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Private Equity 2021

Luxembourg: Law & Practice

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LUXEMBOURG

Law and Practice

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1. TRANSACTION ACTIVITY

1.1 M&A Transactions and Deals

Luxembourg remains a pre-eminent jurisdiction for private equity investment funds, with unregulated funds being the most utilised format. A great number of the transactions are share deals, often involving Luxembourg-resident asset-holding entities. Typically, however, although the holding entity may be located in Luxembourg, the assets are not.

Technology, healthcare, renewable energy, structured debt and credit funds are the areas of investment that have been favoured by sponsors in recent years. In addition, a reasonably large number of structures still invest in real estate in Europe.

An increasing number of participants are less willing to limit their investment policy to specialised areas but are happy to consider a wide range of investment options as they arise on an opportunity basis. Having said that, despite this increase, it is still the case that most private equity sponsors continue to operate within a well-defined and focused investment strategy.

1.2 Market Activity

Technology and healthcare have been the most active growing sectors in Luxembourg in 2020.

The increase in biotech, fintech and professional services transactions seen in 2019 and 2020 continued in 2021.

2. PRIVATE EQUITY DEVELOPMENTS

2.1 Impact on Funds and Transactions

Over a number of years, Luxembourg has taken steps to position itself as Europe's leading location for both private equity fund vehicles and asset-holding vehicles. Luxembourg partnerships – in particular the special limited partnership, or SCSp, and in addition (although to a lesser extent) the simple limited partnership, or SCS – have become the go-to form of entity for private equity pooling vehicles, while private limited liability companies (or SARLs) remain the preferred asset-holding vehicles for private equity funds globally.

The introduction of the AIFMD-compliant Reserved Alternative Investment Fund (RAIF) regime in 2016 has added another available option, and this form is often used by private equity sponsors for pooling vehicles, especially in the context of pan-European marketing to professional investors.

In keeping with global developments, the new laws regarding the introduction of the beneficial owner register, enacted on 13 January 2019 (the "BOR Law") and the law dated 25 March 2020 transposing the EU Council Directive 2011/16 (DAC6) are the most recent changes in the private equity legal environment in Luxembourg.

According to the BOR Law, which came into force on 1 March 2019, all entities that are registered with the Trade and Companies Register in Luxembourg also have to provide details of the identity of its beneficial owners with the Luxembourg Beneficial Owner Register.

DAC6

DAC6 introduced an obligation to disclose "cross-border arrangements" involving two EU member states or an EU member state and a third country. The aim of DAC6 is to prevent aggressive tax planning by increasing national tax authority scrutiny of the activities of taxpayers and their advisers. Originally scheduled for 31 August 2020, the Luxembourg Parliament, on 22 July 2020, voted to approve reporting extensions for DAC6 in light of COVID-19 as follows:

- reportable cross-border arrangements implemented between 25 June 2018 and 30 June 2020 must be reported by 28 February 2021 (ie, up to six months after the original deadline of 31 August 2020);
- reportable cross-border arrangements occurring between 1 July 2020 and 31 December 2020 should now be disclosed within 30 days as from 1 January 2021; and
- reportable cross-border arrangements, occurring on or after 1 January 2021, should also be disclosed within a 30-day period.

The scope of the above laws is broad and includes downstream structures that are the holding companies formed for the purpose of holding the investment in the target.

Company Meetings

Finally, it is worth noting that the Luxembourg legislator, to prevent the spread of the virus, approved laws authorising the governing bodies of any Luxembourg company, notwithstanding any provision to the contrary in their articles of association, to hold their meetings, in particular meetings of shareholders and boards of directors/managers, without requiring the physical presence of their members. Deadline extensions regarding compulsory filings (such as the filing of the annual accounts) have been granted and renewed on a regular basis.

3. REGULATORY FRAMEWORK

3.1 Primary Regulators and Regulatory Issues

The Commission de Surveillance du Secteur Financier (CSSF) is Luxembourg's regulator for financial services (in addition to other roles). The CSSF has regulatory oversight, and in that capacity has responsibility for product-regulated investment funds and also for investment fund managers located in Luxembourg.

