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# Common Legal Framework for Takeover Bids in Europe

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General Editor DIRK VAN GERVEN

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12.103 Requirements specified at nos. 12.88 to 12.100 of this report apply to the right of *sell-out mutatis mutandis*.

### Sanctions

#### Liability for the offer document

12.104 The offer document should identify the persons who are responsible for it. These persons must declare in the offer document that, to the best of their knowledge, the information contained therein is accurate and fair; and that no information which might have an impact on the investor's opinion with regard to the takeover bid has been omitted.

12.105 In case of a false statement or omission of information in the offer document, the investor has a right to claim indemnity from persons responsible, in accordance with the provisions of the Civil Code of the Republic of Lithuania No. VIII-1864 of 18 July 2000.

#### Criminal sanctions and administrative fines

12.106 The Law on Securities permits the LSC to impose administrative fines for violation of the rules on takeover bids. In particular, it may impose an administrative fine of up to €145,000 to natural or legal persons whose offer document has been approved by the LSC but who failed to execute the takeover bid. Further, it may impose an administrative fine of up to €29,000 on natural or legal persons who exercised the squeeze-out right but failed to effect settlement on time or who failed to fulfil its obligation to purchase the shares of any shareholder upon the latter's requirement (Art. 47 Law on Securities).

12.107 Administrative fines are imposed by the LSC in accordance with the procedure established in the Law on Markets of Financial Instruments No. X-1024 of 18 January 2007.

12.108 Decisions of the LSC to impose administrative fines may be appealed to the administrative court within one month, in accordance with the procedure established in the Law on Administrative Procedure of the Republic of Lithuania No. VIII-1029 of 14 January 1999.

12.109 It should be noted that the application of administrative fines to legal persons as specified above does not exempt their managers from statutory civil liability, administrative or criminal liability. It should also be noted that violation of the requirements relating to the takeover bids set forth in the Law on Securities does not entail criminal liability. Such liability may arise only in the case of abuse of insider trading or market manipulation. As regards administrative liability, infringements of the laws governing the securities market may be subject to fines ranging from €290 to €1,450.

## Luxembourg

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## Introduction

13.1 It was in the midst of the controversial takeover battle of Mittal Steel/Arcelor that the Luxembourg Act of 19 May 2006 on takeover bids (hereinafter the 'Takeover Act') transposed the Takeover Directive into the Luxembourg legislation.

On 27 January 2006, Mittal Steel announced a hostile takeover bid for the Luxembourg company Arcelor, the world's leading steel-maker in terms of turnover, and the largest private employer in Luxembourg. On 7 February 2006, the Luxembourg government tabled bill No. 5540 transposing the Takeover Directive. Afterwards, Luxembourg was in the spotlight and under intense scrutiny from the international press, which closely monitored any move that could be interpreted as an attempt to protect Arcelor from a takeover by Mittal. The Luxembourg Chamber of Deputies finally adopted, on 19 May 2006, bill No. 5540, as published in the Luxembourg Official Journal, the *Mémorial A* (No. 86 of 22 May 2006).

The Takeover Act entered into force on 22 May 2006 and applies to all takeover bids for which an offer prospectus was published before its entry into force, without the steps validly accomplished prior to its entry into force having to be repeated. As a matter of consequence, the Luxembourg Secretary of Justice, Mr Luc Frieden, has asked 'Mittal and Arcelor to abide by the planned law'.

A Circular Letter 2006/258 clarifying the provisions of the Takeover Act was published by the CSSF (*Commission de surveillance du secteur financier*) on 18 August 2006.

13.2 The Takeover Act is practically a literal transposition of the Takeover Directive. It reflects the liberal spirit of the Takeover Directive and establishes a number of general principles and minimum guidelines for the conduct of takeover bids for the securities of companies governed by the laws of a Member State of the European Union or the European Economic Area, when all or part of those securities are admitted to trading on a regulated market in one or several Member States. It also seeks to establish an adequate level of protection for holders of securities.

Unlike the majority of EU Member States, Luxembourg did not have any takeover law prior to the Takeover Act. Therefore, the main objective of the Takeover Act was the initial creation of a statutory framework for takeovers in Luxembourg. The key aspects and provisions of the Takeover Act are the following:

- (i) supervision by the Luxembourg Financial Services Authority – CSSF;
- (ii) the introduction into Luxembourg legislation of squeeze-out and sell-out procedures;
- (iii) the definition of 'liquid' securities offered as consideration;
- (iv) the possibility for the target's board to implement defensive measures without prior shareholder approval; and
- (v) the safeguarding of employee rights.

