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Corporate M&A

Liechtenstein
Law and Practice

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LIECHTENSTEIN

Law and Practice

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1. TRENDS

1.1 M&A Market

In the first and second quarters of 2020, M&A activity in the Liechtenstein market was slower than in previous quarters. Yet, as from summer of 2020, the number of deals has surged.

1.2 Key Trends

The COVID-19 pandemic has put some Liechtenstein companies in distress. This has made them attractive targets for foreign companies. Therefore, in particular in the third and fourth quarter of 2020, the number of cross-border deals increased.

1.3 Key Industries

The financial sector was almost entirely unaffected by COVID-19. However, the manufacturing industry suffered. A significant portion of employees were requested to work reduced hours.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

In Liechtenstein, most deals which are structured as private M&A transactions are accomplished by way of a share deal. Very few deals are completed by way of an asset deal.

In a share deal the majority or totality of shares in a target company is acquired by the buyer. The assets of the target company remain in the target company whilst the buyer owns the majority or totality of the shares in the target company. Thus, the buyer acquires the assets of the target indirectly.

In asset deals, however, the targeted assets are transferred by the seller to the buyer. In contrast to a share deal transaction, the assets are transferred directly from the seller to the buyer.

Whether a deal is accomplished via a share or an asset deal depends on many factors. These include whether the buyer wishes to acquire only one specific asset of the target or all assets of the target. Furthermore, the complexity of the business, regulatory issues as well as tax implications are considered.

2.2 Primary Regulators

In Liechtenstein law, there is no primary regulator for M&A activity. There is no national antitrust law or merger control law in Liechtenstein.

Yet, in transactions in the financial industry pertaining to targets which are monitored by the Liechtenstein Financial Market Authority (FMA), certain transactions are supervised by the FMA and in some instances need to be approved by the FMA.

2.3 Restrictions on Foreign Investments

Under Liechtenstein law, there are generally no restrictions regarding foreign investments. Yet, concerning the financial industry, in some instances transactions will need to be approved by the Liechtenstein FMA.

2.4 Antitrust Regulations

There is no national antitrust law or merger control law in Liechtenstein.

2.5 Labour Law Regulations

Applicable labour law provisions are laid down Sections 1173a Article 1 sqq of the Liechtenstein Civil Law Act (*Allgemeines Bürgerliches Gesetzbuch* (ABGB)). Liechtenstein labour law is very liberal, and most provisions are not binding. Some provisions, however, must be observed at all times (eg, those concerning overtime work, assignment and pledging of wage claims, vaca-

tion pay, termination of employment, and abusive termination).

2.6 National Security Review

Under Liechtenstein law there is no national security review of acquisitions.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

The Market Abuse Regulation, as amended from time to time, as well as the delegated and implementing acts issued by the EU Commission in this regard, have been directly applicable in Liechtenstein since 1 January 2021. At the same time, the EEA Market Abuse Enforcement Act (EEA-MDG; Law Gazette 2020 No 155) also applies. The previous Market Abuse Act (MG), the Market Abuse Ordinance (MV) and the Financial Analysis Market Abuse Ordinance (FinMV) have been out of force since 1 January 2021.

As part of the implementation of the 4th EU Anti-Money Laundering Directive (Directive (EU) 2015/849), the Law on the Register of Beneficial Owners of Domestic Legal Entities (VwEG) was adopted in December 2018. The VwEG establishes a register for the purpose of combating money laundering, predicate offences to money laundering and terrorist financing, which register contains information on the beneficial owners of domestic companies or other legal entities as well as trusts. With the decision of the EEA Joint Committee regarding the adoption of Directive (EU) 2015/849, the Anti-Money Laundering Directive entered into force on 1 August 2019.

3.2 Significant Changes to Takeover Law

The Liechtenstein Takeover Act has been amended in light of the Market Abuse Regulation and the EEA Market Abuse Enforcement Act.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

According to the Liechtenstein Takeover Act, the offeror may disclose their consideration of, and their intention to make, an offer to the board of directors of the target company prior to the announcement or publication thereof and may negotiate thereon with such bodies.