However, the CSSF's oversight authority does not extend to limited partnerships that are not subject to product regulation (which includes specialised investments funds, SIFs, and investment companies in risk capital, SICARs) nor does it extend to RAIFs (having said that, RAIFs' management companies are still subject to regulatory oversight by the relevant financial regulator for the home jurisdiction of the relevant management company – which would be the CSSF for all Luxembourg-based management companies). M&A activity would, in similar fashion, be subject to the relevant rules and regulations in the home jurisdiction of the target entity.

There are no specific restrictions that apply in Luxembourg in relation to private equity transactions, but relevant sanctions and the usual anti-money laundering and "know-your-client rules" do, of course, apply in the same way as to any transaction. Antitrust regulations would, in the same way, be applied in accordance with the relevant rules in the appropriate jurisdictions.

4. DUE DILIGENCE

4.1 General Information

In Luxembourg, legal due diligence is usually of secondary importance to financial due diligence but it is still carried out and typically consists – in addition to the usual practice of verifying corporate existence, compatibility of corporate objects, and solvency – of reviewing the corporate governance and past and current activities of the target for compliance against Luxembourg laws and regulations.

The due diligence is usually conducted first via a review of the publicly available documentation – that is, the documents that are required to be filed at, and are available for download from, the Luxembourg Trade and Companies Register – followed by a thorough review of the documentation made available in the data room. Key areas of focus for legal due diligence are company corporate documents, regulatory status and financing arrangements.

4.2 Vendor Due Diligence

Vendor due diligence is an intricate part of the Luxembourg practice in private equity transactions. Advisers will usually rely on the vendor due diligence reports if the adviser is of the opinion that the third party conducting the due diligence is considered reliable, but at least some independent verification is now the rule rather than the exception.

5. STRUCTURE OF TRANSACTIONS

5.1 Structure of the Acquisition

Most acquisitions by private equity funds will be carried out through private treaty sale and purchase agreements negotiated between the parties. Auction sales are less frequent in Luxembourg as very few targets – as opposed to the holding structures – are located in Luxembourg.

5.2 Structure of the Buyer

The private equity-backed buyer will generally take the form of one or several private limited companies (owned by the private equity fund and its co-investors, if applicable), the role of which will be to hold the investment in the target and potentially to obtain third-party financing for the purpose of providing in turn the financing to a special purpose vehicle incorporated in the country of location of the target. The private equity fund will typically lead the process of preparing, agreeing and finalising the acquisition or sale documentation through a dedicated transaction team and in conjunction with advisors selected by the fund.

5.3 Funding Structure of Private Equity Transactions

Private equity deals are mainly funded through a mix of equity and debt. An equity commitment letter, providing contractual certainty of funds, is required in a majority of the deals. In most of the transactions in Luxembourg, the private equity fund (together with its co-investors, if applicable) will want, and will aim, to acquire a majority interest – or, even better, a 100% interest – as opposed to a minority stake, as sponsors tend to value control over the destiny of their investment and the certainty that a majority or outright shareholding can bring.

5.4 Multiple Investors

Although some transactions will involve a consortium of private equity sponsors, the majority of deals are still concluded by a single sponsor. In the recent past, there has been a steady increase in co-investments, either between more than one sponsor or with sponsors and their limited partners.

Deals involving co-investments by other investors alongside the private equity fund investment are starting to constitute an increasing proportion of the total transactions. In Luxembourg, both are in evidence, with co-investments between more than one sponsor and co-investments between a sponsor and its own investors increasing both in number and as a proportion of the whole, year-on-year.

6. TERMS OF ACQUISITION DOCUMENTATION

6.1 Types of Consideration Mechanisms

In Luxembourg, there is no predominant form of consideration structure used in private equity transactions as the consideration mechanism will depend very much on the general strategy adopted by each sponsor and the specific requirements of the transaction. It follows that both locked box and completion accounts mechanisms are seen on a regular basis in transactions involving Luxembourg holding and pooling vehicles. In addition, earn-outs are commonly included where one or more of the founders remain either minority shareholders or part of the management group of the target.