## Scope

13.3 According to Article 2 of the Takeover Act, a takeover bid can be defined as a public offer (other than by the offeree company) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with Luxembourg law. Securities are defined by the Takeover Act as transferable securities carrying voting rights in a company, including share certificates offering the ability to give voting instructions.

13.4 The Takeover Act applies to takeover bids for securities of companies governed by the laws of a Member State of the European Union or the European Economic Area, when all or part of those securities are admitted to trading on a regulated market in one or several Member States.

Given the above, the Takeover Act applies to takeover bids for securities of:

- (i) all companies governed by Luxembourg law whose securities are admitted to trading or that have requested their admission to trading on a regulated market in one or more Member States;
- (ii) all companies governed by the laws of another Member State of the European Union or the European Economic Area whose securities are admitted to trading on a regulated market in Luxembourg;
- (iii) all offerors or persons acting in concert with an offeror or such a company and all other persons concerned.

13.5 However, the Takeover Act does not apply to takeover bids for securities issued by companies the object of which is the collective investment of capital provided by the public, which operate on the principles of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed directly or indirectly out of the assets of those companies ('open-ended funds'); nor does it apply to takeover bids for securities issued by central banks of Member States.

Given the above, the Takeover Act does not apply to securities of companies governed by the laws of a country that is not an EU or EEA Member State (even if those securities are admitted to trading on a regulated market in one or more Member States), or to the securities of companies governed by the laws of a

Member State where those securities are only admitted to trading on a market that is not regulated.

### Conditions of a takeover bid

13.6 A takeover bid shall comply with the general principles governing takeover bids and shall satisfy the conditions precedent of the bid.  
According to Article 3 of the Takeover Act, a takeover bid must comply with the following principles:

- (i) all holders of the securities of an offeree company of the same class must receive equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;
- (ii) the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the company's places of business;
- (iii) the board of an offeree company must act in the interest of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;
- (iv) the bid must not create false markets in the securities of the parties concerned, which make the rise or fall of the prices of the securities artificial and which distort the normal functioning of the markets;
- (v) an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration;
- (vi) a bid must not obstruct an offeree company's conduct of business for longer than is reasonable, which period cannot be longer than six months from the date the offeror has made public its decision to make a bid.

In addition to the above, the offeror is required to draw up and make public in due time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall submit it to the approbation of the CSSF within ten business days of the day the bid was made public.

Finally, a takeover bid must be submitted to further administrative authorities,<sup>1</sup> and in particular for the authorisation of the competition authorities, including the EU Commission.

<sup>1</sup> For example, according to Article 29 of the law of 6 December 1991 on the insurance sector, as amended, a natural or legal person who intends to increase its qualified participation to at least 20%, 33% or 50% of the voting rights or the share capital in a Luxembourg insurance company

13.7 In case the general principles governing takeover bids are manifestly not met by the bid, or if one of the conditions of the bid is not satisfied, the bid will lapse.

### Supervisory authority

13.8 A takeover bid that targets either a company whose registered office is in Luxembourg or another Member State but whose shares are admitted to trading on a regulated market in Luxembourg will be governed by the Takeover Act and supervised by the CSSF. The CSSF exercises its functions impartially and independently of all parties to the bid.

13.9 The CSSF will ensure that all shareholders are treated equally and are given sufficient time and information so as to enable them to make a properly informed decision. The CSSF also verifies that no false markets are created in the takeover process.

### Financial intermediaries

13.10 The Takeover Act does not provide for a list of entities that may act as financial intermediaries with respect to a takeover bid. In the absence of such a list, we are of the considered opinion that all entities that have been approved by the CSSF as financial intermediaries should be allowed to act within the framework of a takeover bid, to the extent that their precise intervention in the bid-offer process is covered by the Banking Act.<sup>2</sup>

### Voluntary takeover bid

#### Scope

13.11 Any natural or legal person who intends to acquire the control (i.e., at least one-third of the voting rights) of a company having its registered office in Luxembourg can make a voluntary bid in accordance with the Takeover Act.

