Private M&A 2022

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LEXOLOGY®
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2017
Fifth edition
ISBN 978-1-83862-702-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Davis Polk & Wardwell LLP

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Latvia and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
September 2021

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Luxembourg

Gérald Origer, Claire-Marie Darnand and Michaël Meylan

Stibbe

STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

The acquisition and disposal of privately owned companies are usually effected by way of the execution of a share purchase agreement between the seller and the buyer in the presence of the company whose shares are being sold (for formality purposes).

In most cases, a typical private equity transaction starts with a bidding process whereby the sellers (which are either the historical shareholders of the sold company, or a private equity house) require a financial adviser to organise an auction. Auctions typically work as follows.

Due diligence

The legal part of the deal sees the seller organising a vendor due diligence (VDD), which is accessible to the bidders (usually there are between three and six contenders) and their respective legal and tax advisers. The bidders have a limited period to review the VDD and the supporting documents, which are available in a virtual data room. The outcome of their review is typically summarised in a due diligence report on a 'key issues only' basis (a red flag report).

Within the framework of their review, questions can be raised to the seller's counsel by the buyer's counsel. Occasionally, an expert session is organised to allow the buyer's counsel (legal and financial) to address their questions directly to the management of the target company. The due diligence period usually lasts three to four weeks (such period can be longer if the company to be purchased belongs to a group that operates in multiple jurisdictions, for instance).

In Luxembourg, the entities under review are mostly holding companies not carrying industrial or commercial activities locally; hence, the due diligence is often limited to corporate, finance and tax aspects (and possibly, as the case may be, labour law, IP or real estate aspects). To limit due diligence costs, it is increasingly common to shorten the time to conduct the due diligence (one or two weeks). In such a case, the report is simplified (red flag report only, with the materiality threshold fixed at a certain amount to limit the issues raised).

Offer

Subject to the due diligence being satisfactory to the buyer, the buyer will submit a binding offer to the seller. If the offer is acceptable, the process eliminates some of the bidders, and usually the process continues with two or a maximum of three bidders.

Review of the transaction documents

The acceptance of the proposed offer by the seller opens a second phase where the seller provides the potential buyers with the transaction documents. Usually, this includes the share purchase agreement and, as the case may be, the shareholders' agreement if the seller intends to keep a stake in the target company or the management is reinvesting as well). Legal counsel to the buyers provide their comments on the documentation (such comments should remain as limited as possible in order to be elected at the end of the process). This phase usually lasts two to three weeks.

Signing

At the end of the process, the transaction documents are executed with the elected buyer. As Luxembourg is a key jurisdiction used for the structuring of investments, the buyer often incorporates a special purpose vehicle in Luxembourg prior to signing, such vehicle being the actual buyer of the target company. The transaction documents usually set a date for the closing of the transaction (a couple of months after signing). The period between signing and closing is usually used to clear antitrust or regulatory issues, or both.

Closing

At the end of the above-mentioned period, the final transaction documents are executed, the purchase price is paid and the transfer formalities are performed. The transaction documents usually consist of a share purchase agreement and, as the case may be, a shareholders' agreement (if the management is involved in the process). Specific agreements such as a management incentive plan can be executed as well. It is also the case that financial documents such as bank loans and relevant collateral agreements are executed at closing if bank financing is necessary for the transaction. The legal documentation necessary to acquire a Luxembourg target is executed under private seal and does not require any notarisation or apostille.

Legal regulation

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Commercial companies are governed by the Law of 10 August 1915, as amended from time to time (the Law). The transfer of instruments issued by commercial companies is set out in various provisions of the Law. Relevant articles of the Luxembourg Civil Code are also applicable to private equity transactions.

The Law does not require Luxembourg law to govern the transaction documents and, in practice, given that Luxembourg is a throughout jurisdiction (ie, a jurisdiction through which the investment or the purchase is made by way of an investment or acquisition vehicle), the transaction documents are usually governed by foreign laws (mostly

English or US law). In such case, the transaction documents are reviewed by Luxembourg counsel to ensure that the terms thereof comply with the Luxembourg mandatory rules and, when the target is a Luxembourg entity, with the Luxembourg transfer formalities.

