Global Public M&A Guide - Luxembourg

Before a Public Takeover Bid

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# 3. Before a Public Takeover Bid

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**3.1 Shareholding rights and powers**

The table below provides an overview of the different rights and powers that are attached to different levels of shareholding within a Luxembourg listed public limited liability company (*société anonyme*) whose shares are admitted to trading on a regulated market operating in the EEA:

|  |  |
| --- | --- |
| **Shareholding** | **Rights** |
| One ordinary share | * The right to attend and vote at general shareholders’ meetings.
* The right to obtain a copy of the documentation submitted to general shareholders’ meetings.
* The right to submit questions to the directors at general shareholders’ meetings on subjects already on the agenda (10% shareholding required if the shares of the company are not admitted to trading on a regulated market operating in the EEA).
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| 5% | The right to put additional items on the agenda of a general shareholders’ meeting and to table draft resolutions for items on the agenda (10% shareholding required if the shares of the company are not admitted to trading on a regulated market operating in the EEA). |
| 10% | * The right to request the board of directors to convene a general shareholders’ meeting.
* The right to request the board of directors to postpone a general shareholders’ meeting that has commenced.
 |
| 25% (at a general shareholders’ meeting)  | The ability to require the dissolution of the company if the ratio of the company’s statutory net equity to the company’s share capital has dropped below 25%. |
| More than 25% (at a general shareholders’ meeting) | The ability at a general shareholders’ meeting to block:* any changes to the articles of association, mergers, de-mergers, capital increases, capital reductions and dissolution of the company;
* the authorization of the board of directors to increase the company’s share capital without further shareholder approval (the so-called authorized capital); and
* the disapplication (limitation or cancellation) of the preferential subscription right of existing shareholders in case of share issues in cash, or issues of convertible bonds or warrants.
 |
| More than 50% (at a general shareholders’ meeting)  | The ability at a general shareholders’ meeting:* to appoint and dismiss directors and to approve their remuneration;
* to appoint and dismiss statutory auditors and to approve their remuneration;
* to approve the annual financial statements;
* to grant discharge from liability to the directors and statutory auditor for the performance of their mandate; and
* to take decisions for which no special majority is required (see, among other things, 1-6 above).
 |
| 95% | The possibility to force all other shareholders to sell their shares through a public bid (a "**squeeze-out**"). |

**3.2 Restrictions and careful planning**

Luxembourg law contains a number of rules that already apply before a public takeover bid is announced. These rules impose restrictions and hurdles in relation to prior stake building by a bidder and prior due diligence by a potential bidder. The main restrictions and hurdles have been summarized below. Some careful planning is therefore necessary if a potential bidder or target company intends to start up a process that is to lead towards a public takeover bid.

**3.3 Insider dealing and market abuse**

Before, during and after a takeover bid, the normal rules regarding insider dealing and market abuse remain applicable. For further information on the rules on insider dealing and market abuse, see 6.3 below. The rules include, amongst other things, that manipulation of the target's stock price, e.g. by creating misleading rumors, is prohibited. In addition, the rules on the prohibition of insider trading prevent a bidder that has inside information regarding a target company, other than in relation to the actual takeover bid, from launching a takeover bid.

**3.4 Disclosure of shareholdings**

The rules regarding the disclosure of shareholdings and transparency apply before, during and after a public takeover bid.

Pursuant to these rules, if a potential bidder starts building up a stake in the target company, it will be obliged to announce its stake if the voting rights attached to its stake have passed an applicable disclosure threshold. The relevant disclosure thresholds in Luxembourg are 5%, 10%, 15%, 20%, 25%, 33 1/3%, 50% and 66 ⅔%. Several listed companies have also opted in their articles of association to apply a lower threshold than the initial threshold of 5% for consistency with the market practice of the jurisdiction where the shares are listed.

When determining whether or not a threshold has been passed, a potential bidder must also take into account the voting securities held by the parties with whom it acts in concert or may be deemed to act in concert (see 3.9 below). These include affiliates. The parties could also include existing shareholders of the target company with whom the potential bidder has entered into specific arrangements (such as call option agreements).

