Global Public M&A Guide - South Africa

Effecting a Takeover

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# 4. Effecting a Takeover

[Last updated: 1 January 2025, unless otherwise noted]

**4.1 Types of takeover bids**

There are three main forms of takeover bids in South Africa:

a general takeover bid, in which a bidder voluntarily makes an offer for 100% of the voting securities issued by the target;

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 35% of the voting securities of the target; and

a squeeze-out bid, in which a shareholder who already holds 90% of the voting securities can squeeze out the remaining holders of voting securities. This type of bid can be combined with a voluntary or mandatary takeover bid.

Voluntary takeover bids can be either friendly (negotiated) or hostile. A friendly takeover involves the bidder approaching the target board prior to making a formal bid to the target's shareholders. The target board agrees to the offer and either recommends it to the shareholders or remains neutral.

A hostile takeover is where the bidder approaches the target board, the target board opposes the bid and advises the shareholders to reject the offer; whereafter the bidder makes an offer directly to the shareholders. Hostile takeovers are less common than friendly takeovers in the South African market.

**4.2 How and when a bid is made public**

The Takeover Regulations provide that a takeover bid must be notified by the bidder in writing to the target's board.

The takeover bid is made public through the release of a "firm intention announcement". Such announcement must be made immediately when the target board receives a formal written offer, or where a mandatory offer is required (discussed in 4.3). The target is responsible for making the announcement where the target board has received a formal written offer, whilst the bidder is required to make the announcement in the case of a mandatory offer. The announcement is published in the press and on SENS, and must contain, among other things:

the terms of the offer;

the identity of the bidder and any concert parties;

the details of any existing holders of shares in the target;

all material conditions to which the offer is subject; and

the details of any arrangements which exist between the bidder and the target or any concert party of either of them.

**4.3 Mandatory offer**

The threshold for triggering a mandatory offer to also acquire all of the securities of the remaining shareholders is the acquisition of 35% or more of the voting securities of a company or of any class of such securities. For purposes of determining such holding, the holdings of all persons acting in concert are aggregated.

A bidder is exempt from the requirement to make a mandatory offer if (i) the bidder would acquire voting securities in the target by means of an issue of securities (and not a direct sale from a offeree shareholder); (ii) the holders of a majority of the independent shares of the target, i.e., shareholders other than the bidder and its concert parties, have agreed to waive the mandatory offer; and (iii) the TRP exempts the bidder from making a mandatory offer.

**4.4 Minimum offer price**

If the bidder (or any person acting in concert with a bidder), has acquired securities in the target within the six-month period before the commencement of the offer period, then the minimum offer price must be (i) identical to, or where appropriate, similar to the highest consideration paid by the bidder for those acquisitions and (ii) accompanied by a cash consideration, at not less than the highest cash consideration paid if the shares that carry 5% or more of the voting rights were acquired for cash. If the bidder considers that the highest consideration for historic acquisitions ought not to apply in a particular case, it may consult the TRP for approval to adjust the offer consideration.

Further, for six months after the later of the (i) closing date of an offer; or (ii) date on which the offer became unconditional, the bidder or its concert parties may not make a second offer to shareholders of the target on more favorable terms than those made under the original offer.

**4.5 Form of consideration**

The acquisition consideration may be discharged in cash or shares, or a combination of cash and shares.

Where the consideration is wholly or partly in cash, the bidder must provide the TRP with an irrevocable unconditional guarantee issued by a South African registered bank, or an irrevocable unconditional confirmation from a third party that sufficient cash is held in escrow, to provide security for payment of the consideration. Such confirmation must be provided both at the time that the firm intention announcement is made and also on posting of the offer circular to shareholders. It is therefore not possible for the bid to be conditional on the bidder obtaining finance.

A bidder cannot offer shares in a foreign company which is not listed on the JSE as consideration, without the approval of the Exchange Control Department of the SARB. The Exchange Control Department does allow this form of consideration, but is likely to impose conditions regarding the sale of the shares and the repatriation of the proceeds of the sale.