The board of directors of the target company shall ensure confidentiality.

The shareholders of the target company with whom the offeror negotiates the acquisition shall also be obliged to maintain confidentiality.

It does not happen frequently that a bidder builds a stake in the target prior to launching an offer. Usually, when negotiations commence the parties enter into a non-disclosure agreement (NDA).

4.2 Material Shareholding Disclosure Threshold

Thresholds apply to certain companies which hold licences issued by the FMA.

In certain circumstances, any person who reaches, exceeds or falls below 10%, 20%, 30%, or 50% of the voting rights in a licensed company as a result of an acquisition, sale or otherwise must notify the FMA of the proportion of voting rights held. In this respect, it should be noted that, under certain circumstances, even if the threshold of 10% has not been reached, if the acquirer otherwise “controls” the target as if it

held 10% or more of the shares, this will also trigger the notification obligation towards the FMA.

4.3 Hurdles to Stakebuilding

The regulatory provisions apply only to notifications to a public authority such as the FMA.

4.4 Dealings in Derivatives

If all legal requirements are met, dealings in derivatives are allowed.

4.5 Filing/Reporting Obligations

The European Market Infrastructure Regulation

Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on over-the-counter (OTC) derivatives, central counterparties and trade repositories (European Market Infrastructure Regulation (EMIR)) entered into force on 16 August 2012 and regulates trading in derivatives in the EU, the authorisation of central counterparties domiciled in the EU and the recognition of non-EU domiciled central counterparties in the EU. EMIR also regulates trading in OTC derivatives, which is subject to settlement, reporting and risk mitigation obligations. The settlement obligation must be fulfilled via a central counterparty. The central counterparty performs a risk mitigation function by assuming the settlement risks of the counterparties to a derivative transaction. Reports must be made to a trade repository, which must either be authorised or recognised in the EU.

The regulation distinguishes between so-called financial counterparties and non-financial counterparties. Financial counterparties are all:

- investment firms under the Bank Act;
- credit institutions, asset management companies;
- (re)insurance companies;
- undertakings for collective investment in transferable securities (UCITS) and their management companies;
- institutions for occupational retirement provision; and
- alternative investment funds managed by licensed or registered alternative investment fund managers.

All other entities domiciled in an EU/EEA state are to be classified as non-financial counterparties for the purposes of the regulation.

EMIR Implementation Act

Liechtenstein is not a member of the EU but a member of the EEA. Still, it was not necessary to transpose the EMIR into national Liechtenstein law, as it became directly applicable in Liechtenstein upon the entry into force of the relevant decisions of the EEA Joint Committee on incorporation into the EEA Agreement. Only supplementary provisions regarding the competent authority and its powers as well as penalty provisions and regulations regarding compliance with EMIR by non-financial counterparties needed to be enacted in national law. For this purpose, the EMIR Implementation Act was enacted in Liechtenstein. This entered into force simultaneously with the decision of the EEA Joint Committee regarding the adoption of Regulation (EU) No 648/2012.

Based on the endorsement decisions of the EEA Joint Committee (JCD 112/2018 and 113/2018, dated 31 May 2018), the legal basis became largely applicable in Liechtenstein when the decisions came into force on 1 June 2018.

Competition Law

There is no national antitrust law or merger control law in Liechtenstein.

4.6 Transparency

There is no requirement for any notification under corporate law. As relates to regulatory law, the notification depends on which type of licence is held by the target company. Generally, a threshold of 10% is considered a qualified interest which shall be reported to the FMA. The FMA shall be notified of such "intent". Under certain circumstances, even if a buyer does not acquire a qualified interest of 10% but through other means (voting rights, shareholder agreements, etc) is in the same position as qualified interest holder of 10%, that buyer shall notify the FMA accordingly.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

From a corporate law perspective, there is no mandatory requirement to disclose a deal. If the target company holds a licence issued by the Liechtenstein FMA, then any disclosure requirements will depend on which licence has been issued by the FMA. Usually, the regulatory laws stipulate that the FMA shall be notified of each and every "intent" to acquire a qualified interest.