Legal title

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

A buyer of instruments issued by a company (or of assets) will typically acquire the full property of said instruments (or assets) by operation of law. According to the general principles of contracts, a sale is binding (and the property is transferred) upon the agreement between the buyer and the seller on the sold assets and on the purchase price. The transfer formalities (update of the share register, registration with the register of companies as the case may be) exist only for the purpose of enforceability towards third parties.

Luxembourg has several pieces of legislation allowing, in various manners, the recognition of a separation of legal and beneficial ownership (similar to trusts, private foundations or *fiducie*). In addition, it is possible to divide the ownership of a share (or of an asset, mostly real estate) between the bare ownership and the usufruct. The holder of the bare ownership remains the actual legal owner, whereas the owner of the usufruct benefits from the revenues generated by the share (dividends) or asset (leases, for instance).

Multiple sellers

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

Normally each seller must agree to the sale of its shares. In practice, minority shareholders grant powers of attorney to the majority shareholders to represent them for the purpose of the transaction (to avoid multiple signatories for the transaction documents). In private equity transactions, when there are minority shareholders, they are usually subject to drag-along provisions set out in a shareholders' agreement or the company's articles of association, or both.

According to article 710-12 of the Law, if the shares of a private limited liability company are sold to a third party, the existing shareholders must approve the new shareholder by a majority of 75 per cent of the shares in issue (or 50 per cent if the articles of association of the company provide so).

The Law does not allow the squeezing-out of reluctant (minority) sellers, unless so agreed in an agreement or the articles of association, or both (or except in the particular case of takeover bids, which are governed by the Luxembourg law of 19 May 2006, which is rarely used in Luxembourg).

Exclusion of assets or liabilities

5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

There is a general rule of contractual freedom allowing the buyer and the seller to define the sold assets and liabilities and the excluded assets and liabilities.

Notifications or approvals, or both can be necessary depending on the assets and liabilities sold (for instance, creditor approval in the case of assignment of a contract).

Consents

6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

There are no regulations forbidding foreign ownership of companies, business or assets as a matter of principle. However, a stringent regulation, meant to prevent money laundering and the financing of criminal activities (such as terrorism), applies to professionals involved in private equity transactions (banks, notaries, legal and tax advisers, etc). All professionals are required by law to identify the ultimate beneficiaries of a transaction and the origin of the funds used.

Regarding internal governmental regulations, internal merger control does not exist in Luxembourg. Hence, no governmental authorisation is to be sought prior to pursuing a transaction likely to have effects on competition on the Luxembourg market. EU regulations will apply if the relevant thresholds are met.

Real estate transactions can be subject to expropriation for national interest considerations.

If the sold entities are vehicles regulated by the Luxembourg Commission of Surveillance of the Financial Sector (CSSF), notifications or approvals, or both might be necessary.

7 Are any other third-party consents commonly required?

Shareholders' consent can be necessary either by effect of the law (if the shares are transferred to a third party and issued by a private limited liability company) or by effect of contractual arrangements (such as shareholders' agreements).

The assignment of contracts or debts usually requires the approval of the other party or the creditor.

If the sold assets are encumbered, the consent of the beneficiary of the security will be required.

Change of control provisions are usually included in bank loans, requiring the lenders' consent prior to transferring the financed company or asset.

Regulatory filings

8 Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

The transfer of shares of a private limited liability company will require, in addition to the update of the shareholders' register, a filing with the

Luxembourg Register of Commerce and Companies. No fees are due in that respect.

In cases where the sold entities are regulated by the CSSF, specific regulatory notifications or filings may be necessary.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

In addition to lawyers, it is very common that the buyer or the seller, or both appoint financial advisers and accountants. Where the lawyer advises on the legal terms of the transaction, the financial adviser and the accountant will focus on accounting matters and on the financial terms of the transaction (mostly pricing and economic merits). Accountants belonging to the Big Four usually also provide tax advice and the tax structuring of the transaction.

