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Liechtenstein
MERGERS & ACQUISITIONS

Contributing firm

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Liechtenstein.

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LIECHTENSTEIN
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1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

In Liechtenstein the key sources of law relevant for M&A transactions are the Liechtenstein Persons and Companies Act as well as the Liechtenstein General Civil Code.

Without a national stock exchange in its own territory it is not surprising that Liechtenstein law does not provide for its own national stock exchange legislation. In practice, the listed Liechtenstein companies usually go public on a stock exchange in Switzerland or in a EEA-jurisdiction. Nonetheless, the Liechtenstein Takeover Act remains applicable for such listed companies.

In addition, within the area of the financial services legislation, there are rules which are relevant for M&A transactions dealing with financial service providers regulated by the FMA. In particular, the FMA must be involved in transactions which lead to a change of control in financial service providers under its supervision.

Due to its tiny internal market Liechtenstein law does not provide for a national Merger Control system/legislation. However, due to its membership in the EEA, Liechtenstein is subject to the provisions and guidance imposed by the EEA merger control laws and regulations.

It has to be noted that the Blockchain Act *(Token- und VT-Dienstleistungsgesetz)* entered into force in January 2020 and sets forth the legal framework for distributed ledger technology service providers in Liechtenstein. As a consequence, companies regulated under the Blockchain Act are supervised by the Liechtenstein Financial Market Authority (FMA). This will also have an impact on M&A transactions in which regulated distributed ledger technology service providers are involved.

2. What is the current state of the market?

M&A activity in Liechtenstein traditionally is private equity-based. This results from the small number of public companies in Liechtenstein. As a consequence, only a very small percentage of the M&A deals are covered by the media. In 2020, COVID-19 also had its impact on the number of closed deals and resulted in a slow-down on the M&A transaction market.

In addition, the majority of M&A transactions includes a cross-border element as the number of domestic market players is limited.

3. Which market sectors have been particularly active recently?

These sectors include transactions in relation to Liechtenstein private banks and life insurers. In particular, some Liechtenstein private banks recently successfully expanded their operations in Europe and the Far East.

One could also note an increase in inbound migrations and cross-border mergers.

Furthermore, the Fintech market continues to be dynamic. The same applies to start-up companies in the filed of distributed ledger technologies. This could be seen as a consequence of the Blockchain Act which regulates distributed ledger services and the token economy. It is observed that newly incorporated start-ups in the Fintech scene are pursuing token-based business purposes as they find a adequate legal framework in Liechtenstein.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

It is generally expected that the slowdown triggered by COVID-19 in 2020 should be overcome during 2021.

Liechtenstein (Holding) companies which often are created for family-governed, foreign groups of companies continue to be frequently involved in M&A transactions with a cross-border dimension.

Furthermore, Liechtenstein is a highly industrialized economy and traditionally export-oriented. Some Liechtenstein corporations are world market leaders in their field. Larger Liechtenstein industrial companies maintain successful subsidiaries abroad and therefore are regularly involved in both intragroup and extragroup M&A transactions.

It will also be interesting to see how new technological developments, especially in the field of distributed ledger technologies and smart contracts, will influence the execution and process of M&A deals.

5. What are the key means of effecting the acquisition of a publicly traded company?

As mentioned, Liechtenstein domiciled public companies are listed on foreign stock exchanges. Therefore, the pertinent rules of the foreign jurisdiction in which this stock exchange is located apply for the acquisition for a publicly traded Liechtenstein company.

However, if such company is licensed in Liechtenstein and under the supervision of the FMA, the intention to acquire a majority stake or to obtain control in its shareholding must also be timely notified with the Liechtenstein FMA. In addition, the notification duties under the Takeover Act must be complied with.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

It must be distinguished whether the target company is privately held or publicly listed.

For non-listed, private companies the information which is publicly available is very limited. For certain legal forms of such companies more public information can be obtained than for others: this includes information disclosed in the Commercial Register. Certain “harmonized” legal forms (such as the AG and the GmbH) must also file financial statements with the Commercial Registry. For these types of companies the file kept by the Commercial Registry is publicly available and accessible.

For listed companies please refer to Question 5 above.