5.2 Market Practice on Timing

Usually, the regulatory laws stipulate that the FMA shall be notified of each and every "intent" to acquire a qualified interest. In Liechtenstein legal practice, "intent" means the signing of a memorandum of understanding or term sheet. Sometimes, the parties notify the FMA only once the share purchase agreement or asset purchase agreement has been signed.

5.3 Scope of Due Diligence

In a private M&A transaction, depending on the target company and in which field of business it is active, the due diligence examination could encompass legal, tax, environmental, business, and industrial examinations.

5.4 Standstills or Exclusivity

In public transactions, exclusivity is not frequently required. In private deals, however, exclusivity clauses are regularly requested. It should be noted that such requests are not always met.

5.5 Definitive Agreements

It is permissible but not common for tender offer terms and conditions to be documented in a definitive agreement.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

The length of the acquisition process depends on the target company and in which field of business it is active. If the target company is licensed by the FMA, then the accomplishment of the acquisition might take up to a year or more. For non-licensed companies the closing could be achieved faster. It would certainly also depend on the complexity of the deal, the size of the target company and the preparedness of the contracting parties to collaborate efficiently.

6.2 Mandatory Offer Threshold

The Liechtenstein Takeover Act regulates the procedure for takeover bids for the acquisition of equity securities issued by a target company and admitted to trading on stock exchanges on a regulated market – within the meaning of Directive 2014/65/EU of the European Parliament and of the Council 15 May 2014 on markets in financial instruments and amending Directives 2002/92/EC and 2011/61/EU – in one or more EEA member states or for trading on stock exchanges in third countries. It should be noted, however, that there is no stock exchange in Liechtenstein. The Takeover Act regulates the negative conflict of competencies in relation to third countries. The Takeover Act forms the legal framework for the

cross-border takeover of listed companies and regulates the procedure.

Any person who acquires a direct or indirect controlling interest in a company (target company) through sole acquisition or through acquisition with persons acting in concert must notify the FMA thereof without undue delay and, within 20 trading days, announce an offer for all equity securities of the target company that complies with the provisions of the Takeover Act.

A controlling interest is an interest which enables the bidder to exercise a controlling influence over the target company. In the assessment, particular consideration shall be given to the percentage of the participation in the voting share capital, the spread of other shareholdings with voting rights, the voting share capital usually represented at general meetings and the provisions of the articles of association. The obligation to make an offer does not exist if the direct shareholding in the target company amounts to less than 30% of the voting rights attached to the shares with permanent voting rights.

6.3 Consideration

Cash is more commonly used than shares in Liechtenstein as consideration.

6.4 Common Conditions for a Takeover Offer

According to Article 8 of the Liechtenstein Takeover Act, offer conditions and a reservation of the right of withdrawal are only permissible if they are objectively justified, in particular if they are based on legal obligations of the bidder, or if the occurrence of the condition or the assertion of the right of withdrawal does not depend exclusively on the discretion of the bidder.

6.5 Minimum Acceptance Conditions

The period for acceptance of the offer may not be less than two weeks and not more than ten weeks from the publication of the offer document. If the administrative body of the target company plausibly demonstrates that it is unable to adequately assess the offer in a timely manner if the offeror's acceptance period is less than three weeks, the FMA may set a minimum acceptance period of three weeks.

It should be noted that if an offer to acquire equity securities has failed, the offeror and all persons acting in concert with it may not make any further offer for equity securities of the target company within one year from the publication of the result of the offer. During the same period, they are also prohibited from any acquisition of shares that would trigger an obligation to make an offer.

6.6 Requirement to Obtain Financing

For the purpose of reviewing the offer document, the offeror shall appoint an expert who is independent of the offeror and subject to the auditors. The expert shall examine the completeness and legality of the offer document, in particular with regard to the consideration offered, and prepare a written report thereon. Furthermore, the expert shall summarise the results of the examination in a concluding statement and, in this statement, also make a declaration that the offeror has at its disposal the funds necessary for the complete fulfilment of the offer.

Offer conditions and a reservation of the right of withdrawal are only permissible if they are objectively justified, in particular, if they are based on legal obligations of the bidder, or if the occurrence of the condition or the assertion of the right of withdrawal does not depend exclusively on the discretion of the bidder.