Professional advisers use their own terms of engagement agreed upon with the buyer or seller. The fees will depend on the value of the deal and the complexity of the transaction (eg, if it involves multiple jurisdictions).

Duty of good faith

10 Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Luxembourg contractual law contains a general provision requiring the execution of contracts in good faith. There is, however, no obligation to negotiate in good faith. Nevertheless, in practice, the parties act in good faith even during the pre-contractual period. Their liability can be sought if, for instance, they end contractual negotiations without justification.

The officers of the parties (managers and directors) have a fiduciary duty requiring them to exercise their mandates in good faith and for the purpose of servicing the object and corporate interest of the company.

Documentation

11 What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

A share deal (which is most commonly used in private M&A transactions) will usually require the entry into the following:

- a share purchase agreement, the provisions of which will include a description of the sold securities (eg, shares, bonds or other similar instruments such as preferred equity certificates, warrants), the purchase price, the payment modalities, the representations and warranties of both parties, and all the customary side provisions (eg, non-competition, key man or confidentiality);
- a shareholders' agreement, should the acquisition not consist of 100 per cent of the share capital, or in the case of a co-investment or management investment. Such a shareholders' agreement will contain clauses covering the governance of the target (appointment of the officers and list of reserved matters requiring a qualified majority or shareholders' approval) and transfer restrictions on the shares (eg, lock-up period, drag-along and tag-along provisions); and
- a management-incentive plan in the case of investment of the management, which will contain similar provisions to a shareholders' agreement, as well as more specific ones (vesting, good leaver and bad leaver provisions, etc).

A transaction bearing on the business or assets will require a sale and purchase agreement that in form and content will be similar to a share purchase agreement, except if the assets consist of real estate, in which case a notarial deed will be necessary.

12 Are there formalities for executing documents? Are digital signatures enforceable?

Contracts regarding instruments issued by a Luxembourg company are executed under private seal. The law requires that the contract be executed in as many originals as there are parties to the contract (each party being supposed to receive one original). Luxembourg law allows the execution of contracts in counterparts. When entered into by companies, the contracts must be executed in their behalf by one or several authorised representatives.

When real estate is transferred, a notarial deed is required.

Digital signatures are valid and enforceable. They are becoming commonly used in private M&A transactions, given that organising physical closings since the outbreak of the covid-19 pandemic has proven to be difficult.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

Luxembourg companies are often the target company of a transaction (ie, the company that will be purchased), and they have mostly holding activities, which limits the scope of the due diligence to a general corporate review.

The scope of the due diligence typically includes legal, tax and financing (other topics, such as labour law, IP or real estate can be considered, but not systematically). The objective of the due diligence is to confirm the ownership of the company (or business or asset), general compliance with the rules applicable to the company and outstanding financial obligations (if any), and to identify any hurdle to a share transfer.

Vendor due diligence reports are often provided to the prospective buyer. The reliance on such reports is limited, as the buyer will always require its advisers to conduct a critical review of the vendor due diligence (VDD) and the drafting of a due diligence report based both on the VDD and on the material available in the virtual data room.

Liability for statements

14 Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller can be held liable for pre-contractual misleading statements. A misleading statement (or the failure to deliver known adverse information) can be the basis of tort liability or allow a claim for the nullity of the contract (under certain conditions). Such liability can be limited, but cannot be entirely excluded (especially in the case of fraud).

Publicly available information

15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Most Luxembourg companies are required to file their information at the Luxembourg Register of Commerce and Companies (RCS) and at the electronic legal gazette, which is publicly available online.

The following information will be available for a potential buyer:

- the articles of incorporation and any changes affecting them;
- the annual accounts;
- the details of the board of directors and managers, and the signatory powers prevailing (eg, single or joint signature); and
- the details of shareholding of the company for private limited liability companies.

In view of a transaction, a buyer will customarily require an RCS excerpt confirming the existence of the company at the date thereof and a negative certificate issued by the RCS pertaining to the company, stating that on the day immediately prior to the date of issuance of the negative certificate there were no records at the RCS of any court order regarding, among other things, a bankruptcy adjudication against the company, a reprieve from payment, controlled management or composition with creditors.