#### Announcement

13.12 The voluntary bid shall be made to all the holders of securities for all their holdings. However, before making the voluntary bid public, the offeror has to inform the CSSF and provide it with certain information.

must notify in advance the *Commissariat aux Assurances* (CAA – the Luxembourg supervisory authority of the insurance sector) of its intention to increase its participation. If a Luxembourg insurance company becomes the subsidiary company of a natural or legal person, such person is submitted to the same notification obligation.

<sup>2</sup> Law of 5 April 1993 on the financial sector, as amended, published in the *Mémorial A*, No. 27 of 10 April 1993.

### Put up or shut up

13.13 The Takeover Act does not provide for the procedures of 'put up or shut up'. However, the CSSF, within its competence of supervisory authority of the financial markets, is competent to require that the issuer disclose all material information that may have an effect on the assessment of the securities admitted to trading on regulated markets in order to ensure investor protection or the smooth operation of the market.<sup>3</sup> Therefore, in case of rumours in the market on a potential takeover bid, the CSSF could try to seek clarification from the person who is the object of such rumours.

### Mandatory takeover bid

13.14 Where a natural or legal person acquires, alone or in concert with others, securities of a company having its registered office in Luxembourg,<sup>4</sup> which, including any of its existing shareholdings and the shareholdings of persons acting in concert with it, give directly or indirectly one-third or more of the voting rights in that company, such person is required to make a bid for the remaining securities at a fair price as a means of protecting the minority shareholders of the offeree company. All the securities of the company, excluding securities that confer voting rights only in specific circumstances, are taken into account for the calculation of the percentage of voting rights.

Given the above principle, it seems that where a shareholder's stake increases above the one-third threshold by means other than active acquisition or subscription, such as a share buy-back and cancellation by the company, there is no obligation to make an offer. Indeed, following the announcement on 26 May 2006 of Arcelor's planned merger with the Russian steel company Severstal, the CSSF stated that if an acquisition of voting rights, initially under the threshold, eventually exceeds the threshold due to reasons other than the acquisition of shares, the provisions of the Takeover Act are not applicable.<sup>5</sup>

13.15 A mandatory takeover bid shall be made at a fair price, which consists of the highest price paid by the offeror or those persons acting in concert with it for the same securities during the twelve months immediately preceding the bid. However, the offer price to be paid will be higher if the offeror has acquired shares at a higher price during the acceptance period. Furthermore, the CSSF is

<sup>3</sup> Law of 10 July 2005 on the prospectus for securities, published in the *Mémorial A*, No. 98 of 12 July 2005.

<sup>4</sup> According to Article 4 of the Takeover Act, in matters relating to company law and in particular the percentage of voting rights that confers control and any derogation from the obligation to launch a bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office. As a matter of consequence, the threshold of one-third of the voting rights provided for by Article 5 of the Takeover Act will only apply to companies having their registered office in Luxembourg.

<sup>5</sup> CSSF, press release dated 2 June 2006.

authorised to adjust the price in certain circumstances under clearly determined criteria. Such criteria include the average market price over a specific period, the liquidation value of the company or other objective valuation criteria generally used in financial analysis techniques.

13.16 The consideration offered in the bid process can consist of securities, cash or a combination of both. However, if the securities offered are not liquid, the offeror must also propose a cash alternative. The securities shall be deemed liquid if either at least 25 per cent of the subscribed share capital represented by that category of securities is held by the public, or if, given the considerable number of securities in the same class held by the public, the regular functioning of the market would be safeguarded by a lower percentage. As a result of this definition, securities of listed companies shall be deemed liquid.

The offeror must, in any case, offer a cash alternative if it acquired or acquires, alone or in concert with others, during a period commencing twelve months preceding the offer and ending upon expiry of the acceptance period, securities conferring 5 per cent or more of the voting rights in the target company.

### Procedure

#### Notification of the intention to launch a public takeover bid

13.17 The offeror must inform the CSSF of its intention to make a public takeover bid before such a decision is made public. The decision to make a public takeover bid is announced to the public by an announcement in a national newspaper (*Luxemburger Wort*, *Tageblatt*). In legal practice, a draft announcement will be carefully reviewed by the CSSF. If the bid offer relates to securities that are listed on several stock exchanges of different Member States of the European Union, the CSSF co-ordinates the content of such announcement with the relevant authorities of such other Member States.

