Global Public M&A Guide - Malaysia

Takeover Tactics

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# 6. Takeover Tactics

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

**6.1 Inside information**

A person who is in possession of "inside information" that relates to any securities listed on Bursa Malaysia is prohibited from:

acquiring or disposing, or entering into an agreement for or with a view to the acquisition or disposal of, such securities;

procuring, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities; or

communicating (directly or indirectly) the insider information to another person if it knows or ought reasonably to know that the other person would or would be likely to deal in those securities or procure a third person to deal in those securities.

This difficulty generally arises when a bidder is given the opportunity to conduct due diligence on the target company before a (potential) takeover bid is made. In the event that inside information is unearthed during due diligence, the same inside information should be disclosed to the public before a takeover bid is made. This will be in many circumstances a difficult exercise, and a large grey area will exist as to whether certain information constitutes inside information.

**6.2 In the event of a public takeover bid**

A bidder who makes or proposes a takeover offer must immediately make an announcement of its firm intention via a press notice. The press notice must be published in at least three national daily newspapers.

Before an approach has been made to the target company or following an approach to the target company, if the target company is the subject of rumor or speculation about a possible bid, or there is undue movement in its share price or a significant increase in the volume of share turnover, and there are reasonable grounds for concluding that it is the potential bidder's actions which have directly contributed to the situation, a holding announcement is required to be made.

**6.3 Insider dealing and market abuse**

The basic legal framework regarding insider dealing and market abuse under Malaysia law is set forth in the CMSA.

In principle, the rules on insider dealing and market abuse remain applicable before, during and after a public takeover bid, albeit that during a takeover bid additional disclosures and restrictions apply in relation to trading in listed securities. See 3.3 and 6.1 for more information.

**6.4 Stake building**

Although stake building is possible, a potential bidder should be aware that it will incur an obligation to publicly disclose its interests in the target when it holds 5% or more of the voting shares (and each change in percentage level thereafter). In addition, a mandatory general offer is triggered if a potential bidder acquires 33% or more of the securities of a public company. This obliges the potential bidder to make an offer for all the remaining securities at the highest price paid by it within six months of a mandatory general offer.

In addition, a stake building exercise will make it more difficult for a potential bidder to invoke the squeeze-out mechanism of minority shareholders, as shares acquired during stake building before launch of the takeover bid cannot be taken into account in determining if the squeeze-out threshold of 90% is met.

**6.5 Irrevocable undertakings**

Arrangements by way of an irrevocable undertaking to sell shares are not uncommon in Malaysia. Under this arrangement, a potential bidder is given the assurance that it will receive a certain level of acceptances for its bid. Typically, a potential bidder will seek to receive undertakings in respect of just over 50% of the total voting rights of the target company.

**6.6 Break fees**

It is not common to agree to a break fee in the event of an unsuccessful bid and there is no specific provision addressing break fees in the Code.

However, the Companies Act provides that a break fee cannot be paid by the target, as this would be providing financial assistance for the purpose of, or in connection with, the purchase of its own shares.

**6.7 Common anti-takeover defense mechanisms**

Without an ordinary resolution passed in a shareholder meeting, the target's board cannot take any action to frustrate an offer during the offer period or if it has reason to believe that a bona fide takeover offer is imminent. A shareholder meeting is required to:

 Issue any authorized but unissued shares of the target.

 Issue or grant options in relation to any unissued shares of the target.

Create, issue or permit the creation or issuance of any securities carrying rights of conversion into or subscription for shares of the target.

 Sell, dispose of, acquire or agree to sell, dispose of or acquire the target's assets in a material amount.

 Enter into contracts (including service contracts), otherwise than in the target's ordinary course of business.

Sell treasury shares into the market.

Cause the target or any of the target's subsidiaries or associated companies to:

purchase or redeem shares in the target; or

provide financial assistance for any such purchase or redemption.

Declare dividends, other than in the normal course and the usual quantum.

However, a shareholder meeting is not required if any of the proposed actions were done pursuant to:

A bona fide contract entered into before receipt of the takeover offer which was not designed to frustrate the target's takeover offer or change the target's activity.

An obligation or other special circumstance which the Securities Commission approves in writing.

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