For companies that are in possession of a license and supervised by the FMA certain additional can be obtained by the public registers which are maintained by the FMA (also on the FMA’s website).

7. To what level of detail is due diligence customarily undertaken?

This depends on the specific transaction features.

Frequently, a Liechtenstein subsidiary forms part of an international transaction. If this subsidiary is not the target company, market players often limit the due diligence review to basic issues (such as corporate information, review of the shareholdings, key employment contracts; change of control clauses, regulatory aspects; litigation etc).

Conversely, if the Liechtenstein entity itself is the target company, the scope and the level of detail for the due diligence review is increased significantly. However, also in such a scenario the structure of the transaction and the resulting information needs of the purchaser can very much determine the scope of the due diligence (intragroup transactions, MBO etc.).

As AML/KYC requirements continuously increase it is also recommended in case of the acquisition of a financial service provider to audit the implemented AML/KYC processes and documentation systems by way of a specific legal and IT due diligence.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

This depends on the legal type of the target entity. In practice, most target companies have the legal form of an AG (*Aktiengesellschaft, Company Limited by Shares*). In such scenarios, the key decision-making body of a target AG is its board of directors. For other legal forms, the pertinent executive body would be in charge.

However, the articles of the target company can set forth additional requirements which must be met to close a M&A transaction. For instance mergers and de-mergers typically require the approval of the general meeting of the shareholders. Conversely, other types of transactions do not necessarily need to involve the shareholders (e.g. asset deals) and are prepared and approved by the board of directors (provided that only a business unit or a part of a target’s assets are sold).

Nonetheless, one needs to bear in mind that any amendment of the target’s articles in the course of the transaction will require the approval by the shareholders and will thus need the required majority (including but not limited the issuance of new shares or the change of the target company's name).

To the extent the shares issued by the target are subject to transfer restrictions set forth in the Articles, a separate approval by the board of directors typically will be necessary.

9. What are the duties of the directors and controlling shareholders of a target company?

The key rule is that the directors of Liechtenstein company must primarily safeguard the target company's interests. When being exposed to a potential transaction, they must safeguard the principles of the business judgment rule and comply with their duty of care and loyalty. For instance, if the transaction includes a merger or de-merger, the board of directors is responsible to draw-up the respective key agreement (*Fusionsplan/Spaltungsplan*). It must apply adequate transparency to the shareholders in this regard.

For transactions which involve more than one Group Company of the same group, there can be potential conflicts of interest which must be remedied by appropriate measures.

In transactions which involve the issuance of new shares (capital increases, mergers) or in which certain shareholders exercise a preemptive or a similar right, the board must treat any participating shareholder of the same category equally in the calculation and distribution of new shares.

Furthermore, it is also a principle under the Takeover Act that the board of the target must always act safeguarding the interests of the target and must treat all shareholders of the same category equally (to the extent that no statutory exceptions apply).

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

In principle, Liechtenstein labour laws are fairly liberal. Nonetheless, the legal framework takes into account certain EU Directives in this regard. Therefore, some requirements to inform or consult with the target's employees or employee representative body can be applicable. Nonetheless, neither these bodies nor labor unions can prevent a transaction from being closed.

Specific transactions may require additional steps such as the information of the employees in a cross-border merger.

Additional notifications of the authorities will be required if the target is under the supervision under the FMA or, if a mass dismissal of a target's labour force is the consequence of a transaction.

11. To what degree is conditionality an accepted market feature on acquisitions?

It is subject to negotiation between the parties to define the applicable signing and closing conditions. In transactions in which a regulated target is involved it is customary to make the transaction conditional on the FMA's prior approval. It is therefore common practice to close such a transaction only after the FMA has confirmed not to object to the change of the shareholding. As the law defines the procedure for the FMA's approval process, the timeline for the transaction must be adjusted accordingly.

For public transactions conditionality can only be used to a certain extent.

