Practical Law™

GLOBAL GUIDE 2017
PRIVATE MERGERS AND ACQUISITIONS

ACC Association of Corporate Counsel

Private mergers and acquisitions in Luxembourg: overview

Mathieu Laurent and Marie-Louise Peretti
Luther

global.practicallaw.com/4-535-3443

CORPORATE ENTITIES AND ACQUISITION METHODS

1. What are the main corporate entities commonly involved in private acquisitions?

The answers to the following questions relate to the acquisition of 100% of the target company/all of a business transferred as a going concern.

The main corporate entities involved in private acquisitions are:

- Private limited liability companies (*sociétés à responsabilité limitée*) (SARL).
- Public limited liability companies (*sociétés anonymes*) (SA).

Corporate partnerships limited by shares (*sociétés en commandite par actions*) (SCA), general corporate partnerships (*sociétés en nom collectif*) (SNC), limited corporate partnerships (*sociétés en commandite simple*) (SCS), special limited partnerships (*société en commandite spéciale*) (SCSp) and simplified limited companies (*société par action simplifiée*) (SAS) are less common and are not covered in this article.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

Shares in an SARL are not transferable to non-members unless shareholders representing at least 75% (with the possibility that the company's articles provide for a higher or a lower percentage) of the shares have approved the transfer in a general meeting (*Article 189, Companies Law 1915, as amended (Companies Law)*). The Companies Law provides that the articles of association can decrease this majority down up to 50% of the shares. Shares between members are freely transferable.

For an SA, there is no legal restriction on transfers of shares.

Foreign ownership restrictions

In principle, there are no foreign ownership restrictions.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

Share purchases: advantages/asset purchases: disadvantages

The two main ways that an acquirer can take control of a business in Luxembourg are by:

- Buying the shares of the company operating the targeted business (a share purchase).
- Buying the business itself, leaving the emptied company in the hands of the seller (an asset purchase).

In an asset purchase, the parties can opt for the purchase to be governed by the division regime (an all assets and liabilities purchase) (*Article 308bis-5, Companies Law*). Under the specific purchase regime, all the company's assets and liabilities are transferred by operation of law to the purchaser.

The main advantages of a share purchase compared to an asset purchase are:

- **Tax costs.** Generally, asset sales are fully taxable while share sales are generally tax exempt.
- **Complexity.** On a share purchase, shares are transferred to the buyer by means of a share purchase agreement. All the assets, liabilities and obligations of the target company are acquired without any specification.

  On an asset purchase, the asset purchase agreement must detail the assets, liabilities and obligations to be transferred as part of the transaction. In addition, more consents and approvals are likely to be required on an asset purchase, as there is a change of ownership of the assets themselves.

  On an all assets and liabilities purchase, there is no requirement to detail all the assets and liabilities to be transferred, as this is done by operation of law. However, the official approval process is more cumbersome (for example, corporate approvals and publication timelines apply) than a share purchase or standard asset purchase. In addition, the purchase agreement is public.
- **Third-party consents and notification.** On a share purchase, there are in principle no third-party consents or notifications (unless otherwise provided for in specific agreements).

  On an asset purchase, third party consents must be sought from creditors to operate the transfer of debts. In addition, debtors will have to be notified, to make the transfer of a claim fully enforceable towards the debtor. A party can validly and freely assign a contract, without any specific requirement to obtain the prior consent of the other party or notify the other party (*Appeal*

Court, Luxembourg, 4 March 2009, D.A.O.R. n°100 – 4/2011). However, this principle is subject to numerous exceptions (for example, personal services agreements (*intuitu personae*) cannot be transferred without the other party's consent) and lower courts have issued dissenting judgments. Therefore, parties usually seek the consent of the other party (or at least notify them).

On an all assets and liabilities purchase, there are in principle no third party consents or notifications since the transfer is realised by operation of law (*Appeal Court, Luxembourg, 10 January 2007, n°29444, B.I.J., 2007*).

Share purchases: disadvantages/asset purchases: advantages

The main advantages of an asset purchase compared to a share purchase are:

- **Liabilities.** On an asset purchase, the purchaser can "cherry pick" assets and only assume known and qualified liabilities. The seller (being the target company) retains, unless the agreement provides otherwise, the existing liabilities of the target company.

  On a share purchase, the purchaser acquires the target company with all its assets, liabilities and obligations (even those that the purchaser does not know about). The seller's liability is limited to the extent of the warranties and indemnities given to the purchaser.

  On an all assets and liabilities purchase, all the assets, liabilities and obligations of the target company are transferred to the purchaser by operation of law (even those that the purchaser does not know about). The seller or preferably a third party (taking into account that the seller will have no assets following the operation) may grant specific warranties and indemnities in favour of the buyer.
- **Financial assistance.** Luxembourg law financial assistance provisions do not apply to asset purchases and all assets and liabilities purchases, as this prohibition only applies to the acquisition of shares (*see Question 19*).

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Sales of companies by auction are common for substantial cross-border transactions. The parties have contractual freedom in relation to the organisation of the auction process.

PRELIMINARY AGREEMENTS

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of intent

Letters of intent or heads of terms are agreements in principle which outline the main terms that the parties have agreed. They can take the form of simple letters or a more complex agreement.