**3.5 Disclosures by the target company**

The target company must continue to comply with the general rules regarding disclosure and transparency. These rules include that a company must immediately announce all inside information. For further information on inside information, see 6.1 below. The facts surrounding the preparation of a public takeover bid may constitute inside information. If so, the target company must announce this. However, the board of the target company can delay the announcement if it believes that a disclosure would not be in the legitimate interest of the company. For instance, this could be the case if the target's board believes that an early disclosure would prejudice the negotiations regarding a bid. A delay of the announcement, however, is only permitted provided that the non-disclosure does not entail the risk of the public being misled, and that the company can keep the relevant information confidential.

**3.6 Announcements of a public takeover bid**

Prior to the public announcement of the takeover bid to the CSSF (see 6.2), no one is permitted to announce the launching of a public takeover bid. This prohibition not only applies to a bidder, but also to the target company, even if the target company has to announce the launch of a bid pursuant to the general disclosure obligations described in 3.5.

A bidder that intends to announce a public takeover bid must first inform the competent securities market authority, i.e., the CSSF if the shares are listed on the regulated market of the LSE, of its intention and then make the announcement. In addition, the bidder will at that time have to make the necessary filings for the actual launching of a public takeover bid, since as soon as the public takeover bid is announced, it can normally no longer be withdrawn, except in certain circumstances.

If there are rumors or leaks that a (potential) bidder intends to launch a public takeover bid, the CSSF could ask for more information on the bidder's intent. See 3.7 for more information. This could lead to an early disclosure, and possibly an acceleration of the preparations by a bidder, as it could be forced by the CSSF to make an announcement as to its intentions.

**3.7 Early disclosures – Put-up or shut-up**

Early disclosure demanded by the CSSF – Whenever required for the good functioning of the markets, the CSSF may request that a person that could be involved in a possible public takeover bid make an announcement without delay or, if the latter person does not make such disclosure, to make the announcement itself. This type of disclosure is often made when the takeover bid cannot yet be formally launched, e.g., for practical purposes or due to merger control, but an announcement is nevertheless appropriate.

Put-up or shut-up – Luxembourg law does not provide an express "Put-up or shut-up" mechanism to force a person to make an announcement regarding whether or not it intends to carry out a public takeover bid. However, under the general supervisory powers of the CSSF and transparency laws, the CSSF could require that the potential bidder disclose its intentions.

**3.8 Due diligence**

The Luxembourg public takeover bid law does not contain specific rules regarding the question of whether or not a prior due diligence can be organized, or how such due diligence is to be organized. Be that as it may, the concept of a prior due diligence or pre-acquisition review by a bidder is generally accepted in the market and also by the CSSF. Appropriate mechanisms have been developed in practice to organize a due diligence or pre-acquisition review and to cope with potential market abuse and early disclosure concerns. These include the use of strict confidentiality procedures and data rooms.

**3.9 Acting in concert**

For the purpose of the Luxembourg takeover bid rules, persons "act in concert":

if they collaborate with the bidder, the target company or with any other person on the basis of an express or silent, oral or written, agreement aimed at acquiring control over the target company, frustrating the success of a takeover bid or maintaining control over the target company;

if they have entered into an agreement relating to the exercise in concert of their voting rights with a view to having a lasting common policy *vis-à-vis* the target company.

Persons that are affiliates of each other are deemed to act in concert or to have entered into an agreement to act in concert.

In view of the above rules and criteria, the target company could be one of the persons with whom a shareholder acts in concert or is deemed to act in concert. For example, this is the case when a target company is already controlled by a shareholder.

The concept of persons acting in concert is very broad and, in practice, many issues can arise when determining whether or not persons act in concert. This is especially relevant in relation to mandatory takeover bids. If one or more persons in a group of persons acting in concert acquire voting securities, as a result of which the group in the aggregate would pass the 33 1/3% threshold, the members of the group will have a joint obligation to carry out a mandatory takeover bid, even though the individual group members do not pass the 33 1/3% threshold.

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