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The International Comparative Legal Guide to:

Mergers & Acquisitions 2018

12th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

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Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd
March 2018

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ISBN 978-1-911367-97-0

ISSN 1752-3362

Strategic Partners



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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Public M&A transactions are governed by a series of laws and regulations under Luxembourg law, which are the following:

- 1) The Civil Code.
- 2) The Code of Commerce.
- 3) The law of 10 August 1915 on commercial companies, as amended (“**Law 1915**”).
- 4) The law of 5 August 2005 on financial collateral.
- 5) The law of 10 May 2016 implementing Directive 2004/25/EC on takeover bids (the “**Takeover Law**”), which shall apply to takeover offers for the securities of companies governed by the laws of a Member State of the European Union or the European Economic Area (“**Member State**”) where all or some of those securities are admitted to trading on a regulated market in one or more Member States.

Depending on the place of trading and the registered address of the target company, different regimes are provided in the Takeover Law; for instance, if the target company (the “**Target**”) is a company with a registered address in Luxembourg whose shares are admitted to trading on the Luxembourg stock exchange (“**LSE**”), the offer will be strictly governed by the Takeover Law. On the other hand, if the Target has its shares admitted to trading on a regulated market outside Luxembourg but on a EU or EEA regulated market, a dual rule system will apply, which means that matters relating to (i) the consideration offered, (ii) the offer procedure, (iii) the contents of the offer document, and (iv) the disclosure of the offer shall be dealt with in accordance with the rules of the Member State where the securities are admitted to trading, while matters relating to (i) the information to be provided to the Target’s employees, (ii) matters relating to company law, in particular the percentage of voting rights which confers control, (iii) any derogation from the obligation to launch an offer, and (iv) the conditions under which the board of the Target may undertake any frustrating action will be strictly governed by the Takeover Law.
- 6) The law of 21 July 2012 on mandatory squeeze-out and sell-out of securities for companies admitted or previously admitted to trading on a regulated market in the EU (with a time limit of 5 years after delisting), or whose securities have been offered to the public (with a time limit of 5 years after launch of the offer).
- 7) The law of 24 May 2011 on the exercise of certain rights of shareholders in general meetings of listed companies,

- 8) The law of 10 July 2005 on the prospectus of securities implementing Directive 2003/71/EC, which contains the rules governing the prospectus to be published when securities are offered to the public in Luxembourg or admitted to trading on the regulated market of the LSE, as amended (“**Prospectus Law**”).
- 9) The rules and regulations of the LSE for those shares that would be admitted to trading on the Euro MTF operated by the LSE.
- 10) The law of 11 January 2008 on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as amended (“**Transparency Law**”).
- 11) Regulation EU 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (“**MAR**”) and repealing Directive 2003/6/EC of the European Parliament and the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, together with the law of 26 December 2016 on market abuse, which implements, among others, criminal penalties in case of infringement of MAR.

1.2 Are there different rules for different types of company?

The Takeover Law does not apply to: (i) takeover offers for securities issued by companies (the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holders’ request, repurchased or redeemed, directly or indirectly, out of the assets of those companies; action taken by such companies to ensure that the stock exchange value of their units does not vary significantly from their net asset value shall be regarded as equivalent to such repurchase or redemption); and (ii) takeover offers for securities issued by the Member States’ central banks.

1.3 Are there special rules for foreign buyers?

See question 1.1 above. Depending on the place of trading, a dual regime of rules may apply, but except for those cases, no rules specifically apply to foreign buyers.

1.4 Are there any special sector-related rules?

The general regime applies irrespective of the sector, but companies may likely be subject to the regulatory regime and thus control

depending on the sector. For instance, activities falling within the financial and insurance sectors are regulated by distinctive regulations and under the control of particular supervisory authorities. The *Commission de surveillance du secteur financier* (“CSSF”) is the competent authority to supervise an offer, especially if the Target has its registered office in Luxembourg and if the securities of that company are admitted to trading on a regulated market in Luxembourg. CSSF shall exercise its functions impartially and independently of all parties to an offer.