Letters of intent are often used:

- As written confirmation of the main terms agreed in principle.
- To outline the timetable and the parties' obligations during the negotiations, and the consequences of a termination of the negotiation process.
- To discharge the seller's liability in relation to the accurateness and completeness of the information provided to the potential buyer.
- As a framework for certain preliminary legally binding clauses, such as confidentiality and exclusivity provisions.

Letters of intent are typically not legally binding, particularly as to the result of the negotiation process. The parties' intention must be clearly stated, to avoid a court ordering specific performance of the purchase based on the letter of intent's terms.

Exclusivity agreements

Exclusivity agreements are contractual agreements entered into between the seller and the potential buyer as part of the negotiation process. Under an exclusivity agreement, the seller undertakes not to negotiate with any other potential buyer. These agreements are binding and are in principle limited as to their duration. In the absence of any exclusivity undertakings, the seller is in principle free to negotiate with any third party.

A breach of the terms of an exclusivity agreement results in the allocation of contractual damages. Specific performance may be ordered in limited circumstances, but this is unlikely.

Non-disclosure agreements

Non-disclosure agreements are entered into between the seller, the potential buyer and the target company (the target company being the owner of the information to be made available to the potential buyer) at the early stage of the negotiation process. This is to ensure that information disclosed during the negotiations remains confidential and is not used for other reasons than for the transaction itself.

Non-disclosure agreements are not subject to any specific formalities to ensure their enforceability.

Legal restrictions prevent the disclosure of certain information, including:

- Personal information is protected by data protection legislation (*Data protection law dated 2 August 2002 as amended and restated*). The Luxembourg draft of Law 7184 creating the National Commission for Data Protection and implementing Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data provides to repeal the present national legislation. This European Regulation will enter into force as from 25 May 2018.
- A company director, the members of the management committee or an executive director may be in breach of their duty of confidentiality if they disclose, without authority, confidential information the disclosure of which may be prejudicial to the company's interest (*Article 66, Companies Law*).
- An employee may be in breach of his general or contractual duties if he discloses confidential information without authority (*Article 458, Criminal Code*).
- The exchange of information between competitors in preparation for an acquisition may infringe Luxembourg competition rules (*see Question 34*).
- A seller may be under a confidentiality obligation owed to a third party (for example, a contractual confidentiality clause).

A breach of the terms of a non-disclosure agreement generally results in the allocation of either or both:

- Contractual damages (whose amount may vary depending on the terms of the agreement).
- Granting of a specific injunction to prevent the party in breach from further exploiting the confidential information.

ASSET SALES

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

Parties to an asset purchase can opt for the purchase to be governed by the all assets and liabilities transfer regime. Under this specific regime, all the assets and liabilities (including personal services agreements (*intuitu personae*), unless expressly prohibited in the agreement itself) are transferred to the purchaser by operation of law.

On a standard asset purchase, employees are automatically transferred (*see Question 32*). In addition, the buyer may inherit liability for environmental matters (*see Question 35*).

Tax charges can be apportioned contractually. However, tax liabilities *per se* are not transferred in an asset sale.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

On a standard asset purchase, creditors' consent must be obtained to transfer debt.

On an all assets and liabilities purchase, no specific notifications or consents are required.

SHARE SALES

8. What common conditions precedent are typically included in a share sale agreement?

The most common conditions precedent included in a share sale agreement are:

- **Regulator's consent.** Where the target company operates in a regulated industry (such as banking or insurance), the regulator's consent to the transaction is required.
- **Third party consent.** Where the main agreements entered into by the target company provide for change of control provisions, the buyer can ask the seller to obtain the third party's consent before the change of ownership.

Special care must be taken in relation to the conditions included in a share sale agreement, as obligations entered into subject to a *potestative* condition precedent (*see below*) are void under Luxembourg law (provided certain requirements are met). A *potestative* condition precedent is one which makes the fulfilment of the agreement dependent upon an event which one of the contracting parties has the power to make happen or to prevent from happening.

SELLER'S TITLE AND LIABILITY

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

Share transactions are within the scope of the Luxembourg civil code (Civil Code) provisions on sales. The seller's title to the shares is implied by law on the following terms:

- **Proper delivery of the shares (*Article 1604, Civil Code*).** The seller must properly deliver the agreed shares to the buyer.
- **Guarantee for hidden defects (*Article 1641, Civil Code*).** The seller guarantees the buyer against any hidden defects of the shares which either:
  - make them unfit for the use for which they were intended at the time of the purchase;
  - impair their use to such an extent that the buyer would not have acquired them or would only have paid a lower price.

  The guarantee relates to the rights granted by the shares (that is, the dividend or interest rights, and voting rights).
- **Guarantee of "quiet possession" of the buyer (*Article 1626, Civil Code*).** The seller must protect the buyer against third parties' acts in relation to the shares (for example, where the shares are subject to an encumbrance before the transfer).

No specific wording is required for these statutory guarantees to apply. However, it is common practice for the parties to include, in the purchase agreement, specific warranties and indemnification provisions relating to the seller's title to the shares. These provisions impose a higher standard than is implied by law.