On the contrary, there are no public records revealing any encumbrances on the shares. These will only be registered in the shareholders' register of the company, which is not publicly available and must be kept at the registered office of the company.

The Luxembourg administration keeps records of mortgages taken on real estate properties, and such information is publicly available. National IP rights (patents, brands, etc) are registered at the Luxembourg IP office, whose records are also publicly available.

Impact of deemed or actual knowledge

16 | What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

If a buyer has previous knowledge of facts relating to a claim, it will either refrain from entering into the transaction or will use such knowledge to enhance its contractual position. Should it not use this knowledge prior to the transaction but rather after, it will be a matter of showing proof of the prior knowledge to preclude the buyer from being successful in its claim. Contractual clauses of limitation of liability could preclude the parties from using information they had previous knowledge about to file a complaint.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

17 | How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

The pricing of a transaction is something of which Luxembourg practitioners usually do not have a grasp as they act as local advisers rather than lead advisers (and in any instance, pricing is determined by financial advisers and accountants rather than by legal counsels). That being said, there is a strong tendency towards locked-box structures. Deals where the price will be subject to adjustment between signing and closing on the basis of closing accounts that once were the majority now tend to be less frequent. Private equity funds prefer using locked-box pricing for the sake of simplicity and business certainty (no further discussion on the price after signing).

Form of consideration

18 | What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

The usual consideration will be cash; however, for legal and tax structuring reasons, it is common to also have consideration paid in kind (shares or a vendor note).

The general rule governing contracts in Luxembourg is the freedom of the parties, a valid contract being deemed as the law prevailing between the parties. Therefore, if all the parties agree, there is no obligation to pay multiple sellers the same consideration.

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

Given that there is a strong tendency for use of the locked-box mechanism, earn-outs, which were very common a few years ago, are now used to a lesser extent but have not completely disappeared and are still used if they are relevant in a given transaction. Deposits and escrows are used whenever the particulars of a transaction so require (in particular, if there is uncertainty about the scope of a claim, for instance, warranty for the full payment of the purchase price, in cases where the latter is paid in several instalments).

Financing

20 | How are acquisitions financed? How is assurance provided that financing will be available?

Depending on the size of the transaction, acquisitions can be either fully financed on a buyer's equity (for small transactions) or financed with a mix of a buyer's equity and a bank loan. Given that money is cheap at the moment, bank financing is very common, and besides 'classical' credit, buyers tend to borrow from alternative sources (lending funds and institutional investors). High-yield financing and bond issuance can also be used as financing tools.

In leveraged buyouts by private equity firms, comfort on financing is usually granted through an equity commitment letter provided by the buyer to the seller. In the equity commitment letter, the fund commits to the special purpose vehicle that it will invest equity in the vehicle at the closing of the transaction. The equity commitment letter is usually delivered (alongside the debt commitment letter) to the seller or target company when the acquisition agreement is executed to serve as evidence that the acquisition vehicle will have sufficient monies to finance the underlying acquisition.

Escrow accounts can also be used to provide alternative or additional guarantees that sufficient financing will be made available.

Limitations on financing structure

21 | Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

Under Luxembourg law, it is in principle prohibited for a public limited liability company or a corporate partnership limited by shares to provide financial assistance to a buyer for the purpose of acquiring the former's shares (there are some exceptions to such rule). Although the Law of 10 August 1915, as amended from time to time (the Law) does not explicitly apply such regulation to private limited liability companies, its provisions not only refer to shares (actions) but also to corporate units (*parts sociales*) of private limited liability companies; therefore, practitioners had applied this rule in general by analogy to private limited liability companies (although this position is subject to debate given that the

financial assistance prohibition provides for criminal liability, and such liability must, in principle, be strictly interpreted). Financial assistance is broadly defined, and includes the direct or indirect advancing of funds, granting of loans or provision of security by a company with a view to the acquisition of its own shares by a third party.

