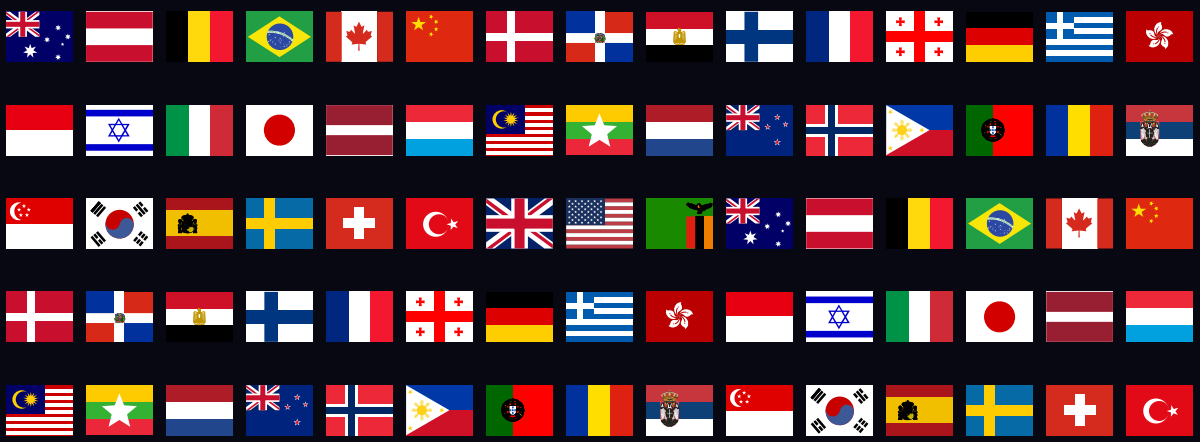
PRIVATE M&A

Luxembourg



LEXOLOGY
Getting The Deal Through

Consulting editor
Davis Polk & Wardwell LLP

Private M&A

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Quick reference guide enabling side-by-side comparison of local insights, including structure and process, legal regulation, consents and filings; advisers, negotiation and documentation; due diligence and disclosure; pricing, consideration and financing; conditions, pre-closing covenants and termination rights; representations, warranties, indemnities and post-closing covenants; tax considerations; employees, pensions and benefits; and recent trends.

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

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 divestment of privately owned companies, businesses or assets are usually effected by way of the execution of a transfer agreement under a private seal. In the case of a shares deal, it would be customary for the relevant agreement to be entered into in the presence of the divested entity to render the relevant operation immediately enforceable towards the divested entity.

A standard acquisition, be it a share deal or an asset deal, will be primarily structured around a bidding process organised by a financial adviser at the request of the seller. The process typically includes the following steps.

Step one: due diligence

Further to the execution of the customary non-disclosure agreements, the initial step will normally involve the organisation of a vendor due diligence by the seller on the basis of a virtual data room made accessible to the bidders (usually there are between three and six contenders) and their respective legal and tax advisers. The bidders have a limited time to review the information provided, ask questions and request specific documents.

Occasionally, an expert session may be organised to allow the buyer's counsel (legal and financial) to address their questions directly to the management of the target company. This due diligence usually lasts three to four weeks, but the exact duration will mainly depend on the complexity and the size of the target group. The outcome of their review will be summarised in a due diligence report on a 'key issues only' basis (a red flag report).

In Luxembourg, the entities under review are mostly holding companies not carrying industrial or commercial activities locally. Consequently, the due diligence process is frequently 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 has become increasingly common to shorten the time to conduct the due diligence (to one or two weeks). In such a case, the report is simplified (red flag report only, with a relatively high materiality threshold to limit the issues raised).

Step two: offer

Subject to the due diligence being satisfactory to the relevant bidders, each candidate will submit a binding offer to the seller. Provided that several offers appear acceptable to the bidder, the process will usually continue with two or maximum three bidders.

Step three: review of the transaction documents

Following the selection of the most adequate candidates, the seller will provide the potential buyers with the relevant acquisition document, thus triggering the next phase of the acquisition process. The documentation will normally comprise an acquisition agreement and often a shareholders' agreement if the seller intends to keep a stake in the target company or if a rollover is contemplated from the start.

Each party's advisers will then proceed with the negotiation of the documentation for usually two to three weeks. This

phase will culminate with the selection of the final bidder on the basis of both the acquisition price and the requested terms and conditions.

Step four: signing

Once in agreed form, the transaction documents will be executed by the relevant parties, usually under a private seal. 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, the 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.