Under the Takeover Act it is a key principle that insider trading and market distortions must be avoided at all times. Furthermore, all information disclosed and distributed by the bidder must be precise and complete; misleading statements must be avoided. Any conditions used in the offer must comply with these principles and all other prerequisites set forth by the Takeover Act. The Takeover Act expressly requires that all conditions and reservations included in the bidders offer must be transparently disclosed in the offer and must not be misleading, incomplete or unlawful.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

Generally the parties to a private M&A transaction are free to agree on exclusivity. Conversely for public deals this is not the case if offers must be submitted in accordance with the Takeover Act.

For certain companies in which the Liechtenstein state holds a majority stake there can be further (legal and political) restrictions on exclusivity.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

This is subject to the agreement by the parties. There are several options such as agreeing on a break-fee in the transaction agreement. In any (private and public) offer such deal protection/cost coverage mechanism must be made transparent to the addressees.

14. Which forms of consideration are most commonly used?

In the great majority of share purchase agreement and asset deals the consideration consists of cash payments.

In other types of transactions, such as mergers, other types of consideration such as a combination of cash and newly issued shares are also common.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Liechtenstein law provides for different statutory thresholds which trigger a disclosure requirement. Therefore, there are different statutory layers for such public disclosures.

For listed companies, the Disclosure Act requires that any direct or indirect acquisition or disposal (whether alone or by way of concerted effort) of shares in a listed company beyond or below the thresholds of 5, 10, 15, 20, 25, 33, 50 or 66 % of the voting rights of the target, a disclosure to the FMA is required. The Disclosure Act contains additional rules for the aggregation and calculation of the applicable percentages.

In addition, the financial services legislation (including but not limited the Banking Act, Insurance Supervision Act, fund legislation etc.) provide for similar but additional specific thresholds which also apply if the target is not listed but under the supervision of the FMA.

16. At what stage of negotiation is public disclosure required or customary?

For listed companies, please refer to Question 5 above.

For regulated non-listed companies, the FMA takes the view that the intention to acquire or sell a participation which changes the shareholdings in relation to the statutory thresholds triggers the need for notification.

17. Is there any maximum time period for negotiations or due diligence?

No. However, it is common for transaction parties to agree on long-stop dates for the completion of a transaction.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

Under the Liechtenstein Takeover Act, in a mandatory offer as well as in a voluntary offer, certain price rules must be observed.

In particular, the price offered in a mandatory takeover bid must not be lower than the last price which the bidder (or any person acting jointly with the bidder) granted or agreed to pay during the last 12 months prior to the notification of the offer for the very same security. In addition, the price must amount at least to the average market value of the respective security during the last 6 months prior to the publication date on which the intention to submit a bid occurred. Other specific rules for bids exist which do not exclusively provide for a cash consideration.

19. Is it possible for target companies to provide financial assistance?

Generally it is possible for target companies to do so in view of the legal principle of freedom of contract. However, there are several limitations imposed by corporate, tax, insolvency and criminal law principles and restrictions. The same applies for the granting of upstream and cross-stream securities. The specific rules also depend of the legal form of the involved entities.

20. Which governing law is customarily used on acquisitions?

The parties to an M&A transaction regularly negotiate a choice of law clause which determines the governing law for the transaction agreements. Liechtenstein conflict of law rules does not necessarily require an SPA dealing with a Liechtenstein target company to be governed by Liechtenstein law (although this is common practice if all the parties are domiciled in Liechtenstein). Frequently, where either the seller or the purchasers are non-Liechtenstein persons or entities, the SPA may be governed by foreign law. Nonetheless, there will be non-contractual issues (regulatory law, corporate law) which will be per se governed by Liechtenstein law and which are not open to the choice of foreign law.

In asset deal agreements it is advisable to choose Liechtenstein law as the governing law if the assets to be transferred are subject to Liechtenstein law and/or physically located in Liechtenstein.

For other types of transactions such as mergers or de-mergers statutory law requires Liechtenstein law to be applied on the corporate aspects (in particular if the articles of the target have to be amended as a consequence of the transaction).

For listed Liechtenstein companies the law of the jurisdiction in which the respective stock exchange is domiciled will also apply. There can be scenarios in which both Liechtenstein corporate law and foreign listing rules/stock exchange laws are applicable on the very same transaction, e.g. on the issuance of new shares by way of capital increase of a Liechtenstein company which intends to list these new shares on a foreign stock exchange.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

Please see Question 5 above.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

This predominantly depends on the type of shares that are the subject-matter of the transaction.

