Global Public M&A Guide - Malaysia

Before a Public Takeover Bid

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# 3. Before a Public Takeover Bid

[Last updated: 1 June 2022, unless otherwise noted]

**3.1 Shareholding rights and powers**

The table below provides an overview of the different rights and powers that are attached to different levels of shareholding within a Malaysia-listed corporation:

|  |  |
| --- | --- |
| **Shareholding** | **Rights** |
| 5% | * Substantial shareholding level which requires the holder to disclose its substantial shareholding to the company, the Securities Commission and Bursa Malaysia. * Any change in interest and cessation of substantial shareholding is also required to be disclosed. |
| Over 10% | The holder may block compulsory acquisition. |
| Over 25% | The holder may block special resolutions of the company. |
| 33% | Threshold for triggering a mandatory offer. |
| Over 50% | A mandatory offer ceases to be conditional. |
| 75% | The holder can ensure special resolutions are passed. |

**3.2 Restrictions and careful planning**

Malaysia law contains a number of rules that already apply before a public takeover bid is announced. These rules impose restrictions and hurdles in relation to prior stake building by a bidder, announcements of a potential takeover bid by a bidder or a target company, and prior due diligence by a potential bidder. The main restrictions and hurdles have been summarized below. Some careful planning is therefore necessary if a potential bidder or target company intends to start up a process that is intended to lead towards a public takeover bid.

**3.3 Insider dealing and market abuse**

Before, during and after a takeover bid, the normal rules regarding insider dealing and market abuse remain applicable. The relevant provisions in the the Code, CMSA and Listing Requirements prohibit an individual in possession of non-public material price-sensitive information from (a) communicating the information to a third party who is likely to deal in the securities or (b) dealing in the securities.

The rules include, among other things, that manipulation of the target company's stock price, e.g., by creating misleading rumors, is prohibited. In addition, the rules on the prohibition of insider trading prevent a bidder that has inside information regarding a target company (other than in relation to the actual takeover bid) from launching a takeover bid.

Apart from the bidder or any person acting in concert ("**PAC**"), any other person who has confidential price-sensitive information about an actual or contemplated takeover bid is prohibited from dealing in the securities of the target company prior to the launch of a takeover offer.

For further information on the rules on insider dealing and market abuse, see also 6.3 below.

**3.4 Disclosure of shareholdings**

The rules regarding the disclosure of shareholdings and transparency apply before, during and after a public takeover bid.

Pursuant to these rules, if a potential bidder starts building up a stake in the target company, it will be obliged to announce its stake if the voting rights attached to its stake have passed an applicable threshold. The relevant disclosure threshold in Malaysia is 5%.

When determining whether a threshold has been passed, a potential bidder must also take into account the voting securities held by the parties with whom it acts in concert or may be deemed to act in concert (see 3.8 below). These include its affiliates, financial or professional advisers and directors. The parties could also include existing shareholders of the target company with whom the potential bidder has entered into specific arrangements, such as call option agreements or voting undertakings.

**3.5 Disclosures by the target company**

The target company must continue to comply with the general rules regarding disclosure and transparency. These rules require a company to immediately announce all inside information (for further information on inside information, see also 6.1 below). The facts surrounding the preparation of a (potential) public takeover bid may constitute inside information. If so, the target company must announce this. However, the board of the target company can delay the announcement if it believes that a disclosure would not be in the legitimate interest of the company. This could, for instance, be the case if the target company's board believes that an early disclosure would prejudice the negotiations regarding a bid. A delay of the announcement, however, is only permitted provided that the non-disclosure does not entail the risk that the public is misled, and that the company can keep the relevant information confidential. Where the target company is the subject of rumors or speculation about a possible bid, or there is significant movement in its share price or share turnover, the target company must immediately make an announcement.

**3.6 Announcements of a public takeover bid**

Bidder's obligations

Announcement of firm intention – A bidder who makes or triggers the obligation to undertake a takeover offer must immediately announce this via a press notice within one hour of incurring the obligation. The press notice must be published in at least three national daily newspapers. One public announcement must be published in Bahasa Malaysia (the national language of Malaysia) and another must be published in English. The bidder must also send written notice of the same to the:

target's board or its designated advisor;

Securities Commission; and

Bursa Malaysia (if the bidder or the target is listed).

Triggering circumstances for a holding announcement – Before the target's board is approached, if there is an untoward movement or increase in the volume of share turnover of the target and there are reasonable grounds to conclude that the actions of the potential bidder have contributed to the situation, the potential bidder must make a brief announcement as to whether there is a takeover offer or a possible takeover offer. Such holding announcements are typically necessitated due to:

Negotiations or discussions being extended to include more than a very restricted number of people (for example, when the bidder wishes to approach a wider group of people to arrange financing or to seek irrevocable commitments).

