Global Private M&A Guide - Limited External Content - Luxembourg

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

This is the **Luxembourg** section. Select a topic from the menu and explore the questions within.

*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

Legal due diligence generally covers broader matters such as corporate issues, business permits, commercial agreements, tax issues, financing agreements, securities, employment and pensions matters, IP/IT and litigation, and for specific matters, such as for the acquisition of a real estate company or building, title deeds, lease agreements, easements, authorizations for the building and exploitation permits (in particular, commodo/incommodo authorization).

The scope of the due diligence mainly depends on the activities and business of the target company. Customarily, the party instructing a third party to conduct a due diligence exercise on a target will tend to agree beforehand not only the scope of the due diligence, but also materiality thresholds applicable for reporting and sampling criteria for carrying out the due diligence in a more efficient way.

Disclosure of documents and information is driven by the seller generally on the basis of the buyer's requests (in the case of buyer due diligence), while the buyer has limited independent and external sources to obtain information.

The legal due diligence is typically limited to a review of documents in a virtual data room combined with a Q and A exercise and management interviews. It has become more common for a seller to provide a vendor due diligence report as part of the information granted to bidders in auction processes.

Issues identified in the due diligence are typically dealt with by either: (i) having them rectified by the seller before signing/closing, sometimes addressed via conditions precedent, for the most salient points, or actions to signing/closing; (ii) representations and warranties in the share purchase agreement' or (iii) specific indemnities.

**Independent appraisal**

In a typical private M&A transaction (share or asset deal), an independent appraisal is not required by law where the purchase price is paid in cash. However, it is customary to use a valuation in determining the enterprise value and the purchase price for a certain target company.

Depending on the corporate form of the companies involved in the transaction, independent appraisals may be required if the purchase price is not paid in cash but in kind through the issuance of new shares (capital contribution in kind).

**Pricing and payment**

There are generally no restrictions on the pricing or methods of payment of the purchase price from a legal perspective.

The purchase price can be paid in euro or other currency, in cash or in kind, in one or several instalments, etc. The acquisition agreement can provide for the full spectrum of price determination mechanisms customarily used in M&A transactions. Recent trends indicate that s locked-box price mechanisms are becoming more popular.

Options to secure the payment of the purchase price by the buyer (e.g. escrow mechanisms, holdback amounts, other forms of guarantee, etc.) are also generally used in practice.

**Signing/closing**

*Share sale*

Share deals are commonly and frequently used in Luxembourg.

The transfer of shares does not require notarization and the share purchase agreement can be executed under private seal. The articles of association or shareholders' agreement may restrict or add additional conditions to the transfer of shares (preemptive rights, transfer restrictions, lock-up).

The law provides for specific formalities depending on the corporate form of the company whose shares are sold (e.g., specific shareholders' approval, registration in the shareholders' register). The target company needs to be notified with respect to the transfer of shares and, for this reason, it is customary that the target company be a party to the share purchase agreement.

In principle, in share deals, agreements entered into by the target company remain unchanged and the company retains all its assets and all its liabilities.

*Asset sale*

In principle, in asset sales, each single asset must be transferred in compliance with the transfer and form requirements applicable to that asset. Notarization is usually not required except for real estate. Sales of real estate assets require the involvement of a public notary. The transfer deed will take the form of an authentic notarial deed and must be recorded at the Mortgage Registry to provide the owner rights of opposition against third parties.

In asset deals, business permits, licenses or contracts are, in principle, not transferred along with the asset, except in certain cases (e.g., lease agreements in real estate, building permits and authorizations, etc.). The buyer will obtain new permits and licenses (e.g., insurance or regulatory sector).