1.5 What are the principal sources of liability?

Any takeover launch pursuant to the Takeover Law must comply with the general principles detailed therein, such as: (1) equal treatment of all holders of securities of the Target; (2) allowing sufficient time and information to enable properly informed decision-making; (3) the board of directors of the Target must act in the interests thereof as a whole and must not deny the holders of securities the opportunity to decide on the merits of the offer; (4) creation of false markets that would become artificial and distorted is prohibited; and (5) ensuring the necessary financing in cash consideration before announcing an offer.

If CSSF considers that the general principles detailed above are manifestly violated, the offer lapses. Moreover, in case of infringements of the Takeover Law likely to breach the general principles, CSSF may pronounce sanctions ranging from a pecuniary fine to a term of imprisonment against: (1) persons omitting to notify CSSF of the launch of the offer; (2) persons refusing to provide CSSF with supplementary required information or who knowingly provide incorrect or incomplete information; and (3) persons omitting to provide the offer document to the representatives of the employees or, in the absence thereof, directly to the employees.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Options for public companies are rather limited. A takeover offer is the most common way to acquire a public company; however, please note that other methods like national or cross-border merger are equally possible. Legal mergers are regulated by Law 1915.

2.2 What advisers do the parties need?

Legal and financial advisers, auditors for evaluation work/assessment, investors’ firms, investment banks, public relation advisers, etc.

2.3 How long does it take?

Where CSSF is the competent authority for controlling the offer, any decision to launch an offer must be made public by the bidder immediately after the decision is taken, and CSSF must be informed of the offer prior to the decision being made public.

As soon as the offer has been made public, the boards of directors of both the Target and the bidder must inform the representatives of their respective employees or, where appropriate, the employees themselves.

The bidder must then draw up, and in good time make public, an offer document containing the information necessary to enable the holders of the Target’s securities to reach a proper and duly informed

decision on the offer. Before this offer document is made public, the bidder must submit a draft to CSSF for approval within 10 working days from the day the offer was made public (the “**Filing Date**”). Within 30 working days as of the Filing Date, CSSF must notify the bidder of its decision on approval. However, if CSSF considers, on reasonable grounds, that the offer document is incomplete or that further information is necessary, it will inform the bidder within 10 working days as of the Filing Date. In this case, the 30 working days’ deadline referred to above runs 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 Target and the bidder must communicate it to the representatives of their respective employees or, where appropriate, to the employees themselves. The Target’s board of directors must draw up and make public a document setting out its opinion on the offer, and the reasons on which that opinion is based.

Before drawing up its opinion, the Target’s board of directors must consult with the employee representatives, or where appropriate with the employees themselves. Where the Target’s board of directors receives, in good time, a separate opinion from the representatives of its employees on the effect of the offer on employment, that opinion must also be attached to the opinion of the board of directors.

The time allowed for the acceptance of an offer may not be less than 2 weeks nor more than 10 weeks from the date of publication of the offer document. Nevertheless, the 10 weeks’ period may be extended on condition that the bidder gives at least 2 weeks’ notice of his/her intention of closing the bid. CSSF may grant derogation to the above-mentioned period in order to allow the Target to call a general meeting of shareholders to consider the offer.

Where the bidder acquires control of the Target, the holders of securities which had not accepted the offer before the end of the time period allowed for acceptance of the offer can then accept it during a supplementary 15-day period (except in cases of a Mandatory Offer, as defined in question 3.1), which runs from the last day of the acceptance period. In the event of a competing offer, the period for acceptance of the initial offer is automatically extended and will only expire when the period for acceptance of the competing offer expires.

However, in any case, a Target must not be hindered in the conduct of its affairs for longer than 6 months starting from the date when the decision to make a takeover offer was made public by the bidder.

2.4 What are the main hurdles?

A distinction should be made between friendly and hostile takeovers. In case of a friendly takeover, the overall process of approval and the timing related thereto by the regulator as well as the (potential) procedure for obtaining clearance from the competition regulator constitute a real hurdle. On the other hand, in case of a hostile takeover, potential litigation by shareholders’/investors’ firms as well as the negative approach of the board of directors must be taken into consideration.

2.5 How much flexibility is there over deal terms and price?

As a general principle, (i) all holders of the securities of a Target of the same class must be afforded equivalent treatment, and (ii) in case of control of a Target acquired by a person, the other holders of securities must be protected.