Basically the transfer of registered shares in a private company requires an SPA and the physical delivery of the share certificates including an endorsement to the purchaser. In addition, a board approval may be necessary if there are transfer restrictions in the target's Articles. To become accepted by the target, the new shareholder must be entered into the shareholder register of the target company.

The transfer of bearer shares in a private company basically requires an SPA and the notification and registration of the purchaser as the new shareholder in the company custodian's register of shareholders. Under the current law, bearer shares are immobilized and thus are no longer transferred by way of mere physical delivery.

With the enactment of the new Blockchain Act and other amendments the Liechtenstein legislator also approved of new mechanism which allows to reduce the formal requirements for a transfer of shares. It is now possible to represent any form of security (registered or bearer shares) in a book-entered security (*Wertrecht*). If this is the case, only the registration of the new shareholder in the book of shares (*Wertrechtebuch*) is a prerequisite but not the physical transfer of the share endorsement. In addition the book of shares or its can be managed and kept on a blockchain basis which makes it possible to transfer the registered book-entered securities automatically by way of tokens.

It should be noted that due to a bilateral customs union between Liechtenstein and Switzerland Swiss stamp duties can apply if one of the parties to the transaction qualifies as securities dealer.

23. Are hostile acquisitions a common feature?

No, this is not the case.

24. What protections do directors of a target company have against a hostile approach?

Basically, the board of directors is not obligated to take up negotiations with an interested party if such negotiations are not in the interest of or even detrimental to the target company.

Many Liechtenstein companies with a small circle of shareholders have articles which restrict (or sometimes even prevent) the acquisition of shares by a third party outside of the existing circle of shareholders. New potential shareholders must be approved by the Board. In addition, such articles can also provide for preemptive rights of in favour existing shareholders. Such rights enable such shareholders to exercise control over the target company.

It is also common to conclude shareholder agreements which restrict or control the entry of third parties into the company. They often include preemptive rights of the key shareholders can only be made between the parties of the shareholder agreement.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Yes, the Liechtenstein Takeover Act includes such requirements if the target company is a listed company.

A mandatory obligation to submit a takeover bid exists for the direct acquisition of more than 30% of the target company's voting securities. Persons who alone or in concert with other persons acting jointly acquire such controlling stake are obligated to notify, without delay, the FMA and within 20 trading days, must make submit a bid for all securities issued by the target company in accordance with the Takeover Act (*Pflichtangebot)*. Blocks of shares of less than 30% of the issued share capital benefit from a safe harbor clause provided by the Takeover Act. Other statutory exceptions from the obligation to submit a mandatory bid exist. Under the Takeover Act the obligation to launch a mandatory takeover bid also extends to the indirect acquisition of control (of more than 30% of the share capital of the target company).

An target company can opt out in its articles that the threshold of 30% shall not be applicable. Alternatively, the company can provide for either an increased or a reduced threshold in its articles.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

General corporate law grants a minority shareholder certain mandatory rights provided that such minority shareholder has a stake of at least 10% of the share capital. These rights mainly relate to shareholder meetings (request the convocation of shareholders meeting/proposals for agenda items). A company's articles can contain additional minority rights beyond this statutory minimum.

Furthermore, there are several provisions under Liechtenstein corporate law which require qualified majorities for the resolution of important agenda items, such as the change of the purpose of a company, the performance of a merger or the increase or decrease of the share capital.

For listed companies, the Takeover Act sets forth a squeeze-out procedure for minority shareholders (see Question 27).

27. Is a mechanism available to compulsorily acquire minority stakes?

The squeeze-out rules under the Takeover Act are confined to Liechtenstein companies which are listed on a stock exchange. Consequently, they do not apply to any other Liechtenstein entity. Under the Takeover Act a bidder who owns at least 95% of the voting rights and of the target company's capital is entitled to request the FMA to order the nullity (*Kraftloserklärung)* of the remaining issue securities. However, such squeeze-out has to occur against payment of the offered price. Depending on the location of the listing, foreign squeeze-out rules may (also) be applicable.

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