

**COMMISSION de SURVEILLANCE  
du SECTEUR FINANCIER**

In case of discrepancies between the French and the English text, the French text shall prevail

Luxembourg, 18 August 2006

To all Luxembourg companies whose securities are admitted to trading or which seek admission of their securities to trading on a regulated market in one or several Member States, to all the companies under the laws of another EU or EEA Member State whose securities are admitted to trading or which seek admission of their securities to trading on a regulated market in Luxembourg, to all offerors and to the persons acting in concert with an offeror or such company and to all the other persons concerns

**CIRCULAR CSSF 06/258**

**Re: Coming into force of the law of 19 May 2006 on the implementation of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 concerning takeover bids**

Ladies and Gentlemen,

We are pleased to draw your attention to the coming into force of the law of 19 May 2006 on the implementation of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 concerning takeover bids (the **Takeover Law**), published in *Mémorial A* – No. 86 of 22 May 2006. The purpose of the Takeover Law is to implement Directive 2004/25/EC (**Takeover Directive**) which sets up minimum guidelines for the course of takeover bids for the securities of companies governed by the law of an EU or EEA Member State, where all or some of these securities are admitted to trading on a regulated market in one or several Member States.

## **1. European context**

The Takeover Directive is an essential part of the Financial services action plan of the European Commission which aims at integrating the European financial markets. In order to take into account the different approaches regarding takeover bids, which largely diverge among Member States, the Takeover Directive leaves a certain leeway with respect to its transposition by the Member States. The purpose of the Takeover Directive is to set up general principles (article 3 of the Takeover Directive and of the Takeover Law) and minimum guidelines for the conduct of takeover bids for the securities of companies governed by the law of an EU or EEA Member State, where all or some of these securities are admitted to trading on a regulated market in one or several Member States. It also aims to ensure an adequate level of protection for holders of securities by establishing common principles and general requirements that the Member States must implement.

## **2. Scope**

According to the definition set out in the Takeover Law, a takeover bid is a public offer (other than by the offeree company itself) 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 national law. Securities are defined by the Takeover Law as transferable securities carrying voting rights in a company, including depositary receipts in respect of shares carrying a possibility to give a voting instruction. By way of consideration the offeror may, under certain conditions, offer securities, cash or a combination of both.

The Takeover Law applies to takeover bids of a company governed by the law of an EU or EEA Member State, where all or part of these securities are admitted to trading on a regulated market in one or several Member States. However, it 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 principle 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, nor to takeover bids for securities issued by the Member States' central banks.

Consequently, the Takeover Law does not apply to the securities of companies governed by the law of a non-EU and non-EEA country, even if these securities are admitted to trading on a regulated market of one or several Member States, nor to the securities of companies of a EU Member State which are only admitted on a non-regulated market, such as the Euro MTF of the Société de la Bourse de Luxembourg S.A. (Luxembourg Stock Exchange).

### 3. Competent authority and applicable law

As regards the legal provisions that apply in the context of a takeover bid, a distinction should be made between the rules of the market on which the securities are admitted to trading and which apply independently and in accordance with specific provisions (such as the rules and regulations of the market concerned, the transparency rules, the “market abuse” provisions, etc.), and the rules that specifically apply to takeover bids (i.e. the rules of the Member State of the authority competent to supervise the bid) and finally the company law provisions (lex societatis, i.e. the “national” law of the company concerned).

#### (a) *Supervision of a takeover bid and rules relating to its course*

According to the Takeover Directive, the authority competent to supervise a takeover bid shall be that of the Member State in which the offeree company has its registered office if that company’s securities are admitted to trading on a regulated market in that Member State (even if, in addition, these securities are also admitted to trading on other markets). In these cases, all aspects of the takeover bid are exclusively governed by the law of this Member State (i.e. matters relating to the course of the takeover bid, as well as matters relating to company law).

In all instances where the Member State of the registered office is not the Member State of the regulated market(s) on which the securities are admitted to trading, the Takeover Directive provides for rules allowing to determine the authority competent for supervision. Indeed, if the offeree company’s securities are not admitted to trading on a regulated market in the Member State in which the company has its registered office:

- (i) if the offeree company’s securities are admitted to trading on a regulated market of a Member State, the authority competent to supervise the takeover bid shall be that of the Member State on the regulated market of which the company’s securities are admitted to trading;
- (ii) if the offeree company’s securities are admitted to trading on regulated markets in more than one Member State, the authority competent to supervise the takeover bid shall be that of the Member State on the regulated market of which the company’s securities were first admitted to trading;
- (iii) if the offeree company’s securities were first admitted to trading on regulated markets in more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States shall be the authority competent to supervise the takeover bid by notifying those regulated markets and their supervisory authorities on the first day of trading.