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Seller

A seller may be held liable for pre-contractual misrepresentation, misleading statements or similar matters (for example, non-disclosure of relevant information to the buyer) on the following grounds:

- **Breach of duty of good faith.** A seller may, in principle, be held liable if he breaches his duty of good faith as part of the negotiation phase of the transaction. This duty of good faith includes to a certain extent a duty to provide the potential buyer with sufficient and accurate information.

  In principle, a seller has a duty to inform a buyer if all of the following conditions are met:
  - the seller knew or should have known the relevant information;
  - the buyer could objectively have expected to receive this information (taking into account the specificities of the transaction); and
  - the buyer could genuinely not have known this information.

  In addition, a seller may be held liable if he provides the potential buyer with inaccurate information, if a reasonable and diligent person would have either:
  - known that this information was inaccurate;
  - made the appropriate qualifications when disclosing this information to the potential buyer.

  However, this ground of action is usually excluded in a pre-contractual agreement or in the purchase agreement itself.
- **Deceit.** The buyer can seek rescission of the contract for deceit and/or a claim for damages if the seller intentionally induced the buyer either:
  - through misleading statements during the negotiations;
  - intentionally omitting to disclose important information.

  This deceit must be such that, if the buyer had known about it, it would not have entered into the contract or would have entered into the agreement on different terms. The buyer can seek rescission or damages if the misrepresentation relates to the

value of the asset being sold (that is, in a share transaction, the value of the business or assets of the purchased company). The buyer must produce evidence of the seller's deceit.

- The purchase agreement cannot eliminate this ground of action.

Advisers

Advisers can be liable for negligent misstatements and under the tort of deceit. Regulated professions (for example, lawyers or accounts) may incur additional sanctions based on their professional rules.

MAIN DOCUMENTS

11. What are the main documents in an acquisition and who generally prepares the first draft?

The main documents in an acquisition are:

- A confidentiality agreement (the seller generally preparing the first draft).
- A letter of intent (the buyer generally preparing the first draft).
- A due diligence report.
- A disclosure letter (prepared by the seller).
- A purchase agreement (the buyer generally preparing the first draft, except for in an auction sale).

Unlike a share purchase, an asset purchase requires several ancillary documents to operate the transfer of ownership of specific assets (for example, real estate properties).

ACQUISITION AGREEMENTS

12. What are the main substantive clauses in an acquisition agreement?

The main substantive clauses in an acquisition agreement are:

- The parties.
- Definitions and interpretation.
- Agreement to sell and purchase the sale shares or the assets.
- Consideration.
- Conditions precedent.
- Pre-completion obligations.
- Completion actions.
- Warranties.
- Indemnification/guarantee provisions.
- Post-closing obligations.
- Boiler plate provisions.

The description of the assets to be transferred as part of an asset purchase agreement tends to be longer on a standard asset purchase than on a share purchase. This is also true for the post-closing obligations and various undertakings from the seller to perfect the transfer of certain assets or agreements.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

A share purchase agreement can provide for a foreign governing law. Even if the agreement is governed by a foreign law, the transfer of ownership of the shares will be automatically governed by the laws of the Grand Duchy of Luxembourg.

WARRANTIES AND INDEMNITIES

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Warranties (contractual statements made by the seller) and indemnities (guarantees or indemnification undertakings granted by the seller) are systematically included in acquisition agreements.

The warranties and indemnification provisions usually cover all aspects of the target company and its business (including its subsidiaries), with a particular focus on the financial accounts used for the transaction and the main assets of the company.

The indemnification provisions are in principle triggered if the warranties are breached. Indemnification provisions may cover additional issues identified during the due diligence process.

15. What are the main limitations on warranties?

Limitations on warranties

The main limitations on the warranties and indemnification provisions relate to:

- **The scope of the warranties or indemnification provisions.** The warranties may be qualified or purposefully not cover certain assets or characteristics of the target company. The agreement can even expressly exclude certain liability heads.
- **The enforcement process of the indemnification provisions.** These provisions generally include time limitation for claims, minimum thresholds for claims, maximum liability provisions and exclusion of contingent liabilities.

Qualifying warranties by disclosure

Warranties are usually qualified by disclosures made by the seller to the buyer. These disclosures impede the buyer in enforcing the indemnification provisions.

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

The remedies available for breach of a contractual warranty depend on the terms of the share purchase agreements:

- **Damages.** A court can grant contractual damages to a buyer for breach of a warranty, if the buyer can prove all of the following:
  - fault of the seller;
  - prejudice;
  - a causal link between the fault and the prejudice.

Damages may also be awarded based on the guarantees implied by law (for example, incidental deceit).

- **Indemnification.** Share purchase agreements generally provide that a breach of the warranties triggers an indemnification provision (similar to a guarantee mechanism). The buyer does not need to prove fault or prejudice (depending on the terms of the agreement).

  The indemnification received by the buyer or the company depends on the terms of the agreement. However, in principle, the purpose of the indemnification provision is to put the buyer and the target company into the position they would have been in had the seller not breached the warranties.

  A court can impose an indemnification obligation on a seller for a breach of a warranty, subject to certain conditions, even if the purchase agreement does not provide appropriate indemnification provisions (*Appeal Court, Luxembourg, 23 February 2005, D.A.O.R., n°88 – 4/2008*).