6.7 Types of Deal Security Measures

Subject to the restrictions set out below, under Liechtenstein law the principle of freedom of contract enables the contracting parties to agree

on any security deal measure as long as it is in line with good morals.

Offer conditions and a reservation of the right of withdrawal are only permissible if they are objectively justified, in particular if they are based on legal obligations of the bidder, or if the occurrence of the condition or the assertion of the right of withdrawal does not depend exclusively on the discretion of the bidder. In Liechtenstein legal practice, break-up fees are sometimes agreed upon.

6.8 Additional Governance Rights

If a bidder does not acquire 100% ownership of a target, that bidder would usually wish to bind the other shareholders somehow. This could be achieved by a shareholders' agreement, amending the statutes of the target company accordingly, etc.

6.9 Voting by Proxy

Shareholders may generally appoint a proxy who exercises their voting rights.

6.10 Squeeze-Out Mechanisms

There is no law regulating squeeze-out mechanisms in Liechtenstein. Therefore, only the common corporate measures could be adopted (eg, a share capital increase). In such cases, each shareholder shall be entitled to that portion of the newly issued shares which corresponds to their existing shareholding. Yet, the resolution of a General Meeting of Shareholders on the increase of the share capital may, with a majority of two thirds of the votes represented, exclude the subscription right in whole or in part. Accordingly, existing shareholders may be diluted.

6.11 Irrevocable Commitments

There is no standard or universal approach to irrevocable commitments by principal shareholders in Liechtenstein. It really depends on the relative deal and transaction.

7. DISCLOSURE

7.1 Making a Bid Public

First, the bidder must notify the FMA of the takeover offer, including the offer document and the expert's report. The date of receipt of the notification shall be confirmed by the FMA. The bidder must then publish the above-mentioned documents no earlier than on the twelfth and no later than on the fifteenth trading day after receipt by the FMA – unless the FMA has prohibited the publication of the offer.

7.2 Type of Disclosure Required

In Liechtenstein, a public offer of securities may, in principle, only be made if the issuer has published in advance an approved securities prospectus which complies with the requirements of the EEA Securities Prospectus Implementation Act (EEA-WPPDG).

In the interest of investor protection, the prospectus must contain, among other things, information about the issuer (for example, the assets and liabilities) and the security to be published. In principle, the FMA must decide within ten working days of the submission of the draft prospectus whether or not it approves the prospectus.

7.3 Producing Financial Statements

Companies limited by shares are required by law to prepare financial statements even if they do not carry on a commercial business. The statutory representative are required to submit documents to the Office of Justice by the end of the 15th month following the balance sheet reporting date.

7.4 Transaction Documents

The offeror shall prepare an offer document which shall contain, at least, the following information:

- the contents of the offer;
- information on the offeror, in particular, if the offeror is a company, the legal form, name and registered office of the company, as well as information on direct and indirect shareholdings in the offeror and its affiliation with a group of companies;
- the equity securities which are the subject of the offer;
- the consideration offered for each equity security as well as the valuation method applied in determining the consideration or the basis of the calculation;
- information on the execution of the bid, in particular on the entities appointed to receive declarations of acceptance and to provide the consideration;
- the type and amount of compensation offered for a loss of rights under the break-through clause and the method by which it is determined;
- if applicable, the minimum and maximum percentage or number of equity securities which the offeror undertakes to acquire and a description of the allotment arrangement;
- the equity securities of the target company which the offeror and persons acting in concert with the offeror already hold or which they are entitled or obliged to acquire in the future;
- the conditions and reservations of withdrawal to which the offer is subject;
- the intentions of the offeror with respect to the future business policy of the target company and, to the extent affected by the bid, of the offeror, and with respect to the continued employment of its employees and management, including any material changes in the terms and conditions of employment;
- the time limit for the acceptance of the offer and for the provision of the consideration;
- in the case of consideration in the form of equity securities, information concerning such equity securities;
- the terms of financing of the offer by the offeror;
- particulars of the persons acting in concert with the offeror or, to the extent known to the offeror, in concert with the target company, including, in the case of companies, their legal form, name and registered office and their relationship with the offeror or the target company – such particulars may be limited to those persons who are relevant to the decision of the target company; and
- an indication of the national law to which the contracts between the offeror and the holders of the equity securities of the target company resulting from the bid are subject, as well as an indication of the place of jurisdiction.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

