Global Public M&A Guide - Hong Kong

Effecting a Takeover

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# 4. Effecting a Takeover

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There are two common forms of takeover bids in Hong Kong:

mandatory general offer; and

voluntary general offer.

In Hong Kong, most public takeover bids are friendly rather than hostile because many public companies in Hong Kong are either family-controlled or owned by shareholders with significant or controlling stakes.

**4.1 Mandatory general offer**

Definition of "control" and trigger points for a mandatory general offer

Under the Takeovers Code, "control" is deemed to mean a holding, or aggregate holdings, of 30% or more of the voting rights of a company.

A mandatory general offer to all shareholders of the target company must be made where:

a bidder acquires shares which, when taken together with the shares already held by the bidder (alone or in concert with others), represent 30% or more of the voting rights of the target company; or

a bidder holding not less than 30% and not more than 50% of the voting rights of the target company acquires (either alone or in concert with others), in any period of 12 months, additional shares carrying more than 2% of the voting rights of the target company. This is commonly known as the "creeper rule".

Concept of "acting in concert"

For the purposes of the Takeovers Code, a person "acts in concert" with the bidder if, pursuant to an agreement or understanding (whether formal or informal), they actively cooperate, through the acquisition of voting rights by either of them, to obtain or consolidate control of the target company. Under the Takeovers Code, the definition of "acting in concert" is drafted in broad terms so that it may apply in a broad range of situations, but it does set out nine classes of persons who are presumed to be acting in concert unless the contrary is established. Evidence that parties are "acting in concert" may be direct or, more likely, may be inferred from circumstantial evidence where no single circumstance will necessarily be determinative.

Offer price of a mandatory general offer

A mandatory general offer must be made in cash or be accompanied by a cash alternative at not less than the highest price paid by the bidder (either alone or in concert with others) for shares of that class during the offer period and within six months before the commencement of the offer period. If the voting rights were acquired for a consideration other than cash, the offer price must be determined by an independent valuation.

If, after an announcement of a firm intention to make an offer and during the offer period, the bidder (either alone or in concert with others) purchases shares of the target company at a price that is above the offer price, the bidder must increase the offer price to the highest price paid for such shares.

Proof of funding requirement

Both the announcement of a firm intention to make an offer and the offer document itself must include a confirmation from the bidder's financial adviser that sufficient resources are available to the bidder to satisfy full acceptance of the offer.

In addition, the bidder's financial adviser must provide written confirmation to the SFC that it is satisfied that there are sufficient resources available to satisfy the bidder's obligations in respect of the offer.

Conditions to a mandatory general offer

Except with the consent of the SFC, all general offers must be conditional upon the bidder having received acceptances which will result in the bidder (either alone or in concert with others) holding more than 50% of the voting rights of the target company. This is commonly referred to as the "acceptance condition".

Where the bidder holds more than 50% of the voting rights before the offer is made, an offer must normally be unconditional.

Listing status of the target company

If the bidder intends to maintain the listing status of the target company, the bidder should observe the public float requirement of the Listing Rules. This requires that at least 25% (or a lower percentage agreed by the Stock Exchange on initial listing) of the target company's securities must be in public hands.

**4.2 Voluntary general offer**

A voluntary general offer is an offer that a bidder voluntarily makes for all the shares of the target company. Any bidder may make a voluntary general offer provided that, during the course of a voluntary offer, it does not make any acquisition of voting rights in the target which triggers a mandatory general offer as discussed in 4.1 above.

Offer price of a voluntary general offer

The offer price may be paid in cash, securities or a combination of the two.

However, if the bidder (either alone or in concert with others) has acquired shares in cash in the target company carrying 10% or more of the voting rights during the offer period and within six months before the commencement of the offer period, the offer price must be paid in cash, or accompanied by a cash alternative, at not less than the highest price paid for such shares. The SFC also has the discretion to require cash to be made available even where less than 10% has been purchased for cash in the six months before the offer period if the vendors are directors or other persons closely connected with the bidder or the target company.

On the other hand, if the bidder (either alone or in concert with others) has acquired shares in the target company carrying 10% or more of the voting rights in exchange for securities during the offer period and within three months before the commencement of the offer period, such securities are required to be offered to all other holders of shares of that class. Unless the vendor is required to hold the securities received until either the offer has lapsed or the offer price has been posted to accepting shareholders, the bidder will also be required to make an offer in cash or to provide a cash alternative. In the case of a purchase in exchange for securities from directors or persons closely connected with the bidder or the target company, the SFC may require a securities offer on the same basis even where less than 10% has been purchased or where the purchase was made more than three months before the offer period.

The offer price may not be at a discount of more than 50% to the market price of the shares of the target company (being the lesser of the closing price of the shares on the trading day before the date of the announcement of a firm intention to make an offer under the Takeovers Code and the five-day average closing price before such day).

If, after an announcement of a firm intention to make an offer and during the offer period, the bidder (either alone or in concert with others) purchases shares of the target company at a price that is above the offer price, the bidder must increase the offer price to the highest price paid for such shares.

Proof of funding requirement

Where the offer consists of cash or any other assets except new securities to be issued by the bidder, both the announcement of a firm intention to make an offer and the offer document itself must include confirmation from the bidder's financial adviser that sufficient resources are available to the bidder to satisfy full acceptance of the offer.

In addition, the bidder's financial adviser must provide written confirmation to the SFC that it is satisfied that there are sufficient resources available to satisfy the bidder's obligations in respect of the offer.

Conditions to a voluntary general offer

A voluntary general offer may be made subject to any conditions except those which depend on the bidder's own judgment or the fulfilment of which is in its control or at its discretion.

Except with the consent of the SFC, all general offers must be conditional upon the bidder having received acceptances which will result in the bidder (either alone or in concert with others) holding more than 50% of the voting rights of the target company. A voluntary general offer may be made conditional upon an acceptance level of shares carrying a higher percentage of the voting rights, failing which the bidder is entitled to withdraw the offer.

However, when setting the acceptance level, if the bidder intends to maintain the listing status of the target company, the bidder should observe the public float requirement of the Listing Rules, which requires that at least 25% (or a lower percentage agreed by the Stock Exchange on initial listing) of the target company's securities must be in public hands.

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