#### Approval and publication of the offer document

13.18 The offeror is required to draw up and make public in due time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before being made public, the offeror shall submit the document to the CSSF for approval within ten working days of the offer being made public. The CSSF shall notify the offeror of its approval decision within thirty working days of presentation of the draft offer document. If the CSSF considers, on a reasonable basis, the document submitted to be incomplete or additional information to be necessary, it shall inform the offeror within ten working days of submission of the offer document for approval. In such a case, the aforementioned deadline shall run from the date on which the required information is presented by

the offeror. In approving the offer document, the CSSF does not provide any assurance as to the economic or financial interest of the bid or the quality or the solvency of the offeror or the offeree company.

#### Opinion of the board of the offeree company

13.19 The board of the offeree company shall draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests, specifically on employment and the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business. There is no official deadline for issuing such opinion, and it could eventually be issued even after the offer document has been published. However, if such opinion is issued before the publication of the offer document, the offeror could decide to include a copy of the opinion of the board of the offeree company in the offer document.

#### Employee representatives' or employees' information and consultation

13.20 Prior to publication of its opinion, the board shall inform and consult employee representatives or, in the absence thereof, the employees themselves. If the board receives from the employee representatives in due time a separate opinion on the effects of the bid on employment, this document must be enclosed with its opinion. However, the employees' opinion is not binding on the board, and the board's position may be different.

#### Acceptance period

13.21 The acceptance period must be defined in the offer document. It must be no shorter than two weeks and no longer than ten weeks from the date of publication of the offer document. The period of ten weeks may be extended on condition that the offeror gives at least two weeks' notice of its intention of closing the bid, for up to six months as from the announcement of the offeror's bid.

13.22 If there is a competing offer, the acceptance period is automatically extended. However, shareholders who do not tender their shares during the acceptance period have the opportunity to accept the offer for a period of fifteen days following expiry of the acceptance period, except in the case of a mandatory bid.

#### Publication of results

13.23 The offeror must publish the number of securities and the related number of voting rights for which its offer has been accepted or which it owns in one way or another, or which are owned by persons acting in concert with it.

### Information and publication

#### Offer document (prospectus) and summary

13.24 The offeror is required to draw up and make public in due time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid.

13.25 According to Article 6 of the Takeover Act, the offer document shall contain, at least, the information on the terms of the bid, the offeror, the securities, the consideration offered, the compensation offered, the maximum and minimum percentages or quantities of securities that the offeror undertakes to acquire, details on the parties concerned by the bid, the conditions of the bid, a business plan, the period for the acceptance of the bid, the financing of the bid, the applicable law and the competent courts.

13.26 The CSSF may request the offeror to provide further information. In this case, the CSSF must inform the offeror within ten business days following the introduction of the offer document for approval. The deadline for the approval of the offer document runs from the date the requested information is given by the offeror.

#### Supplements

13.27 The Takeover Act does not provide for specific rules concerning supplements of the offer document. However, we consider that any new important development or material errors or inaccuracies in the offer document that could have a bearing on the decision to accept the bid, and which occur or are discovered after approval of the offer document but before the end of the acceptance period, should be made public in a supplement to the offer document. This supplement should be submitted for prior approval of the CSSF.

Once the supplement has been published, the holders of securities who have accepted the bid may validly withdraw their decision in case of any new important developments or material errors or inaccuracies in the offer document.

#### Advertisements

13.28 In practice, all announcements and advertisements made in relation to the bid offer are submitted to the CSSF for their prior approval.

In addition, the CSSF will have a close look at verbal communications made during press conferences. Such communications are deemed to reflect the position of the offeror who should be very careful in putting any statements to the public. For instance, the statement that 'the counter-offer's price will be difficult to beat' could be interpreted as the intention to withdraw the offer. If

such withdrawal was intended, the public would need to be informed by written announcement as soon as possible.

#### Equal treatment

13.29 Prior to the Takeover Act, there was no rule that an offeror had to treat all shareholders of the target company equally. The position was that such a principle of equal treatment would apply only to the issuer of the securities but not to an offeror under a takeover bid. This position had been confirmed in the litigation involving GBL, Bertelsmann AG and the RTL Group against RTL minority shareholders.<sup>6</sup>

According to Article 3(a) of the Takeover Act, all the shareholders of securities of the same class must be treated equally.