- **Rescission/cancellation/termination.** Share purchase agreements tend to limit the circumstances in which the parties can rescind, cancel or terminate the agreements, as the parties generally consider that this is not an appropriate remedy (except for in the case of specific material breaches).

  Legal grounds of action such as major error, deceit or non-execution of contractual obligations may allow the purchase agreement to be rescinded or cancelled. Agreements may eliminate some of these grounds of action (for example, cancellation for major error or rescission for non-execution of contractual obligations), but not all grounds (for example, deceit).

Time limits for claims under warranties

The main statutory time limit for claims in commercial matters is ten years. Agreements tend to reduce this time limit to one or two years from the closing date, except for in specific fields (for example, tax warranties and related indemnification provisions generally apply the legal time limit of five years).

CONSIDERATION AND ACQUISITION FINANCING

17. What forms of consideration are commonly offered in a share sale?

Forms of consideration

Consideration in a share sale commonly consists of either (or a combination of):

- A payment in cash at closing (which can be subject to some adjustments).
- A vendor's loan from the seller.
- Shares in another company.

Factors in choice of consideration

The form of consideration generally depends on the purchaser's financial status, the seller's wish to close the transaction quickly, and the seller's potential future involvement in the target company's business.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

To be eligible to issue and list shares on the regulated market or the Euro MTF market of the Luxembourg Stock Exchange (LuxSE), the buyer must have the appropriate legal form (for example, a public limited liability company (*société anonyme*)).

Consents and approvals

The issue of shares must be approved either:

- At an extraordinary general meeting of the buyer's shareholders.
- By a board of directors' resolution, if the issue is under the authorised capital clause of a company's articles of association.

If the shares are to be admitted to trading on the regulated market of the LuxSE, the:

- Supervisory Commission of the Financial Sector (*Commission de Surveillance du Secteur Financier*) is in charge of the approval of the prospectus.
- LuxSE is in charge of the listing on the official list of the LuxSE and the admission to trading of the shares on the regulated market.

If the shares are to be listed on the Euro MTF market of the LuxSE, the LuxSE is in charge of both the:

- Approval of the prospectus.
- Listing on the official list of the LuxSE and the admission to trading of the shares on the Euro MTF market.

Requirements for a prospectus

If the shares are to be admitted to trading on the regulated market of the LuxSE, the prospectus must comply with both:

- The law of 10 July 2005 on prospectuses for securities, as amended.
- Regulation (EC) 809/2004 implementing Directive 2003/71/EC (Prospectus Directive) as regards prospectuses and dissemination of advertisements (Prospectuses Regulation) as amended. The Prospectus Directive will be repealed by Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (New Prospectus Regulation). Most of the provisions of the Prospectus Directive will be repealed with effect from 21 July 2019, however certain provisions were repealed with effect from 20 July 2017 and certain others will be repealed with effect from 21 July 2018.

If the shares are to be admitted to trading on the Euro MTF market of the LuxSE, the prospectus must comply with the rules and regulations of the LuxSE.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

A company cannot directly or indirectly advance funds, make loans or provide security with a view to the acquisition of its shares by a third party, except in limited circumstances (*Article 49-6, Companies Law*).

Exemptions

The financial assistance provisions only apply to an SA, an SAS and an SCA (not to an SARL).

Luxembourg law provides for a type of white wash procedure. It is carried out by the company's management and is subject to stringent conditions:

- The transaction must be done on fair market conditions.
- The management must prepare a report for the attention of the company's shareholders, indicating the:
  - reasons for the transaction;
  - interest of the company in entering into the transaction;
  - conditions on which the transaction is entered into;
  - risks involved in the transaction relating to the company's liquidity and solvency;
  - price at which the third party is to acquire the shares.
- The shareholders' meeting must approve the transaction.
- The management report must be filed with the Luxembourg Trade and Companies Register, and published in the RESA (*Recueil électronique des sociétés et des associations*).
- The aggregate financial assistance is considered as a distribution. Therefore, it must not result in the net assets of the company being below the amount of the subscribed capital plus the reserves (that cannot be distributed under law or by virtue of the articles).

SIGNING AND CLOSING

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

At signing the following documents are commonly produced and executed:

- Share purchase agreement.
- Corporate approvals for both parties.
- Capacity legal opinions.

Closing

At closing the following documents are commonly produced and executed:

- Share register.
- Resignation letters of directors and auditors, and the appropriate discharge of their mandated activities.
- Documentation evidencing satisfaction of pre-closing obligations (for example, termination of intra-group financing, guarantees and encumbrances).
- Services and consultancy agreements.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

Share purchase

A share purchase agreement takes the form of a private deed. The mere consent of both parties is sufficient for a private deed to be valid and binding. However, for the purposes of legal proof, private deeds are in written form and as a matter of principle executed in as many original copies as there are parties having a distinct interest (with an indication of the number of original copies executed on each original).

Standard asset purchase

An asset purchase agreement also takes the form of a private deed. Separate assignment agreements may have to be executed to transfer the ownership of specific assets (for example, real estate properties).

In the case of a transfer of a real estate property, the transfer agreement must take the form of a notarial deed (that is, signed by the parties before a Luxembourg notary public and by the notary himself) in order to be valid and legally binding.