The Law of 6 August 2021 clarified the situation by confirming that the reference to corporate units in the context of financial assistance was a clerical error; thus, private limited liability companies may, directly or indirectly, provide financial assistance to a buyer for the purpose of acquiring the former's shares, to the extent the operation falls within their corporate interest.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Closing conditions are obligations that are to be complied with between signing and closing. They usually refer to antitrust or regulatory obligations that have to be cleared prior to the consummation of the transaction. Such conditions are customary, and there is a consensus between buyers and sellers in that respect. We have recently seen a trend towards 'hell or high water' provisions according to which the buyer takes on all of the antitrust risk in a transaction.

Buyers can seek to add additional conditions, such as prior restructuring of the target. This will be the case, for instance, if some parts of the target group are not in the scope of the transaction and must be carved out prior to closing. Additional conditions can also derive from the outcome of the due diligence (if, for instance, additional information is to be received with regard to a pending claim, or if the dismissal of certain employees or certain officers, or both, is requested).

The buyer may seek conditions regarding the accuracy of the main features of the purchased entity or business (relating to a seller's title, capacity and authority) and business warranties at completion, and the absence of any material adverse change since entering into the transaction.

23 What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

In civil law jurisdictions, there is a major difference between the obligation of a party to do its best to satisfy an obligation and the obligation to reach a result. The parties to private M&A deals are supposed to use their best endeavours or make their best efforts to satisfy the closing conditions. They do not bear an obligation of result but they must demonstrate, if they did not comply with one of the closing conditions, that they did their best to comply with the said obligation.

The strength of the obligation can be adapted by contract, but in any instance, a buyer cannot bear an obligation to reach a result on an obligation on which it has not an absolute grasp (antitrust clearance, for instance, as such decision is taken by an authority independent from the buyer).

Pre-closing covenants

24 Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Parties to a contract usually agree on pre-closing covenants to drive the seller's behaviour during the period between signing and closing.

The objective is to ensure that the seller will operate the company's business in the ordinary course of business.

This will include:

- a prohibition on modifying the share capital (notably through the issuance of new shares or new titles, or both, granting access to the share capital) or to grant securities;
- a prohibition on winding-up, merging or demerging the target entity;
- a prohibition or limitation on distributing dividends or other sums to shareholders;
- a prohibition on selling or purchasing assets, and on entering into contracts other than in the ordinary course of business (a monetary threshold can be agreed upon);
- a prohibition or limitation on hiring new employees (a salary threshold can be specified in that respect);
- an obligation to give the buyer access to the company's accounts or to provide the buyer with reports on the activities of the company during the intermediary period, or both;
- an obligation to inform the buyer regularly (monthly, for instance) about the business and operations of the target company; and
- a prohibition or limitation on initiating judicial proceedings.

All the above prohibitions and limitations can be contractually submitted to the buyer's prior approval in order to be pursued by the seller.

An infringement of the pre-closing covenants will trigger the possibility to seek the contractual liability of the seller (or, as the case may be, to exit the transaction). Such a claim will typically result in damages granted to the buyer. If appropriate, specific performance can be court-ordered as well (but such remedy is less common as it is not always adapted to the contractual fault).

Termination rights

25 Can the parties typically terminate the transaction after signing? If so, in what circumstances?

This matter is purely contractual. Usually, contracts provide for a period within which the closing conditions must be satisfied. Once this period elapses, the contract will reach the 'long-stop date', and if the closing conditions are not satisfied, the contract can be terminated.

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

It is possible (although not customary) to provide for break-up fees in the contractual documentation. Should this be the case, such break-up fees can be revised by a Luxembourg judge if he or she deems the amount to be excessive (it is one of the few topics on which the judge can supersede the will of the parties). Such restriction would be that break-up fees must in any case be agreed on in respect of the company's interest.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

It is common for a seller to give warranties to the buyer. The warranties granted include both warranties about the seller and warranties about the target company. The usual warranties are the following:

- the due organisation and valid existence of the seller under the laws of its country of incorporation;
- the power to execute, deliver and perform its obligations under the transaction documents;
- the fact that the transaction documents constitute, when executed, legal, valid and binding obligations of the seller in accordance with its terms;
- the due organisation and valid existence of the target company under the laws of its country of incorporation;
- that the sold shares are validly issued and fully paid up;
- the ownership of the sold shares and the absence of encumbrances borne by the latter;
- the ownership of the assets of the target company;
- the compliance of the accounts with the relevant accounting standards;
- the compliance with the taxation applicable to the target company; and
- the ownership of intellectual property rights, if any.

