Squeeze-out – Sell-out a significant reform to come

After long and lasting debates, the Luxembourg Parliament has passed today a new law which aims at introducing a formal regime for squeeze-out and sell-out in relation to companies securities of which are or have been traded on a regulated market or have been offered to the public (the “Law”). The Law will introduce on the one hand the so-called “squeeze-out” which may oblige minority shareholders to sell their shares to the majority shareholder, if certain conditions are met. On the other hand, the Law introduces a reverse mechanism, the so-called “sell-out”, which allows minority shareholders under certain conditions to oblige the majority shareholder to buy their shares.

This alert will provide you with an overview of the key elements of both squeeze-out and sell-out under the Law.

Scope

Both squeeze-out and sell-out mechanisms will apply without prejudice of those already set out by the takeover law dated 19 May 2006 which has a narrower scope. The scope of the Law is larger as it includes securities that have not necessarily been subject to a bid.

The Law covers the following situations:

> Luxembourg companies (both public limited companies/“sociétés anonymes”, and partnerships limited by shares/“sociétés en commandite par actions”),

> having traded securities on one or several EEA regulated markets, or

> securities that have been admitted to trading on one or several EEA regulated markets but are not any longer traded on such markets, or

> securities offered to the public under the prospectus law.

Contents

Scope.................................. 1
Definitions ......................... 2
Notification requirements.. 2
Squeeze-out ....................... 3
Sell-out.............................. 5
Two retroactive periods .... 5
Competent Authority – CSSF ....................... 6
Payment of fees.............. 6
Sanctions ......................... 6
Entry into force of the Law 6
Definitions

In order to facilitate the reading and understanding of the terms used in the Law, we will use the following definitions. However, please note that the Law contains more definitions than those provided below:

> “Securities” means securities which entitle to vote, including depositary receipts for shares, and which are or have been traded on a EEA regulated market.

> “Majority Shareholder” means any natural or legal person which holds, on his own or acting in concert with other parties, directly or indirectly, Securities representing at least 95% of the capital carrying voting rights and 95% of the voting rights of a company.

Notification requirements

A Majority Shareholder is subject to specific notification requirements. He shall notify the Supervisory Commission of the Financial Sector (“Commission de Surveillance du Secteur Financier”/CSSF) and the company:

> when he becomes a Majority Shareholder;
> when his holding falls below one of the thresholds of 95%;
> when he acquires new Securities of the company.

Such notification requirements are applicable to already existing Majority Shareholders.

Content of the notification

The Majority Shareholder shall provide the CSSF and the company with at least the following information:

> percentage of his holding;
> a description of the transaction that triggered the notification requirement. The Law does not give any details on the content of such description;
> date on which the transaction has become effective. In other words, the date is this on which the purchaser of the Securities owns them or can exercise the voting rights;
> identity of the shareholder;
> details on the mode of his holding.

Timing of the notification

The notification should be made as soon as possible and at the latest four working days after the shareholder being aware of the acquisition and the transfer being effective.

An already existing Majority Shareholder shall notify only part of the required information mentioned above (i.e. percentage of holding, his identity and
details on the mode of holding) at the latest by two months as from the entry into force of the Law, should he wish to exercise his squeeze-out rights.

**Publication of the information**

The CSSF publishes on its website a list of companies which have received such notification. In addition, the relevant company publishes the information received within three working days and shall also inform the holders of those Securities which are not traded on a EEA regulated market.

**Additional information upon CSSF’s request**

The CSSF may request the Majority Shareholder and/or the company to supply it with any additional information wherever necessary.

**Squeeze-out**

A squeeze-out situation is the situation where a Majority Shareholder of a company may oblige the minority shareholders to sell their Securities to him.

The key features of a squeeze-out mechanism are the following (please note that this is not an exhaustive list):

**Holding threshold**

As mentioned previously, at least 95% of the capital carrying voting rights as well as 95% of the voting rights must be held directly or indirectly by the Majority Shareholder acting on his own or in concert. Such holding thresholds are calculated as from the date on which the shareholder requests the squeeze-out (and/or when the minority shareholders request the sell-out respectively).

The Majority Shareholder shall inform the CSSF ex ante of his intention to launch a squeeze-out.

**Information requirements**

The CSSF will determine the content of the information requirements which shall contain at least:

> identity and details of the majority shareholder;
> name of the independent expert in charge of the determination of the offered price;
> terms of payment;
> other terms in respect of the contemplated squeeze-out.