Step five: closing

Upon satisfaction or waiver of all relevant conditions precedent, completion will take place, and the final completion documentation will be executed. The final purchase price is paid, and the relevant transfer formalities are performed.

The relevant completion documents usually comprise a transfer notice or completion notice and may, as the case may be, include a shareholders' agreement (eg, in the case of a concomitant rollover). Specific arrangements, such as a management incentive plan, are also quite frequent and will typically be implemented at this stage.

If external financing is required, the relevant documentation (eg, bank loans and relevant collateral agreements) will be executed at closing, to the extent it has not yet been implemented at signing. The legal documentation will typically be executed under private seal and does not require any notarisation or apostille.

Law stated - 23 August 2022

Legal regulation

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?

Private acquisitions, as well as disposals, are essentially regulated by the Law of 10 August 1915 on commercial companies , as amended from time to time. Certain relevant articles of the Civil Code (eg, general provisions governing sales or transfers of claims) will also apply.

It is quite common for the transaction documents to be governed by foreign laws (mostly English or US law), even though mandatory Luxembourg rules and compulsory transfer formalities will, in any case, remain applicable.

Law stated - 23 August 2022

Legal title

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 those 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 (eg, dividend) or asset (eg, rent).

Law stated - 23 August 2022

Multiple sellers

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?

Under normal conditions and in the absence of any contractual arrangement to the contrary, each seller must agree to the sale of its shares. To streamline the acquisition process, minority shareholders would typically grant a specific power of attorney to the majority shareholder to represent them for the purpose of the transaction or the shares would be regrouped within a separate special purpose vehicle to simplify the acquisition process.

There is no direct private squeeze-out procedure under Luxembourg law, but alternative strategies are possible. As an illustration, in private equity transactions, it would be customary for minority shareholders to be subject to specific drag-along provisions that are set out in a shareholders' agreement and that allow the majority investor to squeeze out reluctant minority investors.

A specific squeeze-out procedure exists in the particular case of public takeover bids governed by Law of 19 May 2006 transposing Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (rarely used in Luxembourg).

Law stated - 23 August 2022

Exclusion of assets or liabilities

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. The transfer of certain assets (eg, real estate or IP rights) may be subject to certain formalities, and notifications or approvals can be necessary (eg, creditor approval in the case of a debt transfer).

Law stated - 23 August 2022

Consents

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 (eg, banks, notaries, legal and tax advisers). 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 government authorisation is to be sought prior to pursuing a transaction that is likely to have effects on competition in 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.

Law stated - 23 August 2022

Are any other third-party consents commonly required?

Shareholders' consent can be necessary either by effect of the law (if the shares issued by a private limited liability company are transferred to a third party) 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.

Law stated - 23 August 2022

Regulatory filings

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 and a filing with the Luxembourg Register of Beneficial Owners. 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.

Law stated - 23 August 2022

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

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 for the buyer or the seller, or both, to 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).

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 multiple jurisdictions are involved).

Law stated - 23 August 2022

Duty of good faith

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

Even in the absence of any formal agreement, parties have a general duty to negotiate in good faith. Any failure to do so may constitute a culpa in contrahendo , which entails liability in tort. The duty does not prevent parties from negotiating while engaging in parallel discussions with other candidates.

Under the fiduciary duty, while parties may, in principle, always stop negotiations, they may not abusively do so. In other words, parties may only interrupt negotiations in good faith and for legitimate reasons only.

Law stated - 23 August 2022

Documentation

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, but also bonds or beneficiary shares), 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 buyout. Such agreement will contain clauses covering the governance of the target (appointment of the officers and a 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, which will contain similar provisions to a shareholders' agreement, as well as more specific ones (eg, vesting scheme, and good or bad leaver provisions) and may be combined with other ancillary contractual documents (eg, call option agreement).

The acquisition of a business or assets will normally only require a sale and purchase agreement that in form and content will be similar to an equity purchase agreement, except if the assets consist of real estate, in which case a notarial deed will be necessary. In exceptional circumstances, such operation may also require a shareholders' agreement (eg, corporate joint venture incorporated in furtherance of the acquisition of a certain asset or business) and a management incentive plan (eg, the need to replace the seller's existing incentive plan for the employees transferred with the relevant business unit).

Law stated - 23 August 2022

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

Contracts regarding instruments issued by a Luxembourg company are executed under private seal. The contract is to 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 on 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.

Law stated - 23 August 2022

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

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 mostly have holding activities entailing that the relevant due diligence exercise will typically be limited to legal, tax and financing (other topics, such as labour law, intellectual property 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 common but not systematic. As the reliability of the reports is necessarily limited, prospective buyers will always require their advisers to conduct an additional due diligence exercise based both on the vendor's report and documents provided in a virtual data room.