In case of a Mandatory Offer (as defined in question 3.1), such offer shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price, which is defined as the highest price paid for the same securities by the

bidder, or by persons acting in concert with him/her, over a period of 12 months before the offer.

If, after the offer has been made public and before the offer closes for acceptance, the bidder or any person acting in concert with him/her purchases securities at a price higher than the offer price, the bidder shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.

CSSF is authorised to adjust the equitable price either upwards or downwards depending on a pre-determined hypothesis, in case: (i) the highest price was set by agreement between the purchaser and a seller; (ii) the market prices of the securities were manipulated; (iii) the market prices in general or certain market prices in particular have been affected by exceptional occurrences; or (iv) a firm in difficulty needs to be rescued. In such specific circumstances, CSSF shall apply clearly defined criteria which can be the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

A Grand Ducal regulation may provide other circumstances in which market errors could have an impact on the setting of the price. In any case, any decision by CSSF to adjust the equitable price shall be substantiated and made public.

The bidder may offer as consideration (i) securities, (ii) cash, or (iii) a combination of both. However, where the consideration offered by the bidder does not consist of liquid securities admitted to trading on a regulated market, it shall include a cash alternative. A security is deemed sufficiently liquid if at least 25% of the share capital of the bidder represented by this class of securities are distributed to the public or where, due to the large number of securities of a same class and the extent of their spread in the public, a regular functioning of the market can be ascertained through a lesser percentage.

In any event, the bidder shall offer a cash consideration at least as an alternative where he/she or persons acting in concert with him/her, over a period beginning 12 months before the launch of the offer and ending when the offer closes for acceptance, has purchased for cash securities carrying 5% or more of the voting rights in the Target.

As of the Filing Date, the terms of the offer can no longer be amended, except in a more profitable way for the holders of Target's securities. Any price increase of the offer shall mandatorily benefit the holders of securities who have accepted the offer prior to such increase and the acceptances of the offer prior to the publication of the offer document shall not bind the holders of securities. In case of amendment to the terms, the closing of the offer shall only be possible following a reasonable time period after the publication of the amendments.

2.6 What differences are there between offering cash and other consideration?

In case the consideration offered by the bidder includes securities in kind, information concerning those securities must be contained in the offer document. See also question 2.5 above.

2.7 Do the same terms have to be offered to all shareholders?

See question 2.5 above.

2.8 Are there obligations to purchase other classes of target securities?

Not from a Takeover Law perspective, but obligations may be contractually agreed in the offer document.

2.9 Are there any limits on agreeing terms with employees?

The offer is not negotiated with the employees, but the Takeover Law provides for protection rules. When the offer is made public, the boards of the Target shall communicate it to the representatives of its employees or, where appropriate, the employees themselves.

The representatives of the employees, or where appropriate, the employees themselves shall then be involved by the boards in their analysis which shall lead to the drawing up of a reasoned opinion on the offer. The board shall inform and require the advice of the representatives of the employees, or where appropriate, the employees themselves, in particular as regards the effects of the offer on all the Target's interests, specifically as regards employment.

CSSF, as controller, shall determine how to carry out the disclosure of all information and documents required by the Takeover Law in a way to ensure that they are readily and promptly available to the holders of securities at least in those Member States on the regulated markets of which the Target's securities are admitted to trading and to the representatives of the employees of the Target and the bidder or, where appropriate, to the employees themselves.

The board of the Target shall draw up and make public a document setting out its reasoned opinion of the offer and the reasons on which it is based, including its views on the effects of implementation of the offer on all the Target's interests and specifically employment, and on the bidder's strategic plans for the Target and their likely repercussions on employment and the locations of the Target's places of business as set out in the offer document. Before setting out its opinion, the board shall consult with the representatives of the Target's employees or, where appropriate, with the employees themselves. Where the board receives in good time a separate opinion from the representatives of its employees on the effects of the offer on employment, that opinion shall be appended to the document.

2.10 What role do employees, pension trustees and other stakeholders play?

See also question 2.9 above.