## Approvals/registrations

**Foreign investment restrictions**

On 1 September 2023, a [law creating a national screening regime of foreign direct investments](https://bakerxchange.com/collect/click.aspx?u=dytscWlNUDZjOWpjQWRpOE1KeDhiYnNOVWlubWNNSUNUK1lXUis1alpPWWJQaFBBMlpBcjFuQ0szcVhtZUE5QVFlQXRvRmpLdkNrYXBqN3h2UTdBcFpHM0I2bmlFNVdhMjFqcUl4NjM1SEJXZ3JZeHA4aHJaSG5RaXZ3S1gyb2k=&amp;rh=ff00bca3452577777f02eaebbe48964cabdde242) likely to undermine security or public order, aiming to implement Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investment in the EU, as amended ("**FDI Screening Law**"), entered into force.

The national screening mechanism in Luxembourg applies to foreign direct investments (excluding portfolio investments) that may impact the security or public order in an entity governed by Luxembourg law engaged in critical activities on the Luxembourg territory. Critical activities encompass various sectors such as energy, transport, health, communications, data processing, defense, finance, media, and agri-food.

The FDI Screening Law defines a control triggering notification and outlines out-of-scope investments. Mandatory notifications are required before completing a foreign direct investment and upon crossing the 25% voting rights threshold. The screening procedure evaluates potential risks to security or public order, considering factors like infrastructure integrity, technology sustainability, and access to sensitive information.

The outcome could be authorization, conditional authorization or prohibition. The Minister in charge of economy ("**Minister**") may impose measures or sanctions for non-compliance, including fines up to EUR 1 million for individuals and EUR 5 million for legal entities. Foreign investors can dispute fines within one month of the screening decision.

For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Luxembourg currently has no merger control regime. However, a Bill has proposed the introduction of mandatory suspensory merger control. For further information, see the more detailed section on "Antitrust/merger control".

**EU Foreign Subsidies Regulation**

As of 12 October 2023, the EU Foreign Subsidies Regulation (FSR) requires qualifying transactions, and bids in response to certain large public tenders in the EU, to be notified for upfront clearance by the European Commission where the companies involved have benefited from foreign financial contributions (a broad concept) that exceed certain (low) thresholds. Acquisitions of a target with annual revenues in the EU of at least EUR 500 million will trigger FSR deal notifications. Acquisitions of smaller targets will not, regardless of deal value. Outright mergers and large joint ventures will trigger a notification requirement if the EUR 500 million EU-wide revenue threshold is met by one of the merging parties or the joint venture.

**Other regulatory or government approvals**

Depending on the type of investments, certain approvals by the applicable Luxembourg regulator might be needed for acquisition (e.g., Commissariat Aux Assurances, Commission de Surveillance du Secteur Financier, etc.)

## Employment

**General**

Because in a share acquisition there is no change to the employing entity, insofar as there is no change to employment conditions, no specific notification to or consent from employees and/or staff representatives is required.

When an asset deal concerns the transfer of a business (or part of a business) as a going concern, employees of the business automatically and immediately transfer to the buyer by operation of law. The parties to the transfer of business are not free to choose which employees will transfer with the business and, legally, the employees transfer with all existing rights and obligations and the new employer is held to recognize the employees' previous years of service.

The buyer as the legal successor of the former employer also becomes fully liable for all employment-related liabilities. Compensation for the automatic assumption of liabilities should be addressed in the transaction documents.

Pension schemes and the transfer of pension liabilities need to be considered carefully in the transaction context.

The Labor and Mine Inspection must be informed, according to Article L. 127-3 (2) of the Luxembourg Labor Code, that all required notification formalities relating to the transfer of employees have been effectively fulfilled.

**Approval or consultation requirements**

The employer must inform the employee representatives of any proposed transfer of business in good time before the completion of the transfer.

If the staff headcount falls under the threshold for mandatory staff representatives, the transferor and/or transferee must notify all concerned employees in writing before the transfer. That notification must include the date of transfer, reasons for the transfer, legal, economic and social consequences of the transfer for the employees, and any measures that may be taken as a result of the transfer.

Mergers also qualify as a transfer of business triggering notification and/or consultation requirements.