Law stated - 23 August 2022

Liability for statements

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 strict conditions). Such liability can be limited but cannot be entirely excluded (especially in the case of fraud).

Law stated - 23 August 2022

Publicly available information

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 certain information with the Luxembourg Register of Commerce and Companies, which will be publicly available online, notably through the electronic legal gazette.

The following public information will typically be available for a potential buyer:

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

In addition, some limited information on the ultimate beneficial owners of the involved entities will also be available online at the Luxembourg Register of Beneficial Owners.

Regarding a transaction, a buyer will usually require from the Luxembourg Register of Commerce and Companies:

- an excerpt from the Register pertaining to the target confirming the details of the company; and
- a negative certificate pertaining to the target stating that on the day immediately prior to the date of issuance of the negative certificate, there were no records at the register of any court order regarding, among other things, a bankruptcy adjudication against the company, a reprieve from payment, controlled management or composition with creditors.

Encumbrances on shares are not disclosed publicly and will only be registered in the shareholders' register of the company. The Luxembourg administration keeps records of mortgages taken on real estate properties, and that information is publicly available. National IP rights (patents, brands, etc) are registered at the Luxembourg Intellectual Property Office, whose records are also publicly available.

In a standard acquisition, a buyer typically consults all publicly available information on the relevant assets or on the relevant company, as the case may be.

Law stated - 23 August 2022

Impact of deemed or actual knowledge

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?

A buyer's actual or deemed knowledge will, in principle, preclude the relevant buyer from bringing a claim against the relevant seller, except in very exceptional circumstances (eg, fraud). Furthermore, in the final acquisition documentation, it is customary to exclude any liability of the seller for any matters disclosed in the virtual data room during the due diligence process.

Law stated - 23 August 2022

PRICING, CONSIDERATION AND FINANCING

Determining pricing

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

Pricing will typically be determined by financial advisers on the basis of various elements, including the results of the preliminary due diligence process.

In this respect, locked-box structures tend to be more common, while price adjustment mechanisms between signing and closing on the basis of closing accounts are rarer. This tendency can be explained by the fact that private equity funds prefer using locked-box pricing for the sake of simplicity and business certainty.

Law stated - 23 August 2022

Form of consideration

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

Consideration usually takes the form of a cash payment, but payments in kind via a vendor note or shares in the acquiring entity are not uncommon. Such consideration may further, in the specific context of a private acquisition and in the absence of any contractual arrangement to the contrary between the sellers, vary from one seller to another.

As an illustration, the price per share could be higher for a controlling shareholder than for a minority one, but this is quite seldom as targets are normally 100 per cent-owned by the seller, or sellers negotiate together to strengthen their position towards a potential acquirer.

Law stated - 23 August 2022

Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

Given that there is a strong tendency to use the locked-box mechanism, earn-outs, which were very common a few years ago, are now used to a lesser extent; however, they have not completely disappeared and are still used if they are relevant (eg, in the context of the acquisition of a commercially active company).

Deposits and escrows are used whenever the particulars of a transaction require them but remain rather exceptional.

Law stated - 23 August 2022

Financing

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 buyer's equity and external financing (eg, bank loans or yield-bearing bonds).

In leveraged buyouts by private equity firms, comfort on financing is usually granted through an equity commitment

letter, whereby the fund commits to contribute sufficient funds to the relevant acquisition vehicle to cover the payment of the acquisition price on the closing of the transaction at the latest.

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

Law stated - 23 August 2022

Limitations on financing structure

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 its shares (there are some exceptions to the rule).

Such financial assistance is broadly defined. It includes the direct or indirect advancing of funds, the granting of loans or the provision of security by a company with a view to the acquisition of its own shares by a third party.

On the contrary, and provided the operation appears to be in its corporate interest, a private limited liability company may, directly or indirectly, provide financial assistance to a buyer for the acquisition of its own shares.

Law stated - 23 August 2022

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

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.

Buyers may 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).

Buyers may further seek to include conditions relating to a seller's title, capacity and authority as well as conditions pertaining to the absence of any material adverse change in the period between signing and closing.

Law stated - 23 August 2022

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 obligation.

The strength of the obligation can be adapted by the contract; however, in any instance, a buyer cannot bear an obligation to reach a result over which it does not have complete control (eg, antitrust clearance, as such decision is taken by an authority independent from the buyer).