Article 182 paragraph 2 of the Persons and Companies Act (*Personen- und Gesellschaftsrecht* (PGR)) provides for a "safe harbour" for directors when acting on behalf of the legal entity ("business judgement rule"). This principle requires directors to act on the basis of appropriate information and in the best interest of the company, and to ensure that they are not misled by irrelevant issues.

8.2 Special or Ad Hoc Committees

It is not very common for boards of directors to establish ad hoc committees in business combinations.

8.3 Business Judgement Rule

See **8.1 Principal Directors' Duties**. There are several Supreme Court rulings on the business judgement rule found in Article 182 paragraph 2 of the PGR.

8.4 Independent Outside Advice

Sometimes directors of target companies seek advice from lawyers if they anticipate that upon completion they could be replaced.

8.5 Conflicts of Interest

There have not been any notable cases concerning conflicts of interest concerning a public M&A transaction.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

Hostile tender offers are permitted.

9.2 Directors' Use of Defensive Measures

Defensive measures approved by the shareholders' meeting are permissible if the target company's corporate bodies are already obliged to do so or if they have been resolved by the shareholders' meeting after the bidder's intention – to make an offer – has become known. If members of the target company's corporate bodies bring about such resolutions by providing incorrect or incomplete information to the shareholders, they may be liable for damages.

The approval of the shareholders' meeting is required from the time the target company becomes aware of the bidder's intention – to make an offer – until the publication of the result. If the takeover comes about, the period lasts until the bid is executed.

This includes all measures taken by the management and administrative body which could frustrate the bid, in particular for the issuance of equity securities which could prevent the bidder from gaining control over the target company. Measures relating to the search for competing offers are excluded.

9.3 Common Defensive Measures

General regulations under company law that can make a takeover more difficult include (i) maximum voting rights; (ii) all contractual provisions that prevent a rapid change of control, such as staggered management or supervisory board mandates; and (iii) long-term contracts with members of the management board.

Furthermore, a takeover can be made more difficult by the sale of parts of the company that are particularly interesting from the bidder's point of view, or by a capital increase from already authorised capital and the issue of shares with the exclusion of shareholders' subscription rights.

Moreover, change of control clauses are frequently used in relevant agreements.

9.4 Directors' Duties

The Takeover Act does not provide for any specific duties for administrative bodies with respect to taking defensive measures.

9.5 Directors' Ability to "Just Say No"

Directors can "just say no"; the business judgment rule applies. This principle requires directors to act on the basis of appropriate information and in the best interest of the company, and to ensure that they are not misled by irrelevant issues.

10. LITIGATION

10.1 Frequency of Litigation

Litigation in connection with M&A deals is not at all common in Liechtenstein.

10.2 Stage of Deal

See **10.1 Frequency of Litigation**.

10.3 "Broken-Deal" Disputes
See **10.1 Frequency of Litigation**.

11. ACTIVISM

11.1 Shareholder Activism
Shareholder activism is not an important issue in Liechtenstein.

11.2 Aims of Activists
See **11.1 Shareholder Activism**.

11.3 Interference with Completion
See **11.1 Shareholder Activism**.

Marxer & Partner was founded in 1925 and has 12 partners, a permanent consultant, 12 legal staff, four of counsel and approximately 50 other professionals. For many years Marxer & Partner has focused its activities on the fields of corporate law, M&A, trust and estate planning, capital markets, as well as tax. The firm provides in-depth knowledge and advice in these fields to its international client base. Marxer & Partner's experienced corporate litigation team has successfully represented clients in litigation, and international arbitration proceedings complete the scope of services provided to clients. Many of the firm's lawyers regularly contribute to international handbooks and other publications, as well as speaking at conferences. The firm represents Liechtenstein at Lex Mundi, the worldwide association of independent law firms.

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