Warranties can be further developed depending on the scope of the transaction (a target company belonging to a group in multiple jurisdictions) and on the nature of the business.

Representations and warranties are usually included in the same clause of the transaction documents and follow the same legal regime. Indemnities are remedies agreed upon between the parties and the amount is not supposed to be disputed (as it would be in a case of a claim for a breach of representations or warranties).

Limitations on liability

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

There are many ways to limit a seller's liability. It is possible to carve out any and all claims that would arise from matters included in a disclosure letter (if any) or the disclosed information during the due diligence process. They constitute an exclusion of liability.

It is also possible to limit the amount of the seller's liability where such liability would only be triggered as from certain thresholds (claims of a minimal amount shall not trigger liability, except if in aggregate they reach an amount agreed upon by the parties). Once the threshold is reached, the liability can start either from the first euro or for any liability above the threshold.

It is also usual to cap the limitation to a certain amount (which will vary depending on the transaction amount) and to limit the liability in time (usually one year for general liabilities, and sometimes the time for tax liabilities to elapse for tax matters, usually three years). It is, however, held that one may not exclude or limit any liability arising out of a criminal offence or wilful misconduct.

There is a process to be followed by the buyer to trigger the liability: the breaches must be notified in a certain way and within a certain time frame.

Transaction insurance

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Putting in place an insurance to cover warranties and indemnities claims is quite common. The aim is to guarantee the losses in cases of breaches of warranty or if a contractual indemnity is to be paid.

The insurance policy will work with exclusions as well: it will not cover, inter alia, fines, criminal penalties or fraud.

Costs will depend on the transaction at stake and on the particulars of the insured representations and warranties.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Post-closing covenants are customary and are mostly meant to prevent the seller from establishing a new business that would directly compete with the sold business.

The wording of such obligations is usually broad to cover any attempt of the seller, directly or indirectly, acting alone or jointly with others, to acquire, establish or operate a business that competes with the sold business. It is customary to include a provision forbidding the seller to attract employees of the target company.

Such obligations are usually limited in time (one to two years) and geographically (depending on the size and nature of the business or company sold).

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

The Luxembourg registration duties law specifically provides that shares of a Luxembourg company are transferred without proportional registration duties. However, the transfer for consideration of shares in a partnership owning Luxembourg real estate is subject to 6 per cent registration duties.

Proportional registration duties are due on the transfer of movable or immovable goods included in the scope of the registration duties law. The applicable rates range from 0.01 to 14.4 per cent depending on the transaction and the nature of the underlying asset.

A specific fixed registration duty of €75 is levied on:

- the incorporation of a civil or commercial company that has its statutory seat or central administration in Luxembourg;
- any amendment to the articles of association of a civil or commercial company with its statutory seat or central administration in Luxembourg; and
- the transfer to Luxembourg of the statutory seat or central administration of a civil or commercial company.

The buyer is, in principle, the person liable to tax for registration duties where applicable.

Corporate and other taxes

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Capital gains realised by a Luxembourg company on shares, business or assets are taxed as ordinary income.

Capital gains realised by a Luxembourg company on the disposal of a shareholding may benefit from the participation exemption regime, provided the Luxembourg fully taxable collective entity holds, for an uninterrupted period of at least 12 months, a participation representing at least 10 per cent of the nominal paid-up share capital of the disposed entity, or a participation having an acquisition price of at least €6 million. In turn, the subsidiary must be a company resident in a member state of the European Union (as defined in article 2 of EU Directive 2015/121) or a non-resident limited company subject, in its country of residence, to a tax corresponding to corporate income tax that is computed on a taxable basis similar to the Luxembourg tax basis.