The Takeover Directive provides that the matters relating directly to the course of the bid, such as the matters relating to the consideration offered and the bid procedure are governed by the law of the Member State of the supervisory authority. On the other hand, matters concerning, among other things, company law and ensuing matters (such as the percentage of voting rights which confers control of a company) are governed exclusively by the national law of the registered office of the offeree company, as laid down in point (b) below.

In the Grand Duchy of Luxembourg, the CSSF is the authority competent to supervise takeover bids. In this capacity, the CSSF will supervise impartially and independently of all parties to a bid the compliance with the rules laid down in the Takeover Law. The competence of the CSSF, and, where applicable, of the other authorities competent to supervise a takeover bid is determined in accordance with the following rules:

- The CSSF is the only authority competent to supervise a bid if the offeree company has its registered office in Luxembourg and if the securities of this company are admitted to trading on a regulated market in Luxembourg.
- A potential competence of the CSSF is determined in accordance with sub-items (i), (ii) and (iii) respectively, where the securities of a company that has its registered office in Luxembourg are not admitted to trading on a regulated market in Luxembourg or where the securities are admitted to trading on such a market even though the company's registered office is not in Luxembourg.

(b) *Matters relating to company law*

The Takeover Law provides that in matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the administrative or management body of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

It follows that in the three situations addressed in sub-items (i), (ii) and (iii) above, the rules relating to takeover bids (i.e. matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid), shall be dealt with in accordance with the rules of the Member State of the authority competent to supervise a takeover bid, while the matters relating notably to company law and the ensuing matters, are exclusively governed by the national law of the registered office of the offeree company.

(c) *Co-operation between authorities*

The CSSF, as well as the supervisory authorities of the other Member States for the purposes of this Directive and the other authorities supervising capital markets, in particular in accordance with Directive 2004/39/EC (“MIFID”), Directive 2001/34/EC (“admission of securities to official stock exchange listing”), Directive 2004/109/EC (“transparency”), Directive 2003/6/EC (“market abuse”) and Directive 2003/71/EC (“prospectus”) shall co-operate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with those transposed by the Takeover Law.

(d) *Non-application of certain provisions of the Takeover Law*

In the field of competence defined by the Takeover Law, the CSSF is authorised, subject to the general principles set forth in article 3, not to apply, in particular circumstances, the provisions of articles 3(f), in fine; article 5(1) and (3), article 6(1) and (3), article 7(1), article 11(1) and article 13, indent 1(d) of the Takeover Law. A specially reasoned decision is required in this case.

**4. Protection of minority shareholders, the mandatory bid and the equitable price**

Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company (as referred to in article 1(1) of the Takeover Law defining its scope), which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings, at an equitable price (within the meaning of the Takeover Law). Where control has been acquired following a voluntary bid made in accordance with the Takeover Law to all the holders of securities for all their holdings, the obligation to launch a bid shall no longer apply. The percentage of voting rights which confers control and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office. For companies whose registered office is located in Luxembourg, the percentage of voting rights is set at 33 1/3%.

**5. Offer document and course of the takeover bid where the CSSF is the authority competent for its supervision**

The **decision to make a bid** shall be made public by the offeror immediately after the decision has been taken by the offeror and the CSSF shall be informed of this bid before such decision is made public. As soon as the bid has been made public, the boards of the

offeree company and of the offeror shall inform the representatives of their respective employees or, where there are no such representatives, the employees themselves.

The offeror is required to draw up and make public in good time an **offer document** containing the necessary information (in accordance with the requirements of the Takeover Law and including at least the information required in article 6(3) of the Takeover Law) enabling the holders of the offeree company's securities to reach a properly informed decision on the bid. Before this document is made public, the offeror shall communicate it to the **CSSF for approval** within ten working days from the day on which the bid has been made public. The CSSF notifies its decision concerning the approval of the offer document within 30 working days following the submission of the draft offer document. If there are reasonable grounds for the CSSF to consider that the document submitted is incomplete or that additional information is necessary, the CSSF informs the offeror within ten working days running from the day the offer document has been submitted for approval. In this case, the time limit above only runs as from the date on which the offeror provided the required information. By approving the offer document, the CSSF is not bound by the economical and financial opportunity of the operation or the quality or solvability of the offeror or the offeree company.

When the bid is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, the employees themselves.

The board of the offeree company shall draw up and make public a document setting out its **opinion** on the bid, including its views on the effects of implementation of the bid on all the company's interests and specifically employment, and on 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. Before drawing up its opinion, the board shall consult with the **representatives of the company's employees** or, where there are no such representatives, the employees themselves and append, if received in good time, a separate opinion from the representatives of the employees on the effects of the bid on employment.