2.11 What documentation is needed?

(1) Announcement documents (at the start of the offer to the market by the bidder indicating the main purpose of the offer, the results thereof, the potential re-opening of the offer, sell-out or squeeze-out of the offer); (2) the offer document as approved by CSSF; (3) the Target notice relating to the valuation of the offer approved by the Target's board of directors and containing all the information necessary to assess the offer together with the opinion of the Target's board of directors; (4) the acceptance form prepared by the bidder; and (5) a contractual agreement in case of negotiation between the bidder and a major shareholder to secure a majority stake.

2.12 Are there any special disclosure requirements?

There are no specific disclosure requirements (financial, valuation, etc.); however, the bidder's internal discussion concerning the launch of the offer will automatically trigger application of MAR provisions. Therefore, all recipients of insider information will be prohibited from trading shares of the Target and manipulating (or simply attempting to manipulate) the market.

2.13 What are the key costs?

The key costs are the fees for: (1) external advisers (lawyers, auditors, investment bankers, etc.); (2) publication; (3) printing; (4) translation (if required), the offer document shall be drafted either in English, French or German; and (5) CSSF.

2.14 What consents are needed?

A majority of the Target's shareholders. Additionally, the consent of antitrust authorities may be required in case of dominant position.

2.15 What levels of approval or acceptance are needed?

As mentioned under question 2.14 above, a majority of the Target's shareholders must consent to the offer and contribute their shares to the offer. In addition, specific conditions may be determined in the offer document by the bidder; for example, a minimum percentage of the share capital or voting rights being acquired, or obtaining clearance from competition authorities.

2.16 When does cash consideration need to be committed and available?

The bidder must announce the offer only after ensuring that he/she can fulfil, in full, any cash consideration, if that is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.

3 Friendly or Hostile

3.1 Is there a choice?

Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, obtains securities of a company, whose securities are admitted to trading on a regulated market in one or more Member States, which, added to any existing holdings of those securities of his/her's and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her 33⅓% (the "Control Threshold") of all issued securities of the said company, excluding those securities carrying voting rights only in specific circumstances, such a person is required to make an offer as a means of protecting the minority shareholders of that company. Such an offer shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price (see question 2.5 above).

In addition to crossing the Control Threshold, the said acquisition must be performed with the view to obtaining the control of the Target. The mandatory takeover requires the satisfaction of both cumulative criteria (the "Mandatory Offer").

The obligation to make a Mandatory Offer does not apply where the control has been acquired following a voluntary offer made to all the holders of securities for all their holdings.

3.2 Are there rules about an approach to the target?

There are no general rules in the Takeover Law, but the general regime of MAR shall be complied with, especially regarding insider information.

3.3 How relevant is the target board?

See questions 2.3 and 2.9 above. Additionally, the Target board must always act in the corporate interest of the Target taken as whole and must not deny the holders of securities the opportunity to decide on the merits of the offer.

A Target with registered office in Luxembourg has the reversible choice to opt to comply or not with the frustrating provisions of the Takeover Law.

3.4 Does the choice affect process?

A friendly offer will run in a cooperative mode with the most likely outcome being the exchange of information through a due diligence process. Generally, a hostile takeover turns into a recommender offer after negotiations and increase of the offer consideration.

4 Information

4.1 What information is available to a buyer?

Listed companies have to comply with many transparency obligations deriving from different legal sources, thus making most of the information publicly available (annual and periodic financial reports, major shareholdings, management transactions, etc.). Moreover, the Takeover Law requires the publication of the following information: (1) the structure of capital; (2) restrictions on securities' transfers; (3) significant direct and indirect shareholdings; (4) holders of any securities with special control rights and a description of those rights; (5) the system of control of any employee share scheme where the control rights are not exercised directly by the employees; (6) any restrictions on voting rights; (7) agreements between shareholders which are known to the company and may result in restrictions on the transfer of securities or voting rights; (8) rules governing the appointment and replacement of board members and the amendment of the articles of association; (9) powers of board members, and in particular the power to issue or buy back shares; (10) significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company following a takeover bid, and the effects thereof, except where their nature is such that their disclosure would be seriously prejudicial to the company; and (11) agreements between the company and its board members or employees providing for compensation if they resign, are made redundant without a valid reason or if their employment ceases because of a takeover bid.

4.2 Is negotiation confidential and is access restricted?

Yes, see question 3.2 above.

4.3 When is an announcement required and what will become public?

The announcement shall be published directly upon agreement between the parties. General terms of the agreement between the parties shall become public.

