Global Public M&A Guide - Luxembourg

Effecting a Takeover

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# 4. Effecting a Takeover

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There are three main forms of takeover bids in Luxembourg:

a voluntary takeover bid, in which a bidder voluntarily makes an offer for all the voting securities issued by the target company (and securities issued by the company conferring the right to acquire voting securities of the target company);

a mandatory takeover bid, which a bidder is required to make if, as a result of an acquisition of securities, it crosses (alone or in concert with others) a threshold of 33 1/3% of the voting securities of the target; and

a squeeze-out bid, in which a shareholder who already holds 95% of the voting securities can squeeze out the remaining holders of voting securities. This can be combined with a voluntary or mandatory takeover bid.

**4.1 Voluntary public takeover bid**

The bidder is free to make the takeover bid subject to merger control clearance and, subject to prior approval by the CSSF, certain other conditions precedent, such as a minimum acceptance level, a material adverse change condition or a war clause.

The bidder is, in principle, free to determine the price and the form of consideration offered to the target shareholders (absent any pre-existing controlling interest in the target):

The offered price may be paid in cash, securities or a combination of both.

There is no minimum price for a voluntary takeover bid, but the legal rules provide that the terms of the takeover bid, including the price, must be such that they could reasonably be expected to allow the takeover bid to succeed.

If there are different categories of securities, different prices per category can only be due to the characteristics of such categories.

If, during the takeover bid period (starting on the date of the formal offer notice to the CSSF), the bidder or persons acting in concert with the bidder acquire or commit to acquire securities to which the takeover bid relates at a higher price, then the offered price must be raised to that higher price.

**4.2 Mandatory public takeover bid**

A mandatory takeover bid is triggered as soon as a person or group of persons acting in concert (or persons acting on their account), as a result of an acquisition of voting securities, directly or indirectly holds more than 33 1/3% of the (actual outstanding) voting securities of the Luxembourg target company.

The mandatory takeover bid is unconditional.

The main exceptions to the takeover bid obligation include the situations where the stake of more than 33 1/3% is acquired as a result of a voluntary takeover bid. Luxembourg law does not expressly provide other exemptions. Any other exemption is subject to the prior approval of the CSSF. According to publicly available information, the CSSF has granted exemptions in the following circumstances:

the person(s) who ultimately control(s) the Luxembourg target company do(es) not change;

subscription of shares by underwriters in connection with a secondary offering of shares of a listed company;

with respect to the control over special acquisition purpose companies where the interests of the minority shareholders are sufficiently protected, taking into account the transparency of the acquisition operation and the relating arrangements, the ensuing possibility for shareholders to act knowingly, the provisions regarding the related voting procedures and the possibility of an unlimited de facto exit for the shareholders.

In terms of the price offered and the form of the consideration, the same rules apply as in case of a voluntary takeover bid. In addition:

The mandatory offer price must at least equal the highest price paid by the bidder (or any person acting in concert with it) during a period of 12 months preceding the announcement of the takeover bid.

The consideration offered can consist of cash, securities or a combination of both. A cash alternative must be offered (in an amount corresponding to the cash value of the consideration securities at the time of the filing of the takeover bid with the CSSF) if (i) the consideration does not consist of liquid securities that are admitted to trading on a regulated market in Luxembourg or elsewhere in the EEA, or (ii) during a term of 12 months prior to the announcement of the mandatory public takeover bid or during the takeover bid period, the bidder (or a person acting in concert) acquired securities in consideration of a payment in cash (or agreed to make such cash payment) to which at least 5% of the voting rights in the target company are attached.

The CSSF has the power to allow or require an amendment of the price.

**4.3 Follow-on squeeze-out and sell-out right**

Follow-on squeeze-out – a bidder will be able to squeeze out the residual minority shareholders at the end of the takeover bid if it holds, alone or in concert with others, 95% of the voting securities of the target, and can exercise 95% of the voting rights.

Follow-on sell-out right – minority shareholders have a sell-out right if, at the end of the takeover bid (or of its reopening), the bidder holds, alone or in concert with others, 90% of the voting rights of the target.

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