Law stated - 23 August 2022

Pre-closing covenants

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

Pre-closing covenants are quite common in practice and generally ensure that the seller will manage the company's affairs in the latter's best interest in the period between signing and closing. The covenants may 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 collateral on the target entity's assets;
- a prohibition on winding up, merging or splitting up 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 target entity's accounts or to provide the buyer with reports on the target entity's activities during the intermediary period, or both;
- an obligation to inform the buyer regularly (eg, on a monthly basis) about the business and operations of the target entity; 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 so that the seller can undertake them.

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 abort the transaction). The claim will typically result in damages granted to the buyer.

If appropriate, specific performance can be court-ordered as well, although this remedy is less common as it is not always adapted to the relevant breach of contract.

Law stated - 23 August 2022

Termination rights

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

Apart from the specific and rather unlikely situation of termination owing to fraud, acquisition agreements will typically provide for a period within which the closing conditions must be satisfied. If the closing conditions are not satisfied by the long-stop date, the contract will be automatically terminated.

Law stated - 23 August 2022

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 or reverse break-up fees in the contractual documentation. Should this be the case, the break-up fees can be revised by a Luxembourg judge if the amount is deemed to be excessive (it is one of the few topics on which the judge can supersede the will of the parties).

Law stated - 23 August 2022

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

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 representations and warranties to the buyer covering both the seller and the target company. The usual representations and 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;
- the fact 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;
- compliance of the accounts with the relevant accounting standards;
- compliance with the taxation applicable to the target company; and
- ownership of intellectual property rights, if any.

Representations and warranties can be further developed depending on the scope of the transaction (eg, if the target company is the holding entity of a multi-jurisdictional group) and on the nature of the target entity's business.

Specific indemnities are sometimes agreed upon and will generally cover potential tax liabilities of the target entity or will be linked to the outcome of pending litigation.

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).

Law stated - 23 August 2022

Limitations on liability

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, and such limitations will typically be tailored to the particularities of the relevant acquisition. The limitation can go as far as an exclusion of liability allowing the seller to carve out any and all claims that would arise either from matters covered by a disclosure letter (if any) or disclosed during the due diligence process.

De minimis clauses, whereby the seller's liability would only be triggered if the relevant damage exceeds certain thresholds, are also quite common in practice. The clauses may either foresee that once the threshold is reached, the liability can start from the first euro or, alternatively, for any liability above the contractual threshold.

Clauses limiting the relevant liability both in time and to a certain amount are also quite standard. The relevant cap will usually vary with the overall value of the acquisition. A contractual exclusion or limitation of any liability arising out of a criminal offence or wilful misconduct is, however, not possible.

Finally, certain clauses governing the initiation of any liability process and providing, for example, an obligation for the parties to negotiate a satisfactory solution in good faith prior to any formal judicial or arbitration proceedings are also quite frequent in practice.

Law stated - 23 August 2022

Transaction insurance

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?

Warranty and indemnity (W&I) insurance covering damages resulting from breaches of warranties given in the acquisition documentation used to be rather exceptional in Luxembourg but are now becoming increasingly popular. As the representations and warranties are usually tailored to the particularities of the transaction, the choice between a buy-side or a sell-side policy will vary accordingly.

Customary terms of a W&I insurance policy typically include:

- exclusions of certain risks (eg, certain tax risks, fraud or criminal fines);
- de minimis or other limitations (eg, fixed amount of loss that the insured party must bear prior to the intervention of the policy); and
- insurance coverage that is usually linked to the outcome of the due diligence process (eg, inadequate due diligence will inevitably lead to restricted coverage).

Law stated - 23 August 2022

Post-closing covenants

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

Post-closing covenants are customary, the most common being a non-compete covenant of the seller. The wording of the obligation 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 also quite common to include a provision prohibiting the seller from attracting key 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).

Law stated - 23 August 2022

TAX

Transfer taxes

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?

In principle, the transfer of shares in a Luxembourg company should not trigger transfer taxes or registration duties; however, the transfer of units in a tax transparent partnership holding Luxembourg real estate should be subject to 6 per cent transfer tax and 1 per cent transcription tax (with a 50 per cent surcharge if the asset is an office or commercial property located in Luxembourg City, leading to an aggregate rate of 10 per cent).

In addition, the transfer of a Luxembourg real estate asset against the issuance of shares should be subject to reduced transfer taxes, amounting to 3.4 per cent (or 4.6 per cent for an office or commercial property located in Luxembourg City).

The direct sale of a real estate asset should be subject to the aforementioned registration duties (ie, 7 per cent or 10 per cent).