4.4 What if the information is wrong or changes?

As from the date of publication of the offer document, the offer bid can only be withdrawn in the following cases: (1) in case of a

competing bid; (2) if the administrative authorisation required for the acquisition of the Target's securities is missing and, in particular, assuming the transaction could not take place following a decision by the authorities responsible for ensuring free competition; (3) where, independently of the bidder's intention, one of the terms of the bid is not fulfilled; and (4) subject to the duly motivated authorisation by CSSF, in case of exceptional circumstances which do not allow the offer to be completed independently of the bidder's intention.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Yes, in compliance with the notification requirements in case of acquisition or disposal of major holdings set in the Transparency Law (5%, 10%, 15%, 20%, 25%, 33⅓%, 50% and 66⅔%). The voting rights shall be calculated on the basis of all the shares, including depositary receipts representing shares, to which voting rights are attached even if the exercise thereof is suspended.

5.2 Can derivatives be bought outside the offer process?

See question 5.1 above.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

See question 5.1 above.

5.4 What are the limitations and consequences?

See questions 2.5 and 5.1 above.

6 Deal Protection

6.1 Are break fees available?

CSSF indicated that a break fee agreement was likely to violate the general principles of the Takeover Law and therefore should be assessed on a case-by-case basis, taking into consideration the respective terms and conditions thereof as well as the situation of the parties involved in the takeover.

6.2 Can the target agree not to shop the company or its assets?

Yes, subject to the general obligations of the Target's board of directors to act in the interest of thereof. See question 3.3 above.

6.3 Can the target agree to issue shares or sell assets?

See questions 3.3 and 6.2 above.

6.4 What commitments are available to tie up a deal?

See questions 2.5, 2.7 and 3.3 above.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

See questions 2.4, 2.5, 2.14 and 4.4 above.

7.2 What control does the bidder have over the target during the process?

The bidder has no control unless there is a specific agreement with the Target's shareholders.

7.3 When does control pass to the bidder?

Upon closing, when consideration is settled and the result of the offer is announced.

7.4 How can the bidder get 100% control?

If following the offer, the bidder manages to acquire 95% of the voting rights, he/she may, under certain conditions, initiate a squeeze-out process to acquire 100% of the voting rights issued. See question 2.5 above.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

See questions 2.3, 3.3 and 4.2 above.

8.2 What can the target do to resist change of control?

See question 3.3 above.

8.3 Is it a fair fight?

The Takeover Law provides for sufficient protecting measures of the shareholders/stakeholders, while allowing a certain degree of flexibility for the Target's board to fight a non-solicited takeover, in the absence of any economical, industrial, legal justifications. Ultimately, it is a matter of conviction power of the bidder to convince the Target's board of the rationale of the takeover offer as well as the shareholders which remain the ultimate decision-makers.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The most important factor in influencing the success of an acquisition is the power to persuade the Target's board to recommend the offer, thereby increasing one's chances of convincing the shareholders to tender their shares.

9.2 What happens if it fails?

In case of failure, subject to compliance with the general principle of the Takeover Law, an offeror may be authorised to launch a new offer.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

- Law 1915 has been recently significantly amended by the law of 10 August 2016 and completely renumbered by the Grand Ducal decree of 19 December 2017.
- Since 3 July 2016, MAR is directly applicable in Luxembourg together with the law of 26 December 2016 on market abuse, which implements, among others, criminal penalties in case of infringement of MAR.
- The Transparency Law and the Prospectus Law have been recently amended by the law of 10 May 2016 transposing Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC.

- As from 21 July 2019, Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, will be directly applicable in all Member States.



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Pierre-Alexandre heads the Corporate, M&A, Start-up & Fintech department and co-heads the Capital Markets department. He covers a broad spectrum of corporate and transactional matters, with a particular focus on domestic and cross-border mergers and acquisitions, public takeovers, corporate finance transactions, as well as securities law, regulatory and general commercial matters. He has strong experience in takeovers (hostile or friendly) for major financial institutions and industrial groups but also small and mid-cap companies, as well as joint ventures and strategic alliances. He regularly advises on corporate governance issues such as legal and regulatory responsibilities, including directors' duties, individual liability and contentious shareholders' meetings.

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