Staff representatives are generally required to be informed of the proposed impact of the business transfer on employment conditions and the transfer of the employees. Reorganizations and operational changes that need to be implemented in conjunction with the transaction (e.g., split of operations, carve-outs of employees, relocations) typically affect employment conditions and trigger consultation obligations. Although the staff representation does not have a veto right, consultations may take several months and may, therefore, adversely impact the timing of the implementation of the proposed changes.

Terminations solely due to a "transfer of business" are prohibited by law. Terminations for other business or personal reasons remain possible.

## Tax

**Asset deal**

*Acquisition*

The acquisition of assets by a Luxembourg company does not trigger any tax burden. The acquisition cost of assets from a third party is treated as the base cost of the asset. Depreciation of the assets acquired depends on the nature of the assets and their estimated lifetime. Depreciation on buildings is allowed for tax purposes and is usually based on accounting rules. Some specific guidance exists in this respect. The basis for the amortization of the acquired assets is usually the acquisition price. The acquisition costs could be tax-deductible or amortized when activated. The depreciated acquisition cost determines gains or losses arising on a subsequent disposal. However, in the event that a business is acquired from a related party at a price deemed not to be arm's length, a tax adjustment may be made.

Interest expenses incurred on a loan in relation to the acquisition are tax-deductible. Attention should, however, be paid to the interest deduction limitation rule provided for by Article 168-bis of the Luxembourg Income Tax Law. The principle is that exceeding borrowing costs will be deductible in the tax period in which they are incurred; only up to 30% of the taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA). Exceeding borrowing costs means the portion of interest expenses exceeding interest income.

*Sale*

Capital gains triggered from the disposal of assets is, in principle, subject to corporate income tax (CIT) and municipal business tax (MBT) at an ordinary aggregated rate of 24.94%.

Capital gains realized by individuals acting in the course of the management of their private wealth are, as a rule, exempt, unless the gains are speculative or realized in a substantial participation. A gain is speculative if realized within two years regarding real estate or six months regarding all other assets.

Capital gains on foreign real estate are generally exempt under applicable double tax treaties. Luxembourg tax law allows the temporary immunization of a capital gain derived from the disposal of a building or a non-depreciable fixed asset by correspondingly reducing the acquisition price of the asset acquired by the company in lieu of the disposed building or non-depreciable fixed asset.

Provided that the proceeds of the entire sale are reinvested in the acquisition of another qualifying fixed asset at the end of the second year following the year of disposal, at the latest, any capital gains realized on the disposal of the assets will not be subject immediately to taxation in Luxembourg, but will be deferred.

Finally, it is noteworthy to mention that from 1 January 2020 exit taxation rules in relation to the transfer of assets realized upon seat migration (considered as a liquidation from a Luxembourg CIT perspective) have been amended. Indeed, paragraph 127 of the Luxembourg general tax law (Abgabenordnung), which provides the possibility to postpone payment of the tax, under certain conditions, at exit indefinitely, has been changed and replaced by a payment of the exit tax over a five-year period.

*Indirect tax*

In an asset deal, the transfer of the assets is, in principle, regarded as several distinct supplies of goods, each of which is, in principle, subject to value-added tax (VAT) at the appropriate rate. However, no VAT is due when the sale of assets constitutes a totality of assets/business or part thereof as a going concern.

Transfer tax is among the taxes levied on the acquisition of Luxembourg real estate.

The sale of a real estate asset is subject to a 6% registration duty and 1% transcription tax. A 3% municipal surcharge is added for buildings within the Luxembourg municipality. The tax base is the market value or the consideration paid, if the consideration is higher than the market value.

Legally, transfer tax is due to be paid by the buyer. However, it is customary for the buyer and the seller to agree on who will effectively bear the tax. Transfer tax is not recoverable for the buyer but is added to the cost price and, subsequently, (partly) amortized for CIT purposes.

Transfer tax also applies in the event the sale, for VAT purposes, would be part of the transfer of going concern relief.

**Share deal**

*Acquisition*

The acquisition of shares in a company does not trigger any transfer tax.