All assets and liabilities purchase

On an all assets and liabilities purchase, the purchase plan and the purchase agreement, as applicable, must be recorded under the form of a notarial deed (*Article 308bis-5, Companies Law*). Both the purchase plan and the purchase agreement must be filed with the Luxembourg Trade and Companies Register and published in the RESA.

22. What are the formalities for the execution of documents by foreign companies?

No specific formalities apply for the execution of documents by foreign companies.

23. Are digital signatures binding and enforceable as evidence of execution?

An electronic signature is equivalent to a handwritten signature and is therefore fully binding and enforceable if it is both (*Article 18, law dated 14 August 2000 on the e-commerce, as amended*):

- Created by means of a secure signature creation device which is under the sole control of the signatory.
- Based on a qualified certificate fulfilling certain requirements.

24. What formalities are required to transfer title to shares in a private limited company?

The formalities required to transfer title to shares in an SA depend on the form of the shares. The shares can either be registered shares, bearer shares or in dematerialised form. The most common forms of shares are:

- **Registered shares.** The transfer of registered shares must be carried out by means of a declaration of transfer entered in the shareholders' register. The transfer must be notified to or, as applicable, accepted by the company (*Article 40, Companies Law*).
- **Bearer shares.** The transfer of bearer shares must be carried out by means of a declaration of transfer entered in the shareholders' register held by the custodian appointed by the company. The transfer must be notified to, or accepted by, the custodian (as applicable) (*Article 42, Companies Law*).

A transfer of shares in an SARL must comply with the following formalities:

- The transfer must be recorded by a notarial deed or a private deed (*Article 190 § 1, Companies Law*).

- The transfer must be notified to the company or accepted by it (Article 190 § 2, Companies Law).
- The transfer must be recorded in the shareholders' register of the company (*Article 185, Companies Law*).
- A declaration of transfer must be filed with the Luxembourg Trade and Companies Register and published in the RESA (*Article 11bis §2, Companies Law*).

TAX

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

There are no taxes levied on a share sale unless the securities that are sold are those in a Luxembourg tax transparent entity (*société civile*) holding at least one Luxembourg real estate asset (in which case the registration duties set out below apply (*see below, Asset sale*)).

Asset sale

Immovable asset. Luxembourg registration duty applies on the disposal of certain assets that must be registered (essentially real estate located in Luxembourg). This is regardless of whether the contract is executed in Luxembourg or elsewhere.

Where the asset that is disposed of is a Luxembourg real estate asset, transfer tax applies at the standard rate of 6%. If the real estate is located in Luxembourg City, a municipal surcharge of 3% is added. A 1% transcription tax (*droit de transcription*) is also due on the sale of a Luxembourg real estate property.

If the real estate asset sold is located abroad, no registration duty is due in Luxembourg.

Movable asset. There is no need to register the sale of a movable asset. However, if the contract is voluntarily registered, it is subject to a proportional registration duty at a rate of 6% (reduced to 1.2% where the sale is by way of judicial proceeding).

Debt instruments. It is not compulsory to register a document evidencing a debt instrument. Since 2017, the registration duty of 0.24% no longer applies even if such a document is voluntarily registered.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

The tax exemptions and reliefs that apply in an asset sale (*see below, Asset sale*) apply to a security sale of a Luxembourg tax transparent entity holding at least a Luxembourg real estate property.

Asset sale

No registration duty is due on a transfer of buildings to be built (*immeubles à construire*) that are subject to VAT.

There are certain exemptions from the 3% municipality surcharge (for example, for constructible land).

Registration duty on a sale of real estate can be mitigated contributing the asset into a Luxembourg ad hoc vehicle in consideration for shares. In this case, a reduced transfer tax applies at the aggregate rate of 1.1% (that is, 0.6% registration duty and 0.5% transcription tax). To this is added a municipal surcharge of 0.3% if the real estate is located in Luxembourg City.

However, transfer tax will apply at the normal rate of 7% (plus a municipal surcharge of 3% if the real estate is located in Luxembourg City), if both the:

- Contributed property is allocated to a partner or a shareholder different from the contributor of the real estate transfer.
- Allocation occurs within five years of the contribution.

There are other specific exemptions for principal abode acquisition, among others, or buy and sale structures.

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

Capital gains realised by Luxembourg fully taxable companies on the disposal of shares are subject to corporate income tax (CIT) and municipal business tax (MBT).

For the year 2017, the CIT rate is 20.33% if the tax base exceeds EUR30,000 a year. This includes surcharge of 7% of the amount of CIT payable to the unemployment fund.

MBT is levied at an effective rate ranging from 6% to 10.5% depending on the municipality where the company is established. For Luxembourg City, the MBT rate amounts to 6.75%.

Therefore, capital gains realised by Luxembourg companies on the disposal of shares should *prima facie* be subject to tax at the aggregate CIT-MBT rate of 27.08% for companies with their registered office in Luxembourg City. However, exemptions are available under certain conditions (*see Question 28*).

