present or represented), in accordance with the rules applicable to amendment of the articles of association. The decision must be communicated to the CSSF and to all the supervisory authorities of EU member states in which the company's securities are admitted to trading on regulated markets or where such admission has been requested.

In accordance with the Takeover Law, when a bid is made public, any action by the board of directors of the target company to frustrate the bid must be authorised by the shareholders of the company (except in respect of researching alternative bidders).

Furthermore, under the Takeover Law, when an offer is made public, statutory provisions and shareholders agreements restricting the transfer of securities or voting have no effect on the bid. Following the announcement of a bid, if the bidder holds 75% of the share capital, it has the right to convene a general meeting of shareholders at short notice to modify the articles or reorganise the administration or management organs of the company.

Companies that are governed by Luxembourg law can apply both or either the board passivity and breakthrough rules. Under the board passivity rule, the board of the target company must call a general meeting of shareholders to approve or confirm any decisions taken before the acceptance period which does not form part of the normal course of the company's business and the implementation of which may result in the frustration of the bid or for prior consent of the decisions taken during the acceptance period which may result in the frustration of the bid. The general meeting of the shareholders may be called by a single notice published in the in the Mémorial and Luxembourg newspaper at least two weeks prior to the meeting. Under the breakthrough rule, any restrictions on the transfer of securities provided for in the articles of association of the target company may not apply vis-à-vis the bidder during the time allowed for acceptance of the bid.

These rules are weakened by the opt out provisions which allow companies who did not opt in to use defensive measures available, which include:

- Issuing shares subject to the relevant rules in the articles of association of the target company.
- Issuing warrants or stock options, convertible debt instruments, which are triggered and convert convertibles upon the occurrence of certain events set out in the underlying agreements or terms and conditions.
- Selling its assets (or some of them) to a third party (making the target company less attractive to a potential bidder).
- Seeking alternative bidders to frustrate the bid.

However, in not choosing to opt in, companies must submit themselves to other restrictions which limit their possible defences to a hostile takeover bid.

Eventually, the board of the target company must act in the interests of the company as a whole and must not deny its shareholders the opportunity to decide on the merits of the bid (*article 3(c), Takeover Law*).

Tax

26.Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

No transfer tax is payable in Luxembourg on the sale of shares.

Other Regulatory Restrictions

27. Are any other regulatory approvals required, such as in relation to merger control, foreign ownership or specific industries? If so, what is the effect of obtaining these approvals on the public offer timetable?

No additional regulatory approvals are required.

28. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no restrictions on repatriation of profits or exchange control rules for foreign companies.

29. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

In accordance with the Market Abuse Law, where persons who deal in securities of the parties to a bid are in possession of inside information, such information must be disclosed to the market without delay. Inside information must be posted and maintained on the issuer's website for a period of at least five years.

However, an issuer or emission allowance market participant may delay disclosure of inside information when:

- Disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant.
- The delay is not likely to mislead the public.
- It is able to ensure confidentiality.

Issuers must establish a list of all persons who have access directly or indirectly to inside information, including employees and persons performing other tasks, such as advisors, accountants and credit rating agencies. However, they must send this list to the CSSF only at the latter's request. The list must include precise information on each person (that is, identity and the reason for access to information) and indicate the date on which it was created and last updated.

Future Developments

30. What do you think will be the main factors affecting the public M&A market over the next 12 months, and how do you expect the market to develop?

The impact of the COVID-19 health crisis continues to be felt on the M&A activities in Luxembourg. Indeed, both domestic and cross-border deals are in decline. However, the next months can be marked by an opportunity for the public M&A market as M&A activities in Luxembourg are expected to bounce back in the second half of 2021 and the beginning of 2022. The pandemic highlighted new ways of structuring deals for companies and both bidders and target companies.

Also, in December 2020, the EU and China reached an agreement on investment that places an emphasis on providing access to the Chinese market for European investors and ensure fair treatment for European companies in the Chinese market. This agreement is believed to enable more cross-border deals between the EU and China and is likely to play a key role in helping the EU and the Luxembourg markets to recover partially from the pandemic.

Further, mergers using a special purpose acquisition company (SPAC) are also on the rise. SPACs, referred to as "shell companies", are publicly-traded investment vehicles that raise funds via an IPO to complete a targeted acquisition. They provide private companies with a unique way to access the public markets, while offering investors a way to co-invest side-by-side with best-in-class sponsors. Unlike a traditional investment fund, SPACs do not impose any restrictions on the investor's profile since any individual or legal entity with access to the stock market can buy shares. This alternative to the traditional M&A becomes more popular in Europe and particularly in Luxembourg, and can be a faster way for a target company to the public market.

Reform

31. Are there any proposals for the reform of takeover regulation in your jurisdiction?

There are currently no reforms underway in respect of public mergers and acquisitions in Luxembourg.

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