The involvement of a private equity fund (whether as seller or as buyer) can affect the type of consideration mechanism used, in that depending upon the circumstances of the transaction and, in particular, the size of the sponsor and the deal itself, it might be that the type of consideration mechanism will be imposed upon the seller rather than driven by the seller.

A private equity seller will generally provide the same types of protection in relation to the various consideration mechanisms as would be afforded by a corporate seller.

Similarly, a private equity buyer will generally provide the same types of protection in relation to the various consideration mechanisms as would be afforded by a corporate buyer.

6.2 Locked-Box Consideration Structures

Locked box consideration structures are less common in Luxembourg, with closing accounts still being the preferred option – typically being seen as "fairer" to both parties. If a locked box consideration mechanism is used, then it would not be common practice for interest to be charged on leakage.

6.3 Dispute Resolution for Consideration Structures

Alternative dispute resolution is in its infancy in Luxembourg, and probably for that reason separate dispute resolution mechanisms in the transaction agreements are rare – whether a locked box consideration mechanism or a completion accounts consideration mechanism is used.

Typical wording in the transaction documents would envisage an immediate recourse to the Luxembourg court system (it is also not usual for Luxembourg transactions to include reference to a foreign choice of governing law or a foreign choice of jurisdiction). However, as awareness of alternative dispute resolution grows in Luxembourg, the inclusion of specific dispute resolution mechanisms in private equity transaction documents in Luxembourg is increasing in prevalence.

6.4 Conditionality in Acquisition Documentation

It is common for private equity transactions in Luxembourg to include relevant regulatory conditions. In addition, if the target itself is located in Luxembourg then shareholder approval requirements are also not uncommon to ensure compliance with the relevant provisions of Luxembourg company law. However, such shareholder approval requirements are often superfluous – in particular if the seller typically owns sufficient equity for separate and specific approvals not to be required (as is often the case).

Material adverse change/effect provisions are fairly common.

It would be unusual for a deal to be conditional upon third-party consents such as key contractual counterparties in Luxembourg. In practice, the lack of such clauses is often due to the fact that key contracts usually do not provide that consent needs to be obtained in the event of a change of control.

6.5 "Hell or High Water" Undertakings
In those deals where there is a regulatory condition, it would be unusual for a private equity backed buyer to accept a "hell or high water" undertaking in Luxembourg. It would be much more common for completion to be conditional upon the necessary approvals and contractual requirements being fulfilled; the use of clauses in the transaction documents to stipulate such approvals and requirements (including qualitative conditions) is standard practice.

6.6 Break Fees
In such conditional deals with a private equity-backed buyer, neither break fees nor reverse break fees are common. Instead, it is typical for both parties to incur the risks of their costs and expenses until conclusion of the transaction (and completion of all relevant conditions). Any break fees that are envisaged must comply with usual contract law requirements.

In addition, both break fees and reverse break fees should not impose unrealistic penalties as Luxembourg law provides for the possibility for an excessive contractual penalty – such as a financial sanction that is out of proportion to the loss or harm caused – to be reduced by the courts, even down to an amount of zero.

6.7 Termination Rights in Acquisition Documentation
Both a private equity seller or buyer may typically only terminate the acquisition agreement in Luxembourg in limited circumstances, including the triggering of a specifically planned escape clause in the transaction documents, not meeting a condition imposed in the agreement between the parties, or (in much rarer circumstances) due to the complete frustration of the object of the agreement.

6.8 Allocation of Risk
Typically, risk is shared equally, whether the buyer and sellers are private equity funds or not. Of course, the share of risk may be pushed further in one direction or another depending upon the relative bargaining strength of the parties.

The main limitations on liability for the seller will relate to the financial exposure (which would typically be capped) and the length of the liability exposure (which would not generally be limited to a period of two years). The exceptions to these general rules are tax matters, where the relevant period of the statute of limitations will apply and will set the time limit for any liability – which, of course, would probably be to the state rather than the other party. The seller will also typically seek to exclude liability for any known facts resulting from the content of the data room provided to the buyer.