#### Offer document approved in another Member State

13.30 Should the CSSF not be the competent authority to supervise the takeover bid, and should the securities of the offeree company be admitted to trading in Luxembourg, the offer document is recognised in Luxembourg without prior CSSF approval provided the offer document has been approved by the supervisory authority of another Member State and is translated into Luxembourgish, French, German or English.

13.31 The CSSF may require the inclusion of additional information in the offer document only if such information is specific to the Luxembourg market and relates to the formalities for bid acceptance and receipt of consideration due at the close of the bid, as well as to the tax arrangements applicable to the consideration offered to the holders of the securities.

#### Obligations of the offeree company

13.32 The board of directors of the target company must draw up and publish a well-reasoned opinion on the bid, including its implications for the target's interests (particularly employment-related implications), as well as an opinion on the offeror's strategic plans for the target and the likely repercussions on the offeror's employment forecasts and places of business. Before the drawing up of its opinion, the board of the offeree company shall consult the representatives of its employees or, where there are no such representatives, the employees themselves. Where the board of the offeree company receives in due time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be joined to its opinion document.

<sup>6</sup> Tribunal d'arrondissement de Luxembourg, 8 July 2003, *Bulletin d'information sur la jurisprudence*, 8 October 2003, confirmed by the Court of Appeal, 12 July 2006.

13.33 According to Article 11 of the Takeover Act, the target company of which the registered office is located in Luxembourg must publish detailed information on the company in the company's business report and in the consolidated business report. In addition, the board of directors of the target company must present an explanatory report to the annual general meeting of shareholders with respect to detailed information on the company.

13.34 Finally, the directors of the target company must act in the interest of the company as a whole (a general duty of care). The target's board must generally treat all shareholders equally when acting on behalf of the company, and its actions must not result in misuse of corporate assets.

13.35 The directors shall in any case be held liable by the company for the proper performance of their duties and for any misconduct in the management of the company's affairs resulting in joint and several liability to the company and third party for damage caused by a violation of the law of 10 August 1915 on commercial companies, as amended, or the company's articles of association.

#### Obligations of the offeror

##### During the bid

13.36 Once the offer document has been published, the offeror has the obligation to complete the bid in accordance with the conditions authorised by the CSSF and the Takeover Act. The offeror may withdraw or change the bid only under certain conditions, as set out below.

13.37 In case the offeror or persons acting in concert with the offeror acquire, during the acceptance period, the securities of the offeree company at a price higher than the offered price, the latter price must be adapted to this higher price.

Any increase of the price offer must benefit the securities holders who have accepted the bid before such increase; acceptance of the bid lodged before the publication of the offer document does not bind the securities holders.

13.38 The offeror must communicate to the CSSF and publish the number of securities, and specify the number of voting rights for which its bid has been accepted or which belong to him or her, directly or indirectly, respectively to the persons acting in concert with him or her: (i) every seven days from publication of the offer document; (ii) each morning of the last seven days of the time allowed for the acceptance period; and (iii) on the evening of the last day of the time allowed for acceptance.

##### After the bid

13.39 The Takeover Act does not provide for specific obligations of the offeror after the bid.



However, with respect to the acquisition of a major share in listed companies incorporated under Luxembourg law, any natural or legal person who acquires at least 10%, 20%, one-third, 50% and two-thirds of the total voting rights of a listed company shall notify the company and at the same time the CSSF, within seven calendar days, of the proportion of voting rights that have been acquired.<sup>7</sup>

#### Right to withdraw or change the bid

13.40 From the publication of the offer document, the bid can only be revoked in the following cases:

- (i) a competing bid is made;
- (ii) the administrative authorisation required for the acquisition of securities that are subject to the bid has not been granted, in particular if the transaction cannot be achieved because of a decision of the competition authorities;
- (iii) independently from the willingness of the offeror, a requirement of the bid is not fulfilled; and
- (iv) if the CSSF gives a reasoned authorisation in the case of exceptional circumstances that do not allow the realisation of the bid for reasons independent from the willingness of the offeror. The circumstances that would in the eyes of the offeror justify a withdrawal of the bid offer would need to be submitted to the CSSF, which would carefully analyse the circumstances that are presented and then decide whether or not such circumstances justify the withdrawal of the bid offer.