The transfer of movable assets should generally not be subject to transfer taxes or registration duties. Should this transfer be voluntarily registered with the Luxembourg tax authorities, registration duties (fixed or proportional) could apply, unless a specific exemption be available.

The buyer of the asset or the party requesting the voluntary registration is usually the person liable to pay for registration duties (unless otherwise agreed upon).

Law stated - 23 August 2022

Corporate and other taxes

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?

In principle, capital gains realised by a Luxembourg company on the disposal of shares, business or assets should be subject to corporate income tax and municipal business tax at an aggregate rate of 24.94 per cent for 2022.

Capital gains realised by a Luxembourg company upon disposal of shares may benefit, under certain conditions, from an exemption under the participation exemption regime.

Under specific conditions, a tax-neutral rollover regime may be applied to certain share-for-share exchanges in the context of group reorganisations, mergers, etc.

Regarding non-Luxembourg resident shareholders selling shares in a Luxembourg company, there should be no non-resident capital gains tax, except in the case of a sale of participation exceeding 10 per cent that has been held for less than six months by a shareholder in a jurisdiction where no double tax treaty grants the exclusive right to tax in its jurisdiction.

From a VAT standpoint, the transfer of shares should fall outside the scope of Luxembourg VAT (except trading activities). The transfer of a business as a going concern should not be subject to VAT. Other transfers of business or assets should fall into the scope of VAT and be subject to standard VAT rules on goods and services.

Law stated - 23 August 2022

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

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. This is because, legally, it is not a transfer of undertaking, but a transfer of shares of the actual employer. The employees will keep their existing rights.

The total or partial transfer of an activity (be it by way of transfer, merger, demerger, etc) follows the rules laid down by article L127-1 et seq of the Labour Code on the (partial) transfer of undertakings. Based on these provisions, there is a principle of automatic transfer of the rights of the employees (including temporary workers) to the transferee.

On the contrary, cases where only certain assets are sold (which cannot be considered as an actual operational business unit) would not, in principle, constitute a transaction triggering the transfer of the employees.

Law stated - 23 August 2022

Notification and consultation of employees

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 the seller must inform the representatives of the employees (or the employees if there are no representatives of the employees in the target company) in due course before the relevant transfer takes place. Such information will comprise:

- 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 towards 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.

Law stated - 23 August 2022

Transfer of pensions and benefits

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 are, in principle, 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 the 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 those contracts) for the employees.

Regarding extralegal, contractual complementary pension schemes (ie, pension schemes regulated by the Law of 8 June 1999 on complementary pension schemes, as amended), the buyer may not be obliged to continue those plans. This will not, in principle, affect rights that have already been acquired by the relevant employees.

Law stated - 23 August 2022

UPDATE AND TRENDS

Key developments

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?

On 27 July 2022, Bill No. 8053 transposing Directive (EU) 2019/2121 on cross-border mergers, divisions and conversions was presented by the Minister of Justice. This draft piece of legislation will introduce an innovative regime governing both EU and non-EU cross-border operations while promoting the traditionally liberal and business-oriented approach of Luxembourg company law.

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Jurisdictions

Australia	MinterEllison
Austria	Schoenherr
Belgium	Stibbe
Brazil	Campos Mello Advogados
Canada	Bennett Jones LLP
China	Haiwen & Partners
Denmark	Gorrissen Federspiel
Dominican Republic	Guzmán Ariza
Egypt	Soliman, Hashish & Partners
Finland	Waselius & Wist
France	Davis Polk & Wardwell LLP
Georgia	MG Law Office
Germany	Gleiss Lutz
Greece	Karatzas & Partners Law Firm
Hong Kong	Davis Polk & Wardwell LLP
Indonesia	Makes & Partners
Israel	Naschitz Brandes Amir
Italy	Legance - Avvocati Associati
Japan	TMI Associates
Latvia	VILGERTS
Luxembourg	Stibbe
Malaysia	Foong and Partners
Myanmar	Myanmar Legal MHM Limited
Netherlands	Stibbe
New Zealand	Hesketh Henry

Philippines	Zambrano Gruba Caganda & Advincula
Portugal	Cuatrecasas
Romania	MPR Partners
Serbia	Stankovic & Partners NSTLaw
Singapore	WongPartnership LLP
South Korea	Bae, Kim & Lee LLC
Spain	Uría Menéndez
Sweden	Vinge
Switzerland	Homburger
Turkey	Turunç
United Kingdom	Davis Polk & Wardwell LLP
USA	Davis Polk & Wardwell LLP
Zambia	Dentons Eric Silwamba Jalasi & Linyama