Based on the law dated 23 December 2016 on the 2017 tax reform, the CIT rate (including the 7% surcharge) applicable to income exceeding EUR30,000 will be reduced from 20.33% to 19.26% in 2018. Taking the MBT into account, it will bring the global corporate tax rate applicable to companies in Luxembourg-city from currently 27.08% down to 26.01% in 2018.

In addition, the carry forward of tax losses generated by Luxembourg companies as from 2017 is limited to 17 years. This limitation applies for both CIT and MBT purposes.

Asset sale

Capital gains realised by Luxembourg companies on the disposal of assets are in principle taxable at the CIT rate (including the 7% surcharge) of 20.33% (to be brought down to 19.26% in 2018) for companies with their registered office in Luxembourg. Taking the MBT into account, it will bring the global corporate tax rate applicable to companies in Luxembourg-city from currently 27.08% in 2017 to 26.01% in 2018.

Minimum taxation rules

Luxembourg companies, whether they are regulated or not, are subject to a minimum amount of net wealth tax (NWT), which varies depending on the activity they perform. Since 2016, the minimum NWT has replaced the minimum CIT, which was due in the past. They are subject:

- Either to a minimum NWT of EUR4,815 to the extent that more than 90% of their assets are financial assets, transferable securities, bank deposits and receivables against related parties which amount to at least EUR350,000.
- Or, if they do not fall within this first category, to a minimum NWT which ranges between EUR535 and EUR32,100, depending on the level of the total balance sheet of the company:
  - total balance sheet up to EUR350,000: EUR535;

- total balance sheet higher than EUR350,000 and up to EUR2 million: EUR1,605;
- total balance sheet higher than EUR2 million and up to EUR10 million: EUR5,350;
- total balance sheet higher than EUR10 million and up to EUR15 million: EUR10,700;
- total balance sheet higher than EUR15 million and up to EUR20 million: EUR16,050;
- total balance sheet higher than EUR20 million and up to EUR30 million: EUR21,400; and
- total balance sheet higher than EUR30 million: EUR 32,100.

The minimum NWT applies to both non-regulated and regulated entities (that is, entities subject to the authorisation and supervision of the Luxembourg regulator). Regulated entities include Investment Companies in Risk Capital (SICARs), securitisation companies, Variable Capital Pension Savings Companies (SEPCAVs) and Pension Savings Associations (ASSEPs).

To make sure that only companies that would be liable to the minimum CIT (under the minimum CIT rules which applied until 2015) are liable to the minimum NWT, the minimum NWT is reduced by the amount of CIT of the preceding year. In addition, amounts of minimum CIT that have been paid until tax year 2015 remain creditable against any CIT liability that would be due for the fiscal years 2016 and following.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

Capital gains realised by a qualifying seller (*see below*) on the disposal of shares in a qualifying subsidiary (*see below*) are exempt from CIT and MBT in Luxembourg provided that:

- At the date of the disposal, the qualifying seller has held or commits itself to hold a participation during an uninterrupted period of at least 12 months.
- During this 12 month period, the participation represents at least 10% in the qualifying subsidiary or the acquisition price of the participation is at least EUR6 million.

A subsidiary is a qualifying subsidiary if it is either:

- A collective entity referred to in Article 2 of Directive 2011/96/EU on the taxation of parent companies and subsidiaries (Parent-Subsidiary Directive).
- A fully taxable capital company that has been incorporated outside the EU but which is a tax resident of Luxembourg.
- A non-resident capital company which is liable to a tax corresponding to the Luxembourg CIT. For that purpose, the Luxembourg tax authorities usually require a taxation of at least 9.5% on a basis comparable to the Luxembourg CIT basis.

A seller is a qualifying seller if it is either a:

- Fully taxable collective entity which is resident in Luxembourg and has adopted one of the legal forms listed in the annex to Article 166 paragraph 10 of the Luxembourg Income Tax Law (LITL).
- Fully taxable capital company that has been incorporated outside the EU but which is a resident of Luxembourg.
- Luxembourg permanent establishment of a collective entity referred to in Article 2 of the Parent-Subsidiary Directive.
- Luxembourg permanent establishment of a capital company which is resident in a state with which Luxembourg has concluded a double tax treaty.
- Luxembourg permanent establishment of a corporation or co-operative company which is resident of an EEA country other than an EU member state.

The recipient of the capital gains can hold its participation in one of the qualifying subsidiaries through a tax transparent entity as defined in Article 175 of the LITL. The underlying shareholding is valued according to the proportion held in the net assets of the tax transparent entity.

The capital gains realised on the disposal of a participation are subject to the recapture rule. Under the recapture rule, capital gains are subject to tax up to the sum of all related expenses that were deducted for tax purposes in the year of disposal or in previous financial years. Expenses include, for example, interest expenses on loans used to purchase the shares or any write-downs of the participation. The recapture rule merely implies that in certain cases the deduction of related expenses will give rise to a tax deferral rather than to an absolute saving.

Asset sale

Capital gains tax exemptions may be available in the case of an asset sale, under the relevant provisions of a double tax treaty.

In addition, in the case of a sale by a Luxembourg company of real estate assets or assets that may not be depreciated, the Luxembourg company can roll over the gain realised on the disposal (*Article 54, LITL*). To benefit from this rollover relief, both the:

- Assets must have been on the balance sheet as assets for at least five years.
- Rollover must be realised by a new investment in a new asset of the company booked as such on the balance sheet.