The holders of securities who have accepted the bid may validly withdraw in the case of infringement of the conditions of the takeover bid by the offeror or a person acting in concert with him or her.

The revocation of the bid must be notified to the CSSF. At the latest on the day following the receipt of such notification, the CSSF makes the revocation public at the expense of the offeror and according to the conditions established by the CSSF.

13.41 Once the CSSF has received prior notification of the bid, the terms and conditions of the bid may not be revised, except to render them more favourable to the holders of the securities of the offeree company. If such a modification has

<sup>7</sup> Article 1 of the law of 4 December 1992 on the information to be published when a major holding in a listed company is acquired or disposed of, published in the *Mémorial A*, No. 91 of 10 December 1992. Please note that according to bill No. 5711 transposing the Transparency Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004, such notification obligation will, in addition, be applicable in the case of an acquisition of at least 5%, 15% and 25% of the total voting rights of a company listed on a regulated market and for which Luxembourg is the home Member State.

happened, the bid can only be terminated after a reasonable period following the publication of the modifications.

#### Counter offer and higher bid

13.42 If a competing bid is made, the acceptance period of the initial bid shall be automatically extended and shall expire at the end of the acceptance period of the competing bid. The prior acceptance by holders of securities of a bid shall be automatically cancelled if a competing bid is made.

#### Defence mechanisms and other restrictions

13.43 Luxembourg has adopted a liberal approach by submitting the application of anti-takeover measures and the neutralisation of protection measures (the 'board-passivity rule' and the 'breakthrough rules') to the exercise of a reversible option by the target company. Luxembourg has indeed opted out of the breakthrough rules as well as the board-passivity rule of the Takeover Directive. As a matter of consequence, these rules will only apply if the company decides so. Such a decision must be approved by the offeree company's extraordinary general meeting of shareholders, and shall be taken by the majority required to amend the offeree company's articles of association.

In addition, such decision shall be notified to the CSSF as well as to all the supervisory authorities of Member States on the regulated market in which the company's securities are admitted to trading or in which such a request has been made.

#### Board actions to frustrate the bid (optional for Member States)

13.44 Luxembourg has opted out of the rule provided for by Article 9 of the Takeover Directive, according to which, during a takeover bid, the board of directors of the offeree company must obtain the prior consent of the general meeting of shareholders before taking any action (other than seeking alternative bids) that may result in the frustration of the bid and, in particular, before any issuance of shares that could prevent the offeror from gaining control of the target company. As regards decisions taken before the bid has been made public and not yet partly or fully implemented, the board of directors of the target company must obtain approval or confirmation of the general meeting of shareholders for any decision that does not form part of the normal course of the company's business, the implementation of which could result in the frustration of the bid.

13.45 As a matter of consequence, companies having their registered office in Luxembourg may decide that anti-takeover measures are subject to the prior approval of the extraordinary general meeting of shareholders. In the absence of such decision, the board of directors of the offeree company can implement defensive measures ('poison pills') without the prior approval of the general meeting

of shareholders provided, however, that those measures are taken in furtherance of the corporate interests of the latter.

#### Breakthrough of transfer restrictions (optional for Member States)

13.46 Luxembourg has opted out of the breakthrough rules provided for by Article 11 of the Takeover Directive. Companies having their registered office in Luxembourg may decide to neutralise the restrictions on the transfer of securities. Upon such decision of the offeree company, any restrictions on the transfer of securities provided for in the articles of association of the offeree company, in contractual agreements between the offeree company and holders of its securities or in contractual agreements between holders of the offeree company's securities entered into after 21 April 2004 shall not apply *vis-à-vis* the offeror during the acceptance period. In addition, the offeree company may decide that where, following a bid, the offeror holds 75 per cent or more of the capital carrying voting rights, no restrictions on the transfer of securities shall apply.