For CIT purposes, the acquired shares should be taken up in the books against cost price. Acquisition costs can be added to the fiscal cost price of the shares.

Under certain conditions, tax unity is available to achieve an efficient debt push-down. If a Luxembourg resident company or a Luxembourg permanent establishment of a foreign company that is subject to tax corresponding to Luxembourg CIT, holds directly or indirectly at least 95% of the nominal paid-up share capital of another Luxembourg resident company or Luxembourg permanent establishment of a foreign company that is subject to a tax equivalent to Luxembourg CIT, both companies can, subject to certain conditions, form a fiscal unity. Within a fiscal unity, the income and costs of the members are aggregated, and this mechanism can be used to pool or offset the respective taxable profit of each company in the group and to be taxed on the global amount. When the tax consolidation regime applies, the parent company, which is the "umbrella" company, will pay the CIT on the overall taxable profit of the consolidated companies. Under certain conditions, a horizontal tax unity is also possible between companies with the same direct or indirect parent company without the parent company forming part of the consolidation. The parent company can be a fully taxable Luxembourg share capital company, a domestic permanent establishment of a fully taxable foreign share capital company, a fully taxable European Economic Area (EEA) share capital company, or a fully taxable permanent establishment of a fully taxable EEA share capital company.

*Sale*

In general, capital gains are subject to the maximum statutory rate of 24.94% CIT and MBT for the fiscal year 2024. However, capital gains derived from shares in a qualifying subsidiary may be exempt under the conditions of the participation exemption regime. Capital losses on shares are generally deductible for Luxembourg CIT purposes.

The right to tax capital gains on shares realized by a corporate nonresident acting without a permanent establishment in Luxembourg is generally allocated to the seller's country of residence based on the applicable tax treaty.

However, if the sale of a participation in a Luxembourg company qualifying as a substantial participation is made within a period of six months after the acquisition, any gain realized upon the sale will be taxed in Luxembourg, unless a double tax treaty provides otherwise.

*Merger*

As a rule, any profit realized in the context of a transfer of assets/liabilities in the case of a demerger is subject to Luxembourg CIT. Realized hidden reserves (built-in gains), goodwill and fiscal reserves that are not retained following the demerger will be added to taxable profits in the year of the merger or division. However, tax law provides possibilities to realize the demerger in a tax-neutral way under certain conditions. Situations must, therefore, be analyzed on a case-by-case basis.

*Indirect tax*

Transactions relating to shares and participations in other companies (e.g., acquisition, holding and sale of shares), in principle, fall outside the scope of VAT.

However, these transactions may fall within the VAT scope where they are performed in the context of a trading activity. In this case, transactions relating to shares will be exempt from VAT.

The traditional view is that VAT incurred on costs referable to the disposal/acquisition of shares is not deductible. However, the Court of Justice of the European Union has sometimes conceded that this VAT might be deducted where the costs incurred present a direct and immediate link to the taxable person's general activities giving right to a VAT deduction.

The deductibility of input VAT attributable to the sale/acquisition of shares or participation very much depends on the facts of each case. Therefore, the setup of a share deal should be carefully reviewed to mitigate the risk of non-recoverable VAT.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

In Luxembourg, a business can be acquired by way of either a share deal, under which part or all of the target's shares are transferred, or an asset deal, consisting of the purchase of some or all of the target's assets.

Most of the transactions undertaken in Luxembourg are privately negotiated ones, usually between a seller and a preferred buyer. However, recently there has been a move towards more sellers opting to run an auction process.

To enhance its favorable legal environment, Luxembourg has also implemented the various EU merger directives (a draft bill on the transposition of EU Directive 2019/2121 of 27 November 2019, amending EU Directive 2017/1132 regarding cross-border conversions, mergers and divisions ("**Mobility Directive**") into Luxembourg, has already been prepared and awaits approval) . Besides purely domestic mergers, Luxembourg provides for a regulatory framework for cross-border mergers in line with its characteristically open-market approach.