A partial rollover is possible and in such a case only the reinvested gain is proportionally taxed and proportionally deferred.

29. Are other taxes potentially payable on a share sale and an asset sale?

No other taxes are payable on a share sale and an asset sale.

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Groups of domestic companies can opt for an income tax consolidation (*Article 164bis, LITL*). They have two options and can opt either for a vertical corporate income tax consolidation or for a horizontal income tax consolidation.

Availability. Vertical tax consolidation is available where a fully taxable Luxembourg resident corporation or a Luxembourg PE of a foreign company subject to a tax comparable to the Luxembourg CIT holds at least 95% of the share capital in one or more Luxembourg resident fully taxable corporations (that is, incorporated under the legal form of an SA, a SARL or an SCA) or (since 2015) holds a Luxembourg PE of a foreign company which is subject to a tax comparable to the Luxembourg CIT.

The participation must be held directly or indirectly. If the participation is held indirectly, the intermediary companies must also be fully taxable resident or non-resident corporations which are liable to a tax corresponding to the Luxembourg CIT. For that

purpose, the Luxembourg tax authorities usually require a tax rate of at least 9.5% on a basis comparable to the Luxembourg CIT basis.

Horizontal tax consolidation is available to subsidiaries held at least at 95% by the same non-integrated parent company. The integrating subsidiary and the integrated subsidiaries can be Luxembourg resident fully taxable corporations or a Luxembourg PE of a foreign company which is subject to a tax comparable to the Luxembourg CIT. The non-integrated parent company can be either a fully taxable Luxembourg company, a Luxembourg PE of a foreign company subject to a tax comparable to the Luxembourg CIT, a foreign company resident of another EEA country which is subject to a tax comparable to the Luxembourg CIT or a PE located in a EEA country, subject to a tax comparable to the Luxembourg CIT, of a foreign company which is subject to a tax comparable to the Luxembourg CIT. Even though the parent company is not integrated, the requirement to hold a minimum 95% shareholding in the integrated subsidiaries still applies.

Under both the vertical and the horizontal tax consolidations, where the 95% threshold is not met, the tax consolidation regime is available subject to the consent of the Ministry of Finance. In that case, both:

- The holding must be of at least 75%.
- Minority shareholders representing at least 75% of the capital not held by the parent or resident permanent establishment must agree to the tax consolidation.

The 95% threshold must be continuously met from the beginning of the first fiscal year for which the fiscal consolidation applies.

How to obtain. Fiscal consolidation is only available upon filing a written request with the Luxembourg tax authorities. The request must be filed by the integrating company and the integrated subsidiaries together, subject to the fiscal consolidation as well as by the non-integrating parent company (in case of horizontal tax consolidation). The fiscal consolidation becomes effective retrospectively as of the beginning of the fiscal year during which the consolidation was requested. The option must be exercised for at least five subsequent fiscal years.

Effect. In a tax consolidation, the taxable results of the members of the consolidated group are aggregated with those of the integrating company or Luxembourg permanent establishment. This explains why Article 164bis of the LITL provides that all the members of the consolidated group must close their fiscal year on the same date.

The profit or loss of the tax grouping results from the addition of the individual taxable results of the companies that are part of the group (and of the taxable results of the Luxembourg permanent establishment, if applicable). Therefore, a profit realised by one of the companies that is part of the consolidation group may be compensated with losses realised by another company that is part of the consolidation group.

Any carry-forward losses resulting from fiscal years before the tax consolidation can be used by the tax grouping, but only to the extent that the company which has suffered such losses realises a profit.

In addition, in a decision of 24 March 2016, the Luxembourg Administrative Court clarified that even if the requirement of five years has to be assessed at the level of each integrated company, the fact that additional companies join the tax consolidation group at a later stage does not mean that a new tax consolidation group is created. As a result, the integrating company (parent company in the case at hand) can offset the losses generated by the group before new companies joined against profits realised by these new companies after they joined the tax consolidation group.

As in the past, both the vertical and the horizontal tax consolidation regimes are subject to specific conditions as well as some formal requirements. In addition, the law now expressly specifies that a member of a consolidated group cannot simultaneously be part of two consolidated groups.

In the case of tax consolidation, the minimum NWT due by the integrating entity is increased by the minimum NWT due by each of the companies included in the tax consolidation without exceeding EUR32,100.

EMPLOYEES

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset sale

There are no obligations to inform or consult on a sale of single assets (for example, real estate).

However, information and consultation procedures must be completed before the transfer of an economic entity that retains its identity (that is, an organised grouping of resources with the objective to maintain an economic activity). For the definition of transfer, see *Article L.127-2 of the Labour Code*.

The transferee and/or the transferor must inform the representative body or the employee directly if no representative body exists about the (*Article L.127-6, Labour Code*):

- Date of the transfer (or contemplated date).
- Reasons for the transfer.
- Legal, economic and social consequences for the employees resulting from the transfer.
- Measures envisaged regarding the employees.

This information must be given before completion of the transfer.