**Cash consideration**

A Majority Shareholder when deciding to exercise his squeeze-out rights shall ensure that he can pay the consideration entirely in cash.
Price

*Fair price*

The Majority Shareholder may force the minority shareholders to sell their shares to him at a fair price. The fair price should be based on objective and adequate criteria used for the sale of assets.

An independent expert who does not need to be an approved statutory auditor ("réviseur d’entreprises agréé") is appointed by the Majority Shareholder to prepare a valuation report.

The fair price together with the valuation report shall be communicated first to the CSSF within the month of the squeeze-out notification, then to the company, which will be in charge of disseminating this information to all remaining shareholders.

The CSSF may request the management body of the company to give an opinion on the fair price offered and publishes such opinion on its website.

*Fair price may be challenged by the minority shareholders*

Minority shareholders may challenge the fair price offered within one month as from its publishing.

In this context, the CSSF may require the company to provide five names of independent experienced experts and decide to appoint one of them to draw up a second valuation report. The second expert shall determine the fair price with reference to the date on which the fair price offered by the Majority Shareholder was published.

*Fair price to be approved by the CSSF*

In case minority shareholders did not challenge the price offered by the Majority Shareholder, the CSSF will consider it as fair and publish it on its website.

In case the offered price is challenged and a second independent expert is appointed, the CSSF will decide on the fair price. Then the CSSF shall notify its decision to the Majority Shareholder and the company, the Majority Shareholder being in charge of the publication of the fair price and related information.

However, it should be noted that the CSSF will not be in a position to challenge on its own initiative the fair price offered by the Majority Shareholder.

*Squeeze-out in full or partial squeeze-out*

*Full squeeze-out*

The squeeze-out, in practice, may comprise all the Securities which are not held by the Majority Shareholder.

*Partial squeeze-out permitted*

The Majority Shareholder can exercise his squeeze-out rights on a specific category of Securities (e.g. in case the company has issued different categories of Securities – class A and class B).
In such case, the Majority Shareholder has to hold 95% of the Securities in the relevant category and to meet the thresholds of 95% of all the share capital and voting rights.

**No parallel sell-out process**

When a squeeze-out procedure has been launched, no parallel sell-out can take place at the same time.

**Sell-out**

A sell-out situation is the situation where minority shareholders oblige a Majority Shareholder to buy their Securities.

The key features of a sell-out are the following (the below is not an exhaustive list), being said that those features are close to those applying to a squeeze-out:

**Holding thresholds**

Same as for squeeze-out.

**Situations where a sell-out may take place**

In certain situations, a minority shareholder can force a Majority Shareholder to buy his Securities, among which the following:

> the acquisition of Securities by the Majority Shareholder has been published within the last three months;

> the latest sell-out requested by a minority shareholder took place at least two years ago.

**Notification requirements**

The minority shareholder shall notify the Majority Shareholder, the CSSF and the company that he will exercise his sell-out rights.

**Price**

An independent expert shall be appointed by the Majority Shareholder to determine the fair price, being said that the same rules apply for both squeeze-out and sell-out (determination of the fair price, challenge of the fair price offered, appointment of a second independent expert, etc).

Furthermore, the Law introduces two retroactive periods within which both a squeeze-out and a sell-out may take place.

**Two retroactive periods**

**First retroactive period**

> The law is applicable if the delisting of the Securities has become effective no more than five years before the squeeze-out or sell-out.

> The same applies to Securities offered to the public under the prospectus law, if the offer was made no more than five years before the squeeze-out or sell-out.
Second retroactive period
This second retroactive period has been set up, as a transitional measure, for a limited duration of three years starting as of the entry into force of the Law.

Within the first three years following the entry into force of the Law, a squeeze-out and/or a sell-out may be launched for Securities the delisting of which occurred at the earliest on 1 January 1991 (i.e. occurred on or after 1 January 1991).

Competent Authority – CSSF
The CSSF is the competent authority which ensures that the provisions of the Law are complied with (including making sure a fair price is guaranteed) and is vested with the broadest powers in this respect.

Payment of fees
A squeeze-out as well as a sell-out may entail the payment of fees to the CSSF.

Sanctions
Administrative fines as well as criminal penalties may apply in case of infringement of the Law.

Entry into force of the Law
The Law will enter into force on the first day of the third month following its publication in the Mémorial.