Cross-border mergers are possible for any merger of a Luxembourg and foreign company, and are not restricted to EU companies, as long as the foreign jurisdiction does not prohibit the merger and the foreign company complies with the requirements and formalities of its domestic law. A merger will entail the universal transfer of all assets and liabilities of the absorbed company to the absorbing company, except in certain cases. The Mobility Directive's implementation is expected to bring further changes to the applicable regime in terms of scope and applicable procedure.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

The most widely used private company in Luxembourg is the private limited liability company (société à responsabilité limitée (SARL)), which is used by around two-thirds of companies in Luxembourg.

## What are the different types of limited liability companies?

SARL

public limited liability company (société anonyme) — S.A.

simplified joint-stock company (société par actions simplifiée) — S.A.S.

corporate partnership limited by shares (société en commandite par actions) — S.C.A.

common limited partnership (société en commandite simple) — S.C.S.

## Is there a restriction on shareholder numbers?

The number of shareholders of a SARL is limited to 100.

## What are the key features of a share sale and purchase?

In principle, the shares are freely transferable. However, the articles of association of the company, an agreement entered between the shareholders or the law (i.e., the approval right of the shareholders in a SARL) can limit the transferability of the shares. At a minimum, a sale and purchase agreement needs to include the parties that consent to enter into the transaction, the object, the applicable price. The agreement will also record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction. No specific form of agreement is prescribed under Luxembourg law, although it is generally accepted that the drafting principles are heavily influenced by the anglo-saxon legal drafting principles.

In the case of the transfer of shares in a SARL to a non-existing shareholder, the Luxembourg law on commercial companies provides that such transfer requires the prior approval of the current shareholders representing 75% of the company's share capital. It is possible to reduce this majority to 50% in the articles of association.

## What are the key features of an asset sale and purchase?

When a business is transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer applicable to that type of asset. For some assets, this will simply be a case of delivering the asset to the buyer, but in other cases, the formalities are more cumbersome (e.g., requiring filing the transfer in respect of trademarks and patents; or for real estate the additional step of executing the purchase agreement before a notary public in Luxembourg, updating the land registry (cadastre) and filing the notarial deed with the mortgage registry (conservation des hypothèques)). The assignment of contracts under an asset purchase could also raise issues of third-party consent, while in a share deal, third-party consent is needed only for agreements that have a change of control clause. It is, therefore, necessary to include a provision, either in the purchase agreement or in separate agreements, requiring those formalities to be complied with. There will usually be an asset purchase agreement to record the respective rights, obligations and liabilities of the parties.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

It is common to prepare letters of intent or term sheets (generally nonbinding), mostly in order to agree on a potential exclusivity clause, or for setting forth those essential conditions/elements for pursuing the transaction.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** It is customary to have exclusivity provisions in a term sheet.

**Break fee:** Break fee provisions are rarely used.

**Confidentiality:** It is customary to have confidentiality clauses in a term sheet.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Separately negotiated agreements are not often used except for nondisclosure agreements.

## Is there a duty or obligation to negotiate in good faith?

A party in breach of acting in good faith may be liable for damages. Under Luxembourg law, parties negotiating a transaction, including a sale of shares, assets or business, are under a general obligation to conduct the negotiations in good faith. This entails, among other things, that negotiations that are at a reasonably advanced stage where a party can reasonably expect that a transaction will occur, cannot, in principle, be terminated abusively. In the case of abusive termination of the negotiation, damages may be granted and, depending on a case-by-case basis, the parties might include liability caps in the share purchase agreement.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Purchase price adjustments are common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Cash-free debt-free or net asset value adjustments are common. An expert is often appointed where there is disagreement between the parties.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: This is often prepared by the seller or the target company, and responsibility is to be agreed by both seller and buyer.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely, although there is an increasing demand for auditing of the balance sheet in specific cases (i.e., locked-box mechanisms relying on locked-box accounts).

## Is an earn-out common?

Frequency/market practice: Earn-outs are rarely used, except in transactions where the seller continues to manage the target company after closing.