Share sale

There is no need to inform or consult, as the employees remain employed by the same entity. Therefore, the provisions related to the transfer of a branch do not apply in a share deal, as the transaction only affects the internal and organisational rules of the entity (*Appeal Court, Luxembourg, February 28, 2002, Pas. Tome 32, p 225*).

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Business sale

A business sale cannot be a reason for dismissal. However, the transferee can dismiss an employee for economic or organisational reasons, subject to compliance with the rules applicable to dismissals and following a certain period after the transfer.

Share sale

See above, *Business sale*.

Transfer on a business sale

All existing employment contracts and employment conditions (for example, remuneration and seniority) are automatically transferred to the transferee if both the (*paragraph 1, Article L.127-3, Labour Code*):

- Business sale can be considered as the transfer of an autonomous economic entity.

- Business's activity is maintained or taken over by the new owner.

PENSIONS

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes

In principle, every company can set up one or several additional pension schemes. However, employees commonly participate in private pension schemes established by their employers.

The employer can establish either an (*law dated 8 June 1999 on supplementary pension schemes, as amended (Supplementary Pension Schemes Law)*):

- Internal pension scheme with pension promises guaranteed by the book reserves.
- External pension scheme through pension funds or group insurances.

Both pension schemes are complementary to statutory social security on retirement, death or disability, or survivor's pensions.

Pensions on a business transfer

Pension schemes are transferred to the transferee on a business transfer (*Article 14, Supplementary Pension Schemes Law*).

COMPETITION/ANTI-TRUST ISSUES

34. Outline the regulatory competition law framework that can apply to private acquisitions.

The law of 23 October 2011 on competition as amended (Competition Law) provides the competition law framework. The Competition Law:

- Provides the substantive rules:
  - Article 3 covers prohibition of cartels;
  - Article 4 covers prohibition of abuse of dominant position.
- These provisions mirror the cartel and abuse of dominance provisions in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).
- Establishes the competition council as the Luxembourg national competition authority (Competition Council). The legislator has decided not to establish any specific merger control on a national level. However, the competition council of Luxembourg, in a decision of 17 June 2016, has decided to control mergers *a posteriori*.

Triggering events/thresholds

The Competition Council can intervene, after completion of a transaction, to remedy anti-competitive agreements or abuse of a dominant position resulting from the acquisition.

The Competition Council can intervene on its own initiative or following a complaint.

No specific thresholds are provided by the Competition Law.

Notification and regulatory authorities

The Competition Law does not require prior notification of the contemplated acquisition to the Competition Council. However, notifications to other national regulators may be required under sector-specific legislation.

Substantive test

The Competition Council uses similar criteria to that used by the European Commission investigating under Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty).

ENVIRONMENT

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

Both parties may be held liable for clean-up of the contaminated land. Luxembourg laws apply the polluter-pays principle (*law dated 21 March 2012 on waste management* and *law dated 20 April 2009 on environmental responsibility, as amended*). Therefore, many different parties could be held financially liable for the clean-up of the contaminated land, including:

- Producers from which the waste came.
- Waste producers.
- Holders or former holders of the contaminated land.
- Operators of classified activities.

Buyers inherit liability

Asset sale. A buyer may become liable for the contaminated land as the holder of the contaminated land and the operator of the activities that caused environmental damage.

Share sale. A buyer will not become liable for the contaminated land, as the mere acquisition of shares does not involve a change of holder of the contaminated land or a change of operator of the classified activities.

Sellers retain liability

Asset sale. A seller may retain liability for the contaminated land as former holder of the contaminated land.

Share sale. A seller cannot be held liable for the contaminated land unless the target's corporate veil is lifted.

ONLINE RESOURCES

Legilux

W *www.legilux.public.lu*

Description. Legilux is the legal internet portal of the Government of the Grand Duchy of Luxembourg. It provides access to up-to-date Luxembourg laws and codes.

Luther

W *www.luther-lawfirm.lu*

Description. A free translation in English and German of the main business laws are available on our website. These translations are not official.

Administration des contributions directes

W *www.impotsdirects.public.lu*

Description. Official website of the Luxembourg direct tax authorities. There are no English translations.

Guichet

W *www.guichet.public.lu*

Description. Website presented by government of the Grand Duchy of Luxembourg with the objective to simplify exchanges with the state through fast and user-friendly access to all the information and services provided by public institutions. There are no English translations.

Practical Law Contributor profiles

Mathieu Laurent, Partner

Luther

T +352 27484 662
F +352 27484 690
E mathieu.laurent@luther-lawfirm.com
W www.luther-lawfirm.lu

Marie-Louise Peretti, Knowledge Manager

Luther
T +35 227 484 687
F +35 227 484 690
E marie-louise.peretti@luther-lawfirm.com
W www.luther-lawfirm.lu

Professional qualifications. Avocat à la Cour; Solicitor of England & Wales (non-practising)

Areas of practice. Corporate law; corporate finance; mergers and acquisitions; shareholders' disputes.

This guide was prepared in association with Atoz (a Luxembourg member of the Tax and network) for the tax questions.

Romain Tiffon, Partner

ATOZ

T +352 26 940 245
E romain.tiffon@atoz.lu
W www.atoz.lu

Samantha Schmitz-Merle, Director

ATOZ

T +352 26 940 235
E samantha.merle@atoz.lu
W www.atoz.lu