Global Public M&A Guide - Luxembourg

Takeover Tactics

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# 6. Takeover Tactics

[Last updated: 1 January 2025, unless otherwise noted]

**6.1 Inside information**

A Luxembourg company whose shares are admitted to trading on a regulated market has the obligation to immediately disclose to the public all "inside information" that relates to it, including all material changes in information that has already been disclosed to the public.

"*Inside information*" means information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Information shall be deemed to be of a "*precise nature*" if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.

"*Information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments*" shall mean information that a reasonable investor would be likely to use as part of the basis of their investment decisions.

It is up to the company to determine if certain information qualifies as "inside information". This will often be a difficult exercise and a large grey area will exist as to whether certain events will need to be disclosed or not.

**6.2 In the event of a public takeover bid**

The Luxembourg takeover bid rules provide that no announcement can be made of a potential takeover bid unless prior notice has been given to the CSSF.

**6.3 Insider dealing and market abuse**

The basic legal framework regarding insider dealing and market abuse under Luxembourg law is set forth in Regulation (EU) No 596/2014 of 16 April 2014 on Market Abuse (supplementing, as of 3 July 2016, the law of 9 May 2006 on market abuse, as amended). The same regulation applies in the other jurisdictions of the EEA.

In principle, the rules on insider dealing and market abuse remain applicable before, during and after a public takeover bid, albeit that during a takeover bid additional disclosures and restrictions apply in relation to trading in listed securities.

**6.4 Common anti-takeover defense mechanisms**

The table below contains a summarized overview of the mechanisms that can be used by a target company as a defense against a takeover bid. These take into account the restrictions that apply to the board and general shareholders' meeting of the target company pending a takeover bid.

The implementation of anti-takeover defense mechanisms is subject to the prior approval of the general meeting of shareholders, if the articles of association of the target company require such approval.

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| **Mechanism** | **Assessment and considerations** |
| **1. Capital increase** Capital increase by the board (authorized capital) without preferential subscription rights of the shareholders. | * Requires an express authorization in the articles of association by a majority of three quarters of the votes cast at a general shareholders' meeting at which at least 50% of the share capital is present or represented (the 50% quorum does not apply to the second meeting that is convened if the 50% quorum was not reached at the first meeting).
* The authorization is valid for up to 5 years but can be renewed.
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| **2. Share buyback** Share buyback "with a view to avoid imminent and serious harm" to the company. | * A share buyback that is not done "with a view to avoid imminent and serious harm" requires an express authorization from the general shareholders' meeting (no quorum and simple majority of votes cast).
* The amount that can be used to finance the share buyback is capped at the amount of available distributable profits and reserves.
* Buybacks to be made in compliance with corporate transparency and market (abuse) rules.
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| **3. Sale of crown jewels** An arrangement affecting the assets of, or creating a liability for, the company, which is triggered by a change in control or the launch of a takeover bid. | * Even though it is not expressly required by Luxembourg law, if the transaction results in a change in fact of the purpose of the company, prior approval by the general shareholders' meeting, by a majority of two-thirds of the votes cast at a general shareholders' meeting at which at least 50% of the share capital is present or represented, is required (the 50% quorum does not apply to the second meeting that is convened if the 50% quorum was not reached at the first meeting).
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| **4. Warrants on new shares**  Warrants are issued prior to the takeover bid in favor of "friendly person(s)" (without preferential subscription rights of the shareholders) who can exercise the warrants at their option and subscribe for new shares. | * Requires only a decision of the target company's board if the authorized capital permits the issuance of warrants as takeover defense. Prior approval, by a majority of two-thirds of the votes cast at a general shareholders' meeting at which at least 50% of the share capital is present or represented, is required (the 50% quorum does not apply to the second meeting that is convened if the 50% quorum was not reached at the first meeting).
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| **5. Frustrating actions** Actions such as significant acquisitions, disposals, changes in indebtedness, etc. | * Only transactions that have sufficiently progressed already (prior to receipt of notification of a takeover bid) may be implemented by the target's board.
* Other transactions require shareholders' approval after the takeover bid has been notified to the target if it is required pursuant to the articles of association of the target company, provided such requirement has been approved by the general meeting of shareholders of the target company
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| **6. Shareholders’ agreements** Shareholders undertake to (consult with a view to) vote their shares in accordance with terms agreed among them. | * A voting undertaking is only valid if it is limited in time.
* The shareholders could be considered as "acting in concert". If so, disclosure obligations apply and if they hold more than 33 1/3% of voting rights, any subsequent acquisition of shares will trigger an obligation to launch a takeover bid.
* Assumes a stable shareholder base or reference shareholders.
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| **7. Veto rights for certain shareholders** Clauses providing for nomination rights by a reference shareholder or similar governance mechanisms. | * Requires an express inclusion in the articles of association by a majority of three quarters of the votes cast at a general shareholders' meeting at which at least 50% of the share capital is present or represented (the 50% quorum does not apply to the second meeting that is convened if the 50% quorum was not reached at the first meeting)
* Requires reference shareholder(s).
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| **8. Limitations on share transfers** Board approval or pre-emptive restriction clauses in the articles of association or in agreements between shareholders. | * Inclusion in the articles of association requires an approval by a majority of three quarters of the votes cast at a general shareholders' meeting at which at least 50% of the share capital is present or represented (the 50% quorum does not apply to the second meeting that is convened if the 50% quorum was not reached at the first meeting).
* Limitations have to be, and must remain at all times, in the interest of the company and must be limited in time.
* Prior approval clauses can only be invoked against a bidder provided that a refusal of approval is motivated on the basis of a non-discriminating application of approval rules.
* Shareholders could be considered as "acting in concert". If so, see "Shareholders' agreements" above.
* Exceptional for listed companies (listed securities are in principle freely transferable; impact on share liquidity).
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| **9. Multiple listings** Listing of the shares on several stock exchanges. | * Should make the takeover more difficult, particularly if one or more of these markets is located outside of the EEA.
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