## Is a deposit common?

Frequency/market practice: Rarely used.

## Is an escrow common?

Frequency/market practice: Rarely.

## Is a break fee common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Rarely.

## Is the MAE general or specific?

Frequency/market practice: Both seen but specific is more common.

## Is the MAE quantified?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Frequently used.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Commonly used.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Commonly used (in conjunction with a noncompete), notably for management members and key personnel.

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Commonly used (in conjunction with a noncompete).

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common; specific covenants of the seller are often included in the share purchase agreements in order to ensure that the seller will not make certain operations that will decrease the company's value.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Quite common, usually provided in conjunction with the restrictions between signing and closing.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Fairly common; updating warranty disclosure is common until signing. After signing, the party in breach must normally notify the other party of the breach. Remedies are possible depending on the materiality of the breach: either indemnification solely or termination plus indemnification are seen.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; materiality qualifiers are often used either by the use of materiality thresholds, or by other relevant criteria.

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers are commonly used and negotiated (depending upon the respective parties' bargaining power). There is a tendency to generally limit constructive knowledge by opting for either (i) actual knowledge; and/or (ii) limiting the knowledge to specific persons.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Fairly common.

## Is disclosure of the data room common?

Frequency/market practice: Fairly common, but coupled with the negotiation of the valid disclosure criteria.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Commonly used.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Fairly common.

## Is a bring-down certificate at closing common?

Frequency/market practice: Rarely, unless required in a transaction for which warranty and indemnity insurance was sought.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate in all material respects is the more common repetition standard, notably after the decline of the MAE use.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: This differs significantly, subject to negotiations and the value of the transaction. It is customary to see a liability cap of around 20-30% of the total purchase price, with fewer instances of a cap of 50% or more.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: They usually only apply to warranties.

## What are the common exceptions to the cap?

Frequency/market practice: Indemnification related to title/fraud/regulatory aspects (when relevant to the business) is usually not capped.

## Is a deductible or basket common?

Frequency/market practice: Both are common.

## Is a de minimis common?

Frequency/market practice: Very common.

## How long does seller liability survive?

Frequency/market practice: A distinction is made between: (i) fundamental representations and warranties, for which the liability duration can be unlimited; and (ii) business representations and warranties, which, except for tax and social security matters (in respect of which) legal limitations usually apply), are generally applicable between 12 – 36 months.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: Unlimited for fraud and fundamental warranties (title to shares, authority and capacity). Specific indemnities might also be areas on which the seller's liability has fewer limitations/is unlimited.

## Is warranty insurance common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Common, often regarding VAT.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Common.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Common.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Common.

## Is there an exclusion of consequential damages?

Frequency/market practice: Very common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Very common.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes, if it is not contrary to public policy.

## What is the common governing law?

Frequency/market practice: In general, Luxembourg law is chosen for Luxembourg targets.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Litigation is more common and customarily the tendency is to opt for the competence of the courts in Luxembourg City; arbitration is rarely used.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: There is no stamp duty. However, Luxembourg courts may require prior registration of a purchase agreement with the tax administration (Administration de l'Enregistrement, des Domaines, et de la TVA) in Luxembourg, in which case a fixed registration fee of EUR 12 is payable.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: Very common (usually as part of the share purchase agreement and less common as a standalone document); usually covers all customary tax and VAT related aspects relevant for the target. General tax indemnities are also quite frequent in Luxembourg.

Copyright © 2025 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion:** All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites.  **Attorney** **Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction of reasonable portions of the Content is permitted provided that (i) such reproductions are made available free of charge and for non-commercial purposes, (ii) such reproductions are properly attributed to Baker McKenzie, (iii) the portion of the Content being reproduced is not altered or made available in a manner that modifies the Content or presents the Content being reproduced in a false light and (iv) notice is made to the disclaimers included on the Content. The permission to re-copy does not allow for incorporation of any substantial portion of the Content in any work or publication, whether in hard copy, electronic or any other form or for commercial purposes.