6.9 Warranty Protection
Warranties from a private equity seller to a buyer upon exit are typically limited to the accuracy, completeness and veracity of the information provided to the buyer and are usually limited in their duration (typically one to two years). The exception, as mentioned in **6.8 Allocation of Risk**, can be tax matters where the warranties are often extended up to the expiration of the relevant limitation period. Warranties are also usually capped, to between approximately 25% and 100% of the acquisition price.

It is unusual for a management team to provide warranties. Instead, earn-out mechanisms and similar contractual provisions typically provide some level of comfort in terms of the management team's sincerity and commitment by aligning the management team's interests with those of the buyer. Any warranties provided by the management team are likely to be heavily limited and/or capped; after all, in most circumstances, it will not be possible to require the management team to become parties to the acquisition contract and such participation would need to be carefully negotiated.

The above situation would typically not change whether or not the buyer is also a private equity fund.

Full disclosure of the data room is usually allowed against the warranties.

6.10 Other Protections in Acquisition Documentation

Indemnities from a private equity seller are not common, and even less so from the management team (although, as mentioned in **6.1 Types of Consideration Mechanisms**, earn-out and price adjustment mechanisms may be included in the deal structure if the management team stays on post-transaction or if future revenue is to be taken into account).

Warranty and indemnity insurance is becoming increasingly common in Luxembourg, following the trend in most European jurisdictions. This is perhaps not surprising as the majority of targets – as opposed to the holding structure – are located outside of Luxembourg.

Payment retentions and escrow accounts are utilised much more frequently, with escrow amounts sometimes being held back for more than a year if necessary, sometimes until certain post-completion conditions have been met.

6.11 Commonly Litigated Provisions

Litigation in connection with private equity transactions is extremely rare in Luxembourg, notwithstanding the absence of alternative dispute resolution mechanisms in most contracts.

The provisions that are most commonly disputed, even if the dispute does not actually mature into full litigation before the courts, are without doubt the calculation of the consideration. In turn, such disputes over the calculation of the consideration are often based on underlying disputes over the closing accounts that then impact on a closing account consideration mechanism.

7. TAKEOVERS

7.1 Public-to-Private

Public-to-private transactions remain rare in Luxembourg, except (to a limited extent) in relation to utilities and infrastructure assets.

7.2 Material Shareholding Thresholds

In a Luxembourg *société à responsabilité limitée* (limited liability company), all shareholders must be disclosed to the publicly accessible *Registre de Commerce et des Sociétés de Luxembourg*. In a Luxembourg *société anonyme* (public limited company), no shareholders need to be disclosed. Pan-European reporting obligations need to be met and, as mentioned in **2.1 Impact on Funds and Transactions**, there is a new obligation to disclose the beneficial owner(s) of all Luxembourg entities.

In addition, for public companies incorporated in Luxembourg and listed in Luxembourg or in any other European Union member state, any shareholder having an entitlement to vote must notify both the company issuing the shares and the CSSF of any acquisition, transfer or similar operation concerning such shares or rights that causes that shareholder's holding to reach, exceed or fall below various thresholds set at 5%, 10%, 15%, 20%, 25%, 33.33% (one third), 50% and 66.66% (two thirds).

7.3 Mandatory Offer Thresholds

As in most other European Union countries, Luxembourg has adopted and imposed a mandatory offer threshold, which provides that any person reaching or exceeding, further to an acquisition, transfer or similar operation a total of 33.3% (one third) of the voting rights of a listed company has to make a mandatory offer to acquire all the remaining shares of that company at a price at least equivalent to the highest price paid by that person for the same shares over the period of 12 months immediately prior to this mandatory offer.

7.4 Consideration

Cash transactions represent the vast majority of private equity transactions involving Luxembourg funds and holding entities but share deals are not uncommon. Note that should the considerations consist in securities that are not admitted to trading on a regulated market, the consideration shall also include a cash alternative.

7.5 Conditions in Takeovers

In a private equity-backed takeover offer, the percentage of shares a bidder is willing to acquire is not restricted under Luxembourg law (except for mandatory offers, as explained in **7.3 Mandatory Offer Thresholds**) and, therefore, a bidder may specify in its offer the minimum percentage of shares that it is seeking to acquire. Other offer conditions may be, and often are, set out, especially when clearance from competition authorities is required.