The Luxembourg transferring company is the person liable to tax for Luxembourg tax purposes upon disposal of shares in a company, business or assets. On certain assets, a rollover may be applied. In the case of a rollover to move to a new acquisition structure, on a case-by-case basis, several strategies can be implemented (eg, neutral share-for-share exchange).

In the case of a non-Luxembourg-resident shareholder selling the shares of a Luxembourg company, the capital gains arising from the alienation of a substantial participation interest (ie, of more than 10 per cent) in the Luxembourg company should only be taxable if the capital gains are realised within a period of six months following the acquisition of the shares. Most of the tax treaties concluded by Luxembourg prevent Luxembourg (source) taxation.

Finally, the transfer of shares or of a totality of assets or part thereof (provided it can be considered as a going concern) falls outside the scope of Luxembourg VAT.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

According to Luxembourg labour law, the employees of the target company are automatically transferred in the case of the sale of the company they work for. The employees will keep their existing rights. The transfer rule also applies to temporary workers.

The partial sale of an activity will follow the same regime. On the contrary, in cases where only assets are sold, this will not constitute a transaction triggering the transfer of the employees.

Notification and consultation of employees

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

In the case of a transfer of an undertaking or the partial sale of an activity, the buyer and seller must inform the representatives of the employees (or the employees if there are no representatives of the employees in the target company). Such information will consist of:

- the date of the transfer;
- the reason for the transfer;
- the consequences of the transfer (legal, economic and social) for the employees; and
- the measures envisaged toward employees.

The seller or the buyer, when considering measures with respect to their respective employees, shall consult the legal representatives of their respective employees in due course to reach an agreement.

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Transfer of pensions and benefits

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

The employees' rights (including pension rights either derived from the contract or from the collective labour agreement) are maintained by virtue of the transfer. The transfer of the contract is automatic. The only requirement is that the seller must notify the buyer of all the rights and obligations that will be transferred owing to the transaction (a copy of such notification must be provided to the labour administration). The absence of notification will, however, not affect the employees, and will have no impact on the transfer of contracts (and rights attached to such contracts) for the employees.

UPDATE AND TRENDS

Key developments

36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

Regarding legal developments, recent legislation has brought clarification in respect of financial assistance. The Law of 10 August 1915, as amended from time to time (the Law), prohibits in principle public limited liability companies and corporate partnerships limited by shares from providing financial assistance to a buyer for the purpose of acquiring the former's shares (there are some exceptions to this rule).

Although the Law does not explicitly apply the regulation to private limited liability companies, its provisions not only refer to

shares (actions) but also to corporate units (*parts sociales*) of private limited liability companies; therefore, practitioners had applied this rule in general by analogy to private limited liability companies (although this position was subject to debate, given that the financial assistance prohibition provides for criminal liability, and such liability must, in principle, be strictly interpreted).

The Law of 6 August 2021, which entered Into force on 16 August 2021, clarified the situation by confirming that the reference to corporate units in the context of financial assistance was a clerical error; thus, private limited liability companies may, directly or indirectly, provide financial assistance to a buyer for the purpose of acquiring the former's shares, to the extent the operation falls within their corporate interest.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

A Grand-Ducal Regulation dated 18 March 2020 declared a state of emergency in Luxembourg, and many derived legislations applicable to Luxembourg companies have been adopted. The aim of this new set of regulations is to ease the rules applicable to Luxembourg companies.

The Grand-Ducal Regulation dated 20 March 2020 has simplified the decision-making process in Luxembourg companies to address the impossibility for managers or shareholders to be physically present to attend board or shareholders meetings: notwithstanding any contrary provisions in the articles of association, shareholders' and managers' or directors' meetings could be held by phone or video conference.

The Law of 22 May 2020 applicable to Luxembourg companies, under certain conditions, provided a three-month deadline extension for convening annual general meetings (which may be convened within nine months of the end of their financial year) and for filing and disclosing annual accounts, consolidated accounts and related reports.

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ISBN 978-1-83862-702-7