Global Public M&A Guide - Malaysia

Effecting a Takeover

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# 4. Effecting a Takeover

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**4.1 Types of public takeover bid**

The main methods of acquiring control of a public company in Malaysia are:

Takeover offer – The shareholders of the target are asked to accept an offer that has been made by a bidder. This is the most common method of obtaining control. There are two types of offer:

Voluntary offer – This is where an offer is made voluntarily and simultaneously to all the shareholders of the target to acquire their shares in the target.

Mandatory offer – This occurs when an acquirer is entitled to exercise control or meets certain takeover thresholds. Typically, the bidder signs a share purchase agreement to purchase a block of shares which, in turn, triggers the general requirement for an announcement.

Scheme of arrangement – The company collaborates with the bidder for the bidder to take over the target. The target's shareholders will then vote on a takeover proposal put to them by the collaborating parties. The target's assets or shares are transferred to the bidder under a statutory court process (section 366, Companies Act) or other relevant applicable legislation. This method is commonly used by financial institutions and insurance companies to transfer obligations owed to account and policyholders. A scheme of arrangement is now included within the definition of a takeover under the Rules.

Acquisition of assets and liabilities – The target sells its assets and liabilities to the bidder through an ordinary resolution of the target's shareholders (requiring an approval of over 50%, unless it is a major disposal or as otherwise set out in the company's constitution). This controversial method has led to certain public-listed entities being taken over and privatized.

**4.2 Voluntary takeover offer**

In a voluntary takeover, the offer document must include a condition that makes the takeover offer conditional on the bidder receiving acceptances that result in the bidder holding an aggregate of more than 50% of the target's voting shares. In computing the level of acceptances for a voluntary offer, the bidder must not aggregate the voting shares of its PAC unless such persons are joint offerors.

The bidder can set a higher acceptance threshold (but the threshold must be more than 50%). This is especially significant when the bidder wants to compulsorily acquire the voting shares from minority shareholders during the compulsory acquisition process.

In addition, the bidder cannot impose a condition the fulfilment of which depends on either:

an event that is within the control or is a direct result of the bidder's or PAC's action; or

the subjective interpretation or judgment of the bidder or its PAC.

If a voluntary offer is contemplated, a memorandum of understanding or undertaking should only be obtained, in limited circumstances, from key shareholders before making a takeover offer. This is because the mandatory general offer requirements are triggered by arrangements entered into by a bidder that would result in it holding more than 33% of the voting rights in a company. The Rules provide that a voluntary offer becomes a mandatory offer if the bidder or PAC acquires voting shares or voting rights (other than through acceptances) that trigger an obligation to make a mandatory offer.

Once a takeover offer has been announced, it is common for the bidder to seek undertakings from key shareholders to secure their acceptance of the offer. The requirement to make a public announcement is triggered in certain circumstances, including when a bidder intends to seek irrevocable commitments. In that case, the bidder must make the announcement. The offer document should disclose undertakings.

However, unless approved by the Securities Commission, the bidder or its PAC are not permitted to make arrangements with selected shareholders, if such arrangements have favorable conditions which are not being extended to all of the target's shareholders either:

during a takeover offer;

when a takeover offer is reasonably in the bidder's contemplation. This is a question of fact to be determined by the Securities Commission; or

during the six-month period following the close of a takeover offer.

Note also that where the takeover offer is successful, there are also restrictions on the ability of an offeror to acquire further securities on more favorable terms than the previous takeover offer, within 6 months immediately after the close of the takeover offer.

**4.3 Mandatory takeover offer**

No condition can be attached to a mandatory offer other than the condition that the offer is subject to the bidder having received acceptances which would result in the bidder and its PAC holding in aggregate more than 50% of the target's voting shares (see 4.2 above). No other condition can be attached.

If the bidder has acquired, already holds or is entitled to acquire more than 50% of the target's voting shares when the offer is made, the offer shall be unconditional (unless approved by the Securities Commission).

The bidder must make a mandatory takeover offer for voting shares when the bidder (or PAC):

Acquires, holds or exercises control of more than 33% or more of the target's voting shares (or is entitled to do so).

Already holds between 33% and 50% of the target's voting shares and then acquires more than 2% of the target's voting shares in any six-month period.

Acquires 33% or less of the target's voting shares and the Securities Commission exercises its discretion to trigger the mandatory general offer requirements. The mandatory general offer requirements are triggered in cases where despite the bidder and its PAC holding 33% or less of the target's voting shares, the Securities Commission has established that the bidder or PAC has, in fact, obtained control of the target (more than 33% of the target's voting shares). The Securities Commission can apply certain qualitative and quantitative tests to determine whether control has been obtained. The Securities Commission can also require confirmation from the bidder and target, the bidder's and target's boards and their respective advisers.

An exemption from the mandatory general offer requirements can also be obtained from the Securities Commission, depending on the circumstances of the case.

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