However, a takeover offer may not be conditional upon the bidder obtaining financing: a buyer therefore needs to ensure that financing is in place.

The most common security measures the bidders seek are break fees, which are permitted and not specifically regulated under Luxembourg law (with the exception of the provisions on penalties, mentioned in **6.6 Break Fees**). However, the board of directors of the target company should consider carefully before agreeing to accept break fees, as it could be deemed as not in the best corporate interest of the target company unless, in the circumstances in which the break fees are triggered, the termination of the agreement is also in the best corporate interest of the target company.

7.6 Acquiring Less than 100%

If a bidder does not seek or does not ultimately obtain 100% ownership of a target, then the main additional governance right a private equity bidder could seek outside of its shareholding is a right to present a list of candidates for board-level director positions at the shareholders' meetings.

A bidder willing to acquire the entire ownership of a target can force the other shareholders to sell their shares to the bidder when the bidder has acquired at least 95% of the capital carrying voting rights and 95% of the voting rights of the target. However, if a target has issued more than one class of securities, then the "squeeze out" right applies individually to each class of securities.

7.7 Irrevocable Commitments

It is quite common for the bidder to seek irrevocable commitments from the principal shareholders of the target to tender or to vote. However, there is no provision in Luxembourg law ensuring the enforceability of such commitments, so ultimately damages could only be awarded in the event of a breach of the commitment – compulsion via a mandatory injunction is not possible. The negotiation of such commitments in the case of a voluntary takeover offer are usually undertaken at the pre-bid stage.

7.8 Hostile Takeover Offers

In Luxembourg, while hostile bids are permitted, they are rare. The fact that the board of directors of the target company will not support the bidder during the takeover process prevents the bidder from engaging in a hostile takeover and/or making such offer.

8. MANAGEMENT INCENTIVES

8.1 Equity Incentivisation and Ownership

Equity incentivisation of the management team is a common feature of private equity transactions in Luxembourg, but the level of incentive would generally be limited to between 5% and 15% of the equity, depending on the size of the transaction.

8.2 Management Participation

Management participation in private equity transactions is typically structured via both sweet equity (ordinary shares and/or options issued at a lower price to management to create motivation to increase the value of the acquired company with the incentive of a higher price on exit) and institutional strip (corresponding to the cash injected by the private equity investors to acquire the target but key management may also be required to invest in the target to bind their interest to those of the private equity investors) in Luxembourg-based deals, generally depending in the main upon the private equity strategy.

In the same way, managers could be offered ordinary equity but with limited participation that would not trigger any blocking thresholds in terms of decisions or preferred equity deprived of voting rights but granted with incentive financial rights – in the latter case, the preferred instrument used would be preferred shares with no voting rights and preferred rights to dividend.

8.3 Vesting/Leaver Provisions

The typical leaver and vesting provisions for management shareholders would grant options that would vest with a minimum of a three-year period, sometimes extended to five years. The award agreement may contain performance goals and measurements such as sales, earnings, return on investment or earnings per share.

The exercise period is generally quite long (up to ten years in certain structures). However, all vested but not exercised rights would be lost as soon as the holder ceases to be employed by the company or an affiliate.

8.4 Restrictions on Manager Shareholders

In terms of restrictive covenants agreed to by management shareholders, non-compete and non-disparagement undertakings are often part of the contractual arrangements, but enforcement can sometimes be difficult, with prohibitory injunctions generally available only under limited circumstances.

Non-compete clauses, in any event, need to be limited to the Luxembourg territory, and for a limited period of time that needs to be agreed as reasonable. If a non-compete clause would prevent the manager from being able to work because the clause is too broad either in scope or in time, it will not be enforceable. Non-solicitation clauses are less strictly regulated and are therefore often included and more liberally applied.

8.5 Minority Protection for Manager Shareholders

Manager shareholders are not usually granted greater protection than other minority shareholders. It is worth noting that, under Luxembourg law, minority shareholders do not benefit from any form of special protection regime; there is only an anti-dilution mechanism provided in the law for shareholders in a société anonyme.