#### Breakthrough of voting restrictions (optional for Member States)

13.47 Companies having their registered office in Luxembourg may decide to apply the breakthrough rule in relation to any restrictions on voting rights provided for by the Takeover Directive. Upon such decision of the offeree company, any restrictions on voting rights provided for in the offeree company's articles of association, contractual agreements between the offeree company and its shareholders or between shareholders entered into after 21 April 2004 shall not have effect at the general meeting of shareholders that decides on any defensive measures. In addition, the offeree company may decide that multiple-vote securities shall carry only one vote each at the general meeting of shareholders that decides on any defensive measures. Finally, the offeree company may, as well, decide that where, following a bid, the offeror holds 75 per cent or more of the capital carrying voting rights, no restrictions on voting rights or any extraordinary rights of shareholders concerning the appointment or removal of board members provided for in the articles of association of the offeree company shall apply.

#### Exemption in the event of bid by exempt company

13.48 A company having its registered office in Luxembourg that has exercised the option to apply the relevant restrictions on takeover defences and share-transfer and voting-right restrictions according to Article 9<sup>8</sup> of the Takeover Act shall no longer be obliged to apply these restrictions if it itself becomes the object of a takeover bid by a company not subject to such restrictions or a company indirectly or directly controlled by such a company.

<sup>8</sup> See nos. 13.43 to 13.47 of this report.

#### Squeeze-out

13.49 One of the most innovative aspects of the Takeover Act consists in the introduction of a squeeze-out mechanism into Luxembourg law.

According to the squeeze-out mechanism, an offeror holding securities representing at least 95 per cent of a target's voting shares and 95 per cent of its voting rights is allowed to force minority shareholders, within three months following the end of the acceptance period, to tender their shares at a fair price, which must be paid in cash or take the same form as the consideration offered in the bid, it being understood that there must be a cash alternative. The CSSF shall ensure that a fair price is paid.<sup>9</sup>

#### Sell-out

13.50 Prior to the Takeover Act, minority shareholders had very limited rights, as neither Luxembourg company law nor securities law granted them the right to be bought out by a majority shareholder. Luxembourg's political and economic circles have long defended this choice (i.e., not to include protection for minority shareholders in Luxembourg company law) in order to imbue the law with a more liberal spirit and attract multinationals to Luxembourg.

The Takeover Act has brought some fundamental changes to minority rights. If, further to a takeover bid open to all of a target's shareholders, a natural person or legal person or entity, either alone or together with persons acting in concert with it, ends up holding securities carrying more than 90 per cent of the voting rights in the target company, the minority shareholder has the right,<sup>10</sup> within three months following the end of the acceptance period, to oblige that majority shareholder to purchase its shares at a fair price, either in cash or the same form of consideration offered in the bid, it being understood that there must be a cash alternative. The CSSF has been entrusted with a supervisory role with respect to the fairness of the price paid.

#### Sanctions

##### Prospectus liability

13.51 The Takeover Act does not provide for a specific prospectus liability.

However, the offeror should be very careful in setting up the offer document in order to avoid any potential liability risk. The offeror should therefore indicate the source of the information that is given and make reasonable research in order to provide the holders of securities with relevant information on the bid offer, its merits and consequences. The offeror could, indeed, potentially be held liable for incorrect information, due, in particular, to a lack of diligence.

<sup>9</sup> Art. 15 Takeover Act. <sup>10</sup> Art. 16 Takeover Act.

Nevertheless, if the target company does not provide any or sufficient information to the offeror for setting up an offer document with information that could be relevant in the bid process (in particular, if the bid offer is viewed by the target company to be hostile), it could be very difficult for the offeror to give complete information in the offer document. In such circumstances, and in order to avoid or reduce any potential liability risk, the offeror shall inform the holders of such lack of information and the risks resulting therefo.

#### Criminal sanctions and administrative fines

13.52 The Takeover Act provides for both administrative and criminal sanctions for the infringement of its provisions.

According to Article 17(1) of the Takeover Act, in the case of infringement of the general principles applicable to a takeover bid, the CSSF may impose a fine upon the parties to the bid of €125 to €12,500.

According to Article 17(2) of the Takeover Act, persons mentioned below in items (i), (ii) and (iii) shall be subject to a jail term of eight days to five years, a fine of €251 to €125,000 or to both:

- (i) any person who fails to inform the CSSF of a bid;
- (ii) any person who refuses to give to the CSSF the offer document containing the required information or who knowingly gives incorrect or incomplete information;
- (iii) any person who fails to give the offer document to the employees' representative, or when there is no such representative, to the employees themselves.

## The Netherlands

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