The **time allowed for the acceptance** of a bid may not be less than two weeks nor more than 10 weeks from the date of publication of the offer document. The period of 10 weeks may be extended on condition that the offeror gives at least two weeks' notice of his/her intention of closing the bid. The CSSF may grant a derogation from the period in order to allow the offeree company to call a general meeting of shareholders to consider the bid. Where the offeror acquires control of the offeree company, the holders of securities that have not accepted the bid until the closing of the offer acceptance period have the opportunity to accept this offer within 15 days, except in the case of a mandatory offer.

The **disclosure of the bid** shall ensure market transparency and integrity for the securities of the offeree company, the offeror or any other company affected by the bid, in particular in order to prevent the publication or dissemination of false or misleading information.

The parties to a bid are required to provide, at any time and on request, the CSSF and, where applicable, the supervisory authorities of their Member State, with all the information on the bid in their possession and necessary for the supervisory authority to discharge its functions.

**6. Offer document and course of the takeover bid where the CSSF is not the authority competent for its supervision**

In the event of a takeover bid for which the CSSF is not the competent authority, the offer document shall be recognised in Luxembourg, subject to its approval by the competent authority and a translation into Luxembourgish, French, German or English, where the securities of the offeree company are admitted to trading in Luxembourg, without its being necessary to obtain the approval of the CSSF. 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 to be complied with to accept the bid and to receive the consideration due at the close of the bid, as well as to the tax arrangements to which the consideration offered to the holders of the securities will be subject.

**7. Breakthrough**

Member States are not required to apply the provisions of the Takeover Directive relating to the implementation of defensive measures (article 9 of the Takeover Directive) and the breakthrough of protection mechanisms (article 11 of the Takeover Directive). Member States may thus reserve the right not to require companies which have their registered offices within their territories to apply article 9(2) and (3) and/or article 11 of the Takeover Directive. Article 9 of the Takeover Directive requires, in principle, that the board of the offeree company obtain the prior authorisation of the general meeting of shareholders before taking any defensive measure, other than seeking alternative bids. Article 11 of the Takeover Directive provides for the breakthrough of the existing protection mechanisms such as shareholder agreements during the offer acceptance period, restrictions on voting rights (except where they are compensated for by specific pecuniary advantages) and multiple voting rights during the general meeting which sets down possible defensive measures. Where a Member State does not make these provisions mandatory, it shall nevertheless grant companies which have their registered offices within its territory the option, which shall be reversible, of applying voluntarily these provisions in accordance with article 12 of the Takeover Directive.

Luxembourg has chosen not to transpose the requirements of both articles concerned in a mandatory way. Thus, article 9 of the Takeover Law corresponds to article 12 of the Takeover Directive, which allows Member States to exempt the companies concerned from applying article 9(2) and (3) and/or article 11 of the Takeover Directive. Consequently, Luxembourg companies are allowed to apply the provisions of articles 9 and 11 of the Takeover Directive (as transposed by the Takeover Law into articles 10 and 12 respectively of the Takeover Law), but are not compelled to do so by law.

## **8. Other rules applicable to the conduct of bids**

The bid lapses when the CSSF notes that the general principles governing takeover bids in accordance with the Takeover Law are obviously not being complied with within the scope of this bid and where one of the conditions precedent of the bid has not been satisfied. From the prior information of the CSSF by the offeror, the terms of the bid cannot be amended, except in a more profitable way for the holders of securities of the offeree company. Where a competing bid is made, the offer period of the initial bid shall be automatically extended and expire at the same time as the offer period of the competing bid. The holders of securities that have accepted an offer are automatically released from their acceptance in case of a competing offer.

The offeror is required to communicate to the CSSF, at specific times laid down in the Takeover Law, and disclose the number of securities, specifying the number of inherent voting rights, for which his/her bid has been accepted or which belong to him/her, in one way or in another, or to the persons acting in concert respectively.

## **9. Right of squeeze-out and right of sell-out**

A shareholder that has become the majority shareholder following a takeover bid may, if he/she holds not less than 95% of the capital carrying voting rights and not less than 95% of the voting rights of the offeree company, require the minority shareholders to sell him/her the securities at a fair price (within the meaning of the Takeover Law).

The minority shareholders may require the offeror to buy their securities from them at a fair price (within the meaning of the Takeover Law) where, following a takeover bid, the offeror has acquired the securities of the offeree company representing more than 90% of the voting rights.

## **10. Sanctions**

In case of infringements of the Takeover Law which are likely to breach the general principles set out in article 3, the CSSF can impose a disciplinary fine on the parties to a bid. The law also provides for criminal sanctions.



**11. Fees (taxes)**

Grand-ducal regulation of 5 June 2006 amending Grand-ducal regulation of 10 November 2003 relating to the fees to be levied by the CSSF, adds a new section I. to article 1 “Lump-sum fees” of this regulation, which lays down the fees to be levied on the natural or legal persons governed by public or private law making a “takeover bid” or a “bid” governed by the Takeover Law, where the CSSF is the authority competent for the supervision of the bid.

Yours faithfully,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

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