On a contractual basis, an anti-dilution mechanism could be agreed upon between the shareholders, but in most deals it is unusual for a majority shareholder to agree to such an anti-dilution mechanism on a voluntary basis. In the same way, management rarely enjoys vetoes except over a limited number of matters related to the business.

The typical deal structure of a private equity transaction would not allow a management team to have a right to control or influence the exit of the private equity fund as the fund will, on the contrary, wish to ensure that it has full freedom to decide the time, form and mechanism of its exit.

9. PORTFOLIO COMPANY OVERSIGHT

9.1 Shareholder Control

A private equity shareholder (assuming that it has at least a majority shareholding) ultimately has total control over a portfolio company, although it would be unusual for the shareholder to interfere in the operations of the board on a day-to-day basis.

A private equity fund shareholder would generally as a minimum have the final say in the majority of the appointments to the portfolio company's board, thus indirectly ensuring control over the management.

When only a minority stake is taken, the private equity shareholder will typically require a right of veto over key decisions – whether at board or shareholder level – such as the disposal of assets, entering into new or amended financing arrangements, a change in key executives, or the entering of new investors into the structure.

9.2 Shareholder Liability

The concept of a separate legal identity for a corporation is recognised and enforced in Luxembourg, and the corporate veil would only be pierced in extreme circumstances in the event of the insolvency of the company and actions inconsistent with the position of shareholder on the part of the fund.

Limited partners of limited partnerships are generally only liable for the debts of the partnership if they have interfered in the management of the partnership and a (non-exclusive) list of limited partner prerogatives is enshrined in law. Shareholders of limited liability companies generally have the ability to influence (via their voting rights) the actions of the company.

9.3 Shareholder Compliance Policy

Whether or not a fund shareholder would impose its compliance policies on a portfolio company will typically depend upon the nature of the portfolio company's business and whether this would be practical and appropriate. The portfolio company's shareholders can, in practice, influence a variety of actions by means of either:

- their voting rights pursuant to the constitutional rights afforded to shareholders; or
- any shareholder agreements that have been put in place.

10. EXITS

10.1 Types of Exit

The typical holding period for private equity transactions before the investment is sold or disposed of varies depending upon a variety of factors, but is between three to five years on average.

The most common form of private equity exit is via a share sale to a third party (often a secondary transaction with another private equity sponsor). IPOs are becoming more and more frequent, in part due to the growth of the capital market's appetite for technology and healthcare businesses in particular. Dual-track exits – that is, an IPO and sale process running concurrently – are unusual.

Depending upon the terms of the fund and the timing of the transaction, private equity sellers typically reinvest as soon as a suitable new target has been identified and the terms of the new transaction agreed.

10.2 Drag Rights

Drag rights are typical in the equity arrangements, although rarely enforced, with a sale of all shares with consent of all shareholders being more usual. There is no typical drag threshold in Luxembourg, although the majority control threshold would be more frequent than other thresholds. The threshold usually depends on the terms of the transaction.

10.3 Tag Rights

Typically, management shareholders also enjoy tag rights when the private equity fund shareholder sells a stake, and again there is no typical threshold – it depends on the equity structure of the transaction.

10.4 IPO

On an exit by way of IPO, the typical lock-up arrangement will seek to prevent insiders from selling for a period of between three and six months at a minimum. In addition, where the seller retains a significant interest, a relationship agreement would be expected for the benefit of the new investors. Regulatory requirements often drive lock-up periods; where regulatory requirements dictate, most transactions do not extend lock-ups beyond the regulatory periods.

Maples Group is a leading service provider offering clients a comprehensive range of legal services on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg and is an independent provider of fiduciary, fund services, regulatory and compliance, and entity formation and management services. Its global network of lawyers and industry professionals is strategically located in the Americas, Europe, Asia and the Middle East to ensure that clients gain immediate access to expert advice and bespoke support, within convenient time zones. With a presence in Luxembourg through its fiduciary, fund administration, entity formation and management services since 2007, the Maples Group expanded its global offering in 2018 with the addition of Maples and Calder (Luxembourg) SARL, a law firm specialising in the areas of funds and investment management, corporate, finance, tax and associated regulatory matters.

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