Negotiations between a controlling shareholder and the bidder when:

the bidder becomes the subject of rumors or speculations about a possible takeover offer before the bidder approaches the target's board;

there is an unusual movement in the price of the target's voting shares or voting rights;

there is a significant increase in the turnover volume of the voting shares or voting rights of the target; and

there are reasonable grounds to conclude that the actions of the controlling shareholder have contributed to the situation.

A sale and purchase agreement for the acquisition of voting shares or voting rights being signed, which will lead to the bidder triggering a mandatory offer obligation.

Following the holding announcement, the bidder must:

Announce its firm intention to make a takeover offer or confirm that it will not be making a takeover offer within two months from its first preliminary announcement unless the Securities Commission has granted an extension of time under the Code. Once the bidder has made a takeover announcement, the bidder must proceed with the offer and cannot withdraw unless permission is obtained from the Securities Commission.

(Submit the offer document to the Securities Commission for its consent within four days of the date of announcement.

Post the offer document (as approved by the Securities Commission) within 21 days of the date of announcement to the target's board and shareholders, and holders of convertible securities.

Restrictions – After announcing that it does not intend to make a takeover offer, the bidder (or PAC) cannot do any of the following for six months:

Announce a takeover offer of the target.

Acquire voting shares or voting rights which would trigger a mandatory offer obligation.

Procure an irrevocable commitment to acquire shares of the target which would trigger a mandatory offer obligation.

Make any statement which raises or confirms the possibility that a takeover offer may be made for the target.

Take any steps in connection with a possible takeover offer for the target.

Target's obligations

Triggering circumstances for holding announcement – After being approached by the bidder, which may or may not lead to an offer, the primary responsibility for making a holding announcement as to whether there is a possible takeover offer will normally rest with the target's board. The target's board should also keep a close watch on its share price and volume of share turnover.

Additional triggering circumstances for a holding announcement – The target must also make an announcement when:

The company is the subject of rumors and speculations, or is subject to unusual price movement or turnover volume of its voting shares or voting rights, whether or not there is a firm intention to make an offer.

Negotiations or discussions of a possible takeover are extended to include more than a very restricted number of people.

The target's board is aware that there are negotiations or discussions between a potential offeror and the holder(s) of more than 33% of the voting shares or voting rights of the target.

The target's board approaches the bidder to acquire a controlling stake in the target and:

the target becomes the subject or rumors and speculations about a possible takeover offer before the bidder makes an approach to the target's board;

there is unusual movement in the price of the target's voting shares;

there is a significant increase in the turnover volume of the target's voting shares; and

the number of bidders to be approached is to be increased to include more than a very restricted number of people.

Announcement of firm intention – The target's board must, within one hour of receiving notice from the bidder, make an announcement to the public through a press notice or to Bursa Malaysia (if the company is listed). The announcement must also be sent to all of the target's shareholders within seven days of receiving the notice.

**3.7 Due diligence**

Due diligence in a takeover offer, whether hostile or recommended, is limited. This is due to a combination of insider trading laws (see 3.3 above) and the fact that a takeover offer cannot easily be withdrawn once announced. Due diligence is generally limited to information in the public domain.

Where a bidder plans to acquire a controlling block of shares in the target from a controlling shareholder, it can as part of that arrangement conduct due diligence enquiries on information relating to the target that is in the possession of that shareholder. In practice, the ability of the bidder to conduct due diligence on the target's records can be limited, as the other substantial shareholders of the target can resist. The target must give similar information to another bona fide potential bidder that makes a competing takeover offer, at that bidder's request (see 3.5 above).

The following information is in the public domain for a public-listed company:

Information lodged at the Companies Commission, including:

the company's constitution; and

corporate forms, such as the forms for the return of allotment of shares and notification of change in the register of directors, managers and secretaries.

Information lodged pursuant to the Listing Requirements, including:

announcements;

annual audited accounts;

quarterly financial reports;

circulars to shareholders;

annual reports; and

prospectuses.

Analysts' research reports, which may include information on the target's:

industry sector;

potential earnings;

future business prospects; and

expected price range for its shares.

**3.8 Acting in concert**

For the purpose of the Malaysia takeover bid rules, persons "act in concert" if:

pursuant to an agreement, arrangement or understanding, they cooperate to acquire jointly or severally voting shares of a company for the purpose of obtaining control of that company; or

pursuant to an agreement, arrangement or understanding, they cooperate to act jointly or severally for the purpose of exercising control over a company.

Persons that are affiliates of each other are deemed to act in concert or to have entered into an agreement to act in concert.

The concept of persons acting in concert is very broad, and in practice many issues can arise to determine whether persons act or do not act in concert. This is especially relevant in relation to mandatory general offers. If one or more persons in a group of persons acting in concert acquire voting securities as a result of which the group in the aggregate would pass the 33%-threshold, the members of the group will have a joint obligation to carry out a mandatory general offer, even though the individual group members do not pass the 33%-threshold.

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