**4.6 Conditions**

It is common for takeover offers to be subject to regulatory and other conditions. Regulatory conditions typically include anti-trust approval, the approval of the exchange control authorities (for cross-border transactions) and the approval of industry regulators, depending on the industry sector to which the target belongs. Other conditions may include obtaining shareholder approval and the consent of counterparties to material contracts of the target which contain change of control provisions. An offer may not be subject to any condition that is dependent solely on the subjective judgment of the directors of the bidder, or where the directors of the bidder are able to control the fulfilment (or not) of such a condition.

In addition, if the bidder intends to obtain:

100% of the target's shares, it will bargain for a condition that 90% of the target's shareholders accept the offer; or

control of the target, it will bargain for a condition that more than 50% of the target's shareholders accept the offer.

In the case of schemes of arrangement or mergers and amalgamations, the offer will be conditional upon 75% of the shareholders voting in favor of the transaction.

**4.7 Restrictions on launching new offers (put-up or shut-up)**

Where an offer has been announced or posted but has not become or been declared unconditional, and has then been withdrawn or has lapsed, neither the bidder nor its concert parties can, for 12 months following the date on which the offer is withdrawn or lapses:

make an offer for the target; or

acquire any shares of the target which would result in a mandatory offer requirement being triggered.

**4.8 Restriction on frustrating action**

If the board of the target believes that a bona fide offer might be imminent, or has received such offer, the board must not:

take any action in relation to the affairs of the target which could result in the (i) offer being frustrated or (ii) shareholders being denied an opportunity to decide on the merits of the offer;

issue any shares or convertible securities or grant any options;

sell or dispose of or agree to sell or dispose of a material asset (except in the ordinary course of business);

enter into contracts other than in the ordinary course of business; or

make a distribution that is abnormal as to timing and amount,

without the consent of the TRP and shareholders, or in terms of a pre-existing obligation or agreement.

**4.9 Regulatory approvals**

(a) Antitrust approval

Intermediate and large mergers require prior notification to and approval from the South African Competition Authorities.

A transaction must be notified as an intermediate merger and approved by the South African Competition Commission if:

the target firm has assets or turnover of ZAR 100 million or more; and

the parties to the merger have combined assets or annual turnover of ZAR 600 million or more.

A transaction must be notified as a large merger and approved by the South African Competition Tribunal if:

the target firm has assets or turnover of ZAR 190 million or more; and

the parties to the merger have combined assets or annual turnover of ZAR 6.6 billion or more.

(b) Exchange control approval

In general, there are no restrictions on foreign ownership of shares. However, certain industries (including banking, insurance and broadcasting) have specific statutory restrictions on the percentage shareholding in a South African company by foreign shareholders.

In addition, all dealings in and registration of shares in which non-residents of South Africa are involved are governed by the Exchange Control Regulations.

In the case of a disposal of shares in a South African target to a non- resident, the shares in the South African target will constitute "controlled securities" for exchange control purposes.

As regards on-market disposals of shares in the South African target, upon transfer of the shares from the seller to the buyer, the relevant Central Securities Depository ("**CSD**") will record the buyer's residential status (i.e. being a non-resident) in the registers of both the CSD and the authorized dealer, against presentation of the broker's note indicating the value of the trade.

In relation to off-market disposals of shares in the South African target, documentary evidence such as a sale agreement or validated trade advice and auditors' certificates, where applicable, must be viewed by the relevant CSD in order to ensure that such transactions are concluded at arm's length and at fair and market related prices.

In the absence of exchange control approval for the transaction, the South African target would be prohibited from remitting dividends and other distributions to a non-resident shareholder offshore.

(c) Industry-specific regulations

There are a number of other industry-specific regulations that may be applicable, for example in the banking, mining and communications industries.

(d) Foreign investment regulation

There is no overarching foreign investment regulation regime in South Africa, however there are draft regulations which have not yet come into force. There is no estimate as to when these draft regulations will become effective. As per section 2.4 above, in certain industries there are sectoral regulations which may apply.

(e) TRP Approval

An offer may not be implemented or given effect until (a) a request has been made to the TRP for a compliance certificate, certifying that the Takeover Regulations have been complied with; and (b) the TRP has issued such compliance certificate. This is usually the last condition to the offer to be fulfilled.

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